

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of )  
 )  
GEORGE ELIASON )  
F/V TAMMY LIN ) DECISION  
ADF&G # 66275 )  
Appellant )  
\_\_\_\_\_ )  
November 19, 1999

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on Reconsideration on June 12, 1996, which denied Mr. Eliason's application for a Vessel Moratorium Qualification and Permit under the Vessel Moratorium Program on Groundfish and Crab for the F/V TAMMY LIN.<sup>1</sup> The IAD concluded that Mr. Eliason was not entitled to a moratorium qualification or permit for the F/V TAMMY LIN because it was not a qualifying vessel. The IAD also stated that Mr. Eliason was not entitled to a Moratorium Qualification or Permit based on the landings made from the F/V ANNA J because Mr. Eliason was not the current owner of the F/V ANNA J and he had not shown that he retained the moratorium rights of that vessel.

RAM referred this case to this Office for filing as an 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.<sup>2</sup>

ISSUES

1. Is Mr. Eliason entitled to a vessel moratorium qualification and permit based on the landings of the F/V TAMMY LIN?

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<sup>1</sup> The Vessel Moratorium Program for Groundfish and Crab, 50 C.F.R. § 679.4(c), expires on December 31, 1999. This program 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 areas and certain species of crab in the Bering Sea and Aleutian Islands area. The application period for LLP is from September 13, 1999 through December 17, 1999. For further information on the License Limitation Program, Mr. Eliason 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.

<sup>2</sup> 50 C.F.R. § 679.43.

2. Is Mr. Eliason entitled to a vessel moratorium qualification and permit based on the landings of the F/V ANNA J?

## BACKGROUND

Mr. Eliason applied for a vessel moratorium qualification and permit on March 6, 1996. He claimed landings from the F/V TAMMY LIN of moratorium groundfish with hook gear in period 1 (January 1, 1988 to February 9, 1992) and period 2 (February 10, 1992 to December 11, 1992). RAM made an Initial Administrative Determination on March 25, 1996, which denied Mr. Eliason's application, because RAM could not verify that the F/V TAMMY LIN made the landings claimed by Mr. Eliason.

Mr. Eliason wrote to Steve Pennoyer, NMFS Regional Administrator, objecting to RAM's decision on two grounds. First, Mr. Eliason stated that the F/V TAMMY LIN did have groundfish landings during the qualifying period (January 1, 1988 to February 9, 1992) and submitted a printout from the Oregon Department of Fish and Wildlife of all the landings of the F/V EDITH M (the prior name of the F/V TAMMY LIN) in 1982 - 1994 that appear on fish tickets in the Department's computer file. This printout shows landings of rockfish in 1988 and 1990 and lingcod in 1989. Second, Mr. Eliason stated that he had many landings of crab, rockfish and halibut from the F/V ANNA J, which he owned for 32 years and had sold in December 1994. Mr. Eliason asked:

Why would the moratorium license go to the vessel in any case? I paid for the licenses on the Anna J, I caught the fish, I took the risks, I sold the fish and I signed the fish tickets. I alone, nobody else, no corporation, no investors, no fish company nor a silent partner.

Why, after all those years, would I now be excluded? Conversely, why would the person who just bought the Anna J and who had never made a commercial sale, now be included in the moratorium and receive a groundfish license? Why wouldn't the permit or license go to the sole operator of a qualified vessel? One who made the landings and had planned on continuing his fishing operation in a similar manner? There is something very wrong here.<sup>[3]</sup>

RAM treated Mr. Eliason's letter to Steve Pennoyer as a request for reconsideration. In its IAD on Reconsideration, RAM affirmed its first IAD because RAM could not verify that the groundfish landings were made in the Gulf of Alaska or the Bering Sea/Aleutian Islands area. RAM noted that the State of Alaska had no records of the F/V TAMMY LIN being licensed in

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<sup>3</sup> The Official Record for the Moratorium Program does show that the F/V ANNA J, ADF&G #19858, was qualified to harvest moratorium groundfish with hook, trawl and pot gear. Kaleb Aldred, the owner of the F/V ANNA J according to the Official Record, applied for and received a Moratorium Qualification and Permit based on the fishing history of the F/V ANNA J.

Alaska until 1995.

