

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of ) Appeal No. 99-0007  
)  
BOB WOOD )  
F/V MAHALO ) DECISION  
ADF&G # 36407 )  
Appellant )  
\_\_\_\_\_ ) December 3, 1999

STATEMENT OF THE CASE

On January 11, 1999, Bob Wood applied for a vessel moratorium qualification for the F/V MAHALO under the Vessel Moratorium Program on Groundfish and Crab.<sup>1</sup> The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on February 22, 1999, which denied Mr. Wood a final moratorium permit, an interim moratorium permit and a moratorium qualification. The basis of the IAD was that Mr. Wood was applying after December 31, 1998 and a moratorium permit based on the moratorium qualification of the F/V MAHALO had not been issued on or before that date.

RAM issued an IAD on Reconsideration on March 8, 1999, which only reconsidered Mr. Wood's request for an interim permit. RAM concluded that issuance of an interim permit for the F/V MAHALO was authorized but RAM would not issue the permit because the vessel was lost at sea and it was never replaced, salvaged or rebuilt.

Mr. Wood 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. 50 C.F.R. § 679.43.

ISSUES

1. Should the F/V MAHALO receive a final moratorium permit?

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<sup>1</sup> 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. Wood 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. Should the F/V MAHALO receive a transferable certificate of moratorium qualification?
3. Should the F/V MAHALO receive an interim moratorium permit and a non-transferable certificate of moratorium qualification?

## BACKGROUND

The Official Record for the Moratorium Program shows the F/V MAHALO as an original qualifying vessel entitled to receive a moratorium permit with gear endorsements to harvest crab with pot gear and groundfish with pot, trawl and hook gear. An original qualifying vessel is a vessel that had a landing of moratorium crab or moratorium groundfish during the qualifying period, which was January 1, 1988 through February 9, 1992.<sup>2</sup> The F/V MAHALO sank on January 18, 1992. The record contains no indication that any salvage efforts have begun or are contemplated.

Mr. Wood applied for a moratorium qualification for the F/V MAHALO on January 11, 1999. Although the application did not request a moratorium permit, RAM treated it as an application for both a moratorium qualification and permit. In its IAD dated February 22, 1999, RAM stated that it could not grant Mr. Wood's application for a moratorium qualification and final moratorium permit because he was applying after December 31, 1998 and his application was not based on a moratorium qualification that had been used as a basis for obtaining a moratorium permit on or before December 31, 1998. The IAD also denied Mr. Wood an interim permit.

On March 1, 1999, Arthur Anderson of All Alaskan Seafoods, Inc., acting on behalf of Mr. Wood, asked RAM to "review your Initial Administrative Determination regarding the moratorium permit for the F/V MAHALO and issue an interim moratorium permit for the vessel." RAM issued an IAD on Reconsideration, dated March 8, 1999, which stated that Mr. Wood's application for an interim permit is approved but no interim permit will be issued because the F/V MAHALO was lost at sea on January 18, 1992 and was neither replaced nor salvaged nor reconstructed: "Accordingly, there is no vessel upon which a VMP [vessel moratorium permit] derived from the F/V MAHALO's fishing history may be used."

Mr. Wood's appeal requests that he receive a final moratorium permit, an interim moratorium permit and, by implication, a moratorium qualification. Mr. Wood alleges the following facts, which this Decision will accept as true, for purposes of resolving this Appeal. The F/V MAHALO is an original qualifying vessel. Mr. Wood intended to apply for a vessel moratorium permit based on the fishing history of the F/V MAHALO in 1995 just as he had applied for other vessels which he owned and which were entitled to moratorium permits. He mistakenly thought he had applied for a permit for the

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<sup>2</sup> 50 C.F.R. § 679.2. Moratorium crab are Tanner and king crab harvested in the Bering Sea and Aleutian Islands (BSAI). Moratorium groundfish are groundfish, except sablefish harvested with fixed gear, in the Gulf of Alaska and BSAI. *Id.*

F/V MAHALO and it had been granted. He wanted to transfer the moratorium qualification of the F/V MAHALO to the F/V SWELL RIDER and obtain a moratorium permit for F/V SWELL RIDER.<sup>3</sup>

