

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 00-0003
)	
JOHN B. LEE III)	DECISION ON RECONSIDERATION
Appellant)	
_____)	February 12, 2004

STATEMENT OF THE CASE

John B. Lee III appealed an Initial Administrative Determination [IAD] issued by the Restricted Access Management Program [RAM] under the North Pacific Groundfish and Crab License Limitation Program [LLP].¹ The IAD denied Mr. Lee's application for an LLP groundfish license with a Southeast Outside area endorsement based on the fishing history of the F/V JEWEL. Mr. Lee can appeal the IAD because it directly and adversely affects his interest.²

The LLP application period was September 13, 1999 to December 17, 1999.³ On December 13, 1999, Mr. Lee applied for a Federal Fishing Permit [FFP] to authorize the F/V JEWEL to operate as a catcher vessel harvesting groundfish in the Gulf of Alaska beginning January 1, 2000. A Federal Fishing Permit is not a restricted access permit. NMFS will issue an FFP to any applicant who completely fills out the FFP application.

On December 31, 1999, Mr. Lee applied for a moratorium permit under the Vessel Moratorium Program [VMP] for Groundfish and Crab. The VMP was a restricted access program. NMFS only issued a moratorium permit to an applicant who made specified legal landings of moratorium groundfish or crab during specified time periods.⁴ The VMP expired on December 31, 1999 and was replaced by the LLP.

RAM construed Mr. Lee's application for a moratorium permit as an application for an LLP license and treated December 31, 1999, as the date that Mr. Lee applied for an LLP license. Since this date was after the LLP application deadline of December 17, 1999, RAM denied Mr. Lee's application.

¹ The LLP is located in 50 C.F.R. § 679, primarily 50 C.F.R. § 679.4(k). The LLP regulations are on the NMFS Alaska Region's website: <http://www.fakr.noaa.gov/regs/summary.htm>

² 50 C.F.R. § 679.43(b).

³ Notification of application period, 64 Fed. Reg. 49,104, 49,104 (Sept. 10, 1999)

⁴ Final Rule, 60 Fed. Reg. 40,763 (1995). The regulations for the Moratorium Program were originally at 50 C.F.R. § 676.1 - 679.6. They were relocated to 50 C.F.R. § 679.1 - 679.7, Final Rule, 61 Fed. Reg. 31,228 (1996), and eliminated from the Code of Federal Regulations after the LLP came into effect on January 1, 2000. Final Rule, 65 Fed. Reg. 45,316 (2000).

On appeal, Mr. Lee argued that his FFP application should be treated as meeting the LLP application deadline. I issued a Decision on December 5, 2002 that rejected Mr. Lee's argument and affirmed the IAD.

Mr. Lee filed a motion for reconsideration. I have reconsidered my original Decision and conclude that, in the original Decision, I misunderstood a material point of law. Specifically, I conclude that I misunderstood the standard articulated by the Regional Administrator in *George B. Ramos* for determining whether an act by an applicant, short of filing an application, constitutes a significant act for purposes of meeting an application deadline.⁵ I conclude that Mr. Lee's application for an Federal Fishing Permit for the F/V JEWEL can and should be treated, as a matter of law, as meeting the LLP application deadline. Since I rule in Mr. Lee's favor on this basis, I do not reach his other arguments.

SUMMARY OF DECISION ON RECONSIDERATION

The IAD is vacated. I conclude, as a matter of law, that Mr. Lee filed a timely LLP application. I base this on the Decision on Review by the Regional Administrator in *George V. Ramos*, Appeal No. 94-0008 at 3, April 21, 1995: "Both the agency [NMFS] and previous decisions [of the Office of Administrative Appeals] 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." I conclude that Mr. Lee satisfies the *Ramos* standard for filing a timely LLP application as a matter of law through the significant act of applying for a Federal Fisheries Permit authorizing the F/V JEWEL to harvest groundfish in the Gulf of Alaska.

ISSUE

Should NMFS treat Mr. Lee as having timely filed an LLP application for an LLP groundfish license, as a matter of law, through his application for a Federal Fishing Permit for a catcher vessel to harvest groundfish in the Gulf of Alaska?

ANALYSIS

To receive an LLP license, a person must be an "eligible applicant."⁶ An eligible applicant is "a qualified person who submitted an application during the application period announced by NMFS and . . . who owned a vessel on June 17, 1995, from which the minimum number of documented harvests of license limitation groundfish or crab species were made in the relevant

⁵ *George B. Ramos*, Appeal No. 94-0008, Decision on Review by Regional Administrator (April 21, 1995).

