

SUMMARY OF DECISION

The LLP has an application deadline of December 17, 1999. I conclude that RAM met its obligation under 50 C.F.R. § 679.4(k)(6) to notify Mr. Lee of the LLP program and the application deadline. I cannot conclude that RAM had an obligation to send Mr. Lee an LLP application by certified mail, even though that may have made a difference in whether Mr. Lee filed a timely LLP application. I conclude that it was a reasonable exercise of administrative discretion for RAM to specify an application period that ended on December 17, 1999, a date before Mr. Lee's moratorium permit expired on December 31, 1999.

Mr. Lee applied to renew his Federal Fisheries Permit for the F/V JEWEL on December 13, 1999. Mr. Lee's application to renew a federal fisheries permit for the F/V JEWEL does not satisfy Mr. Lee's obligation to submit an LLP application by December 17, 1999.

The reasons why Mr. Lee did not file an LLP application by December 17, 1999, which center around his work in remote Alaskan locations for most of the application period, unfortunately do not meet the high standard for extraordinary circumstances, which are necessary for equitable tolling of the application deadline.

I affirm the IAD, which declined to process Mr. Lee's LLP application for a groundfish license.

ISSUES

1. Did NMFS fulfill its obligation in 50 C.F.R. § 679.4(k)(6) to notify Mr. Lee of the LLP and the LLP application deadline?
2. Did RAM have a duty to send LLP applications by certified mail?
3. Did NMFS have a duty to specify an LLP application period that ended on December 31, 1999, when Mr. Lee's moratorium permit expired?
4. Does Mr. Lee's application to renew his federal fisheries permit for the F/ V JEWEL satisfy his obligation to file an LLP application by the LLP application deadline?
5. Should NMFS accept Mr. Lee's late LLP application under the doctrine of equitable tolling?
6. Does NMFS have the authority to accept Mr. Lee's LLP application?

ANALYSIS

To receive an LLP license, a person must be an "eligible applicant."⁴ An eligible applicant is

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

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 areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5)”⁵

NMFS announced an LLP application period of September 13, 1999 to December 17, 1999:

The application period for groundfish licenses and crab species licenses under the LLP begins on September 13, 1999, and ends at the close of business on December 17, 1999. Incomplete applications will be returned to the applicant with specific kinds of information identified that are necessary to make the application complete. **Applications postmarked after December 17, 1999, or delivered after the close of business on December 17, 1999, will be denied.**⁶

The LLP regulation on applications also directs NMFS to deny LLP applications received or postmarked after December 17, 1999:

The Regional Administrator [for the Alaska Region of NMFS] will issue a groundfish or a crab species license to an applicant if a complete application is submitted by or on behalf of the applicant during the specified application period, and if that applicant meets all the criteria for eligibility in paragraph (k) of this section. **An application that is postmarked or delivered after the ending date of the application period for the license Limitation Program specified in the Federal Register will be denied.**⁷

The basic rule is that late applications are denied. The vast majority of late applications are denied because they are late. 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,⁸ if the late applicant has taken decisive action to file an application by the deadline, or if the late applicant proves grounds for equitable tolling of the application deadline. 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. The question is whether Mr. Lee has shown that NMFS has authority to accept his late application.

⁵ 50 C.F.R. § 679.2 (emphasis added). 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.*

⁶ Notification of application period, 64 Fed. Reg. 49,104, 49,104 (1999)(emphasis added).

⁷ 50 C.F.R. § 679.4(k)(6)(i).

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

Since I have not held a hearing to determine the facts, I accept, for purposes of this Decision, that the facts asserted by Mr. Lee are true.

1. Did NMFS fulfill its obligation in 50 C.F.R. § 679.4(k)(6) to notify Mr. Lee of the LLP and the LLP application deadline? Yes.

LLP regulation 50 C.F.R. § 679.4(k)(6) provides in part:

(i) An application form will be sent to the last known address of a person identified as an eligible applicant by the official LLP record. An application form may be requested from the Regional Administrator.

(ii) Application period. An application period of no less than 90 days will be specified by notification in the Federal Register and other information sources deemed appropriate by the Regional Administrator.