On the question of landings by the F/V ANNA J, RAM concluded:

With respect to your claim to any moratorium qualification that may be held by the F/V ANNA J, the moratorium qualification of a vessel follows the vessel, unless it is transferred or the moratorium rights are retained by the vessel owner by agreement between buyer and seller. You have not provided any evidence that you retained, through any agreement with the person who purchased the F/V ANNA J, any of the “fishing rights” associated with the vessel.

## 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.<sup>4</sup> 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.<sup>5</sup> Moratorium crab are Tanner and king crab harvested in the Bering Sea and Aleutian Islands area (BSAI).<sup>6</sup> Moratorium groundfish are species of groundfish, except sablefish caught with fixed gear, harvested in the Gulf of Alaska or in BSAI. The question is whether Mr. Eliason has rights to participate in the moratorium fisheries based on landings of the F/V TAMMY LIN or the F/V ANNA J.

### 1. The F/V TAMMY LIN

The F/V TAMMY LIN is not an original qualifying vessel because it did not make landings of moratorium crab or moratorium groundfish during the qualifying period (January 1, 1988 to February 9, 1992). Mr. Eliason never claimed landings of moratorium crab. Although rockfish and lingcod are commonly considered groundfish, the fish landed from the F/V TAMMY LIN are not moratorium groundfish because they were not landed in the Gulf of Alaska or BSAI. The record strongly suggests that these fish were landed in Oregon because the landing printout was from the Oregon Department of Fish and Wildlife and the F/V TAMMY LIN was not licensed in Alaska until 1995.

### 2. The F/V ANNA J

Mr. Eliason states that he owned the F/V ANNA J while it made qualifying landings and sold the

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<sup>4</sup> 50 C.F.R. § 679.4(c)(7).

<sup>5</sup> 50 C.F.R. § 679.2.

<sup>6</sup> 50 C.F.R. § 679.2

boat after it made qualifying landings.<sup>7</sup> If a vessel is sold after it made qualifying landings, there will be, in a sense, two vessel owners: the vessel owner at the time the vessel made the qualifying landings and the vessel owner when application for the vessel's moratorium rights is made.<sup>8</sup> Mr. Eliason raises the question of which vessel owner should receive permanent, transferable moratorium rights that result from the fishing history of the vessel.

The federal regulations for the Moratorium Program provide that a moratorium permit is to be issued to the owner of the vessel at the time of application.<sup>9</sup> Both RAM and this Office have concluded that a vessel's moratorium qualification may be severed from the vessel and remain with the prior owner.<sup>10</sup> But both RAM and this Office have concluded that the regulations require that the vessel moratorium qualification remain with the vessel unless otherwise specified in an agreement or contract.<sup>11</sup>

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<sup>7</sup> This Decision assumes these are the facts.

<sup>8</sup> Actually, a boat could have more than two owners. A boat could have more than one owner during the qualifying period and could have made landings when owned by each. A boat could have more than one owner during the application period. This could present issues not raised by this appeal.

<sup>9</sup> 50 C.F.R. § 679.4(c)(6), formerly 50 C.F.R. § 676.5(b). *See Yukon Queen Fisheries LLP*, Appeal No. 96-0009 at 3 n.2 (Sept. 17, 1998); *Glen Lockhart*, Appeal 96-0015 at 3 n.10 (Nov. 16, 1999).

<sup>10</sup> *In Re Application of Yukon Queen Fisheries, LLP*, Appeal No. 96-0009, September 17, 1998.

<sup>11</sup> RAM used this rule in its IAD on Reconsideration on Mr. Eliason's claim and in its treatment of other claims. *See, e.g., Wallace Botsford*, Appeal No. 96-0043 at 2, November 1, 1999. *Yukon Queen* relied on the preamble to the moratorium regulations which provides in part:

Moratorium qualification is presumed to belong to the current owner of the vessel that made a legal landing of moratorium species from January 1, 1988, through February 9, 1992, unless otherwise specified in a purchase agreement or contract. The moratorium qualification of a vessel may be transferred from the owner of the vessel to another person by mutual agreement. For example, the moratorium qualification of a vessel may be retained by the vessel's owner for liquidation independently of the vessel. A vessel owner also may choose to retain the moratorium qualification of the vessel when it is sold, lost, or destroyed, so that he/she can obtain a moratorium permit for a replacement vessel. Regardless of the reason for transferring a moratorium qualification, valid documentation of the transfer is required before the transfer will be approved and a moratorium permit issued based on that moratorium qualification.

