NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 04-0002
	)	
JAMIE MARIE, INC.	)	DECISION
Appellant	)	
_____	)	April 13, 2006

STATEMENT OF THE CASE

Jamie Marie, Inc., [Jamie Marie] appeals an Initial Administrative Determination [IAD] that the Restricted Access Management Program [RAM] issued on January 9, 2004. RAM issued the IAD under the North Pacific Groundfish and Crab License Limitation Program [LLP].[1] The LLP is a program of limited access to the North Pacific groundfish and crab fisheries adopted pursuant to the Magnuson-Stevens Fishery Conservation and Management Act [Magnuson-Stevens Act].[2]

The IAD denied Jamie Marie's application for an LLP groundfish license endorsed for the Bering Sea and the Central Gulf of Alaska, with gear designations for trawl and non-trawl gear, and a catcher vessel designation. Jamie Marie's application listed the F/V JAMIE MARIE, ADFG 58330 as the qualifying vessel.

The IAD determined that the F/V JAMIE MARIE did not make the harvests required for an LLP groundfish license. Specifically, the F/V JAMIE MARIE did not meet the requirement for harvests in a general qualifying period in 50 C.F.R. § 679.4(k)(4)(i). The IAD determined that Jamie Marie was entitled to an interim, non-transferable license pending final agency action on its appeal, pursuant to 50 C.F.R. § 679.43(p).

Jamie Marie can appeal the IAD because it directly and adversely affects its interests.[3] I did not order a hearing because, even assuming that the facts as stated by Jamie Marie are true, Jamie Marie is not entitled to an LLP license.[4] I conclude that the record contains sufficient information to decide this appeal.[5] I therefore close the record and issue this decision.

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[1] The LLP is located in 50 C.F.R. § 679, primarily 50 C.F.R. § 679.2 (definitions), 50 C.F.R. § 679.4(k)(requirements for licenses), 50 C.F.R. § 679.7 (prohibitions), and 50 C.F.R. § 679.43 (appeals). These regulations are on the NMFS Alaska region website: http://www.fakr.noaa.gov/regs/summary.htm

[2] 16 U.S.C. §§ 1801 - 1883.

[3] 50 C.F.R. § 679.43(b)

[4] 50 C.F.R. § 679.43(g)(3)(i), (iii), (iv).

[5] 50 C.F.R. § 679.43(g)(2).

SUMMARY

The IAD is AFFIRMED. Jamie Marie does not meet the requirements in federal regulation for an LLP groundfish license. Jamie Marie acknowledges this but argues that NMFS should be estopped, or prevented, from applying the LLP regulations to its application.

Jamie Marie states that it relied on representations by a NMFS employee in 1991 that halibut would be considered a groundfish for purposes of receiving a limited access groundfish license and, as a result, did not harvest Pacific cod in 1992 and did not meet the requirements for an LLP groundfish license. I assume that Jamie Marie's statement of the facts is true. Even assuming that, Jamie Marie does not meet five requirements for government estoppel. Any one of these deficiencies bars Jamie Marie from relief.

First, Jamie Marie was not ignorant of the true facts, namely that in 1991 and 1992, it did not need a limited access license to harvest Alaska groundfish and NMFS had not established requirements for a limited access license that it might need to harvest groundfish in the future.

Second, Jamie Marie's reliance on the NMFS employee's statement was unreasonable for the purpose of preventing NMFS from applying the rules that the Secretary of Commerce adopted for an LLP license. An applicant cannot rely, or assume, that government will adopt, without change, a proposal for requirements for a license to participate in a limited access fishery.

Third, if a NMFS official told Jamie Marie that it would definitely receive a license *before* the government had adopted regulations for the license – no matter what the public said in response to a proposed rule, no matter what the Secretary of Commerce said in its legal review of the rule – the government official was clearly acting outside the scope of his authority.

Fourth, NMFS did not commit affirmative misconduct. At most, the NMFS employee's private statements to Jamie Marie were mistaken, careless or negligent. These statements come nowhere close to constituting affirmative misconduct. NMFS's public actions are that it proposed a regulation that defined halibut as a qualifying species for the Vessel Moratorium Program and withdrew the proposed rule when it determined, and the Secretary concurred, that the proposed rule violated the national standards in the Magnuson-Stevens Act. The North Pacific Fishery Management Council [Council] and NMFS then proposed, and the Secretary approved, a VMP regulation in 1995, and an LLP regulation in 1998, under which Jamie Marie did not qualify for a limited access license. None of these actions constitute misconduct of any kind.

Fifth, estoppel is not necessary to avoid serious injustice. When a fishery goes from open access fishery to limited access, a vessel owner is not entitled to know the rules for participation in the limited access fishery, *before the government adopts those rules through the process specified in the Administrative Procedure Act and the Magnuson-Stevens Act.* It does not cause serious injustice to evaluate Jamie Marie's application by the rules that the Secretary adopted for LLP licenses in 1998 and that NMFS applied to all other applicants for an LLP license.

ISSUES

1. Does Jamie Marie, Inc., meet the requirements for an LLP groundfish license in federal regulation?

2. Should NMFS be estopped, or prevented, from denying Jamie Marie an LLP license because Jamie Marie does not meet the requirements for an LLP license in federal regulation?

ANALYSIS

1. Does Jamie Marie, Inc., meet the requirements for an LLP groundfish license in federal regulation? No.

Pursuant to the Magnuson-Stevens Act, the Secretary adopted the final LLP regulation in October 1998.[6] The LLP regulation took effect January l, 2000.[7] To meet the requirements in the LLP regulation for a groundfish license, an applicant must have owned a vessel on June 17, 1995 that made specified harvests or must own the vessel's fishing history apart from the vessel.[8] The vessel must have made harvests in a general qualification period [GQP] and an endorsement qualification period [EQP].[9]

The basic GQP requirement is one harvest of license limitation groundfish in either the Bering Sea/Aleutian Islands or the Gulf of Alaska in a period of four and a half years: January l, 1988 through June 27, 1992.[10] The F/V JAMIE MARIE did not harvest groundfish until 1993.[11]

The LLP regulation extends the GQP until December 31, 1994 for vessels less than 60 feet in length that harvested groundfish with pot or jig gear.[12] The F/V JAMIE MARIE is over 60

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[6] Final Rule, 63 Fed. Reg. 52,642 (Oct. l, 1998). The Secretary adopted a separate transfer and application rule in 1999. Final Rule, 64 Fed. Reg. 42,826 (Aug. 6, 1999).