⁶ 50 C.F.R. § 679.4(k)(4); 50 C.F.R. § 679.4(k)(5).

areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5).”⁷ NMFS announced an LLP application period of September 13, 1999 to December 17, 1999.⁸

The basic rule is that late applications are denied.⁹ But NMFS has recognized three situations where it has authority to accept a late application: if NMFS has not provided notice to the late applicant as required by regulation or agency practice,¹⁰ if the late applicant proves grounds for equitable tolling of the application deadline,¹¹ or if the late applicant has taken significant action to file an application by the deadline.¹² In each of these situations, NMFS has determined that, although the application was late in fact, it was timely filed as a matter of law.

I conclude that Mr. Lee’s FFP application is a significant act that meets the LLP application deadline. The Regional Administrator for the Alaska Region of NMFS, in his Decision on Review of *George M. Ramos*, stated NMFS’s policy for determining whether an act by an applicant, short of filing an application, meets an application deadline:

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 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 timely-filed Request for Application (RFA) as a timely-filed application, the placing of the application in the mail, or the acceptance of faxed applications. Neither Mr. Ramos 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

⁷ 50 C.F.R. § 679.2. A qualified person for the LLP means “a person who was eligible on June 17, 1995, to document a fishing vessel under chapter 121, Title 46, USC.” *Id.*

⁸ Notification of application period, 64 Fed. Reg. 49,104, 49,104 (1999).

⁹ 50 C.F.R. § 679.4(k)(6)(i).

¹⁰ *Rodney Whitehead*, Appeal No. 00-0008 at 4 (Feb. 8, 2001).

¹¹ *John T. Coyne*, Appeal No. 94-0012, Decision (Jan. 31, 1996) & Decision on Reconsideration, (May 24, 1996); *Estate of Kinberg*, Appeal No. 95-0035 (Aug. 1, 1997); *Christopher O. Moore*, Appeal No. 95-0044 (Sept. 5, 1997).

¹² *George M. Ramos*, Appeal No. 94-0008, Decision on Review Affirmed at 3 - 4 (April 21, 1995).

decisions, are therefore correct and are hereby AFFIRMED.¹³

This Office applied the *Ramos* standard in *Afanasy Reutov* and concluded that an applicant, who filed an LLP application for one vessel by the application deadline, could apply for an LLP vessel for a second license, even though the applicant applied for the second license after the application deadline.¹⁴ The appeals officer interpreted *Ramos*

to mean that, as a matter of policy, NMFS *prefers* deciding whether an applicant actually meets the substantive requirements for a license over denying an application because it is late. This policy lets NMFS get to the merits of as many applications as possible. This policy is consistent with this Office's approach in *Adamonis*, where we broadly construed an applicant's IFQ claim and decided it on the merits rather than finding it was untimely:

Claims for QS [Quota Share] should be broadly construed in order to supply the meaning intended by the applicant and to serve the ends of justice. [Appeal No. 95-0133, Decision on Reconsideration at 9 (Feb. 7, 1997)]

But the *Ramos* policy is *not* without limits. If an applicant has not taken any significant or decisive act to apply by the application deadline, NMFS's hands are tied. It must deny the application.¹⁵

I conclude that the original Decision in this appeal misstated and misapplied the *Ramos* standard.

The original Decision misstated the *Ramos* standard. In the original Decision, I stated that the standard for when an act by an applicant, short of a completed application, can satisfy an application deadline is that the applicant took "decisive" action, not significant action, by the application deadline.¹⁶ I conclude this is incorrect. The standard should be whether the applicant took "significant" action because that is how the Regional Administrator stated the test in *Ramos*, because I will not assume that the Regional Administrator was being imprecise and because the significant action test allows NMFS to decide more applications on the merits.

The original Decision misapplied the *Ramos* standard. In the original decision, I concluded that Mr. Lee's application for an FFP could not count as a significant or decisive action for meeting

¹³ *George M. Ramos*, Appeal No. 94-0008, Decision on Review Affirmed at 3-4 (April 21, 1995) (emphasis added).

¹⁴ *Afanasy Reutov*, Appeal No. 00-0005 (Nov. 8, 2002). This decision, and other OAA decisions, are available on the NMFS Alaska Region website, <http://www.fakr.noaa.gov/appeals/default.htm>

¹⁵ *Id.* at 9 (emphasis in the original).

