

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
NATIONAL APPEALS OFFICE

In re Application of

████████████████████

Appellant

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Appeal No. 12-0004

DECISION

STATEMENT OF THE CASE

This appeal is before the National Appeals Office (NAO) a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA's headquarters in Silver Spring, Maryland and maintains an office in NMFS's Alaska Regional office. NAO is the successor to the Office of Administrative Appeals (OAA), Alaska Region, and is charged with processing appeals that were filed with OAA.¹

This case comes before NAO based on a timely appeal filed by ██████████ (Appellant). Appellant appeals an Initial Administrative Determination (IAD) issued by NMFS Restricted Access Management (RAM) program on August 30, 2012.² In the IAD, RAM permanently revoked 1,196 units of Pacific Halibut Quota Share (QS) which were initially issued to Appellant in the Pacific Halibut and Sablefish IFQ Program (IFQ Program).³

In late 1994, Appellant was issued 1,196 units of Halibut QS.⁴ In January 2008, NMFS sent Appellant a letter indicating Appellant was considered to be an inactive QS holder and pursuant to a potential change in the IFQ Program regulations, NMFS could possibly revoke his shares.⁵ NMFS issued final regulations on May 18, 2012 which changed the IFQ Program regulations by revoking inactive QS.⁶ These regulations became effective on June 18, 2012.⁷ On June 19, 2012, NMFS sent Appellant a Notice of Determination of Quota Share Inactivity (Inactive QS Notice) advising Appellant his shares would be revoked unless he responded in writing with a request to keep his

¹ 50 C.F.R. § 679.43.

² Case File, Pleadings Tab, Appellant's appeal submission signed and dated on September 3, 2012; Original File Tab, IAD dated August 30, 2012.

³ Original File Tab, IAD dated August 30, 2012.

⁴ Original File Tab, Quota Share Data Summary, Dated November 14, 1994.

⁵ Original File Tab, Letter from RAM dated January 2008.

⁶ 77 Fed. Reg. 29556 (May 18, 2012).

⁷ 77 Fed. Reg. 29556 (May 18, 2012).

shares by August 17, 2012.⁸ On August 27, 2012, Appellant faxed a written letter to NMFS requesting to keep his shares.⁹ On August 30, 2012, RAM issued the IAD at issue in this appeal.¹⁰ In the IAD, RAM permanently revoked the Appellant's QS.¹¹ In the IAD, RAM indicated Appellant did not respond to the Inactive QS Notice within the required time period.¹² Additionally, RAM notified Appellant of his right to appeal to the OAA.¹³

NAO received Appellant's timely appeal of the IAD. In the appeal, Appellant indicates 1) he did not receive the Inactive QS Notice because he was out of the country¹⁴ and 2) he would like to keep his shares. In his appeal, Appellant admits he submitted his request to keep his QS after the August 17, 2012 deadline. Appellant attached a copy of his flight itinerary which indicated he was in Hawaii during the time the notice was sent and he did not return home until after the deadline to respond to the notice.¹⁵

On November 16, 2012, NAO acknowledged Appellant's appeal and requested any additional information be provided to NAO by December 7, 2012. NAO received no additional documentation from Appellant.

Upon review of Appellant's appeal and case record, I have determined the record contains sufficient information on which to reach a final judgment. There is no disputed material issue of fact and no need for a hearing for testimony on disputed factual issues. Appellant's arguments on appeal concern legal questions and policy issues. I therefore am exercising my discretion to not hold a hearing and issue a decision based on the case record. Accordingly, I close the record and issue this decision.¹⁶

ISSUES

At issue in this appeal is whether RAM properly revoked Appellant's 1,196 units of Pacific Halibut QS. To resolve this issue, I must evaluate the following:

Did Appellant establish by a preponderance of the evidence that he responded to the Inactive QS Notice by the August 17, 2012 deadline?

If the answer to the question is "no," I must conclude that Appellant did not timely respond to the Inactive QS Notice and uphold the IAD.

⁸ Original File Tab, Inactive QS Notice dated June 19, 2012.

⁹ Case File, Pleadings Tab, Appellant's appeal submission signed and dated on September 3, 2012; Original File Tab, Facsimile from Appellant to RAM dated August 27, 2012.

¹⁰ Original File Tab, IAD dated August 30, 2012.

¹¹ Original File Tab, IAD dated August 30, 2012.

¹² Original File Tab, IAD dated August 30, 2012.

¹³ Original File Tab, IAD dated August 30, 2012.

¹⁴ Appellant indicated he was out of the country, however the record shows he was in Hawaii.

¹⁵ Case File, Pleadings Tab, Appellant's appeal submission signed and dated on September 3, 2012, flight itinerary attachment.

¹⁶ See 50 C.F.R. § 679.43 (g) and (k).

FINDINGS OF FACT

1. On June 19, 2012, NMFS sent Appellant an Inactive QS Notice indicating Appellant's shares would be revoked unless he objected by responding in writing within 60 days (deadline of August 17, 2012).¹⁷
2. NMFS sent the Inactive QS Notice to Appellant's address of record, which Appellant provided to NMFS on April 23, 2007.¹⁸
3. On August 27, 2012, Appellant faxed a response to the agency requesting to keep his shares.