The Regional Administrator refers to the Regional Administrator for the Alaska Region of NMFS. The Regional Administrator gave RAM the duty of implementing and publicizing the LLP. I conclude that RAM met the three requirements of this regulation for notice to Mr. Lee.

First, RAM specified an LLP application period in the Federal Register: September 13, 1999 to December 17, 1999.

Second, in addition to the Federal Register, RAM publicized the LLP and the LLP application period in other sources. It formulated and implemented a Media Plan.⁹ Throughout the LLP application period, RAM placed paid advertisements in newspapers, distributed press releases and public service announcements, put extensive information on the NMFS Alaska Region website, placed LLP information in NMFS offices and Alaska Department of Fish and Game offices, made direct public contact at meetings of interest to the fishing community and responded to contacts from media representatives. All LLP advertisements prominently stated that the application deadline was December 17, 1999 and that applications submitted after the deadline would be denied.

Mr. Lee states that he did not see any LLP announcements and he was working on a tugboat serving remote ports in Alaska in the Arctic Ocean and the Beauford Sea from mid-August until mid-to-late November 1999.¹⁰ The boat did not use NOAA weather radio and did not have any

⁹ Memorandum re the LLP Media Plan, Philip Smith, RAM Program Administrator, August 26, 1999; Memorandum re Implementation of LLP Media Plan, Philip Smith, February 15, 2000.

¹⁰ Mr. Lee's affidavit of April 7, 2000 states that he was away until the end of November 1999 but the travel schedule attached to the affidavit states that he worked on a tugboat for Brice, Inc., from August 4 to November 17, 1999 and the affidavit from Brice puts Mr. Lee's employment as August 8 to

magazines and publications oriented toward the fishing industry. Mr. Lee does not suggest any publicity that would have reached him. Even if he had, the regulation does not require that RAM publicize the LLP in a way that reaches every single potential LLP applicant in every single location, no matter how remote. It requires notice of the application deadline through the Federal Register and “other information sources deemed appropriate by the Regional Administrator.”¹¹ RAM did that.

Third, RAM had a duty to send eligible applicants an LLP application form. Eligible applicants were persons who, according to the official LLP record, met the requirements for an LLP license. Mr. Lee was an eligible applicant, based on the fishing history of the F/V JEWEL. RAM therefore had an obligation to send Mr. Lee an LLP application at his last known address.

The last known address RAM had for Mr. Lee was an address in Homer. Mr. Lee does not assert that he gave RAM a different address. The RAM Program Administrator stated that RAM sent to Mr. Lee’s Homer address an LLP application packet in September 1999 and a reminder post card in November 1999.¹² RAM submitted copies of the mailing labels it used for LLP mailings, which showed Mr. Lee’s Homer address. Mr. Lee has never stated that RAM used an incorrect address for him or that the Homer address was not his correct mailing address. It is the address he is using in this Appeal.

I find that RAM mailed an application packet in September 1999 and a reminder post card in November 1999 to the last known address it had for Mr. Lee.¹³

The problem is that Mr. Lee did not ever see that LLP application packet. He submitted an affidavit from his wife, Lori Lee, which explains what happened:

2. . . . John is away from home on an average of 280 days per year. If I receive any mail I consider to be of importance to him, I write it down on a list so that the next time he calls I can review it with him.

November 15, 1999. Statement of James B. Huffman, Sr., February. 11, 2000. I do not resolve when Mr. Lee returned to Homer but accept that it was between the middle and end of November 1999.

¹¹ 50 C.F.R. § 679.4(k)(6).

¹² Affidavit of Philip Smith, RAM Program Administrator, August 17, 2000. The LLP application packet consisted of a cover letter, a blank application, an application instruction booklet, a letter explaining upcoming changes in the LLP and a one page Qualification Summary sheet with the applicant’s name, address, vessel and the type of license and endorsements that, according to the official LLP record, the applicant could receive based on the fishing history of that vessel.

