

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
RESTRICTED ACCESS MANAGEMENT DIVISION

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| In re Application of |) | Appeal No. 95-0004 |
| |) | |
| KENNETH M. ADAMS, |) | DECISION |
| Appellant |) | |
| |) | March 22, 1995 |
| _____ |) | |

Kenneth M. Adams has appealed an initial administrative determination of the Restricted Access Management Division ["Division"] of the National Marine Fisheries Service ["NMFS"], dated January 9, 1995, which denied 19,640 pounds of his application for 68,179 pounds of Quota Share [QS] for halibut in IFQ Regulatory Area 3A under the Individual Fishing Quota [IFQ] program. The appeal is timely, and Appellant has adequately alleged that his interests are harmed by the initial determination.

ISSUE

Whether NMFS should award an additional 19,640 pounds of QS to the Appellant, which represents Appellant's estimate of the legal landings of halibut in Regulatory Area 3A that would have been made on his boat in 1989 but for the Exxon Valdez Oil Spill.

BACKGROUND AND STATEMENT OF FACTS

To qualify for the IFQ program for halibut, a person must have owned or leased a vessel that made at least one legal landing of halibut during any one of the three years of 1988-90. A qualified person is entitled to an award of initial QS equal to the "highest total legal landings of halibut ... for any 5 years of the 7-year ... period 1984 through 1990" made by a vessel or vessels that he or she owned or leased. [50 CFR 676.20(b)]. This Appellant qualified with landings in 1988 and 1990, and the Division calculated his QS on the basis of landings in the five years of 1985 - 88 and 1990.

Appellant's application was accompanied by a letter alleging that he was unable to participate in the halibut fishery in 1989 due to the Exxon Valdez oil spill. He claimed that except for the oil spill he would have expected to have made halibut landings equal to the average landings of a class "F" vessel, as he had purchased such a vessel in 1987 and had made his first fish landings

with it in 1988. Based on that assumption, Appellant's application included 1989 as one of his base years -- at an assumed halibut catch of 21,686 pounds -- instead of his lowest harvest year, 1987, when he landed 2,046 pounds. The Division awarded QS to the Appellant based on his actual landings, denying his request to be credited for additional pounds based on his estimate of landings he would have made but for the oil spill. In his initial administrative determination, RAM Division Chief Philip J. Smith explained:

The NMFS/RAM Division has no authority to allocate the qualifying pounds you seek. The North Pacific Fishery Management Council ... considered the effects of the T/V EXXON VALDEZ oil spill when the IFQ program was under development. As a result of that consideration, the Council recommended to the Secretary of Commerce that eligibility for QS could be obtained by the owner of a qualifying vessel that participated in any one of three years, 1988, 1989, or 1990 (not just one year, which would have seriously disadvantaged those whose participation in the fishery was negatively affected by the spill). The Secretary agreed.

Further, the program allows those whose fishing history may have suffered from low production (as a result of any circumstance, not just the oil spill) to "drop" two of the seven years, 1984-1990, when calculating their total qualifying pounds. In this way, special circumstances or other "hardships" experienced by applicants (such as the 1989 oil spill), would not totally foreclose an applicant's eligibility or the calculation of the total qualifying pounds that will be allocated to the applicant.

Mr. Smith further noted that the Council revisited this question during its meetings in 1994, but voted to retain the provisions of the current regulations without modification to further accommodate "hardship" situations.

In his Statement of Appeal, the Appellant claims that the Division's denial of his claim for QS based on hypothetical landings during 1989 "denies him the opportunity to fairly participate in the halibut fishery in Area 3A." He candidly acknowledges his awareness of the Council's "decision to disallow hardship considerations," but suggests that the Council was not "aware of the degree of difficulty their decision would create for the severely stressed fishermen of the [Exxon Valdez oil spill] area." He further argues that to deny hardship claims categorically, "as the [Council] has chosen to do doubly victimizes fishermen who reside in the [oil spill] area" by preventing them from participating in the 1989 halibut fishery and also from using 1989 as a year for calculating IFQ.

DISCUSSION

The Appellant in this case admittedly failed to make the legal landings of halibut in 1989 that would have been necessary to obtain QS based on that year, and there is no precedent for an award of QS under the IFQ Program based on hypothetical rather than actual landings. He is thus not entitled to relief under the regulations. Nor is there any basis for the granting of discretionary relief in this case, notwithstanding the hardship he and other fishermen have undoubtedly suffered because of the Exxon Valdez oil spill. To justify discretionary relief, a party must show not only that relief should be granted as a matter of fairness, but also that such relief *is consistent with*, and will not undermine, *the purpose of the particular rule in question*.¹ The granting of relief in this case would be inconsistent with the relevant regulation and would frustrate its purpose.

The initial administrative determination in this case correctly noted that the Division has no authority to allocate to the Appellant the QS he seeks for hypothetical rather than actual landings of halibut. Further, it carefully and fully explained the basis for that conclusion. I cannot improve on that explanation.

DISPOSITION AND ORDER

The Division followed the regulations in denying this Appellant's request to be awarded QS representing hypothetical landings of halibut in 1989, and its action is therefore AFFIRMED. This decision takes effect on April 19, 1995, unless by that date the Regional Director orders review of the decision.

Kenneth R. Clark
Appeals Officer

¹Michael B. White, Appeal No. 94-009, decided January 17, 1995, affirmed January 20, 1995, at page 5; emphasis added.