

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 96-0007
)	
SAMISH MARITIME, INC.)	
F/V REBEL)	DECISION
ADF&G # 56992)	
Appellant)	
_____)	December 2, 1999

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on February 28, 1996, which denied Samish Maritime, Inc.'s [Samish Maritime] application for a vessel moratorium qualification and permit for the F/V REBEL under the Vessel Moratorium Program on Groundfish and Crab.¹ The IAD concluded that Samish Maritime was not entitled to a moratorium qualification or permit for the F/V REBEL because it was not a qualifying vessel.² Samish Maritime filed a timely appeal. Because the record contains sufficient information on which to reach a final decision and because there is no genuine and substantial issue of adjudicative fact for resolution, no hearing was ordered.³

ISSUE

Is Samish Maritime entitled to a vessel moratorium qualification and permit for the F/V REBEL?

¹ The Vessel Moratorium Program for Groundfish and Crab, 50 C.F.R. § 679.4(c), which expires on December 31, 1999, should not be confused with the North Pacific License Limitation Program (LLP), 50 C.F.R. § 679.4(k). As of January 1, 2000, a license limitation permit will be necessary to harvest certain species of groundfish in the Gulf of Alaska and Bering Sea and Aleutian Islands (BSAI) areas and Tanner and king crab in BSAI. The application period for LLP is from September 13, 1999 through December 17, 1999. For further information on LLP, Samish Maritime may contact Restricted Access Management (RAM), NMFS, Box 21668, Juneau, Alaska 99802-1668, 907-586-7474 or 1-800-304-4846 (option 2). The NMFS website at "<http://www.fakr.noaa.gov>" also has information on the LLP.

² Samish Maritime filed an application for a moratorium qualification and permit for the F/V RENEGADE at the same time as the F/V REBEL. The facts in these two appeals are virtually identical and the argumens are the same. The Decision on the F/V RENEGADE is being issued on the same date as this Decision and is Appeal No. 96-0008.

³ 50 C.F.R. § 679.43.

BACKGROUND

On behalf of Samish Maritime, Ronald Warren, President of Samish Maritime, applied for a moratorium qualification and permit based on landings of the F/V REBEL on January 8, 1996. Samish Maritime claimed landings from the F/V REBEL of moratorium crab and moratorium groundfish with pot gear in period 1 (January 1, 1988 to February 9, 1992) and period 2 (February 10, 1992 to December 11, 1992). RAM issued an IAD, which denied the application, because RAM could not verify that the F/V REBEL made the landings claimed by Samish Maritime.

The IAD told Samish Maritime that it had until April 28, 1996 to ask RAM to reconsider its decision or file an appeal with this Office. Samish Maritime, through counsel, filed an appeal by letter dated April 26, 1996. With the appeal, Samish Maritime filed a lengthy affidavit of Ronald Warren, dated April 26, 1996, which explained why he believed his company was entitled to a moratorium permit and qualification. This Office received the letter and affidavit on April 29, 1996. Since the letter was mailed, and presumably postmarked, by the deadline of April 28, 1996, this Office treated the appeal as timely filed.⁴

With the IAD, Samish Maritime received an interim moratorium permit and a non-transferable certificate of moratorium qualification for the F/V REBEL with gear endorsements to harvest moratorium crab and moratorium groundfish with pot gear. These are the gear endorsements to which the F/V REBEL would be entitled, if its application were granted. RAM took this action pursuant to federal regulation 50 C.F.R. § 679.4(c)(10), which grants an applicant an interim permit pending final agency action on his or her appeal.

Mr. Warren alleges the following facts in his affidavit. He is a long-time fisherman with 28 years of experience in Alaska fisheries who has owned and operated numerous vessels, seven of which he constructed himself. He sold the F/V GRIZZLY and the F/V MAVERICK in 1988 with the intent to use the proceeds to build three new smaller vessels. He began constructing the F/V REBEL in 1988 and the F/V RENEGADE in 1989 and contracted with Giddings Boat Works for the construction of the F/V POLESTAR in 1989.