¹³ *Cf. Wayne Brosman*, Appeal No. 94-0047 (Jan. 10, 1995)(one critical factor in accept late application was that RAM, through an oversight, had not mailed Mr. Brosman an IFQ application).

3. John gave me no instructions before he left to watch for a license limitation application. . . . I thought John had all of the permits he needed for his groundfish operation.

4. I do not remember seeing any application for the groundfish license limitation, but it is possible that the application arrived at our house. National Marine Fisheries Services send us quite a bit of mail, a lot of which does not apply to John's particular fishing business. For example, John received information about Stellar Sea Lions, which was not relevant to his fishing in southeast. Since much of the mail from NMFS is not relevant to John's fishing, and John gave me no instructions to look for a license limitation application, I was not aware of the importance of such an application. Whether I saw the application or not, its importance did not register with me, and I did not designate the application as something John needed to address.

5. When the IFQ (Individual Fishing Quota) Program was implemented, the packets arrived certified mail. If the LLP Packets arrived this way, I would have noticed, however they did not or it would have been more noticeable.¹⁴

A. Did RAM have a duty to send LLP applications by certified mail? No.

The assertion in paragraph 5 of Mrs. Lee's affidavit is credible and I accept, for purposes of this Decision, that if RAM had sent LLP applications by certified mail, Mr. Lee would have filed a timely LLP application. The question is whether RAM had a duty to send LLP applications by certified mail. The regulation – 50 C.F.R. § 679.4(k)(6) – does not require that NMFS send the LLP applications by certified mail. It simply requires that “an application be *sent* to the last known address of a person identified as an eligible applicant by the official LLP record.” Certified mail is one way to send applications. First class mail is another.

RAM had the administrative discretion to choose which way to send these applications.¹⁵ RAM's efforts to notify eligible applicants, including the way it sent out LLP application packets, resulted in many applications filed by the LLP application deadline.¹⁶ I conclude that RAM did not abuse its discretion in implementing 50 C.F.R. § 679.4(k)(6) by sending LLP applications by first class mail.

¹⁴ Affidavit of Lori Lee, April 18, 2000.

¹⁵ A classic description of administrative discretion is “the power to choose between two or more courses of action each of which is thought of as permissible.” H. Hart & A. Sachs, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, 144 (Eskridge & Frickery ed. 1994).

¹⁶ *See note 18 infra*.

B. Did NMFS have a duty to specify an LLP application period that ended on December 31, 1999, when Mr. Lee's moratorium permit expired? No.

Mrs. Lee thought Mr. Lee had all of the permits he needed for his groundfish operation. This refers to the fact that Mr. Lee had a moratorium permit to fish groundfish that was valid until December 31, 1999. When Mr. Lee left Homer to work on the tugboat in August 1999 -- before the LLP application period and the publicity campaign began -- he did not know that he would need to apply for another permit *before* his current permit expired. Mr. Lee therefore did not inform his wife to be on the lookout for an LLP application form.

I am sympathetic to Mr. Lee's situation because this was the first year, since he began fishing groundfish in 1982, that he had to apply for a permit before December 31st and because, normally, a person does not have to apply for one license *before* his 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 the question again is whether NMFS had the duty to specify an application period that ended December 31, 1999, when Mr. Lee's moratorium permit expired. The LLP regulations did not require an LLP application period that ended on December 31, 1999 but gave NMFS the task of specifying an application period "of no less than 90 days."¹⁷ NMFS chose an application period of 90 days: from September 13, 1999 to December 17, 1999. The issue is whether this was a reasonable exercise of agency discretion.

NMFS had to issue LLP licenses for the fishing year starting January 1, 2000. If NMFS chose an LLP application period that ended on December 31, 1999, NMFS would have had no time to evaluate who had submitted an LLP application before the 2000 fishing year started and before it had to issue LLP licenses for the federal groundfish fishery. NMFS chose an application period that gave it a very modest amount of time to evaluate who had submitted timely LLP applications before it had to issue LLP licenses.