60 Fed. Reg. 40,763, 40,766 (1995), *quoted in Yukon Queen Fisheries, LLP*, Appeal No. 96-0009 at 3 n.3. The preamble or background section to the proposed moratorium regulations also support this conclusion. "Moratorium qualification would be a characteristic of the vessel that stays with the vessel, except as described below." 60 Fed. Reg. 25,677, 25,680 (May 12, 1995). "Moratorium qualification would be assumed to remain attached to the vessel that made a legal landing of moratorium species during the qualifying period, unless otherwise specified in a purchase agreement or contract." *Id.* at 25,681.

Mr. Eliason sold the F/V ANNA J in December 1994. The record contains no evidence or even a claim that Mr. Eliason and the buyer of the F/V ANNA J agreed to separate the vessel's qualification from the vessel and agreed that Mr. Eliason would retain the F/V ANNA J's moratorium qualification. Put another way, this record contains no indication that, when Mr. Eliason applied for a moratorium qualification and permit, he was the owner of the F/V ANNA J or the moratorium rights of the F/V ANNA J.

Therefore I conclude that Mr. Eliason is not entitled to a moratorium qualification or permit based on the landings of the F/V TAMMY LIN, because that vessel had no landings during the qualifying period. I conclude that Mr. Eliason is not entitled to a moratorium qualification or permit based on the landings of the F/V ANNA J because he did not own the F/V ANNA J or the moratorium rights of the F/V ANNA J when he applied for a moratorium qualification and permit.

Mr. Eliason clearly believes that it is unfair that the regulations did not provide that he automatically kept the moratorium rights of the F/V ANNA J, because it was his actions while he owned the F/V ANNA J that created moratorium fishing rights. The regulatory history of the Moratorium Program<sup>12</sup> does not clearly reveal why the Council structured the Moratorium Program so that moratorium rights were presumed to stay with the vessel, and go to the new owner, but it does reveal that the Council made that choice.<sup>13</sup>

Any potential unfairness to Mr. Eliason from this choice has been substantially mitigated by the federal regulation which required that Mr. Eliason receive an interim moratorium permit, during the pendency of his appeal, with the gear endorsements that he requested.<sup>14</sup> Thus, Mr. Eliason will have had an interim moratorium permit to harvest groundfish with hook, trawl and pot gear from the F/V TAMMY LIN from March 20, 1996 until the effective date of this Decision. Since the Moratorium Program ends December 31, 1999, Mr. Eliason has been able to participate in the moratorium fisheries with the F/V TAMMY LIN for virtually the entire Moratorium Program.

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<sup>12</sup> See Notice of Proposed Rule, 59 Fed. Reg. 28,827- 28,838 (June 3, 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).

<sup>13</sup> See *supra* notes 7-11 and accompanying text. The Council adopted a different approach with the License Limitation Program. It appears that, under LLP, the rights flowing from a vessel's fishing history are presumed to stay with the person who owned the vessel on June 17, 1995. If any other person claims a vessel's LLP rights, including the vessel's current owner, it is that other person who has the burden of proving, by the express terms of a written contract, entitlement to the vessel's LLP rights. See 50 C.F.R. § 679.2 (definition of "eligible applicant").

<sup>14</sup> 50 C.F.R. § 679.4(c)(10).

## FINDINGS OF FACT

1. The F/V TAMMY LIN did not make landings of any moratorium species between January 1, 1988 and February 9, 1992.
2. Mr. Eliason was not the owner of the F/V ANNA J when he applied for the moratorium qualification and permit.
3. Mr. Eliason did not retain the moratorium rights of the F/V ANNA J when he sold the vessel.

## CONCLUSIONS OF LAW

1. Mr. Eliason is not entitled to a moratorium qualification or permit based on the landings of the F/V TAMMY LIN.
2. Mr. Eliason is not entitled to a moratorium qualification or permit based on the landings of the F/V ANNA J.

## DISPOSITION

The IAD on Reconsideration that is the subject of this appeal is **AFFIRMED**. This Decision takes effect December 20, 1999, 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, November 29, 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.

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Mary Alice McKeen  
Appeals Officer