At some point, Mr. Wood realized that an application based on the landings of the F/V MAHALO had not been submitted in 1995. Mr. Wood alleges that for two months prior to his January 11, 1999 application, he was in frequent contact with NMFS and RAM personnel. Mr. Wood's attorney alleges:

[Mr. Wood] submitted written applications for a VMQ [vessel moratorium qualification] and VMP [vessel moratorium permit] following a lengthy process, spanning more than two months, of telephone communications with NMFS and RAM personnel regarding the apparent loss of paperwork pertaining to a similar Application in 1995 as well as the procedural requirements to complete the recent application.

In the frequent communications during that time period, NMFS and RAM personnel regularly advised Applicant Bob Wood and the person assisting him, Mr. Arthur J. Anderson, regarding the substantive and especially the procedural requirements relating to the applications. Both Applicant and Mr. Anderson reasonably relied on the advice and information provided by NMFS and RAM personnel. In the numerous telephone conversations they were not informed that the Application must be filed on or before December 31, 1998. The Application was filed on January 11, 1999.

#### DISCUSSION

The F/V MAHALO sank on January 18, 1992. Mr. Wood claims entitlement to a moratorium qualification and permit for the F/V MAHALO.<sup>4</sup> The regulation which addresses the treatment of vessels that sank in 1992 is 50 C.F.R. § 679.4(c)(9)(iii):

*Vessels lost or destroyed from 1989 through 1995.* The moratorium qualification of any vessel that was lost or destroyed on or after January 1, 1989, but before January 1,

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<sup>3</sup> The record is not clear whether Mr. Wood or someone else owns the F/V SWELL RIDER but that does not affect the Appeal

<sup>4</sup> Even though Mr. Wood's application only requested a moratorium qualification, this Decision treats Mr. Wood's appeal as claiming entitlement to both a moratorium qualification and permit for the following reasons: [1] RAM treated Mr. Wood's applications as applications for a moratorium qualification and moratorium permit and denied Mr. Wood both a moratorium qualification and a permit; [2] Mr. Anderson's letter of March 1, 1999, on behalf of Mr. Wood, asked for an interim permit; and [3] the Appeal requests issuance of a moratorium permit.

1996, is valid for purposes of issuing a moratorium permit for that vessel, if salvaged, regardless of when salvage began, provided that the vessel has not already been replaced and the LOA [length overall] of the salvaged vessel does not exceed its maximum LOA. The moratorium qualification of any vessel that was lost or destroyed on or after January 1, 1989, but before January 1, 1996, may be transferred to another vessel provided the LOA of that vessel does not exceed the maximum LOA of the original qualifying vessel. The moratorium qualification of such a vessel is not valid for purposes of issuing a moratorium permit for 1998 unless that vessel is used to make a legal landing of a moratorium species from January 1, 1996 through December 31, 1997.

## **1. Final moratorium permit**

The first sentence of 50 C.F.R. § 679.4(c)(9)(iii) provides that the moratorium qualification of a vessel that sank in 1992 can only be used to issue a permit for that vessel if the vessel is salvaged, regardless of when salvage began. This contrasts with the treatment of vessels that sank in 1988. The moratorium qualification for a vessel that sank in 1988 is not valid for purposes of issuing a permit for the sunken vessel, unless salvage began on or before June 24, 1992.<sup>5</sup> Mr. Wood's application for a moratorium permit for the F/V MAHALO could not be granted because the F/V MAHALO had sunk in 1992 and salvage had never begun on that vessel.

Since this Decision affirms RAM's denial of a moratorium permit based on federal regulation 50 C.F.R. § 679.4(c)(9)(iii), I do not reach the question whether Mr. Wood's application should be denied based on federal regulations 50 C.F.R. §§ 679.4(c)(6)(iii) and (c)(7)(iii), because it was filed after December 31, 1998.<sup>6</sup> This makes it unnecessary to resolve whether Mr. Wood communicated with NMFS and RAM personnel in the fall of 1998 and whether his allegations, if true, could affect the treatment of his application.

## **2. Certificate of moratorium qualification**

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<sup>5</sup> 50 C.F.R. § 679.4(c)(9)(ii).

