

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 99-0003
)
AL L. ANDERSON ENTERPRISES)
F/V ALYSA JUNE) DECISION
ADF&G # 61634)
Appellant)
_____) December 1, 1999

STATEMENT OF THE CASE

On January 12, 1999, Al L. Anderson, on behalf of Al L. Anderson Enterprises, applied for a vessel moratorium qualification and permit under the Vessel Moratorium Program on Groundfish and Crab, based on landings made by the F/V ALYSA JUNE.¹ The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on February 22, 1999, which denied Mr. Anderson a final and interim moratorium permit because he was applying after December 31, 1998 and a moratorium permit based on the moratorium qualification of the F/V ALYSA JUNE had not been issued on or before that date. RAM issued an IAD on Reconsideration on March 8, 1999, which granted Mr. Anderson an interim moratorium permit but reaffirmed its denial of a final moratorium permit.

Mr. Anderson filed a timely appeal with this Office. 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.²

ISSUE

Does the F/V ALYSA JUNE have moratorium qualification?

¹ The Vessel Moratorium Program for Groundfish and Crab, 50 C.F.R. § 679.4(c), which expires on December 31, 1999, should not be confused with the North Pacific License Limitation Program (LLP), 50 C.F.R. § 679.4(k). As of January 1, 2000, a license limitation permit will be necessary to harvest certain species of groundfish in the Gulf of Alaska and Bering Sea and Aleutian Islands (BSAI) areas and Tanner and king crab in BSAI. The application period for the LLP is from September 13, 1999 through December 17, 1999. For further information on LLP, Mr. Anderson may contact Restricted Access Management (RAM), NMFS, Box 21668, Juneau, Alaska 99802-1668, 907-586-7474 or 1-800-304-4846 (option 2). NMFS's website at "<http://www.fakr.noaa.gov>" also has information on LLP.

² 50 C.F.R. § 679.43.

DISCUSSION

After extensive public comment and debate,³ the North Pacific Fisheries Management Council put the Moratorium Program into place on September 11, 1995.⁴ The Moratorium Program was a temporary measure to freeze the number of vessels in the moratorium fisheries while the Council developed a more comprehensive plan to rationalize the moratorium fisheries and prevent overfishing and overcapitalization in them.⁵ The original regulations for the Moratorium Program provided that, to participate in the moratorium fisheries from January 1, 1996 to December 31, 1998, a vessel had to have a moratorium permit.⁶ The Council assumed that, by December 31, 1998, the more permanent program to limit participation in the moratorium fisheries would be in effect.

But the new program -- by now named the North Pacific Fisheries Licence Limitation Program or LLP -- was not in place by December 31, 1998. The Council did not wish to leave the moratorium fisheries unregulated and therefore, in January 1999, extended or reauthorized the Moratorium Program through December 31, 1999.⁷ The Council made very few changes in the regulations. The only changes it made were changes directly relevant to the extension, such as making the requirements for moratorium permits applicable through December 31, 1999,⁸ and two new regulations which are the subject of this appeal. The Council added regulation 50 C.F.R. § 679.4(c)(7)(iii), which provided for the expiration of the moratorium qualification of certain vessels:

Expiration of moratorium qualification. A vessel's moratorium qualification will expire on December 31, 1998, unless a moratorium permit has been applied for on or before December 31, 1998, and subsequently issued based on that moratorium qualification.

³ See Notice of Proposed Rule, 59 Fed. Reg. 28,827- 28,838 (June 3, 1994); Notice of Proposed Rule, 60 Fed. Reg. 25,677 - 25,687 (May 12, 1995); Final Rule, 60 Fed. Reg. 40,763 - 40,775 (Aug. 10, 1995).

⁴ Final Rule, 60 Fed. Reg. 40763, 40771 (Aug. 10, 1995).

⁵ 60 Fed. Reg. at 25,677.

⁶ 50 C.F.R. § 676.3, renumbered as 50 C.F.R. § 679.4(c)(1). The renumbering was part of the consolidation of NMFS regulations, 61 Fed. Reg. 31,228 - 31,302 (June 19, 1996), and was not intended to make any substantive changes in the regulations, *id.* at 31,229.

⁷ Final Rule, 64 Fed. Reg. 3651-3653 (Jan. 25, 1999). The proposed rule is found at 63 Fed. Reg. 63,442-63,444 (November 13, 1998).

⁸ 50 C.F.R. § 679.4(c).

The other new regulation, a companion to the first, was 50 C.F.R. § 679.4(c)(6)(iii):

An application for a moratorium permit received after December 31, 1998, will be denied unless it is based on a moratorium qualification for which a moratorium permit was issued on or before December, 31, 1998.

The two new regulations adopted amendments to the Fishery Management Plan for the moratorium fisheries which NMFS had approved on December 16, 1998.⁹ The Council articulated a clear reason for these new regulations: a concern that too many vessels would seek permits in 1999.¹⁰

These regulations adopted a policy change for the Moratorium Program. As originally adopted, a person claiming entitlement to a moratorium permit could apply at any time. If a vessel had moratorium qualification, either by its own landings or by transfer from another vessel, the vessel owner (or the owner of the qualification if it has been severed from the vessel) could apply at any time for a moratorium permit. A vessel had moratorium qualification by its own landings if it made landings of moratorium species during the qualifying period, which was January 1, 1988 through February 9, 1992.¹¹ That vessel was called an original qualifying vessel. The two new regulations introduced a new element in the regulatory scheme. If someone had not used the moratorium qualification of an original qualifying vessel to apply for a moratorium permit by December 31, 1998, that qualification expired on that date.¹²

Although the Moratorium Program, as originally adopted, had no explicit application deadline, the program itself was set to expire on December 31, 1998 and so, in effect, there was an application

⁹ Final Rule, 64 Fed. Reg. at 3651.