The proceeds from the sale of the F/V GRIZZLY and F/V MAVERICK were not sufficient to finance the building and construction of the three new vessels and Mr. Warren had to borrow \$720,000 for that task. He states that he worked unceasingly on construction of the F/V REBEL and the F/V RENEGADE but those vessels were not completed until the summer of 1992 – after the qualifying

⁴ Memorandum to OAA and RAM Division staff from Edward H. Hein, Chief Appeals Officer, May 19, 1995, re Policy on late filing of appeals: "An appeal postmarked on the appeal deadline will be accepted as timely." The file does not contain the envelope with the postmark but since the letter was dated April 26, 1996, mailed from Seattle, Washington and received in Juneau, Alaska on April 29, 1999, this Office treated the appeal as mailed, and therefore filed, by April 28, 1999.

period – when they began participating in the moratorium crab fisheries. The F/V POLESTAR was completed in 1991 and made qualifying landings of moratorium crab in the qualifying period (January 1, 1988 to February 9, 1992) and therefore received a moratorium permit and qualification.

The nub of Samish Maritime's claim revolves around what Mr. Warren said he was told in late 1991. Mr. Warren's affidavit states in part:

Prior to selling the F/V MAVERICK and the F/V GRIZZLY, and prior to beginning construction of the F/V REBEL, the F/V POLESTAR and the F/V RENEGADE, I was totally unaware of the Limited Entry Regulations. By the time I became aware of the possibility of a moratorium in late 1991, all my funds and resources had been committed to the F/V REBEL and the F/V RENEGADE. There was nothing I could do except work as hard as I could to finish these vessels as quickly as possible.

Faced with this dilemma, I called someone in Juneau to discuss the situation. I don't know who I talked to and I am not even sure now what agency I called although I believe it was our office of the National Marine Fisheries Service but I do remember clearly that I was assured by them that I could rest easy since the purpose of the Limited Entry Regulations was to eliminate speculators and new entries into the fishing; not to eliminate "old timers" such as myself.

....

I am aware that the crab deliveries by the F/V REBEL and the F/V RENEGADE fall outside of the qualifying landing period of January 1, 1988 - February 9, 1992. However, the reason the F/V REBEL and the F/V RENEGADE did not make any landings was because they were under construction. Obviously, the F/V POLESTAR was also constructed during the same period but completed in time to qualify under the Moratorium. However, much of the work on the POLESTAR was done by Giddings Boat Works and therefore it was finished much faster than I was able to finish the other two boats working alone in my backyard. Had I been able to afford to have all three boats built by a shipyard, all three could have been completed in time to qualify and I would not be in the position that I find myself in today.

This situation, combined with the fact that I was told not to worry about the limited entry regulations, prevented me from landing any crab with the two smaller boats within the qualifying period. Had I been aware of the arbitrary need to make a delivery prior to February 9, 1992, perhaps I could have sent the boats out, even uncompleted and partially rigged, to make a token delivery as I understand now that many others did simply to satisfy the limited entry landings requirements.

Mr. Warren then states that if the F/V REBEL and the F/V RENEGADE are excluded from the moratorium fishery, he will be bankrupt in a matter of months.

DISCUSSION

For a vessel to qualify to participate in the Moratorium Program, the vessel must have moratorium qualification. A vessel has moratorium qualification either because it is an original qualifying vessel or because it has received a moratorium qualification by transfer from an original qualifying vessel.⁵ An original qualifying vessel is a vessel that made landings of moratorium crab or groundfish during the qualifying period, which is January 1, 1988 to February 9, 1992.⁶ Moratorium crab are Tanner and king crab harvested in the Bering Sea and Aleutian Islands area (BSAI). Moratorium groundfish are species of groundfish, except sablefish caught with fixed gear, harvested in the Gulf of Alaska or in BSAI.⁷

Samish Maritime did not dispute that the F/V REBEL did not make any landings within the qualifying period. Neither did it allege that F/V REBEL received a moratorium qualification by transfer from another vessel. Samish Maritime argued that nonetheless it should receive a moratorium qualification and permit for the F/V REBEL because, to deny Samish Maritime a moratorium permit for the F/V REBEL, would be patently unfair and would violate National Standard 4 of the Magnuson-Stevens Fishery Conservation and Management Act, which states in part that conservation and management measures shall be fair and equitable to fishermen.⁸ Samish makes three arguments in support of that claim.

1. Notice

Samish argues that the official notice of the possibility of a moratorium program occurred in September 1990, after Mr. Warren had sold the F/V MAVERICK and the F/V GRIZZLY. Mr. Warren implies that he might have kept the F/V MAVERICK and the F/V GRIZZLY if he had known the moratorium program might be coming on board. Samish Maritime correctly notes that the North Pacific Fisheries Management Council notified the public of the "control date" and the "due consideration" date for development of the Moratorium Program in September 1990.⁹ The notice in the Federal Register states:

The North Pacific Fishery Management Council (Council) intends to develop a recommendation to the Secretary of Commerce (Secretary) a management regime for the groundfish, crab, and halibut fisheries currently under the Council's authority that

⁵ 50 C.F.R. § 679.4(c)(7).

