



The IAD is affirmed. Mr. Medhaug did not apply by the application deadline of June 3, 2005. The CRP regulation at 50 C.F.R. § 680.40(f)(1)(iii) requires NMFS to deny applications that are filed after the application deadline.

Mr. Medhaug argues that he did not receive a CRP application packet before the application deadline. An applicant's lack of receipt of CRP application materials does not authorize NMFS to accept a late application. NMFS does not have an obligation to guarantee that potential CRP applicants receive a CRP application. NMFS does have an obligation, established in CRP regulation 50 C.F.R. § 680.40(f)(1), to send applications to persons that NMFS identifies as eligible to receive Quota Share under the CRP. In April 2005, NMFS sent CRP application materials to Mr. Medhaug at the address in Washington State that NMFS had for Mr. Medhaug. NMFS had obtained Mr. Medhaug's address from the State of Alaska Commercial Fisheries Entry Commission in November 2004. The State of Alaska CFEC had used that address to send Mr. Medhaug State of Alaska fishing permits from 1991 to 2007. NMFS met its obligation to send CRP application material to Mr. Medhaug.

Mr. Medhaug's absence from the country for five years to care for aging parents in Norway is not an extraordinary circumstance that authorizes NMFS to toll the application deadline and accept a late application. Mr. Medhaug is being treated the same as other fishermen who filed late applications. NMFS has no grounds upon which to treat Mr. Medhaug's application as timely filed.

#### ANALYSIS

Mr. Medhaug states the basis of his appeal:

In March 2002, my wife and I moved/relocated back to Norway due to the fact that our parents were getting older and we felt they needed our assistance. I did not receive my crab rationalization packet. Upon returning back to the US, to see my children and grandchild, I had discussions with peers and realized I was entitled to crab rights I had not capitalized on. Therefore, I submitted my application in 2007.

I have spent most of my life as a permit holder in the Alaska Crab Fisheries and feel it's only right to get the same opportunity as my fellow fishermen have.<sup>4</sup>

NMFS must follow the federal regulations that implement the Crab Rationalization Program. The CRP regulation states at 50 C.F.R. § 680.40(f)(1)(iii):

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<sup>4</sup> Letter from Jan O. Medhaug to NMFS (Oct. 15, 2007).

An application that is postmarked, faxed, or hand delivered after the ending date for the application period for the Crab QS Program specified in the Federal Register **will be denied**. [emphasis added]

The application period specified in the Federal Register was April 4, 2005 to June 3, 2005.<sup>5</sup> The ending date of the application period, and therefore the application deadline, was June 3, 2005. RAM received Mr. Medhaug's application for QS on July 30, 2007.<sup>6</sup> I interpret Mr. Medhaug's appeal as making three arguments why NMFS should award him QS, even though he filed it after the application deadline.

**First**, Mr. Medhaug states that he did not receive CRP application materials before the application deadline. The CRP regulation requires that NMFS send applications to persons identified by NMFS as eligible to receive QS in the official crab rationalization record.<sup>7</sup> The CRP regulation also requires that NMFS send an application to anyone who requests it.<sup>8</sup> Mr. Medhaug did not request a CRP application before the application deadline of June 3, 2005.

But NMFS did identify Mr. Medhaug as an eligible to receive Crew Quota Share in the official crab rationalization record. NMFS, therefore, had an obligation to send Mr. Medhaug CRP application materials. If NMFS did not meet its obligation to send Mr. Medhaug CRP application materials, this could constitute grounds for NMFS to accept a late application from Mr. Medhaug.<sup>9</sup>

NMFS, through the actions of RAM, met its obligation to send Mr. Medhaug CRP application material.<sup>10</sup> In April 2005, RAM sent Mr. Medhaug CRP application material to the address it had for Mr. Medhaug in its CRP database. The application material consisted of a cover letter, a CRP Application and Instructions, a summary of the official crab rationalization record that summarized the applicant's relevant fishing history, excerpts from the regulations and a series of handouts with general information on the program.<sup>11</sup>

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<sup>5</sup> Notice of Application Period, 70 Fed. Reg. 1194 (March 8, 2005).

<sup>6</sup> Mr. Medhaug had submitted a written request to RAM for his CRP catch history in January 2007. Letter from Mr. Medhaug to RAM (faxed Jan. 18, 2007 from Trident Seafoods office). Even if NMFS treated January 18, 2007 as Mr. Medhaug's application date, that date is still after – approximately one and a half years after – the application deadline of June 3, 2005.

