

**NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
OFFICE OF THE REGIONAL ADMINISTRATOR**

In re Application of _____)
_____)
Appellant. _____) Appeal No. 10-0115
_____)
_____)

**REGIONAL ADMINISTRATOR'S DECISION AFFIRMING
THE NATIONAL APPEALS OFFICE'S ORDER**

I have reviewed the National Appeals Office's (NAO) Order Dismissing Appeal (dated April 11, 2012, the NAO's Order Denying Motion for Reconsideration (dated May 14, 2012), and the Appellant's pleadings. I affirm the NAO's Order Dismissing Appeal.

The facts are not in dispute:

On June 3, 2005, _____, then owner and president of _____ applied for Bering Sea/Aleutian Island Crab Processor Quota Share (PQS).

On June 27, 2005, the Restricted Access Management (RAM) Division of the National Marine Fisheries Service (NMFS) informed _____ that "none of the claims made on [his] application are supported by information in the Official NOAA Fisheries Crab Rationalization Record" Letter from P. Smith, RAM, to _____ of June 27, 2005 at p. 1. RAM further notified _____ that he had 30 days from the date of that letter "to submit additional evidence (or argument). *Id.*

_____ did not submit any additional evidence.

On April 19, 2006, RAM notified _____ that in light of its record and _____ failure to submit additional evidence or argument, it denied _____ application for PQS. RAM notified _____ that he had until June 19, 2006 to appeal that determination. The record shows that "_____" agent for _____ received that determination and NMFS receipt his signature card on April 28, 2006.

On February 28, 2012, nearly six years later, _____, appealed the April 19, 2006 determination.

Appellant requested that the NAO accept his untimely appeal under equitable tolling principles. Although the NAO concluded that it could not accept Appellant's appeal under an equitable theory, this agency has not yet fully addressed whether tolling applies to its regulations for filing appeals at 50 C.F.R. 679.43(d). However, I need not do that here since Appellant has not offered a sufficient basis for accepting his appeal nearly six years after the deadline.

Appellant does not adequately address why it missed the appeal deadline. Rather, it states that, in 2005, ██████ was involved in contentious litigation, ██████ was in Mexico, and he had no access to ██████ documentation. As a preliminary matter, this does not explain why ██████ did not file a document asking for more time or have an employee of ██████ prepare the necessary paperwork. The fact that ██████ was spending so much time in Mexico does not excuse him from deadlines; rather, it suggests that he should have had another employee handling his paperwork. Further, Appellant offers no explanation for the events of 2006 when NMFS notified ██████ that his application had been denied. ██████ registered agent received that notice and Appellant has failed to explain why it did not appeal the decision at that time. Appellant suggests the bankruptcy proceedings intervened, but according to Appellant, those proceedings began on August 11, 2006, nearly 2 months after the appeal period expired. Financial duress, even to the point prior to the filing of bankruptcy petition, does not in and of itself excuse the requirement that one file his appeal in a timely manner. Accordingly, there is no basis for tolling the appeal deadline more than six years in this case.

Moreover, even if I accepted that appeal, Appellant's claim lacks merit. Appellant does not claim NMFS's Official Record for the Crab Rationalization Program is wrong or even that ██████ would have qualified for quota share under the program's regulations. Rather, it claims that the Council's motion for the development of a hardship provision and NMFS's subsequent codification of such a provision mistakenly covered the time period 1988 through 1997, rather than 1989 through 1997.

Specifically, under the hardship provision, an applicant must have, among other things, processed Bering Sea snow crab quota share species "in each crab season for that fishery during the period from 1988 through 1997." 50 C.F.R. § 680.40(d)(3)(ii)(A)(emphasis added). Appellant claims he would have qualified had the hardship provision covered 1989 through 1997, but not 1988, and it argues that the Council actually meant for the period to begin in 1989. However, Appellant states that, due to an error committed by ██████ and a few "specialists," who purportedly drafted the Council's motion, the motion and subsequent regulation limit eligibility for the hardship provision to those who processed crab beginning in 1988.

Appellant's evidence of the Council's intent consists of a declaration from ██████ and an email from former Council member David Fluharty who introduced the motion with the hardship provision. Fluharty either does not or cannot recall whether the date should have been 1988 or 1989 since his email does not address it. More importantly, regardless of what was the intent of one member, a few members, or the entire Council, the fact of the matter is the Council moved for the hardship period to be a certain time period and NMFS adopted that same time period in regulation. See 70 Fed. Reg. 10,174 (March 2, 2005). Appellant does not claim it would have qualified for quota share under the regulation NMFS actually promulgated. NMFS does not have authority to disregard the plain terms of the regulation based on the alleged intent of the Council or certain Council members.

For the foregoing reasons, the decision of the NAO is affirmed.



James W. Balsiger, Ph.D.
NOAA Fisheries, Alaska Region
Regional Administrator

7.20.12

Date