<sup>6</sup> 50 C.F.R. § 679.4(c)(6)(iii) provides: "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." 50 C.F.R. § 679.4(c)(7)(iii) provides: "*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." These two regulations were added when the Moratorium Program was extended and reauthorized through December 31, 1999. Final Rule, 64 Fed. Reg. 3651 - 3653 (Jan. 25, 1999)

Mr. Wood also applied for a moratorium qualification for the F/V MAHALO, which RAM denied. The regulations for the Moratorium Program only speak of applications and requirements for permits. The regulations do not provide for applications for moratorium qualifications and do not explicitly provide for certificates of moratorium qualification. The North Pacific Fisheries Management Council, which developed the Moratorium Program, viewed moratorium qualification as a “characteristic of the vessel.”<sup>7</sup> The regulations define moratorium qualification simply as something that is necessary for issuance of a permit: “[moratorium qualification] means a transferable prerequisite for a moratorium permit.”<sup>8</sup>

RAM perceived a need for vessel owners to have a document, which tangibly reflected the fact that a vessel had moratorium qualification. Vessel owners could show this document to potential buyers, partners, banks and the like. RAM therefore devised a “certificate of moratorium qualification.” RAM issued a transferable certificate, if the vessel received a final moratorium permit, and non-transferable certificates, if the vessel received an interim permit. When RAM denied Mr. Wood’s application for a vessel moratorium qualification for the F/V MAHALO, that meant that RAM declined to issue Mr. Wood a transferable certificate of moratorium qualification for the F/V MAHALO.

Although the regulations do not explicitly provide criteria for issuing certificates of moratorium qualification, they do define moratorium qualification.<sup>9</sup> Since the defining characteristic of moratorium qualification is its ability to serve as the basis for issuing a moratorium permit, the answer to whether the F/V MAHALO should receive a certificate of moratorium qualification depends on whether, at the time Mr. Wood applied for a moratorium qualification (January 11, 1999), the F/V MAHALO’s moratorium qualification could be the basis for issuing a moratorium permit. If the moratorium qualification of the F/V MAHALO could give rise to a moratorium permit when Mr. Wood applied, RAM should grant Mr. Wood’s application for a moratorium qualification. If the moratorium qualification of the F/V MAHALO could not give rise to a moratorium permit when Mr. Wood applied, RAM properly denied Mr. Wood’s application for a moratorium qualification.

I have concluded that the moratorium qualification of the F/V MAHALO could not give rise to a moratorium permit for the F/V MAHALO itself because the F/V MAHALO had not been salvaged. Could the moratorium qualification of the F/V MAHALO have given rise to a moratorium permit for another vessel – besides the F/V MAHALO – when Mr. Wood applied on January 11, 1999? Federal regulation 50 C.F.R. § 679.4(c)(9)(iii) requires that, to issue a permit in 1998 based on a moratorium qualification of a vessel that sank in 1992, the qualification of the sunk vessel had to have been the basis for issuance of a permit to another vessel and that vessel had to have made landings in 1996 or 1997 using the qualification of the sunk vessel. That regulation was repromulgated as part of

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<sup>7</sup> Notice of Proposed Rule, 60 Fed. Reg. 25,677, 25,680 (1995).

<sup>8</sup> 50 C.F.R. § 679.2.

<sup>9</sup> 50 C.F.R. § 679.2.

the extension of the Moratorium Program through December 31, 1999.<sup>10</sup>

Since the record has no other application for a moratorium permit based on the moratorium qualification of the F/V MAHALO, besides Mr. Wood's application, I conclude that another vessel did not make landings in 1996 or 1997 on a permit that was based on the moratorium qualification of the F/V MAHALO. Therefore, the moratorium qualification of the F/V MAHALO could not be the basis for issuing a moratorium permit to any vessel other than the F/V MAHALO, when Mr. Wood applied for a moratorium qualification on January 11, 1999. Since the moratorium qualification of the F/V MAHALO could not be the basis for issuing a permit to any vessel at the time of Mr. Wood's application, I conclude that RAM correctly declined to issue Mr. Wood a transferable certificate of moratorium qualification for the F/V MAHALO.