[7] Final Rule, 65 Fed. Reg. 45,316, 45,316 (2000).

[8] 50 C.F.R. § 679.2 (definition of eligible applicant).

[9] 50 C.F.R. § 679.4(k)(4)(i) & (ii). All harvests must be documented harvests. *See* 50 CFR § 679.2. When I refer to harvests, I mean documented harvests.

[10] 50 C.F.R. § 679.4(k)(4)(i)(A)(1); 50 C.F.R. § 679.4(k)(4)(i)(B)(1).

[11] Affidavit of Ron Miller ¶ 8 (March 30, 2000). The record does not contain the date in 1993.

[12] 50 C.F.R. § 679.4(k)(4)(i)(A)(2); 50 C.F.R. § 679.4(k)(4)(i)(B)(2).

feet.[13]

The LLP regulation extends the GQP until June 17, 1995 for vessels that harvested crab between January 1, 1988 and February 9, 1992 and crossed over or harvested groundfish between February 10, 1992 and December 11, 1994.[14] The F/V JAMIE MARIE did harvest groundfish between February 10, 1992 and December 11, 1994 but did *not* harvest crab between January l, 1988 and February 9, 1992 and therefore does not meet the GQP as a crab crossover vessel.

The LLP regulation has an "unavoidable circumstance" provision. It grants a license to an applicant that did not make some of the harvests required for an LLP license if the applicant meets certain conditions.[15] Jamie Marie does not satisfy that provision for two reasons. First, the unavoidable circumstance provision does not excuse an applicant from a harvest during the basic general qualifying period for an LLP license, which is January l, 1988 through June 27, 1992. In fact, the unavoidable circumstance applicant must have made a harvest of crab or groundfish in the period January l, 1988 through *February 9, 1992*, which was the qualifying period for a moratorium permit. Jamie Marie did not do that. The Council limited the LLP unavoidable circumstance provision to applicants that made a harvest in the qualifying period for a moratorium permit.[16] Moratorium permits were issued under the Vessel Moratorium Program (VMP). The VMP was the precedessor to the LLP and was in effect from 1996 to 1999.[17]

Second, the unavoidable circumstance must be something that physically kept a vessel from participating in a fishery – the vessel must be "lost, damaged or otherwise unable to participate in the license limitation groundfish or crab fisheries."[18] The F/V JAMIE MARIE was physically able to participate in the groundfish fishery in 1988 through 1992. Jamie Marie states that it did not harvest groundfish in 1992 because of statements by a NMFS official in 1991. I examine whether Jamie Marie's reliance on these statements proves a claim of "government estoppel" under the next issue but the claimed statements by NMFS clearly did not make the F/V JAMIE MARIE lost, damaged or unable to participate in the groundfish fishery. Therefore, Jamie Marie

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[13] The official LLP record has the vessel's length overall as 90 and 89 feet. Notice of Opportunity to Submit Evidence (Feb. 2, 2000). I do not know if the vessel used pot or jig gear.

[14] 50 C.F.R. § 679.4(k)(4)(i)(A)(3); 50 C.F.R. § 679.4(k)(4)(i)(B)(3)(groundfish harvest must be with trawl or longline gear and cannot be sablefish with fixed gear).

[15] 50 C.F.R. § 679.4(k)(8)(iv).

[16] 50 C.F.R. § 679.4(k)(8)(iv); *Pequod, Inc.,* Appeal No. 00-0013 at 10 (April 12, 2002).

[17] Final Rule, 60 Fed. Reg. 40,763 (1995) *adopting* 50 C.F.R. §§ 676.1 to 676.6. Originally in effect from 1996 to 1998, the VMP was extended through 1999. Final Rule, 64 Fed. Reg. 3651 (1999). It was removed as obsolete from federal regulation in 2000. Final Rule, 65 Fed. Reg. 45,316 (2000).

[18] 50 C.F.R. § 679.4(k)(8)(iv). *See, e.g., Pequod, Inc.,* Appeal No. 00-0013 at 20 - 21 (April 12, 2002)(vessel grounded and suffered catastrophic damage).

does not qualify for an LLP groundfish license under the unavoidable circumstance provision.

I therefore conclude that Jamie Marie does not meet the requirements in federal regulation for an LLP groundfish license.

2. Should NMFS be estopped, or prevented, from denying Jamie Marie an LLP license because Jamie Marie does not meet the requirements for an LLP license in federal regulation? No.

Jamie Marie acknowledges that it does not meet the requirements in federal regulation for an LLP groundfish license. Jamie Marie claims entitlement to an LLP license under a theory of government estoppel.

Equitable estoppel is a remedy to prevent injustice when one person, who is ignorant of the facts, reasonably and detrimentally relies on misrepresentations by another person. If justice and fairness require, the person who misled the other party will be prevented or "estopped" from asserting a legal claim or defense that the person could otherwise assert.[19]

Government estoppel is equitable estoppel applied to the government. Applying estoppel to the government presents special problems when an applicant for a government license asks that the government be estopped from judging its application by the rules the government has adopted and has applied to other applicants for the same license. The public has a strong interest that the government follow properly adopted rules and judge all applicants by the same rules. The Supreme Court has stated: "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant."[20]

Estoppel against the government is therefore rare and invoked only in extraordinary circumstances.[21] The government may be estopped only if [1] the government official acted within the scope of his or her authority,[22] [2] the government committed affirmative misconduct[23]

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[19] *See* BLACKS LAW DICTIONARY 538 (6th ed. 1990).

[20] *Heckler v. Community Health Services of Crawford County, Inc.,* 467 U.S. 51, 60 (1984)(footnote omitted).

[21] *Murphy v. Department of Taxes,* 795 A. 2d 1131, 1133 (Vt. 2001); 31 C.J.S. [Corpus Juris Secundum] Estoppel § 177 (1996).

[22] 31 C.J.S. Estoppel § 180 b (1996). This is arguably an elaboration of the regular requirement that a party's reliance must be reasonable.