¹⁶ Decision at 8 & n. 22.

the LLP application deadline.¹⁷ I conclude that Mr. Lee’s application for an FFP is a significant act toward applying for an LLP license. I conclude that NMFS has the authority to accept Mr. Lee’s filing of an FFP application as meeting the LLP application deadline and should exercise its authority to do that. I conclude that, in applying the *Ramos* standard, I overlooked or misunderstood the following points.

First, in the original Decision, I misunderstood the significance of what Mr. Lee communicated to NMFS in his FFP application for the F/V JEWEL. In the FFP application, Mr. Lee requested an FFP to continue operating the F/V JEWEL as a catcher vessel harvesting groundfish in the Gulf of Alaska with hook and line gear in the year 2000.¹⁸ Mr. Lee stated in his motion for reconsideration, “You had all the information you needed for my LLP application, however it was not on the correct form.”

It comports with *Ramos* to put substance over form. It comports with *Ramos* to interpret Mr. Lee’s FFP application as communicating to NMFS his intention to participate in the groundfish fishery in the Gulf of Alaska, for purposes of meeting the LLP application deadline. It comports with *Ramos* to interpret Mr. Lee’s FFP application as a significant step toward applying for an LLP license since an FFP alone would do Mr. Lee no good without an LLP license. The FFP permit alone would not let Mr. Lee continue to use the F/V JEWEL to fish for groundfish in the Gulf of Alaska, as he had done for the prior eighteen years.

Second, in the original Decision, I stated that an FFP was necessary to harvest “groundfish” and an LLP was only necessary to harvest “license limitation groundfish” and therefore an application for an FFP could not be reasonably interpreted as an application for an LLP.¹⁹ I overstated the difference between the groundfish and license limitation groundfish, which, in fact, is quite small.

Groundfish are “[t]arget species and the ‘other species’ category, specified annually pursuant to § 679.20(a)(2).”²⁰ Section 679.20(a)(2) is the process whereby NMFS, after consultation with

¹⁷ Decision at 8 - 10.

¹⁸ The fishing history of the F/V JEWEL, as contained in the official LLP record, is nine pages long and confirms that the F/V JEWEL made documented harvests of license limitation groundfish in the Southeast Outside District of the Gulf of Alaska every year from 1989 to 1999. The official LLP record does not contain years prior to 1989. Mr. Lee states that the F/V JEWEL began fishing for groundfish in Southeast Alaska in 1982, an assertion I accept as true. Letter from John B. Lee to NMFS (Dec. 30, 1999); Motion for Reconsideration at 4 (Dec. 18, 2002).

¹⁹ Decision at 9.

²⁰ This was the definition of groundfish from at least 1996 until 2002. Final Rule, 61 Fed. Reg. 31,228, 31,233 (1996). In 2002, NMFS added a second definition of groundfish: “FMP [Fishery Management Plan] species as listed in Table 2 to this part.” Final Rule, 67 Fed. Reg. 4100, 4107 (2002).

the North Pacific Fishery Management Council, establishes the annual TAC , or total allowable catch, for certain species of fish. **License limitation groundfish** are “target species and the ‘other species’ category, specified annually pursuant to § 679.20(a)(2), except that demersal shelf rockfish east of 140° W. Longitude and sablefish managed under the IFQ program are not considered license limitation groundfish.”²¹ Thus, the difference between groundfish and license limitation groundfish is [1] demersal shelf rockfish east of 140° W. Longitude²² and [2] IFQ sablefish.²³

For 2000, the year for which Mr. Lee submitted an FFP application, the total groundfish TAC for the GOA was 298,510 metric tons.²⁴ Of that, about 12,000 metric tons, or four percent, were groundfish but not license limitation groundfish.²⁵ The numbers for other years are similar. In 2003, the total groundfish TAC for the Gulf of Alaska was 236,440 metric tons.²⁶ Approximately 13,000 tons, or five and a half percent, were groundfish but not license limitation groundfish.²⁷ Thus, there is approximately a 95% overlap between groundfish and license limitation groundfish.

I find it quite likely that an FFP applicant, who clearly is stating an intention to fish for

This second definition does not appear to enlarge the definition of groundfish and is not relevant to interpreting Mr. Lee’s 1999 application.