<sup>7</sup> 50 C.F.R. § 680.40(f)(1)(i).

<sup>8</sup> 50 C.F.R. § 680.40(f)(1)(i).

<sup>9</sup> *Rodney P. Whitehead*, Decision, Appeal No. 00-0008 (Feb. 8, 2001), *Rodney P. Whitehead*, Decision on Reconsideration, Appeal No. 00-0008 (March 20, 2001). NMFS accepted a late application because NMFS had not sent LLP application materials to the last known address it had for the applicant.

<sup>10</sup> Exhibits 1 - 9 to Order Before Status Conference (Nov. 9, 2007).

<sup>11</sup> Exhibit 3, page 5, to Order Before Status Conference (Nov. 9, 2007).

RAM used the address for Mr. Medhaug that it had gotten from the State of Alaska, Commercial Fisheries Entry Commission [CFEC] in November 2004. RAM obtained Mr. Medhaug's address from the State because Mr. Medhaug had received State of Alaska permits in the past. It was on the basis of these permits, and fishing under them, that Mr. Medhaug was eligible to receive Crew Quota Share under the CRP. The CFEC used this address to send Mr. Medhaug his State of Alaska fishing permits from 1991 to 2007.<sup>12</sup>

NMFS does not have an obligation to make sure that a potential recipient of QS receives CRP application materials. This Office stated in *Scott S. Spinak*: "Federal regulation 50 C.F.R. § 680.40(f)(1)(i) requires NMFS to send CRP application materials to eligible applicants, both unsolicited and upon request. The regulation does not require NMFS to guarantee receipt of those materials."<sup>13</sup> I conclude that NMFS met its obligation to send Mr. Medhaug CRP application materials under 50 C.F.R. § 680.40(f).

**Second**, Mr. Medhaug was out of the country from 2002 to 2007 to care for aging parents in Norway and asks that his late application be accepted for that reason. The CRP regulation states that applications received or mailed after the application deadline will be denied.<sup>14</sup> It does not have any exceptions. Specifically, the regulation does not authorize NMFS to evaluate why an applicant was out of the country and to accept a late application if the applicant had a good reason for being out of the country.

In very limited circumstances, NMFS has authority to accept a late application under the doctrine of equitable tolling. The doctrine of equitable tolling allows an administrative agency to treat a late application as though it had been filed on time when the applicant did not file a timely application due to extraordinary circumstances beyond the applicant's control.<sup>15</sup> The circumstances have to be so severe that they effectively prevented the applicant from submitting an application during the application period.<sup>16</sup>

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<sup>12</sup> Exhibit 10 to Order Before Status Conference (Nov. 9, 2007). The CFEC sent Mr. Medhaug his State of Alaska fishing permits at the same address in Seattle, Washington from 1991 until the first permit in 2007. The CFEC sent a second permit to Mr. Medhaug in 2007 at the same street address and zip code but put Shoreline as the city, not Seattle. When Mr. Medhaug filed his appeal in 2007, he used Shoreline as the city in his address. Mr. Medhaug did not argue that mail addressed to Seattle, rather than Shoreline, would have been undeliverable or returned to the sender.

<sup>13</sup> *Scott S. Spinak*, Appeal No. 05-0006 at 6 (June 4, 2007).

<sup>14</sup> 50 C.F.R. § 680.40(f)(1)(iii). I quote the regulation at page 3 *supra*.

<sup>15</sup> *Scott S. Spinark*, Appeal No. 05-0006 (June 4, 2007).

<sup>16</sup> *Christopher O. Moore*, Appeal No. 95-0044 (Sept. 5, 1997) (during application period, applicant was dealing with the continuing effects of his mother's brutal murder and his stepfather's trial for that murder); *Estate of Marvin C. Kinberg*, Appeal No. 95-0035 (Aug. 1, 1997) (applicant, a nurse,

By contrast, NMFS does not have authority to accept late applications from applicants who are facing normal or ordinary situations. NMFS has not accepted late applications from persons who simply did not know about the application period,<sup>17</sup> who were out of the country during the application period,<sup>18</sup> who were in remote areas of this country during the application period,<sup>19</sup> or whose agent failed to recognize the significance of application materials sent by NMFS.<sup>20</sup>

Mr. Medhaug is like these late applicants, who were facing ordinary, rather than extraordinary, life circumstances. Mr. Medhaug's circumstances were not the type of circumstances that would prevent an applicant from making arrangements to have his mail checked and forwarded to him while he was out of the country. Mr. Medhaug's circumstances are not the type of circumstances that would make it practically impossible for an applicant to learn about the CRP program – from peers, family, publications – and apply for QS under it.