[23] *E.g., Watkins v. United States Army,* 875 F.2d 699, 707 (9th cir. 1989), *cert. denied* 498 U.S. 957 (1990).

and [3] estoppel is necessary to prevent serious injustice and will not unduly damage the public interest.[24]

Jamie Marie submits two affidavits: an affidavit of Ron Miller, dated March 30, 2000, and an affidavit of Phil Chitwood, dated January 28, 2004. For purposes of this Decision, I assume that the facts, as stated in these affidavits, are true. Ron Miller is the president, chief executive officer and principal shareholder of Jamie Marie, Inc., which owns the F/V JAMIE MARIE.

Phil Chitwood contacted NMFS on Ron Miller's behalf two times in 1991. Jamie Marie emphasizes that Mr. Chitwood was "not merely a casual observer of Alaska fisheries" but "a uniquely informed individual who sought specific advice from NMFS regarding a complex set of rules and regulations."[25] From 1977 to 1984, he was Chief of the Fisheries Management Division for the NMFS Alaska Region. From 1984 to 1988, he was responsible for the fishing operations of Marine Resources International in the Pacific Ocean and the Bering Sea. In 1988, Mr. Chitwood became the Director of Government Affairs for Arctic Alaska Fisheries, which operated thirty-five vessels in Alaskan waters, one-third of which fished for groundfish. Ron Miller's father, Francis Miller, was President of Arctic Alaska Fisheries. Francis Miller asked Phil Chitwood to contact NMFS on Ron Miller's behalf.[26]

Ron Miller's affidavit sets forth the basic facts of his claim:

> 4. Jamie Marie, Inc., purchased the JAMIE MARIE in 1988 for the specific purpose of catching Groundfish and Crab.
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> 5. During the first few years of operations, we harvested Halibut in Alaskan waters. **I believed that harvesting Alaska Groundfish would eventually be subject to some sort of License Limitation Program and I wanted to be certain that the JAMIE MARIE would qualify for a license. Accordingly, in early 1991, Phil Chitwood, of Arctic Alaska Fisheries, contacted NMFS on behalf of me and Jamie Marie, Inc., and asked whether Halibut landings would qualify for a Groundfish Permit. NMFS advised us that Halibut landings would qualify the Vessel and her Owner. I asked Phil to contact NMFS again, prior to starting conversion work on the JAMIE MARIE to double check that Halibut could be used for a Groundfish Permit. The NMFS' answer was the same and was consistent with a North Pacific Fishery Management Council Report published in a 1992 edition of "True North,' which, in discussing a limitation program, defines "Qualifying Vessels" to include "all vessels legally landing Groundfish, Halibut. . . ."**

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[24] *Id.*

[25] Jamie Marie Appeal at 4 (March 4, 2004).

[26] Affidavit of Phil Chitwood ¶¶ 5 - 9 (Jan. 28, 2004).

> 6. In the Spring of 1992, the JAMIE MARIE was ready and able to catch Codfish and other Alaskan Groundfish. In reliance on NMFS' representations that my Halibut landings would qualify the JAMIE MARIE for a Groundfish Permit, I made the decision to refrain from further fishing while lenthening the JAMIE MARIE and converting her into a trawler. Beginning in approximately June 1992, I invested $900,000.00 in accomplishing this work and purchasing trawl gear. . . .
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> 7. If I had not been told prior to the conversion work that Halibut landings would qualify the JAMIE MARIE and Jamie Marie, Inc. for a License Limitation Groundfish Permit, I would have refrained from converting the Vessel at that time and instead I would have made Cod landings prior to 1992 with longlines or pots to qualify the Vessel.
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> 8. Between 1993 and 1999, the JAMIE MARIE harvested Codfish, Pollock and other species in Alaskan waters.[27]

Mr. Chitwood's affidavit agrees with Mr. Miller's affidavit. Mr. Chitwood states that, in 1991, he called NMFS to determine whether Ron Miller's halibut landings from the F/V JAMIE MARIE "would qualify the vessel and/or its owner for a groundfish permit in the event a Limited Access Fishery Program was enacted." He states he "was told by Mr. Jay Ginter and/or possibly another staff person, that halibut was considered to be a groundfish and that harvesting of halibut is included in the Bering Sea and Gulf of Alaska groundfish management plans." Mr. Chitwood states that, in his second contact, he "was again informed that halibut was considered to be a groundfish and the JAMIE MARIE's landings would qualify under a Limited Access Program."[28]

I do not make or imply any factual determination about what any NMFS employee did, or did not, tell Mr. Chitwood and whether a NMFS employee did, or did not state, that the employee was talking about proposals only. To determine that, I would have to hold a hearing. I do not make those determinations because, even assuming the facts as stated by Jamie Marie, Jamie Marie does not meet five requirements for government estoppel.

The central fact in this case is that in 1991, Jamie Marie wanted, and sought, information on what would be the eventual requirements for a limited access regime for the North Pacific groundfish fishery. Therefore, Jamie Marie received information on *proposals* for a limited access management system for the North Pacific groundfish fishery. Because of this, Jamie Marie does not meet five requirements for government estoppel.

First, Jamie Marie was not ignorant of the true facts. Second, Jamie Marie's reliance on

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[27] Affidavit of Ron Miller (March 30, 2000)(emphasis added)

[28] Affidavit of Phil Chitwood ¶ 9 (Jan. 28, 2004).

proposed action is unreasonable as a matter of law. Third, if a NMFS employee gave more than information about possible future regulations, the employee was acting outside the scope of his authority. Fourth, NMFS did not commit affirmative misconduct. Fifth, estoppel is not necessary to avoid serious injustice.

A. Jamie Marie was not ignorant of the true facts.

A party asserting estoppel must be ignorant of the true facts.[29] The relevant true facts are that, in 1991 and 1992, [1] Jamie Marie did not need a limited access license to harvest groundfish and [2] the federal government had not adopted regulations which established the requirements for any limited access groundfish license Jamie Marie might need in the future. I find that Jamie Marie knew, or should have known, these facts.