All of NMFS's publicity about the LLP stated that it was a one-time only application period and prominently featured the LLP application deadline of December 17, 1999. In spite of possible confusion resulting from the fact that the moratorium permits were valid until December 31, 1999, many applicants applied by the deadline and many applied in the last several days of the LLP application period.¹⁸

¹⁷ 50 C.F.R. § 679.4(k)(6).

¹⁸ Philip Smith, RAM Program Administrator, responded to questions from Mark Workhoven, KLUE-RM Radio, Oregon, on December 17, 1999 that the numbers of applications "was running slightly behind our expectations (in rough numbers, 2,100 received v. 2,600 expected)" but on December 20, 1999, Mr. Smith told Wesley Loy of the Anchorage Daily News that NMFS had gotten "slam dunked" in the last few days of the LLP application period and that it appeared that most eligible applicants had

I conclude that NMFS's specification of an application period that ended December 17, 1999 was a reasonable exercise of administrative discretion.¹⁹ I conclude that RAM provided Mr. Lee with notice as required by the LLP regulation 50 C.F.R. § 679.4(k)(6).

2. Does Mr. Lee's application to renew his federal fisheries permit for the F/ V JEWEL satisfy his obligation to file an LLP application by the LLP application deadline? No.

On December 13, 1999 Mr. Lee applied to renew his Federal Fisheries Permit [FFP] for the F/V JEWEL. The FFP application states that Mr. Lee wants a Federal Fisheries Permit to operate a catcher vessel in the Gulf of Alaska with hook and line gear for the period January 1, 2000 to December 31, 2002. Mr. Lee notes that the FFP application has much of the same information as the LLP application: his name, the vessel's name, identifying information about the vessel. Mr. Lee argues that his FFP application should meet his obligation to file an LLP application by December 17, 1999.

Mr. Lee is correct that NMFS has a policy of liberally interpreting actions by applicants to meet the application deadline.²⁰ But NMFS also has a strong policy that the application deadline must be respected and followed because it is a requirement in a duly promulgated regulation.²¹ The way NMFS has reconciled these two policies, when faced with an applicant who has done something by the application deadline short of filing an application, is that the applicant must have taken "decisive action" by the application deadline to complete the filing of the application.²²

applied. Memorandum re Implementation of LLP Media Plan, February 15, 2000, Attachment 8.

¹⁹ I note that even though Mr. Lee was not available for the start of the LLP application period, he was back in Homer by mid to late November and was therefore potentially exposed to RAM's media efforts during the last two to four weeks of the LLP application. RAM placed three display advertisements in the Homer Daily News between December 2 - 16, 1999 and public service announcements to the same paper throughout the entire application period. Memorandum re Implementation of LLP Media Plan, February 15, 2000, Attachment 5.

²⁰ *George M. Ramos*, Appeal No. 94-0008, Decision on Review Affirmed, April 21, 1995 at 3-4; *Afanasy Reutov*, Appeal 00-0005 (Nov. 8, 2002).

²¹ *Id.*

²² *Kurt Danielson*, Appeal No. 94-0003 (Nov. 30, 1995). The Regional Administrator referred to "the performance of some *significant* act in furtherance of filing his/her application prior to expiration of the deadline." *George M. Ramos*, Appeal No. 94-0008, Decision on Review Affirmed, April 21, 1995 at 3-4. The RA was relying on prior decisions of this Office and RAM policy. I believe that "decisive action" more accurately states the requirement. Mr. Lee's FFP application does not constitute significant action or decisive action in furtherance of filing an LLP application.

In the IFQ program, an applicant who gave an IFQ application to a tender for mailing by the application deadline was found to have taken decisive action by the deadline.²³ In the LLP program, an applicant who applied for a license for one vessel by the deadline was held to have taken decisive action to participate in the LLP program and was able to apply for a second license after the deadline.²⁴

I conclude that Mr. Lee's FFP application does not constitute a decisive act in furtherance of filing an LLP application. An FFP application, even liberally interpreted, cannot fairly be viewed as communicating a vessel owner's request or intention to participate in the *License Limitation Program*.

First, there is nothing on the FFP application itself that can be interpreted as requesting an LLP license. Although it has identifying information about the vessel, an FFP application simply requests a Federal Fisheries Permit.