⁶ 50 C.F.R. § 679.2.

⁷ 50 C.F.R. § 679.2

⁸ 16 U.S.C. § 1851(a)(4).

⁹ Notice, 55 Fed. Reg. 36,302-36,303 (Sept. 5, 1990).

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 and implemented.

Due consideration, however, will be given to those vessels under construction, reconstruction, or under contract for construction, reconstruction or purchase as of September 17, 1990, for the purpose of participating in the identified fisheries, provided that those vessels have harvested or processed fish in the identified fisheries by January 15, 1992. Due consideration also will be given to those vessels that were under written option or contract for purchase, or written contract for construction or reconstruction, prior to September 17, 1990, that was canceled due to the previously proposed January 19, 1990 control date provided that those vessels are under written contract for construction, reconstruction or purchase as of January 1, 1992, for the purpose of participating in the identified fisheries, and provided those vessels have harvested or processed fish in the identified fisheries by January 15, 1992.

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 entry into the identified fisheries while the Council continues discussions on whether and how access to these fisheries should be controlled.¹⁰

In September 1991, the Council changed the "due consideration" date from January 15, 1992 to February 9, 1992 because of the delay in the 1992 trawl groundfish season.¹¹ That due consideration date became the last day of the qualifying period.

The Council put the public on notice that it was considering limiting entry into the crab, groundfish and halibut fisheries. Although Mr. Warren was not a new entrant into the crab fishery, he sold the vessels that he had been using to participate in that fishery.¹² The F/V REBEL and the F/V RENEGADE were new vessels and in these fisheries represented a potential increase in effort in these fisheries, over and above the participation of the F/V MAVERICK and F/V GRIZZLY. The Council gave Mr. Warren legally sufficient notice that he would have sixteen months (September 1990 to January 1992), a period later enlarged by three weeks, to complete construction of the F/V REBEL and F/V RENEGADE and go fishing. The Council was not required to give Mr. Warren individual notice that it was developing a

¹⁰ 55 Fed. Reg. at 36302.

¹¹ Proposed Rule, 60 Fed. Reg. 25,677, 25,677 (May 12, 1995).

¹² This Decision assumes without deciding that the F/V MAVERICK and the F/V GRIZZLY were qualified vessels.

program to limit participation in the moratorium fisheries.¹³

2. Misadvice

Samish Maritime argues that NMFS should be estopped from enforcing duly promulgated regulations because someone in a government agency told Mr. Warren in late 1991 not to worry because he was an oldtimer and the purpose of the Moratorium Program was not to eliminate oldtimers from the fisheries. Initially, I note there are factual problems with Mr. Warren's claim. Mr. Warren does not know who he spoke to. He believes, but is not sure, he talked to the NMFS office in Seattle. Mr. Warren does not state what he told the person he talked to. Mr. Warren may have stated that he was an "oldtimer" but he does not state that he explained that he had sold the vessels which were the "oldtimers" and that he was building new vessels which would represent an increase in fishing effort in the moratorium fisheries.

A more fundamental problem exists with Mr. Warren's argument. Although the question of whether, and under what circumstances, the government can be estopped is a complex question, any courts that have permitted estoppel have required a showing of serious affirmative misconduct by the government.¹⁴ Samish Maritime 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.¹⁵ 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.

In fact, the regulations which were initially proposed in 1995 for the Moratorium Program were ultimately disapproved by the Secretary of Commerce as violating the Magnuson Act and other federal

¹³ See Foss v. NMFS, 161 F.3d 584 (9th Cir. 1998).

¹⁴ See Jean F. Rydstrom, Annotation, *Modern Status of Applicability of Doctrine of Estoppel Against Federal Government and Its Agencies*, 27 A.L.R. 2d 702 (1976)

¹⁵ See Prowler Partnership v. Gainhart Samuelson, Appeal No. 95-0084 at 10 (Nov. 8, 1995) ("[T]he statements [by RAM] 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 the IFQ program and the IFQ regulations were adopted.")

laws and had to be substantially rewritten.¹⁶ The final rule took effect on September 10, 1995.¹⁷ Clearly, the government has the authority, and indeed the obligation, to respond to public comment and official review, when it is developing a complex regulatory scheme such as the Moratorium Program.