In 1992 and 1992, the North Pacific groundfish was an open access fishery. In 1991 and 1992, and up until 1995, to harvest groundfish, the only federal permit a person needed was a Federal Fisheries Permit, which anyone could receive if they filled out an application.[30] Jamie Marie knew this. Jamie Marie bought the F/V JAMIE MARIE in 1988 for the purpose of catching groundfish, was ready to go cod fishing in 1992, and would have gone cod fishing but for statements from NMFS. I find that Jamie Marie knew, in 1991 and 1992, it did not need a limited access permit to harvest groundfish.

In 1991 and 1992, I also find that Jamie Marie knew that the federal government had not adopted regulations which established the requirements for any limited access license Jamie Marie might need to harvest groundfish in the future. Jamie Marie does not assert differently. Jamie Marie does not assert that, in 1991 and 1992, it believed that NMFS had *already* adopted regulations that granted Jamie Marie a groundfish license based on halibut landings.

The affidavits of Mr. Miller and Mr. Chitwood show that Jamie Marie knew, in 1991 and 1992, the government had not adopted requirements for a groundfish limited access license. Mr. Miller states that, in 1991, "I believed that harvesting Alaska Groundfish *would eventually be subject to some sort of License Limitation Program* and I wanted to be certain that the JAMIE MARIE *would qualify for a license.*"[31] Mr. Chitwood states: "During 1991, I became aware that groundfish *was likely to become a Limited Access Fishery*."[32] Mr. Chitwood states that he called the Alaska Region of NMFS to determine whether Mr. Miller's landings of halibut on the F/V JAMIE MARIE "would qualify the vessel and/or its owner for a groundfish permit *in the event a*

[29] 31 C.J.S. § 178 at 674 (1996).

[30] 50 C.F.R. § 679.4(b).

[31] Affidavit of Ron Miller ¶ 5 (March 30, 2000)(emphasis added).

[32] Affidavit of Phil Chitwood ¶ 9 (Jan. 28, 2004)(emphasis added).

Limited Access Fishery Program was enacted."[33]

A necessary implication of these statements is that Mr. Miller and Mr. Chitwood knew, in 1991 and 1992, that the government had not already adopted a limited access program. And the whole point of Jamie Marie's appeal is that, in 1991 and 1992, it wanted to know whether to go cod fishing in order to qualify for a federal groundfish permit in the future. It was precisely *because* the government had not adopted regulations which established the requirements for a groundfish license that Jamie Marie could not consult written, published federal regulations and instead sought information through Mr. Chitwood.

And Mr. Chitwood would know the basic legal fact that the Secretary of Commerce is the ultimate legal authority for approving a limited access system for a fishery under the Magnuson-Stevens Act and that, until the Secretary approves Fishery Management Plan amendments and implementing regulations, there is nothing in place that is legal, final and in effect. It is like baseball. It does not matter whether a runner is one foot or thirty feet from home plate. Until the runner crosses home plate, there is no score.

Mr. Miller and Mr. Chitwood's belief that limited access was coming was not surprising because the North Pacific Fishery Management Council had notified the public in September 1990:

> The North Pacific Fishery Management Council (Council) intends to develop **for recommendation to the Secretary of Commerce (Commerce)** a management regime for the groundfish, crab, and halibut fisheries currently under the Council's authority that limits the number of vessels participating in those fisheries. This notice announces that any fishing vessel entering those fisheries after September 17, 1990, will not be assured of future access to those fisheries if a moratorium on new entry into those fisheries is developed.[34]

Thus, in 1991, if a NMFS employee stated that "halibut was considered to be a groundfish" for purposes of the moratorium program, Jamie Marie knew that all it was getting, *that all it could possibly be getting*, was a NMFS's employee's opinion or best guess as to what the requirements for a limited access permit would eventually be.[35] Reading Jamie Marie's affidavits in the light most favorable to Jamie Marie, they prove that, based on a NMFS employee's statement, Jamie Marie believed that the government would, in the future, adopt the requirement that halibut landings would qualify an applicant for an limited access license.

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[33] Affidavit of Phil Chitwood ¶ 9 (Jan. 28, 2004)(emphasis added).

[34] Notice, 55 Fed. Reg. 36,302 (Sept. 5, 1990)(emphasis added). The control date of September 17, 1990 was corrected to September 15, 1990. Notice, 55 Fed. Reg. 37,729 (Sept. 13, 1990.

[35] *Samish Maritime, Inc.*, Appeal No. 96-0008 at 6 (Dec. 2, 1999)("By late 1991, Mr. Warren knew that the Moratorium Program was being developed and that, assuming everything he states is true, he was only getting one person's best guess as to what the Moratorium Program would eventually be.").

But whether you call the NMFS employee's statements to Mr. Chitwood a hope, an opinion, a guess, a prediction or a mistake, I conclude that, in 1991 and 1992, Jamie Marie knew, or should have known, that the federal government had not adopted the requirements for a limited access license that Jamie Marie might need in the future to participate in the Alaska groundfish fishery.

B. Jamie Marie's reliance on NMFS's statements was unreasonable as a matter of law.

To prove estoppel, a party's reliance on the statements or actions of the other party must be reasonable.[36] It is not enough that the party relied on the government's conduct. The reliance must have been reasonable. Jamie Marie relied on statements by a NMFS employee that it would qualify for a license, before NMFS had adopted the requirements for that license. Mr. Miller states:

> I believed that harvesting Alaska Groundfish would eventually be subject to some sort of License Limitation Program **and I wanted to be certain that the JAMIE MARIE would qualify for a license.** [37]

Although Mr. Miller wanted certainty, an applicant is not entitled to certainty about what federal regulations will require for a limited access fishing license, *before the regulations are adopted.* Jamie Marie states that its situation is unique "because of the interface between Mr. Chitwood and NMFS"[38] and because Mr. Chitwood "was a uniquely informed individual who sought specific advice from NMFS regarding a complex set of rules and regulations."[39] No matter who asks the question, no matter that Mr. Chitwood was formerly Chief of the Fisheries Management Division in the NMFS Alaska Region, a member of the public cannot reasonably expect to be told, with certainty, what *future* legal requirements for a license will be. And Mr. Chitwood was *not* asking advice about a "complex set of rules and regulations" because NMFS had not, in 1991 and 1992, adopted *any* rules or regulations for groundfish limited access licenses or permits.