Second, more vessels must obtain an FFP than an LLP. An FFP is necessary for any vessel to harvest any *groundfish* in the Gulf of Alaska or the Bering Sea and Aleutian Islands.²⁵ An LLP license is necessary only for vessels to harvest *license limitation groundfish*.²⁶ An LLP is necessary only for a vessel to conduct *directed fishing* of license limitation groundfish, not groundfish caught incidentally to fishing for other species.²⁷ Thus, it is not accurate that an application to renew an FFP means a vessel owner wants or needs an LLP license.

Third, accepting an application for a Federal Fisheries Permit to meet the LLP application deadline simply can not be squared with the language of the LLP regulations – that an eligible applicant is “a qualified person who submitted an application during the application period announced by NMFS,”²⁸ that “[a]n application that is postmarked or delivered after the ending date of the application period for the License Limitation Program specified in the Federal Register will be denied.”²⁹ The plain reading of that language is that the application that is

²³ *Michael White*, Appeal No. 94-0009 (Jan. 17, 1995).

²⁴ *Afanasy Reutov*, Appeal No. 00-0005 (Nov. 8, 2002).

²⁵ 50 C.F.R. § 679.4(b)(1).

²⁶ 50 C.F.R. § 679.4(k)(1)(i). *Groundfish* include sablefish managed under the IFQ program and demersal shelf rockfish east of 140° W. longitude whereas *license limitation groundfish* exclude those species. 50 C.F.R. § 679.2. The LLP also exempts some vessels based on size. 50 C.F.R. § 679.4(k)(2).

²⁷ 50 C.F.R. § 679.4(k)(1)(i).

²⁸ 50 C.F.R. § 679.2.

²⁹ 50 C.F.R. § 679.4(k)(6)(i).

required is not an application for *any* permit or license, but an application for an LLP license.

Nothing in the regulatory history of the LLP remotely suggests that the application that must be filed by the application deadline could be an application for an Federal Fisheries Permit.³⁰ The FFP has been required since at least 1980.³¹ NMFS adopted this requirement as part of the first Fishery Management Plan for the Gulf of Alaska.³² The FFP was not, and still is not, a restricted access permit. Anyone who fills out the FFP application can receive one. The FFP was basically a way the Federal Government could get a handle on how many boats were out there, who the owners were and the type of fishing gear used on the vessels. The LLP is a *new* program. It is a restricted access program. It seeks to limit the number of vessels in the fishery.³³ The LLP license is required “in *addition* to the permit and license requirements” in other parts of 50 C.F.R. § 679.4.³⁴

To hold that an FFP application satisfies the requirement for a timely LLP application ignores the fact an LLP license is a completely separate requirement from an FFP, required for very different purposes from an FFP and granted on completely different criteria from a FFP. It would not be a liberal interpretation of what actions meet the LLP application deadline. It is an unreasonable interpretation. It goes too far and would violate NMFS’s duty to respect and follow the application deadline.

I conclude that NMFS may not accept Mr. Lee’s application to renew his FFP for the F/V JEWEL as satisfying his obligation to file a timely application for an LLP license.

3. Does NMFS have the authority to accept Mr. Lee’s LLP application under the doctrine of equitable tolling? No.

Under the doctrine of equitable tolling, NMFS may toll, or suspend, an application deadline if the applicant proves three things:

First, the applicant must prove that the late application was the result of extraordinary circumstances beyond his or her control. Second, the applicant must prove that he or she

³⁰ Proposed Rule, 62 Fed. Reg. 43,866 - 43,898 (1997); Final Rule, 63 Fed. Reg. 52,642 (1998); Proposed Rule, 64 Fed. Reg. 19,113 (1999); Final Rule, 64 Fed. Reg. 42,826 (1999).

³¹ 45 Fed. Reg. 73,487 (Nov. 5, 1980), promulgating 50 C.F.R. § 672.4: “No vessel of the United States may fish for groundfish in the Gulf of Alaska without first obtaining a permit issued under this part. Permits shall be issued without charge.”