3. Exclusion from the moratorium fisheries

Samish Maritime argues that Ronald Warren made such a substantial investment in the F/V REBEL and the F/V RENEGADE that he would be subject to financial ruin and bankruptcy if these vessels could not participate in the moratorium fisheries. Assuming arguendo this is true, unless there is some independent legal problem with a regulation, the simple fact that application of a regulation will have an adverse financial effect on a person does not entitle them to an exception from the regulation.

Further, because it received an interim moratorium permit, Samish Maritime was not, in fact, excluded from the moratorium fisheries. This permit has been valid during the pendency of this appeal and it included all the gear endorsements that Samish Maritime requested.¹⁸ Samish Maritime will have had an interim moratorium permit to harvest moratorium crab and groundfish with pot gear from February 28, 1996 under December 31, 1999, when the Moratorium Program ends. Samish Maritime, therefore, has not been excluded from participating in the moratorium fisheries with the F/V REBEL. The only effect of RAM's denial of Samish Maritime's application is that Samish Maritime has had a non-transferable certificate of moratorium qualification, rather than a transferable certificate, but it alleges no harm from that. Samish Maritime emphatically stated that it wanted a moratorium qualification permit so it could participate in the moratorium fisheries, not because it wanted to transfer the qualification.

4. Role of appeals officer

An appeals officer must presume the validity of duly promulgated regulations. It is not the role of an appeals officer to rule on the wisdom or legality of duly promulgated regulations.¹⁹ Based on the clear requirements of these regulations, I conclude that the F/V REBEL is not a qualifying vessel. Neither has the F/V REBEL received a moratorium qualification by transfer from another vessel. Therefore, I

¹⁶ Notice of Proposed Rule, 59 Fed. Reg. 28,827- 28,838 (June 3, 1994); Disapproval and Withdrawal of Proposed Rule, 59 Fed. Reg. 43,534-43,535 (Aug. 24, 1994); Notice of Proposed Rule, 60 Fed. Reg. 25,677 - 25,687 (May 12, 1995); Final Rule, 60 Fed. Reg. 40,763 - 40,775 (Aug. 10, 1995). [cite]

¹⁷ 60 Fed. Reg. at 40,771.

¹⁸ 50 C.F.R. § 679.4(c)(10).

¹⁹ Charles J. Petticrew, Appeal No. 95-0008 at 3-4 (July 3, 1996); George M. Ramos, appeal No. 94-0008, Regional Director's Decision on Review at 4 (April 21, 1995).

conclude that Samish Maritime is not entitled to a vessel moratorium qualification and permit for the F/V REBEL.

FINDINGS OF FACT

1. The F/V REBEL did not make landings of any moratorium species between January 1, 1988 and February 9, 1992.
2. The F/V REBEL did not receive a moratorium qualification by transfer from another vessel.
3. The regulations for the Moratorium Program came into effect on September 11, 1995.
4. The regulations for the Moratorium Program were duly promulgated.
5. Whatever communication Ronald Warren had with a government agency concerning the Moratorium Program occurred in 1991.
6. Samish Maritime has been able to participate in the Moratorium Program on an interim moratorium permit from February 28, 1996 through December 31, 1999.

CONCLUSIONS OF LAW


1. Samish Maritime had legally sufficient notice of the development of the Moratorium Program.
2. To receive a moratorium permit, federal regulations require that a vessel must have moratorium qualification by its own landings or by transfer of a moratorium qualification from another vessel.
3. The F/V REBEL does not have moratorium qualification by its own landings or by transfer of a moratorium qualification from another vessel.
4. NMFS is not estopped from evaluating the application of Samish Maritime under the regulations of the Moratorium Program.
5. Samish Maritime is not entitled to a moratorium qualification or permit for the F/V REBEL.

DISPOSITION

The IAD on Reconsideration that is the subject of this appeal is AFFIRMED. This Decision takes effect January 3, 2000, unless by that date the Regional Administrator orders review of the Decision.

Any party, including RAM, may submit a Motion for Reconsideration, but it must be received by this

Office not later than 4:30 p.m. Alaska time, on the tenth day after this Decision, December 13, 1999. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion.



Mary Alice McKeen
Appeals Officer