In dealing with a private party or the government, a person is on notice that proposed actions are simply that: proposed. But this concept applies with special force to the government because the government has a legal obligation under the Administrative Procedure Act to publish proposed regulations, seek public comment on them and change the proposed regulations if warranted by public comment.[40] The Secretary of Commerce has a special obligation, pursuant to the Magnuson-Stevens Act, to determine whether proposed amendments to Fishery

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[36] 31 C.J.S. Estoppel § 178 at 674 (1996).

[37] Affidavit of Ron Miller at ¶ 5 (March 30, 2000).

[38] Jamie Marie's Supplemental Argument, Letter from Robert Green to NMFS (March 31, 2006).

[39] Jamie Marie's Appeal at 4 (March 4, 2004).

[40] 5 U.S.C. § 553.

Management Plans [FMP] are consistent with the national standards in the Act and other applicable law.[41] The Secretary makes the same determinations for proposed regulations.[42]

A member of the public is not legally entitled to rely, or assume, that this process will not result in any changes and, in this instance, it did. The Secretary specifically disapproved the proposal to treat halibut as a qualifying species for receiving a groundfish limited access permit or license and NMFS withdrew the proposed regulation.[43] Even if it was surprising or unexpected that the Secretary disapproved the proposed rule, a member of the public is charged with the knowledge that that is always a possibility.

I conclude that an applicant cannot estop the government from applying duly promulgated regulations because the applicant relied on statements by government employees as to what those regulations would be. This conclusion is squarely supported by prior decisions by this Office. In *Sherry L. Tuttle & Lori Whitmill*, this Office stated:

> Determinations regarding applications under the moratorium program must be based on the regulations as finally adopted. Appellants allege that they received advice from NMFS officials in 1993, two years before the final rule for the vessel moratorium program was published. Therefore, even assuming arguendo that NMFS agents had made the statements alleged by the Appellants, that these statements constituted misadvice, and that the Appellants relied on the statements to their detriment, NMFS cannot be bound by the statements because they would only have been mere speculation about what the final moratorium program regulations would ultimately provide. I find that Appellants' reliance on statements allegedly made by NMFS agents concerning proposed regulations did not constitute reasonable reliance for purposes of the doctrine of government estoppel.[44]

In *Samish Maritime*, this Office rejected a claim of estoppel virtually identical to Jamie Marie's.[45] In *Prowler Partnership v. Samuelson*, this Office rejected a claim for quota share under the IFQ program based on verbal misadvice: "The statements [by NMFS] must have been made in 1987 or 1988 in order to have had any effect on the Appellant's decisions regarding the NMFS contracts. The agency cannot be bound by statements that were allegedly made before

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[41] Sec. 304(a), 16 U.S.C. § 1854(a).

[42] Sec. 304(b), 16 U.S.C. § 1854(b).

[43] Disapproval of FMP Amendments and Withdrawal of Proposed Rule, 59 Fed. Reg. 43,534 (Aug. 24, 1994). I discuss the regulatory process that resulted in the final LLP rule at pages 15 - 17 *infra*.

[44] *Sherry L. Tuttle & Lori Whitmill*, Appeal No. 96-0010 at 2 - 3 (Dec. 3, 1999)

[45] *Samish Maritime*, Appeal No. 96-0008(Dec. 2, 1999).

the IFQ and the IFQ regulations were adopted."[46] In *Jamie Marie, Inc.*, Jamie Marie's prior appeal of its denial of a moratorium permit, this Office rejected Jamie Marie's estoppel claim and observed: "Jamie Marie points to no authority that permits estoppel based on a claim that the litigant was misadvised by a government official about what the regulations of a program were going to be."[47]

In this appeal, Jamie Marie relies on *Watkins v. United States Army*, where the government was estopped from denying reenlistment to a serviceman because the Army had, in the past, repeatedly reenlisted the serviceman with full knowledge of his homosexuality. The government was estopped based on something it actually did in the past, not something it told the serviceman it would do in the future.[48] Jamie Marie relied on *verbal advice* about *a future regulation*. These facts come nowhere close to the facts where a claimant has proved reasonable reliance on action by the government. To prove reasonable reliance, a claimant usually has relied on past conduct by the government that is contained in written documents. This was the situation with *Watkins* and other decisions which found reliance sufficient to warrant estoppel against the government.[49]

I therefore conclude that Jamie Marie's reliance on verbal statements by a NMFS employee about future regulations for a license was unreasonable as a matter of law. I conclude Jamie Marie's reliance cannot be the basis for estopping the government from evaluating Jamie Marie's application for a license according to the regulations that the government actually adopted for that license.

C. If a NMFS employee gave Jamie Marie more than information about possible future requirements for a license, the NMFS employee acted outside the scope of his authority.

Jamie Marie may argue that it received more than information about what was being proposed or considered for a future regulation. Jamie Marie may argue that it was told that it would definitely receive a license. If Jamie Marie received a guarantee that it would receive a license,

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[46] *Prowler Partnership v. Gainhart Samuelson*, Appeal No. 95-0084 at 10 (Nov. 8, 1995). The IFQ, or Individual Fishing Quota Program, limits access to the Pacific halibut and sablefish fisheries. 50 C.F.R. § 679.40.

[47] *Jamie Marie, Inc.*, Appeal No. 96-0086 at 4 - 5 (Dec. 2, 1999).

[48] *Watkins v. United States Army*, 875 F.2d 699, 706 - 709 (9th cir. 1989), *cert.* denied 498 U.S. 957 (1990).

[49] *See, e.g., United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973)(landowners relied on government's approval of written contracts, government's refusal to terminate contracts and government's assistance in dividing partnership lands); *Gestuvo v. District Director of US Immigration and Naturalization* Service, 337 F. Supp. 1093 (C.D. Calif. 1971)(alien relied on INS's approval of petition for preference classification). Even if a claimant proves reasonable reliance, the claimant cannot estop the government if the claimant does not prove affirmative misconduct by the government and meet other requirements for estoppel.

the government official was acting outside the scope of his authority.

A NMFS official could not ethically, or legally, promise a member of the public that a proposal would not be changed as a result of public comment, legal review or review by higher officials within the Department. Put another way, a government official would probably never be acting within the scope of their authority if the official promised anyone that they would receive a license, before the regulations for the license had not been adopted.