³² Supplementary Information, Proposed Rule, 43 Fed. Reg. 17,242, 17,242 (1978).

³³ Final Rule, 63 Fed. Reg. 52,642, 52,642 (1998).

³⁴ 50 C.F.R. § 679.4(k)(1)

was diligent in submitting an application after the end of the extraordinary circumstances that prevented filing within the application period. Third, the applicant must prove that processing the application would not harm or frustrate the IFQ [or the License Limitation] program.³⁵

Mr. Lee asserts that the combination of the following facts constitute extraordinary circumstances beyond his control. He worked in a remote location for most of the application period. It was impractical to have every piece of mail forwarded to him. His wife may not have received the LLP application packet and the reminder post card. If she received it, she failed to understand that Mr. Lee had to apply for an LLP license if he wanted to continue fishing groundfish in Alaska. Mrs. Lee's failure is understandable for the reasons stated in her affidavit.³⁶ If the standard for equitable tolling was whether the applicant acted reasonably or understandably, these combination of circumstances would justify equitable tolling.

But that is not the standard. Mr. Lee must prove that extraordinary circumstances prevented him from applying by the deadline. I conclude that these facts do not constitute extraordinary circumstances and therefore do not justify tolling the application deadline. There are two parts to Mr. Lee's claim: his work in a remote location and his wife's failure to understand the LLP application. The fact that Mr. Lee worked in a remote location, where he could not receive his mail directly, is not an extraordinary circumstance. Fishing is a seasonal industry. Many fisherman take other jobs in their off season. In Alaska, those jobs may be in remote locations.

We held in *David Hall* that an applicant's residence in a remote location, which led to his unawareness of the IFQ application deadline, was not an extraordinary circumstance sufficient to toll the application deadline.³⁷ We held in *Richard Foss*, that an applicant's work in a remote location during the IFQ application period -- tuna fishing in the Pacific -- was not an extraordinary circumstance sufficient to toll the application deadline.³⁸

In *T. Samuelson & T. Vasileff*, we addressed what happens when a fisherman applies late because the person checking his mail made a mistake.³⁹ In that case, the vessel owner did not receive an IFQ application because a bookkeeper did not follow instructions to forward all mail related to the vessel to one of the owners. We held that the bookkeeper acted as the vessel

³⁵ *Estate of Nghia Nguyen*, Appeal 98-0004 at 7 - 8 (Sept. 27, 2001).

³⁶ See pages 5 - 6 *supra*.

³⁷ Appeal No. 95-0014 (Sept. 1, 1998).

³⁸ *Richard Foss*, Appeal No. 95-0003 (Aug. 6, 1996), *aff'd sub nom, Foss v. NMFS*, 161 F. 3d 584, 590-91 (9th Cir. 1998)

³⁹ *T. Samuelson & T. Vasileff*, Appeal No. 94-0011 (Sept. 18, 1995).

owner's agent and that the bookkeeper's mistake was attributable to the owners.

Mrs. Lee either [1] did not receive the LLP application at their Homer address at all, [2] received it and did not read it or [3] read it and did not understand it. As for [1], the possibility of the application being lost in the mail is not sufficient for equitable tolling. That is not an extraordinary circumstance. It is always *possible* that something could be lost in the mail. Every late applicant could make that argument.

As for alternatives [2] and [3], NMFS could not accept a late application if Mr. Lee himself asserted simply that he had not read the LLP application packet or had read it but did not understand it. A failure of a person to read or understand an application packet is not an extraordinary circumstance. If it did, that would also come close to nullifying the application deadline because many, if not most, applications are late because the applicants did not hear of the program or did not know they had to apply.

If NMFS could not accept a late application because Mr. Lee did not read or understand the application, NMFS cannot accept a late application because someone acting on Mr. Lee's behalf did not read the application or did not understand it. If it did, that would establish a far more lenient standard for fisherman who do not read their own mail versus fishermen who do, a difference in treatment not supported by any LLP regulation or policy.