²¹ Final Rule, 63 Fed. Reg. 52,642, 52,653 (1998), *codified at* 50 C.F.R. § 679.2.

²² The LLP excluded demersal shelf rockfish [DSR] east of 140° W. longitude because the State of Alaska manages that fishery. Final Rule, 63 Fed. Reg. 52,642, 52,643 (1998). This category of DSR is the same as the DSR in the Southeast Outside District in Table 1 of the annual TAC specifications for the GOA. *See* 50 C.F.R. § 679.2 (defines Southeast Outside District of the GOA as “that part of the Eastern GOA Regulatory Area contained in Statistical Area 650”); Figure 3 to Part 679 (defines the coordinates of statistical area 650 as “east of 140° W long. and southward to the limits of the US EEZ.”).

²³ The LLP excluded IFQ or fixed gear sablefish because that fishery is managed under the IFQ program. Final Rule, 63 Fed. Reg. 52,642, 52,643 (1998). Sablefish caught with hook-and-line gear = fixed gear sablefish = IFQ sablefish. 50 C.F.R. § 679.2 (definitions of fixed gear, hook-and-line gear, longline gear, IFQ sablefish).

²⁴ Final 2000 groundfish harvest specifications for GOA, 65 Fed. Reg. 8298, 8303 (2000). The harvest specifications, year by year, are in the Final Rules section of the NMFS Alaska Region website, <http://www.fakr.noaa.gov/frules/default.htm>.

²⁵ 340 metric tons for demersal shelf rockfish (DSR) east of 140° W. longitude and 11,528 metric tons for IFQ sablefish. *Id.* at 8302 (Table 1) & 8304 (Table 2).

²⁶ Final 2003 groundfish harvest specifications for GOA, 68 Fed. Reg. 9924, 9928 (2003).

²⁷ 390 metric tons for demersal shelf rockfish east of 140° W. longitude east and 12,794 metric tons for IFQ sablefish. *Id.* at 9928 (Table 1) & 9929 (Table 2).

groundfish, also intends to fish for license limitation groundfish. And, given Mr. Lee's eighteen-year-history of fishing for license limitation groundfish, it is especially reasonable and fair to interpret *his* specific FFP application as communicating to NMFS an intention to fish for license limitation groundfish, for purposes of meeting the LLP application deadline.

Third, in the original Decision, I noted that some small vessels do not need to obtain an LLP license.²⁸ It is true that the owner of a catcher vessel with a length overall of twenty-six feet or less does not need to obtain an LLP license to conduct directed fishing for groundfish in the GOA.²⁹ But the F/V JEWEL is 41 feet and therefore the activities Mr. Lee sought to conduct with the F/V JEWEL through his FFP application are not excluded from the LLP.

Fourth, in the original Decision, I overlooked that no other applicant has received, or even applied for, an LLP license based on the fishing history of the F/V JEWEL.³⁰ This suggests a lack of prejudice to other license holders and to NMFS from processing Mr. Lee's application. Since NMFS has issued no license based on this vessel's fishing history, no other license holder need defend his or her license.³¹ Since NMFS has issued no license based on this vessel's fishing history, this license has not been transferred to an innocent third party. Therefore, NMFS will not face the dilemma of denying an eligible applicant or issuing two licenses based on the same fishing history.³²

Fifth, in the original Decision, I noted that "[t]he LLP license is required 'in addition to the

²⁸ Decision at 9 n. 26.

²⁹ 50 C.F.R. § 679.4(k)(2)(i). The other exceptions are vessels 32 feet and under in BSAI, vessels that do not exceed 60 feet and use a maximum of 5 jig machines in BSAI, and a vessel specifically constructed for and used exclusively in accord with a community development plan approved by NMFS. 50 C.F.R. § 679.4(k)(2)(ii), (iii) & (iv).

³⁰ The NMFS Alaska Region website lists LLP licenses that NMFS has issued and the original qualifying vessel. The only permit NMFS has issued based on the F/V JEWEL is the interim permit issued to Mr. Lee. <<<http://www.fakr.noaa.gov/ram/dailyllp-gf.pdf>>> visited December 8, 2003.