PRINCIPLES OF LAW

Pursuant to the IFQ Program regulations, inactive QS holders wishing to keep their QS must respond in writing to NMFS within 60 days of receiving an Inactive QS Notice (or within the appropriate date contained in the notice).¹⁹ If an inactive QS holder does not respond prior to the deadline, NMFS will revoke the inactive QS.²⁰ NMFS sends the Inactive QS Notice to the address of record of the inactive QS holder.²¹ In general, NMFS will establish the address of record used by the applicant in initial correspondence to NMFS concerning the application. Notifications of all actions affecting the applicant after establishing an address of record will be mailed to that address, unless the applicant provides NMFS, in writing, with any changes to that address.²²

ANALYSIS

On May 18, 2012, NMFS published the Final Rule in the Federal Register.²³ The Final Rule in the Federal Register addressed the revocation of inactive QS, including information pertaining to the 60-day deadline and a description of options for inactive QS holders.²⁴ On June 18, 2012, these regulations became effective.²⁵ Under the new

¹⁷ Original File Tab, Inactive QS Notice dated June 19, 2012.

¹⁸ Original File Tab, Facsimile from Appellant with change of address information.

¹⁹ 50 C.F.R. § 679.40(a)(10)(i).

²⁰ 50 C.F.R. § 679.40(a)(10).

²¹ 50 C.F.R. § 679.40(a)(10)(i).

²² 50 C.F.R. § 679.43(e).

²³ 77 Fed. Reg. 29556 (May 18, 2012).

²⁴ 77 Fed. Reg. 29556 (May 18, 2012).

²⁵ 50 C.F.R. § 679.40.

regulations, NMFS was authorized to revoke inactive QS unless inactive QS holders adhered to a 60-day deadline with requests to keep QS.²⁶

On June 19, 2012, NMFS sent Appellant an Inactive QS Notice dated June 19, 2012, informing Appellant of his inactive status and the steps Appellant must take to avoid the QS revocation.²⁷ The notice provided:

...If you wish your QS to remain "active" you must respond in writing to this Inactive QS Notice and your response must be received by NMFS/AKR/RAM within 60 days, or by Friday, August 17, 2012...Failure to respond in writing to this Notice within this 60 day period will result in permanent revocation of your halibut/sablefish QS and IFQ holdings.²⁸

Initially, Appellant's address of record was the address he provided in his application for QS.²⁹ However, on April 23, 2007, Appellant faxed NMFS a notification of a change in his address.³⁰ Following this change in address of record, in October 2007, NMFS sent a letter to Appellant at his new address of record.³¹ In that letter, NMFS notified Appellant about certain IFQ services available on-line. In January 2008, NMFS sent to Appellant another letter at this same new address of record.³² This letter informed Appellant that NMFS considered him to be an inactive QS holder and that the North Pacific Fishery Management Council had recommended NMFS implement regulations revoking all QS held by inactive QS holders. There is no evidence to indicate and the record does not show that either the October 2007 or January 2008 letters from NMFS to Appellant were returned by the postal service or that Appellant did not receive them. The Inactive QS Notice was returned to NMFS with "return to sender" and other postal markings indicating the letter was unclaimed by the addressee. NMFS acted reasonably when they sent the Inactive QS Notice to Appellant's updated address of record because that was the most recent address provided to NMFS by Appellant and because NMFS had no information indicating prior letters sent by NMFS to this updated address were returned or not received by Appellant.

On August, 27, 2012, Appellant faxed NMFS a letter indicating he would like to keep his QS and due to being out of the country,³³ the Inactive QS Notice was returned to sender.³⁴ Appellant responded to NMFS requesting he keep his QS ten days after the deadline response date of August 17, 2012. RAM had no authority under the Pacific

²⁶ 50 C.F.R. § 679.40(a)(10)(i).

²⁷ Original File Tab, Inactive QS Notice dated June 19, 2012.

²⁸ Original File Tab, Inactive QS Notice dated June 19, 2012.

²⁹ Original File Tab, Application for Quota Share.

³⁰ Original File Tab, Facsimile from Appellant with Change of Address Information.

³¹ Original File Tab, October 2007 NMFS letter.

³² Original File Tab, January 2008 NMFS letter.

³³ Appellant indicated he was out of the country, however the record shows he was in Hawaii.

³⁴ Original File Tab, Facsimile from Appellant to RAM dated August 27, 2012.

Halibut and Sablefish QS IFQ regulations to accept a late response to the Inactive QS Notice.

In his appeal, Appellant attached a flight itinerary which indicated he was in Hawaii from April ██████ 2012 - August ██████ 2012.³⁵ Appellant acknowledged his untimely response but attributed it to not receiving the notice because he was away from home when the Inactive QS Notice was sent to his address. Pursuant to 50 C.F.R. § 679.43(e), NMFS sent the Inactive QS Notice to the address provided by Appellant. By publishing the announcement in the Federal Register, and sending Appellant at his address of record the January 2008 letter informing him of the upcoming implementation or regulations revoking QS held by inactive QS holders, and by sending him at his address of record the Inactive QS Notice, NMFS provided Appellant with ample notice of the 60 day deadline. It is ill-fated Appellant missed the deadline by only ten days, but NAO must follow the IFQ Program regulations.

CONCLUSIONS OF LAW

Appellant did not respond to the Inactive QS Notice within the 60 day deadline.

RAM correctly followed its regulations governing the IFQ Program when it permanently revoked Appellant's QS.

ORDER

The IAD dated August 30, 2012 is upheld. This decision takes effect thirty days from the date issued, January 21, 2013,³⁶ and will become the final agency action for purposes of judicial review, unless a motion for reconsideration is made pursuant to <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>, or the Regional Administrator elects to reverse, modify, or remand this decision pursuant to 50 C.F.R. § 679.43(k) and (o).

Appellant or RAM may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Time, on the tenth day after the date of this Decision, December 31, 2012. A Motion for Reconsideration must be in writing, must allege one or more specific material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement in support of the motion.

³⁵ Case File, Pleadings Tab, Appellant's appeal submission signed and dated on September 3, 2012, flight itinerary attachment.

³⁶ 50 C.F.R. § 679.43(k) and (o).



Steven Goodman
Administrative Judge

Date Issued: December 21, 2012