The requirement that the government official must be acting within the scope of their authority is tied to the reasonable reliance requirement. In *Fierce Packer*, this Office awarded an LLP license, concluding that a third-party purchaser of a fishing history was entitled to rely on written statements by a federal bankruptcy trustee and a federal bankruptcy court order that the trustee had authority to sell a vessel's LLP fishing history free and clear of any liens or competing challenges.[50] In *Watkins v. Army*, the serviceman was entitled to rely on the action of officials who repeatedly reenlisted him with full knowledge of his homosexuality.[51] In situations where a person is contracting with the government or settling a legal dispute with the government, a person is entitled to rely on the contract or the legal settlement if the person dealt with a government employee who had authority to make a contract or settle a legal dispute.[52]

Jamie Marie asks me to treat the NMFS employee who spoke to Mr. Chitwood as having authority to tell Jamie Marie what it had to do to qualify for an LLP license, before NMFS adopted requirements for a license. Jamie Marie asks to be treated as having the legal and moral equivalent of a promise, contract or a settlement agreement to receive an LLP license – a promise that the NMFS employee made before NMFS adopted regulations for LLP licenses. No NMFS official, no matter what their rank, has authority to adopt private, individual requirements for an LLP license. Put another way, no NMFS official has authority to adopt requirements for an LLP license *before* the Secretary adopts regulations that the agency will apply to all applicants for the license. And a member of the public is properly charged with knowledge of that fact.

When Mr. Chitwood states that, as Chief of the Fisheries Management Division in the NMFS Alaska Region, he "frequently spoke with people in the fishing industry and [he presumes] they relied on representations I made or answers to questions they posed,"[53] I take that to mean that he answered questions about what legal requirements actually were and what a person had to do to

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[50] *Fierce Packer*, Appeal No. 04-0004 at 6 - 9, 15 - 17 (Dec. 18, 2000). Fierce Packer bought the fishing history from the bankruptcy trustee for $200,000. *Id.* at 7.

[51] *Watkins v. United States Army*, 875 F.2d 699(9th cir. 1989), *cert.* denied 498 U.S. 957 (1990).

[52] Vartanian, Annotation, *Applicability of Doctrine of Estoppel Against Government and Its Governmental Agencies*, 1 A.L.R. 2d 338 at § 6[a] (1948).

[53] Affidavit of Phil Chitwood at ¶ 6 (Jan. 28, 2004).

be in compliance with legal requirements. I do not take his statement to mean that, even if asked, he told people what future regulations would require and what they would have to do to comply with federal fishing regulations *that had not been adopted.* If Mr. Chitwood did, he was acting outside the scope of his authority.

I therefore conclude that, if a NMFS official went beyond providing Jamie Marie information about possible future requirements for an LLP license, the official acted outside the scope of his authority and his statements cannot be the basis for government estoppel.

D. NMFS did not commit affirmative misconduct.

Affirmative misconduct requires an affirmative misrepresentation or affirmative concealment of a material fact by the government.[54] A summary of the law fleshes out this requirement:

> A simple misstatement is not affirmative misconduct supporting estoppel against the United States, and the fact that the incorrect information is given orally makes it even less likely to rise to the level of affirmative misconduct. Information provided by a government hotline cannot be enough to estop the government from enforcing violations of federal law. **To constitute affirmative misconduct supporting an estoppel, the misconduct must be beyond mere negligence, carelessness, mistake, inaction, acquiescence, or failure to follow an internal agency guideline**. Absent affirmative misconduct, the United States may not be estopped from asserting its statutory rights.[55]

If the NMFS employee stated that Jamie Marie would definitely receive a limited access license for groundfish based on halibut landings, and the employee did not state this was only a proposal, the employee's statement was, at most, negligent, careless or mistaken. A misstatement of legal requirements does not rise to the level of affirmative misconduct.[56]

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[54] *Watkins v. United States Army*, 875 F.2d 699, 707 (9th cir. 1989), *cert.* denied 498 U.S. 957 (1990).

[55] 31 C.J.S. Estoppel § 178 at 675 (1996)(emphasis added)(footnotes omitted).

[56] *See, e.g., Schweiker v. Hansen*, 450 U.S. 785, 790 (1981)(per curiam)(applicant for social security cannot estop the government even though the applicant relied on incorrect advice from a social security field representative which was contrary to the claims manual: government errors "fall far short of conduct which would raise a serious question whether petition is estopped from insisting upon compliance with the valid regulation."); *United States v. Marine Shale Processors*, 81 F. 3d 1329, 1348 - 1352 (5th Cir. 1996)(state environmental agency's letter that incorrectly told a facility it complied with federal requirements is not affirmative misconduct); *Purcell v. United States*, 1 F. 3d 932, 940 (9th Cir. 1993)(IRS agent's failure to inform taxpayer of potential personal liability if he continued operating the business and agent's encouragement of taxpayer to continue to operate the business does not estop the IRS from collecting taxes from the taxpayer: "Affirmative misconduct involves ongoing active misrepresentations or a pervasive pattern of false promises as opposed to an isolated act of providing

In its public statements, NMFS said that the moratorium proposals were only proposals and would not become law unless the Secretary approved them. In its notice to the public in September 1990, the Council announced that it intended to develop "**for recommendation to the Secretary of Commerce** a management regime for the groundfish, crab, and halibut fisheries currently under the Council's authority that limits the number of vessels participating in those fisheries."[57] In September 1992, the Council's True North Report, mentioned by Mr. Miller, began:

> **TIME OUT.** The free-for-all is over in the North Pacific. The 15-year fever of expansion broke in June 1992 when the North Pacific Fishery Management Council called a three-year moratorium on new entries into the federally managed fisheries off Alaska.
>
> **The proposed moratorium still needs to be approved by the Secretary of Commerce. If she approves**, it will be implemented sometime in early 1993.
>
> After the moratorium begins, only qualifying vessels will be allowed into the Council-managed groundfish, halibut and crab fisheries. All vessels that legally landed groundfish, halibut, Bering Sea/Aleutians king crab or opilio or bairdi Tanner crab between Jan. l, 1980 and Feb. 9, 1992, will qualify. If your vessel doesn't qualify, you will not be able to get a federal fishing permit.[58]