### **3. Interim permit and non-transferable certificate of moratorium qualification**

The regulation governing award of interim permits is 50 C.F.R. § 679.4(c)(10), which states:

*(ii) Permit denial.* An initial administrative determination that denies an application for a moratorium permit must authorize the affected vessel to catch and retain moratorium crab or moratorium groundfish species with the type of fishing gear specified on the application. The authorization expires on the effective date of the final agency action relating to the application.

The IAD on Reconsideration took note of that section but still declined to issue Mr. Wood an interim permit and a non-transferable certificate of moratorium qualification.<sup>11</sup> The language of the regulation is clear. RAM issued an initial administrative determination that denied Mr. Wood's application for a moratorium permit. It was therefore under an obligation to issue an interim permit that authorized the affected vessel to catch and retain the moratorium crab and moratorium groundfish species with the type of fishing gear specified on the application.<sup>12</sup> Mr. Wood's application claimed the F/V MAHALO had landed moratorium crab in the qualifying period (January 1, 1988 to February 9, 1992). This entitled Mr. Wood to an interim permit to harvest moratorium crab from the F/V MAHALO.<sup>13</sup>

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<sup>10</sup> Final Rule, 64 Fed. Reg. 3651-3653 (January 25, 1999).

<sup>11</sup> Whenever RAM issued an interim permit, it issued a nontransferable certificate of moratorium qualification. This Decision therefore treats RAM's denial of an interim permit as including a denial of a nontransferable certificate of moratorium qualification.

<sup>12</sup> Order, Richard Newby, Appeal No. 99-0001, February 26, 1999.

<sup>13</sup> The Official Record indicated that the F/V MAHALO had the landings necessary to receive a gear endorsement to harvest moratorium groundfish with trawl, pot and hook gear.

RAM's statement that it could not issue an interim permit for the F/V MAHALO because the F/V MAHALO was lost at sea and neither salvaged nor reconstructed is not true. RAM could have issued Mr. Wood an interim permit in the name of the F/V MAHALO, which is what Mr. Wood requested.

Although I conclude it was technically error for RAM to decline to issue Mr. Wood an interim permit for the F/V MAHALO, it was harmless error because the F/V MAHALO had sunk. Mr. Wood makes no allegation that he could have made any use of an interim qualification or permit issued in the name of the F/V MAHALO.

Mr. Wood's appeal implies that his real interest was to transfer the moratorium qualification for the F/V MAHALO to the F/V SWELL RIDER. Mr. Wood did not file an application to transfer a moratorium qualification from the F/V MAHALO to the F/V SWELL RIDER. As noted, since the qualification of the F/V MAHALO had not been used as a basis for landings in 1996 or 1997, Mr. Wood would not have been able to transfer the qualification of the F/V MAHALO to the F/V SWELL RIDER.

#### FINDINGS OF FACT

1. The F/V MAHALO sank in 1992.
2. No efforts were made to salvage the F/V MAHALO.
3. No one applied for a moratorium permit based on the moratorium qualification of the F/V MAHALO before Mr. Wood applied on January 11, 1999.
4. No vessel made landings in 1996 or 1997 using a moratorium permit that was based on the moratorium qualification of the F/V MAHALO.

#### CONCLUSIONS OF LAW

1. The moratorium qualification of the F/V MAHALO could not be a basis for issuing of a moratorium permit for the F/V MAHALO.
2. Mr. Wood was not entitled to a final moratorium permit for the F/V MAHALO.
3. The moratorium qualification of the F/V MAHALO could not be the basis for issuing a moratorium permit for any vessel in 1998 and 1999.
4. Mr. Wood was not entitled to issuance of a certificate of moratorium qualification for the F/V MAHALO.
5. Mr. Wood was entitled to the issuance of an interim moratorium permit and a non-transferable

certificate of moratorium qualification for the F/V MAHALO.

6. RAM's failure to issue Mr. Wood an interim moratorium permit and a non-transferable certificate of moratorium qualification for the F/V MAHALO was harmless error.

#### DISPOSITION

The IAD 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.

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Mary Alice McKeen  
Appeals Officer