¹⁰ The reason for these new regulations was that many persons who could have applied for moratorium permits between January 1, 1996 and December 31, 1998 did not. If all those persons applied in 1999, the Council was concerned it would adversely affect the moratorium fisheries. The purpose of the new requirement was thus “to eliminate the potential for latent capacity entering the affected fisheries through a restriction on the submission of new moratorium permit applications during the extension.” 64 Fed. Reg. at 3651.

¹¹ 50 C.F.R. § 679.2. Moratorium species are either moratorium crab or moratorium groundfish. Moratorium crab are Tanner or king crab harvested in the Bering Sea and Aleutian Islands area (BSAI). *Id.* Moratorium groundfish are groundfish, except sablefish caught with fixed gear, harvested in the Gulf of Alaska or BSAI. *Id.*

¹² Strictly speaking, it was not a totally new element. The original regulations provided that in very limited situations, the moratorium qualification for a vessel that was lost or destroyed in 1988 was not valid for issuing a moratorium permit and, in effect, expired. 50 C.F.R. § 676.4(b) renumbered as 50 C.F.R. § 679.4(c)(9)(iii).

deadline of December 31, 1998. Although the new regulations did not explicitly establish an application deadline, they did make clear that new permits applied for in 1999 would not be issued, except through qualification transfer requests, which would only replace permits that had already been issued.

The Official Record for the Moratorium Program does not show that the F/V ALYSA JUNE is an original qualifying vessel. Mr. Anderson submitted fish tickets which appear to show qualifying landings.¹³ For purposes of this appeal, I assume that the F/V ALYSA JUNE is a qualified vessel and that a moratorium permit would have been issued, based on the moratorium qualification of the F/V ALYSA JUNE, if an application had been filed on or before December 31, 1998.

Mr. Anderson applied on January 12, 1999. The record contains no assertion or evidence that anyone besides Mr. Anderson applied for a moratorium permit based on the moratorium qualification of the F/V ALYSA JUNE on or before December 31, 1998. Therefore the regulations unambiguously provide that the moratorium qualification of the F/V ALYSA JUNE expired on December 31, 1998.

Mr. Anderson's only argument revolves around the effective date of the new regulations. He notes that the regulations for the extension of the Moratorium Program were published in the Federal Register, dated January 25, 1999, with an effective date of January 19, 1999. He argues that application of these rules to his claim, filed on January 12, 1999, amounts to retroactive rulemaking and that is not permitted without a grant of express statutory authority to an agency, particularly when the rule impairs a substantive right. Assuming *arguendo* that this is a correct statement of law, the flaw with this argument is that these regulations, as applied to Mr. Anderson, do not constitute retroactive rulemaking.

It is true the Council's reauthorization of the Moratorium Program was not effective until January 19, 1999. But the prior regulations, which were in effect until December 31, 1998, in essence provided for an application deadline of December 31, 1998 because that is when the Moratorium Program expired. Thus, Mr. Anderson is not being retroactively subjected to a new standard. The new regulations "[did not] limit [applicants'] ability to apply for a permit any more than it would have been limited under the status quo," which were the regulations in effect until December 31, 1998.¹⁴

Further, the extent to which the new regulations impair Mr. Anderson's substantive rights is quite limited due to the operation of regulation 50 C.F.R. § 679.4(c)(10), which was also readopted by the Council as part of its extension of the Moratorium Program. That regulation required that RAM issue Mr.

¹³ The fish tickets appear to show two landings of moratorium groundfish (Pacific cod) in the Gulf of Alaska in January 1992.

¹⁴ Proposed Rule, 63 Fed. Reg. at 63,443.

Anderson an interim moratorium permit which is valid pending final agency action on the application.¹⁵ Therefore, Mr. Anderson has been able to participate in the moratorium fisheries for the 1999 season on an interim permit.

Between January 1 and January 19, 1999, when Mr. Anderson applied, there were no regulations for the Vessel Moratorium Program on Groundfish and Crab in effect. As of January 19, 1999, the new regulations were in effect. RAM properly followed these regulations in processing Mr. Anderson's application. I conclude that the moratorium qualification of the F/V ALYSA JUNE expired on December 31, 1998 because neither Mr. Anderson nor anyone else had applied for a moratorium permit based on the qualification of that vessel by December 31, 1998. Therefore, I conclude that the F/V ALYSA JUNE does not have moratorium qualification.

FINDINGS OF FACT

1. Mr. Anderson filed an application for a moratorium permit and qualification after December 31, 1998, which was based on landings of the F/V ALYSA JUNE.
2. No one had applied for a moratorium permit based on the moratorium qualification of the F/V ALYSA JUNE on or before December 31, 1998.

CONCLUSION OF LAW

1. RAM properly followed the regulations that were in effect when it processed Mr. Anderson's application.
2. The moratorium qualification of the F/V ALYSA JUNE expired on December 31, 1998.
3. The F/V ALYSA JUNE does not have moratorium qualification.

DISPOSITION

The IAD on Reconsideration that is the subject of this appeal is **AFFIRMED**. This Decision takes effect January 3, 2000, unless by that date the Regional Administrator orders 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 the tenth day after this Decision, December 13, 1999. 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.

¹⁵ Order, Richard Newby, Appeal No. 99-0001, Feb. 26, 1999.

Mary Alice McKeen
Appeals Officer