The only situation where failure to understand an application, or failure to respond to an application, can excuse a late application is when the failure is the result of extraordinary circumstances beyond Mr. Lee's or Mrs. Lee's control. In *Christopher Moore*, the applicant applied late because he had debilitating psychological problems caused by the brutal murder of his mother by his stepfather and the resulting six-week trial.⁴⁰ In *Estate of Kinberg*, the applicant applied late because she suffered severe depression after her husband died at home from an unexpected heart attack and because she took medication which affected her abilities to remember and respond to information.⁴¹ Unlike *Moore* and *Kinberg*, neither Mr. Lee nor Mrs. Lee were suffering any severe psychological problems which undermined their ability to process and respond to information.

The extraordinary circumstances sufficient to justify tolling the application deadline have to be just that: extraordinary. Extraordinary circumstances typically involve a very unusual event and often life-and-death situations. Extraordinary circumstances cannot be those that persons encounter in the normal course of a busy life. Extraordinary circumstances cannot be those that simply result from the fact that people must sometimes decide whether to work away from their home. That is a choice within the realm of ordinary choices faced by applicants.

⁴⁰ *Christopher O. Moore*, Appeal No. 95-0044 (Sept. 15, 1997).

⁴¹ *Estate of Kinberg*, Appeal No. 95-0035 at 2 (Aug. 1, 1997).

Conclusion

The LLP regulations plainly require a timely application. I conclude that NMFS does not have authority under any theory to accept Mr. Lee's late LLP application. NMFS fulfilled its obligation to notify Mr. Lee of the LLP application deadline. Mr. Lee's FFP application does not satisfy the LLP application deadline. Mr. Lee's reasons for filing a late application, although understandable, do not constitute extraordinary circumstances which permit NMFS to toll or suspend the application deadline.

FINDINGS OF FACT

1. NMFS specified an LLP application period in the Federal Register from September 13, 1999 to December 17, 1999.
2. RAM publicized the LLP and the LLP application deadline in other information sources, as described in its media plan.
3. RAM mailed Mr. Lee an LLP application packet in mid-September 1999 to Mr. Lee's address in Homer Alaska.
4. RAM mailed Mr. Lee a post card in November 1999 reminding Mr. Lee of the deadline to apply for an LLP license to Mr. Lee's address in Homer.
5. Mr. Lee's address in Homer Alaska is Mr. Lee's last known address to NMFS.
6. Mr. Lee did not inform NMFS of any other address besides his Homer address.
7. Mr. Lee's address in Homer was his mailing address during the LLP application period.
8. Mr. Lee filed an application for a Federal Fisheries Permit on December 13, 1999.
9. Mr. Lee filed an application for a Vessel Moratorium Permit on December 31, 1999.

CONCLUSIONS OF LAW

1. NMFS fulfilled its obligation in 50 C.F.R. § 679.4(k)(6) to notify Mr. Lee of the LLP and the LLP application deadline.
2. RAM did not have a duty to send LLP applications by certified mail.
3. NMFS did not have a duty to specify an LLP application period that ended on December 31, 1999, when Mr. Lee's moratorium permit expired.

4. Mr. Lee's application to renew his federal fisheries permit for the F/ V JEWEL does not satisfy his obligation to file an LLP application by the LLP application deadline.
5. Mr. Lee's work in remote parts of Alaska during the LLP application period does not constitute extraordinary circumstances that toll or suspend the LLP application deadline.
6. A late applicant's failure to read or understand an LLP application does not constitute extraordinary circumstances that toll or suspend the LLP application deadline, unless it was the result of extraordinary circumstances.
7. The failure of a late applicant's agent to read or understand an LLP application does not constitute extraordinary circumstances that toll or suspend the LLP application deadline, unless it was the result of extraordinary circumstances.
8. Mrs. Lee's failure to read or understand the LLP application was not the result of extraordinary circumstances.
9. NMFS may not accept Mr. Lee's late LLP application under the doctrine of equitable tolling.
10. NMFS does not have authority to accept Mr. Lee's late LLP application.

The IAD denying the Appellant's application is AFFIRMED. This Decision takes effect on January 6, 2003, unless by that date the Regional Administrator orders review of the 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, December 16, 2002. 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 or points and authorities 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