The Council and NMFS did propose regulations that allowed any vessel that made a halibut, groundfish or crab landing during a twelve-year qualifying period – January l, 1980 to February 9, 1992 – to harvest or "cross over" into any halibut, groundfish or crab fishery.[59] In the proposed moratorium rule, NMFS specifically requested public comment on whether this provision undermined the objective of the moratorium, which was to limit the number of vessels in the moratorium fisheries.[60] In the proposed rule, NMFS stated that "the Secretary has not

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misinformation.")(citations omitted); *United States v. Manning*, 787 F. 2d 431, 437 (8th Cir. 1986) (defendant cannot estop the government based on statements by Fish and Wildlife Service agent at a public meeting: "[The agent's] statements, while arguably misleading or inaccurate, did not rise to the level of 'affirmative misconduct.']; *Hoyl v. Babbitt*, 927 F. Supp. 1411, 1417 (D. Colo. 1996)("Here, at most, BLM officials expressed optimism regarding Hoyl's chances of obtaining a suspension. Such action does not constitutive an affirmative act of misrepresentation or concealment of material fact."); *Alaska Limestone Corporation v. Hodel*, 614 F. Supp. 642, 647 - 649 (D. Alaska 1985)(Secretary of Interior's failure to comply with statutory deadlines does not constitute affirmative misconduct).

[57] Notice, 55 Fed. Reg. 36,302, 36,302 (Sept. 5, 1990)(emphasis added).

[58] Exhibit 2 at 1 [emphasis added] to Notice of Addition of Documents to the Appellate Record (March 10, 2006)(hereinafter Notice).

[59] Proposed Rule, 59 Fed. Reg. 28,827 - 28,838 (June 3, 1994).

[60] Proposed Rule, 59 Fed. Reg. 28,827, 28,829 (June 3, 1994). The proposal would have allowed 13,500 vessels to participate in the moratorium fisheries whereas, in 1991, only 4500 vessels did. *Id.*

determined whether the FMP [Fishery Management Plan] amendments these regulations would implement are consistent with the national standards, other provisions in the Magnuson Act, and other applicable law."[61]

The Secretary of Commerce disapproved the proposed moratorium rule on August 5, 1994.[62] Through the Assistant Administrator for Fisheries, the Secretary concurred in the disapproval of the proposed rule by the Director of the NMFS Alaska region.[63] The Secretary concluded that the proposed FMP amendments were inconsistent with the Magnuson Act national standards and other legal standards.[64] The Director of the Alaska Region stated that he reached this conclusion "based on the advice from NOAA General Counsel" and "[a]fter careful consideration of the public comments, key issues raised during Council development of the proposed amendments, the documents submitted by the Council, and the public records."[65]

The primary reason was the crossover provision and the twelve-year qualifying period. The Director of the NMFS Alaska Region explained to the Council:

> The most significant difficulties with the moratorium as proposed were the crossover provision and the qualifying period. The crossover provision would have allowed a vessel with no prior history of participation in one moratorium fishery to enter that fishery because of prior participation in a different moratorium fishery. Under this provision, substantial numbers of vessels could enter either fishery for the first time under the crossover provision, thereby exacerbating overcapacity problem in that fishery and confounding the expressed objective of the moratorium to freeze the numbers of vessels in the groundfish, crab and halibut fisheries. Likewise, the qualifying period would have allowed fishing capacity, in terms of numbers of vessels, to increase significantly instead of being held roughly constant with that experienced in recent years.[66]

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[61] *Id.* at 28,828.

[62] North Pacific Fishery Management Council Newsletter [NPFMC] at 2 (Oct. 20, 1994), Exhibit 3 to Notice. I put the disapproval documents in the record: Memorandum for Rolland Schmitten, Assistant Administrator for Fisheries, from Steven Pennoyer, Director NMFS Alaska Region (Aug. 4, 1994), Exhibit 5 to Notice; Concurrence by Roland Schmitten (Aug, 4, 1994), Exhibit 6 to Notice. Exhibit 7 is the communication of the Secretary's disapproval to the Council. Letter from Steven Pennoyer, Director NMFS Alaska Region, to Richard Lauber, NPFMC Chairman (Aug. 5, 1994).

[63] Exhibit 5 and 6 to Notice.

[64] Exhibit 5 and 6 to Notice.

[65] Exhibit 5 at page 3 to Notice.

[66] Exhibit 7 to Notice at page 2.

Specifically, with regard to halibut, the Director noted that, since the Council's approval of a moratorium in 1992, the Secretary had adopted an Individual Fishing Quota program for halibut.[67] The Council was told that halibut would be managed under the IFQ program and that it should take no further action to include halibut in the moratorium program.[68]

NMFS withdrew the proposed moratorium rule.[69] The Council and NMFS proposed a new moratorium rule that excluded halibut as a qualifying species and had a limited crossover provision for crab vessels which harvested crab between January l, 1988 and February 9, 1992 and harvested, or crossed over into, groundfish between February 10, 1992 and December 11, 1994.[70] The Secretary approved that rule in 1995.[71] The Secretary adopted a final LLP rule in 1998, which excluded halibut as a qualifying species and adopted essentially the same crossover provision.[72]

Under a theory of estoppel, I cannot require NMFS to treat Jamie Marie as though the Secretary adopted a rule that the Secretary rejected. This would be especially questionable when the Secretary rejected the rule specifically because it allowed vessels like the F/V JAMIE MARIE, who had only caught halibut, to cross over into groundfish.

NMFS did not commit affirmative misconduct by proposing a rule that would have granted Jamie Marie a permit and then withdrawing the proposed rule when, upon further examination, NMFS concluded it violated the national standards in the Magnuson-Stevens Act and other legal requirements. Nor did the Secretary's disapproval of the rule constitute affirmative misconduct. NMFS did not commit misconduct at all by following the procedure in the Magnuson-Stevens Act for adopting limited access regulations.

E. Estoppel is not necessary to avoid a serious injustice.

Jamie Marie must show that judging its application by the regulations the Secretary adopted would result in a serious injustice. Jamie Marie claims that, but for the advice of a NMFS employee, it would have harvested groundfish in the spring of 1992, a month or two before the

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[67] Exhibit 5 to Notice at page 6.

[68] Exhibit 7 to Notice at page 4. An applicant would have received credit for halibut caught between 1988 and 1992 under the IFQ program. 50 C.F.R. § 679.40(a)(3)(i) & (a)(4)(i).