I conclude that Mr. Medhaug's circumstances – absence from the country for five years to care for aging parents – are not extraordinary circumstances that authorize NMFS to equitably toll the CRP application deadline.

**Third**, Mr. Medhaug asks that he have the same opportunity as his fellow fishermen. All other fishermen who applied for CRP Quota Share were subject to the application deadline. If they applied late, their applications were denied. If Mr. Medhaug's late application were accepted, he would be getting the right to file late, while NMFS denied the application of other fishermen, who filed late. Mr. Medhaug is being treated the same as his fellow fishermen who filed late applications.

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suffered from severe depression after her husband died at home from a massive heart attack); *John T. Coyne*, Decision on Reconsideration, Appeal No. 94-0012 (May 24, 1996) (applicant was in a compulsory drug rehabilitation program with extremely limited contact with the outside world during the application period). These are the only instances where this Office found, after extensive factual hearings, that a late applicant satisfied the requirements for equitable tolling of an application deadline.

<sup>17</sup> *Scott S. Spinak*, Appeal No. 05-0006 (June 4, 2007) (applicant moved to Hawaii, his forwarding address from Oregon expired and he did not know about the CRP application period); *Chris R. Opheim, Sr.*, Appeal No. 00-0006, Decision on Reconsideration (Jan. 24, 2003) (applicant filed a late application for an License Limitation Program or LLP permit).

<sup>18</sup> *Richard D. Foss*, Appeal No. 95-0003 (Aug. 6, 1996) (applicant was in the South Pacific commercially fishing during IFQ application period).

<sup>19</sup> *David L. Hall*, Appeal No. 95-0014 (Sept. 1, 1998) (applicant in remote small town in California during IFQ application period).

<sup>20</sup> *T. Samuelson and T. Vasileff*, Appeal No. 94-0011 (Sept. 18, 1995) (applicant/doctor was out of the country on sabbatical when NMFS sent him an IFQ application and neither his partner nor his bookkeeper informed him).

Unfortunately, I can find no grounds under which NMFS can treat Mr. Medhaug's application as timely filed. I therefore conclude that NMFS should not treat Mr. Medhaug's application as timely filed.

#### FINDINGS OF FACT

1. In April 2005, RAM sent CRP application materials to Mr. Medhaug at the address that RAM had for Mr. Medhaug.
2. RAM used the most recent address it had for Mr. Medhaug.
3. RAM used the address for Mr. Medhaug that it had gotten from the State of Alaska, Commercial Fisheries Entry Commission, in November 2004.
4. The State of Alaska, Commercial Fisheries Entry Commission, sent Mr. Medhaug State of Alaska permits at this address from 1991 to 2007.
5. Mr. Medhaug did not request a CRP application before the end of the CRP application period, which was June 3, 2005.

#### CONCLUSIONS OF LAW

1. RAM properly relied on federal regulation 50 C.F.R. § 680.40(f)(1)(iii) to deny Mr. Medhaug's application for Quota Share under the CRP on the grounds that Mr. Medhaug applied after June 3, 2005, the deadline for CRP applications.
2. NMFS, through RAM's actions, met its obligation under 50 CFR § 680.40(f) to send Mr. Medhaug CRP application materials.
3. Mr. Medhaug's circumstances – absence from the country for five years to care for aging parents – are not extraordinary circumstances that authorize NMFS to equitably toll the CRP application deadline.
4. NMFS should not treat Mr. Medhaug's CRP application as timely filed.

#### DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect February 10, 2008, unless by that date the Regional Administrator orders review of the Decision.

Mr. Medhaug 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 the tenth day after this Decision, January 21, 2008. A motion for reconsideration must be in writing, must specify one or more material matters of fact or law that I have overlooked or misunderstood, and must be supported by a written statement in support of the motion.

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Mary Alice McKeen  
Administrative Judge