

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

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| In re Application of |) | Appeal No. 06-0006 |
| |) | |
| JIM ENGLAND, |) | DECISION |
| Appellant |) | |
| |) | July 3, 2008 |
| _____ |) | |

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program of the National Marine Fisheries Service (NMFS) issued an Initial Administrative Determination (IAD) on February 9, 2006, that denied Mr. England’s application for catcher vessel crew Quota Share (QS) in the Bering Sea snow crab fishery under the Bering Sea/Aleutian Islands (BSAI) Crab Rationalization Program (CRP). RAM denied the application because the official Crab Rationalization Record¹ does not show that he made the requisite legal landings to qualify for the QS.

Mr. England filed a timely appeal of the IAD. His interests are directly and adversely affected by the IAD, as required by 50 C.F.R. § 679.43(b). He did not request an oral hearing, nor is an oral hearing authorized in this case because there is no genuine and substantial issue of adjudicative fact for resolution at a hearing, as required by 50 C.F.R. §679.43(g)(3)(i). The record contains sufficient information to decide this appeal, and therefore the record is now closed. 50 C.F.R. §679.43(g)(2).

ISSUE

Does Mr. England qualify for catcher vessel crew QS in the Bering Sea snow crab fishery under the Crab Rationalization Program?

¹ The “official Crab Rationalization Record” is defined in 50 C.F.R § 680.2 as “the information prepared by the Regional Administrator [of NMFS] about the legal landings and legal processing by vessels and persons in the BSAI crab fisheries during the qualifying periods specified at § 680.40.” According to RAM, the “official Crab Rationalization Record” is a comprehensive data base that contains relevant information on the BSAI crab fisheries, including permit holder and fish ticket landing files, processing information, and other data required for properly assigning harvesting and processing histories to qualified persons and calculating the amounts of QS and Processor QS to which they are entitled. The information in the official CRP record is derived from a variety of sources, including the Alaska Department of Fish and Game, the Commercial Fisheries Entry Commission, the Alaska Department of Revenue, and NOAA Fisheries Service (NMFS). [General Guidelines for Preparing Applications, BSAI Crab Rationalization - “Instructions for Applying for QS and PSQ” - April 2005].

ANALYSIS

To qualify for catcher vessel crew QS in the Bering Sea Snow crab fishery, Mr. England must demonstrate that he made a legal landing of Bering Sea snow crab in three of the following “historical participation” crab seasons: January 15 - February 29, 1996; January 15 - March 21, 1997; January 15 - March 20, 1998; January 15 - March 22, 1999; and April 1-8, 2000; and in two of the following “recent participation” crab seasons: April 1-8, 2000; January 15 - February 14, 2001; and January 15 - February 8, 2002.²

RAM states,³ and Mr. England acknowledges in his application,⁴ that he did not make any legal landings in two of the three recent participation seasons – 2001 and 2002 – for catcher vessel crew QS in the Bering Sea snow crab fishery. I find that Mr. England did not make the requisite legal landings of crab to qualify for catcher vessel crew QS in the Bering Sea snow crab fishery under the CRP.

On appeal, Mr. England claims that he would have made legal landings of Bering Sea snow crab during the 2002 season but for the sinking of the F/V WINDY BAY in August 2001; and that he will “suffer irreparable harm” if he is not issued crab QS.⁵ Mr. England argues that the sunken vessel provision for vessel owners, at 50 C.F.R. § 680.40(c)(2)(vi), should be applied to captains like him, because his ability to participate during the recent years was thwarted by the sinking of the F/V WINDY BAY.

Mr. England notes that “extenuating circumstances” have been recognized in court decisions, other jurisdictions, and Federal limited access programs, and that the failure to address “extenuating circumstances” for vessel captains is an inadvertent omission and inconsistent with the rules promulgated to protect historical fisherman. Mr. England points out that it is unfair to preclude him from crab QS due to the sinking of the F/V WINDY BAY. He states that he has been a commercial fisherman his entire adult life and has been involved in every king and snow crab fishery since 1981, except for the 2001 king crab season and the 2002 snow crab season.

Even if all of that is true, other than for crew that died while working as part of a harvesting crew,⁶ the CRP regulations do not provide a hardship or special circumstance exception to the

² 50 C.F.R. § 680.40(b)(1)(ii) and 50 C.F.R. § 680.40(b)(3)(iii)(B) and (C). Columns C and D, Table 7 to Part 680 - Initial Issuance of QS by Crab QS Fishery.

³ IAD at 2.

⁴ Mr. England stated on his application that he made legal landings of Bering Sea snow crab in 2000, but not during 2001 or 2002.

⁵ Appeal pleading at 1, 3.

⁶ 50 C.F.R. § 680.40(b)(3)(iii)(C)(2).

landing requirements for catcher vessel crew QS. Nor do the CRP regulations provide a “sunken vessel” exception to the legal landing requirements for catcher vessel crew QS. The sunken vessel provision at 50 C.F.R. § 680.40(c)(2)(vi) applies only to catcher vessel *owner* QS or catcher/processor owner QS. For whatever reason, the North Pacific Fishery Management Council (Council) chose not to provide an “extenuating circumstances” provision to the landing requirements for catcher vessel crew QS.

As the Alaska Regional Administrator has stated about another program, but which is equally applicable here, the policies embodied in a NMFS fishery management program:

. . . are the policies of the [North Pacific Fishery Management] 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 [Administrative Procedure Act] 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.

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 [be] found before the Council.⁷

As an Administrative Judge, I am bound by the language of the regulations and do not have the authority to create an exception to the regulations. I conclude that Mr. England cannot qualify for the QS he seeks on appeal based on the sinking of the F/V WINDY BAY or any irrevocable harm caused by the implementation of the CRP regulations. In light of this, I conclude that Mr. England does not qualify for catcher vessel crew QS in the Bering Sea snow crab fishery under the CRP.

FINDING OF FACT

Mr. England did not make the requisite legal landings of crab to qualify for catcher vessel crew crab QS in the Bering Sea snow crab fishery under the CRP.

CONCLUSIONS OF LAW

1. Other than for crew that died while working as part of a harvesting crew, the CRP regulations

⁷ *George M. Ramos*, Regional Administrator’s Decision on Review, Appeal No. 94-0008 at 4-5 (Apr. 21, 1995).

do not provide a hardship or special circumstance exception to the landing requirements for catcher vessel crew QS.

2. Mr. England cannot qualify for the QS he seeks on appeal based on the sinking of the F/V WINDY BAY or irrevocable harm caused by the implementation of the CRP regulations.

3. Mr. England does not qualify for catcher vessel crew QS in the Bering Sea snow crab fishery under the CRP.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect August 4, 2008, unless by that date the Regional Administrator takes further action pursuant to 50 § 679.43(o). Mr. England 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 July 14, 2008, 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.

Randall J. Moen
Administrative Judge