[69] Disapproval of FMP Amendments and Withdrawal of Proposed Rule, 59 Fed. Reg. 43,534 (Aug. 24, 1994).

[70] Proposed Rule, 92 Fed. Reg. 25,677, 25,678, 25-680 - 25,681 (May 12, 1995).

[71] Final Rule, 60 Fed. Reg. 40,763, 40,773 - 40,774 (Aug. 10, 1995), *adopting* 50 C.F.R. § 676.2 (definition of moratorium groundfish) and 50 C.F.R. § 676.3(e)(2), (3), (4) (crossover provisions).

[72] Final Rule, 63 Fed. Reg. 52,642 (1998), *adopting* 50 C.F.R. § 679.4(k)(4)(i)(A)(3) and (B)(3)

end of the four and a half year general qualifying period, January l, 1988 to June 17, 1992.[73]

Many, if not all, unsuccessful LLP applicants would have made the harvests necessary for an LLP license if only they had known in advance what was necessary. But the LLP regulation requires actual harvests. And an applicant can receive an LLP license based on a claim that the applicant would have made, but did not make, harvests only under the unavoidable circumstance regulation. That regulation requires, among other things, a problem that prevented the vessel from physically participating in the fishery. Jamie Marie does not meet that requirement.[74]

Before it adopts a system of limited access, the government does not have an obligation to inform vessel owners what the requirements will be so that they can meet those requirements. In fact, that would cause a rush of speculative entrants into the fishery – persons participating because they know access will be limited and want to get in under the wire. The Council's Notice in 1990 states: "This action is necessary to alert the public of the Council's fishery management intentions and possible constraints on future access to public fishery resources. The intended effect of this announcement is to *discourage* new entry into the identified fisheries while the Council continues discussions on whether and how access to these fisheries should be controlled."[75]

My conclusion concerning reasonable reliance applies here. If I granted Jamie Marie's claim of estoppel, I would be saying that Jamie Marie was entitled to certainty when it sought information from a government official about future legal requirements. I cannot say that. When a fishery goes from open access to restricted access, a member of the public is not entitled to know, and cannot expect to know, with certainty, what the new rules will be, before the government adopts them.

A member of the public can seek information, make its best guess as to what those rules will be and act accordingly. Based on its assessment of what the future rules will be, a vessel owner can choose to participate in certain fisheries and not others. A vessel owner can make certain investments and not others. But if, after the final rules are adopted, the vessel owner wishes it had participated in different fisheries, the vessel owner is not entitled to an exception to the final rules under the theory of government estoppel. It does not cause serious injustice to judge that applicant according to the rules that the government actually adopted and applied to all other applicants for the same license.

Jamie Marie has been participating in the groundfish fishery since 1993. Under the VMP

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[73] 50 C.F.R. § 679.4(k)(4)(i)(A)(1); 50 C.F.R. § 679.4(k)(4)(i)(B)(1).

[74] 50 C.F.R. § 679.4(k)(8)(iv). *See* page 4 *supra.*

[75] Notice, 55 Fed. Reg. 36,302, 36,302 (Sept. 5, 1990)(emphasis added).

regulation, it received an interim moratorium permit from 1996 to 1999.[76] Under the LLP regulation, it has received an interim (non-transferable) LLP license since 2000.[77] This lessens, but does not eliminate, the adverse economic effect on Jamie Marie from judging its application according to final, published regulations.

I conclude that NMFS should not be estopped, or prevented, from denying Jamie Marie an LLP license because Jamie Marie does not meet the requirements for an LLP license in federal regulation.

FINDING OF FACT

1. In 1991 and 1992, Jamie Marie knew that it did not need a limited access license to participate in the North Pacific groundfish fishery.

2. In 1991 and 1992, Jamie Marie knew that the federal government had not adopted the requirements for a groundfish limited access license that it might need in the future.

3. In 1991 and 1992, Jamie Marie should have known that the federal government had not adopted the requirements for a groundfish limited access license that it might need in the future.

CONCLUSIONS OF LAW

1. Jamie Marie does not meet the requirements for an LLP license in federal regulation.

2. NMFS should not be estopped, or prevented, from denying Jame Marie an LLP license because Jamie Marie does not meet the requirements for an LLP license in federal regulation.

3. Jamie Marie was not ignorant of the true facts in 1991 and 1992, namely that it did not need a limited access license to harvest groundfish and that NMFS had not adopted the requirements for a groundfish limited access license that it might need in the future.

4. Jamie Marie's reliance on statements by NMFS in 1991 about possible future requirements for a groundfish license is unreasonable as a matter of law and cannot estop NMFS from applying the requirements for an LLP license that the Secretary of Commerce adopted in 1998.

5. An applicant for an LLP license is not entitled to know, with certainty, what the requirements for an LLP license will be, before NMFS adopts those requirements.

6. If a NMFS official promised Jamie Marie what the future requirements for a groundfish permit or license would be, the official was acting outside the scope of the official's authority.

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[76] *Jamie Marie,* Appeal No. 96-0086 at 5 (Dec. 2, 1999).

[77] 50 C.F.R. § 679.4(k)(6)(ix); 50 C.F.R. § 679.43(p).

7. NMFS did not commit affirmative misconduct if an NMFS employee misstated the legal requirements for a limited access license.

8. NMFS did not commit affirmative misconduct by proposing a rule that would have granted Jamie Marie a permit and by withdrawing the proposed rule when the Secretary of Commerce disapproved it.

9. Under a theory of estoppel, I cannot require NMFS to treat Jamie Marie as though the Secretary adopted a rule that the Secretary rejected.

10. It does not cause serious injustice to evaluate Jamie Marie's application for an LLP license according to the requirements for an LLP license that the Secretary adopted in federal regulation and that NMFS has applied to other applicants for an LLP license.

DISPOSITION

The IAD that is the subject of this Appeal is AFFIRMED. This Decision takes effect May 15, 2006, unless by that date the Regional Administrator takes further action under 50 C.F.R. § 679.43(o).

The Appellant 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, April 24, 2006. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that I overlooked or misunderstood, and must be accompanied by a written statement in support of the motion.

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Mary Alice McKeen
Administrative Judge