

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
)
 JIMMY D. HUTCHENS,)
 Appellant)
 _____)
)

Appeal No. 95-0094

DECISION

June 28, 1995

STATEMENT OF THE CASE

Appellant Jimmy D. Hutchens appeals an initial administrative determination ["IAD"] of the Restricted Access Management Division ["Division"], dated April 14, 1995, which denied his application for additional halibut Quota Share ["QS"] under the Pacific halibut and sablefish Individual Fishing Quota ["IFQ"] program. The Appellant appeals only that portion of the IAD that denied his claim for additional qualifying pounds of halibut in 1989, which constitutes about two-thirds of the pounds denied. The Division denied these claimed pounds because they were not based on actual landings; rather, they represented the average of Appellant's halibut landings for 1988 and 1990. The appeal was timely filed and the Appellant has adequately alleged that his interests are directly and adversely affected by the IAD. The Appellant requested a hearing, but because there are no factual issues in dispute, a hearing was not ordered.¹

ISSUE

Whether NMFS should allocate qualifying pounds that are not based on actual landings in order to compensate the Appellant for his inability to fish in Prince William Sound due to the EXXON VALDEZ oil spill.

BACKGROUND AND DISCUSSION

Calculations of halibut QS are based on "a person's highest total legal landings of halibut in each IPHC regulatory area for any 5 years of the 7-year halibut QS base period 1984 through 1990." 50 C.F.R. §676.20(b). Appellant established that he made halibut landings in 1988 and 1990, and he has been awarded QS based on those landings. He concedes that he made no landings in 1989. He explains that even though he had purchased bait, prepared his vessel for longlining, and hired a crew for the 1989 halibut season, he diverted the vessel that year to the EXXON VALDEZ oil spill cleanup. As a result, the Division did not include 1989 in its calculation of Appellant's halibut QS.

¹As provided in 50 C.F.R. § 676.25(g)(3), a hearing may not be ordered unless, among other things, "There is a genuine and substantial issue of adjudicative fact for resolution at a hearing. A hearing will not be ordered on issues of policy or law."

Appellant argues that because he would have fished halibut in 1989 but for the EXXON VALDEZ oil spill, the Division should allocate to him additional qualifying pounds for that year in an amount equal to the average of his halibut landings in 1988 and 1990. The issue raised in this appeal was considered in Kenneth M. Adams². The appellant in that case was also a qualified person who had been awarded QS. He similarly sought an allocation of additional qualifying pounds of halibut to compensate for his inability to fish in Prince William Sound in 1989 because of the EXXON VALDEZ oil spill. Mr. Adams requested an allocation in an amount equal to the average halibut landings made by class "F" vessels in area 3A in 1989.

This office agreed in that case with the Division's determination that the Division has no authority to allocate additional pounds that are not based on actual landings.³ We noted that the North Pacific Fishery Management Council had considered the negative impact of the spill on commercial fishing and had, for that reason, recommended a three-year qualifying period, which included the year before and the year after the oil spill. The Council also voted to allow applicants to drop two of the seven years used to calculate qualifying pounds to account for "special circumstances and 'hardships' experienced by applicants (such as the 1989 oil spill)." After a review of the policy in 1994, the Council "voted to retain the provisions of the current regulations without modification to further accommodate 'hardship' situations."⁴

The Appellant in the instant case rightly points out that the provision allowing applicants to drop their two worst years does not help him or other applicants with five or fewer years of halibut fishing history during the base years (1984 through 1990). This fact, however, does not authorize the Division to allocate to the Appellant additional qualifying pounds for a year in which he had no landings.

The decision in Adams is determinative in this appeal. The Appellant here, as in Adams, seeks to use average landing estimates as a basis for additional qualifying pounds. However, the IFQ program regulations do not allow such estimates to be used in lieu of actual landings.

²Appeal No. 95-0004, decided March 22, 1995.

³See also William E. Crump, Appeal No. 95-0024, decided June 27, 1995 at 2, finding that landings that "might have been made but for the EXXON VALDEZ oil spill" cannot be used to qualify a person for QS under 50 C.F.R. §676.20(a)(1).

⁴*Id.* at 2.

DISPOSITION

The Division's initial administrative determination denying Appellant additional qualifying pounds that might have been landed but for the EXXON VALDEZ oil spill is AFFIRMED. This decision takes effect July 28, 1995, unless by that date the Regional Director orders review of the decision.

John G. Gissberg
Appeals Officer

I concur in the factual findings of this decision and I have reviewed this decision to ensure compliance with applicable laws, regulations, and agency policies, and consistency with other appeals decisions of this office.

Edward H. Hein
Chief Appeals Officer