³¹ Cf. *Afanasy Reutov*, Appeal No. 00-0005 at 11 (Nov. 8, 2002): "The [LLP] application process is designed to yield one transferable license based on one vessel's fishing history. This suggests that an applicant could not request an additional license based on another vessel's fishing history if NMFS had taken final agency action and awarded the license based on another vessel's fishing history to another applicant." (citation omitted)

³² Cf. *Fierce Packer*, Appeal No. 00-0004 at 21 - 22 (Dec. 18, 2000) (awarding an LLP license, in part, because the applicant was an innocent third party purchaser of the LLP qualifying fishing history from a federal bankruptcy trustee even though it resulted in two LLP licenses from one fishing history); *Darius Baltz*, Appeal No. 95-0028 at 1 (Jan. 3, 1996) ("[A]s a matter of policy, [RAM] does not revoke such QS [Quota Share] in the hands of an innocent third party," even though it resulted in two applicants receiving IFQ credit for the same fishing history).

permit and license requirements” in other parts of 50 C.F.R. § 679.4.”³³ The Decision misconceives the import of this requirement. It is a substantive requirement. A vessel must have an LLP, in addition to any other required license, to legally conduct directed fishing for license limitation groundfish. Mr. Lee is not challenging the substantive requirement. Mr. Lee is not arguing that he should be able to conduct directed fishing for license limitation groundfish with only an FFP. He raises a procedural point: whether his application for an FFP gets him in the door, so that NMFS can decide whether he meets the substantive requirements for an LLP license.

Sixth, in the original Decision, I did not overlook that Mr. Lee’s moratorium permit expired on December 31, 1999 and this was *after* he had to apply for his LLP license.³⁴ But I did not consider whether that fact was relevant to determining whether Mr. Lee’s FFP application was a significant act toward applying for an LLP license. Usually a person does not have to apply for a new license until the person’s current license expires. Driver’s licenses are the example that comes most readily to mind. A person does not have to apply for a new driver’s license before his or her current license expires. But Mr. Lee was in an unusual situation. Mr. Lee’s then-current (moratorium) license expired *after* the deadline to apply for his next (LLP) license. I conclude that this fact supports treating Mr. Lee’s FFP application as a significant step toward applying for his LLP license.

I therefore conclude that, looking at Mr. Lee’s situation through *Ramos* lenses, NMFS has authority to accept this application and should exercise that authority. This conclusion results from applying a liberal standard, as enunciated in *Ramos*, in judging whether Mr. Lee’s actions are significant as a matter of law and are properly treated as meeting the application deadline. Mr. Lee applied for a Federal Fishing Permit by the LLP application deadline. Mr. Lee’s FFP application communicates an intention to participate in the LLP groundfish fisheries. The overlap between groundfish and license limitation groundfish is approximately 95%. Mr. Lee had a moratorium permit that was valid through December 31, 1999 and was in the unusual situation of having to apply for another government license before his prior license expired. No other person has received, or applied for, an LLP license based on the fishing history of the F/V JEWEL.

FINDINGS OF FACT

1. The LLP application period was September 13, 1999 to December 17, 1999.
2. Mr. Lee filed an application for a Federal Fisheries Permit on December 13, 1999.
3. Mr. Lee filed an application for a Vessel Moratorium Permit on December 31, 1999.

³³ Decision at 10 *quoting* 50 C.F.R. § 679.4(k)(1).

³⁴ Decision at 7.

4. No other person has received, or applied for, an LLP license based on the fishing history of the F/V JEWEL.

CONCLUSIONS OF LAW

1. The test for whether an act by an applicant, short of filing an application, can meet the application deadline is whether the applicant took a significant act in furtherance of filing the application by the deadline.
2. Mr. Lee's application for a Federal Fishing Permit for the F/V JEWEL for a period beginning January 1, 2000 is a significant act toward applying for an LLP groundfish license.
3. NMFS should treat Mr. Lee as having timely filed an LLP application for an LLP groundfish license, as a matter of law, through his application for a Federal Fishing Permit for a catcher vessel to harvest groundfish in the Gulf of Alaska.

DISPOSITION

The IAD denying John B. Lee's LLP application is VACATED. The Restricted Access Management Program is ORDERED to process Mr. Lee's LLP application based on the fishing history of the F/V JEWEL. This Decision takes effect on March 15, 2004, unless by that date the Regional Administrator orders review of the Decision.

Since this Decision on Reconsideration changes the result from the original Decision, the appellant or 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 the tenth day after the date of this Decision, February 23, 2004. A motion for reconsideration must be in writing, must allege one or more specific, material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement 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.

Mary Alice McKeen
Appeals Officer