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

In re Application of	)	
	)	Appeal No. 11-0076
[redacted]	)	
	)	DECISION
Appellant	)	
	)	

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. The undersigned is the administrative judge assigned to review and decide this matter.[1]

This appeal involves the License Limitation Program (LLP). The regulations for that program were recently amended to include provisions for endorsements for harvesting Pacific cod, the subject of this appeal. [redacted] (Appellant) has been denied an endorsement for the Western Gulf (WG) in an Initial Administrative Determination (IAD). In the IAD, NMFS's Restricted Access Management program (RAM) in the Alaska Regional office, denied Appellant a WG endorsement because his history of certain Pacific cod landings was insufficient to meet the regulatory standard.[2] As explained by RAM in the IAD:

> The only WG Pacific cod harvests made under the authority of [Appellant's] license were made in 2008. Those harvests were insufficient to meet the minimum participation requirement for a licensee with an MLOA [maximum length overall] of less than 60 feet, as [Appellant's] license is endorsed. The requirement for such a license is 10 metric tons, or 22,066 pounds, of Pacific cod cumulative over the period January 1, 2001 through December 8, 2008. The WG landings attributed to your license in the official record are deficient in two ways. First, these landings were determined to not qualify as landing in a directed federal Pacific cod fishery; these landings were incidental catch during the Pacific halibut IFQ [Individual Fishing Quota] fishery. Additionally, the total amount landed was less than 2,000 pounds (less than one (1) metric ton).[3]

---

[1] *See* 50 C.F.R. § 679.43.
[2] Appellant was granted an endorsement for the Central Gulf (CG). Original File Tab, IAD dated June 7, 2011.
[3] Original File Tab, IAD dated June 7, 2011, pg. 8.

On appeal, Appellant asks NAO to reverse the IAD.

ISSUE

The broad issue is whether Appellant will receive a WG endorsement. To resolve that issue, I must determine whether evidence in the record shows Appellant landed at least 10 metric tons (22,066 pounds) of Pacific cod in a directed federal Pacific cod fishery in the WG between January 1, 2002 and December 8, 2008.

FINDINGS OF FACT

1. Appellant holds an LLP license.[4]

2. In the IAD dated June 7, 2011, RAM granted Appellant a CG endorsement based on his qualifying landings history.[5]

3. Also in the IAD, RAM denied Appellant a WG endorsement based on his qualifying landings history.[6]

4. Appellant harvested less than 10 metric tons of qualifying fish in the WG during the time period between January 1, 2002 and December 8, 2008.[7]

PRINCIPLES OF LAW

The applicable regulations are amendments to existing program regulations governing the License Limitation Program (LLP). Generally, the amendments affect LLP groundfish license holders who, under the new regulations, need an endorsement in order to fish Pacific cod in the Central Gulf (CG) or Western Gulf (WG) of Alaska. The type of fishing which requires the endorsement is for directed fishing of Pacific cod using certain types or gear or methods. Since those details of the regulations are not at issue in this appeal, I will not describe them in more detail or with more precision.

What is at issue in this appeal are the applicable regulations that establish the history in the industry an applicant must have in order to be eligible for an endorsement. For vessels with a maximum length overall (MLOA) of less than 60 feet, an applicant's relevant fishing history must show he harvested 22,066 pounds (10 metric tons or 10 mt) of Pacific cod. He must have done so between January 1, 2002 and December 8, 2008. For an endorsement for the WG, the historical harvest must have been landed in the directed Pacific cod fishery in federally-managed fishery in the WG.[8]

---

[4] Original File Tab, License Limitation Program Groundfish License.
[5] Original File Tab, IAD dated June 7, 2011.
[6] Original File Tab, IAD dated June 7, 2011.
[7] Original File Tab, LLP Fish Tickets by Vessel & License dated May 26, 2011.
[8] 50 C.F.R. § 679.4(k)(10).

In determining legal landings creditable for an endorsement, NMFS uses the Official Record of an applicant's fishing history.[9] An applicant bears the burden of proving the Official Record is not accurate.[10]

The procedural regulations that apply to this appeal are found at 50 C.F.R. § 679.43.

ANALYSIS

In his appeal, Appellant argues he bought his LLP license in 2006 to fish in the Central and Western Gulf and Bering Sea, has fished with it since buying the license, and intends to fish in the Eastern and Western Gulf as well as the Bering Sea. Appellant explains he is building a boat to fish in those areas. Appellant believes without an endorsement and the ability to fish in those areas, he will not survive financially.

In his appeal, Appellant does not challenge the substantive basis for NMFS's denying him a WG endorsement. In any event, I have independently reviewed the record and agree with RAM's assessment. The record shows Appellant harvested less than 2,000 pounds of Pacific cod fish in the WG in the time period roughly between 2002 and 2008. Further, the landings were incidental catch (not directed fishing) during the Pacific halibut IFQ fishery.[11]

It is Appellant's burden to show the IAD is wrong. On appeal, he does not identify or present evidence that would show the record, particularly the Official Record of his relevant historical landings, is incorrect. Therefore, I must uphold the IAD.

In reaching my decision, I have considered Appellant's arguments raised on appeal. I acknowledge his concerns about the financial hardship that could ensue should he not receive a WG endorsement. I have carefully read how he entered the industry and the expectations he had in buying a LLP license. However, NAO must follow applicable regulations. NAO is not authorized to "make law" by granting Appellant a hardship exception or to make a decision based on equitable considerations. And, under the applicable regulations, unfortunately for Appellant, his landings history is insufficient to qualify for a WG endorsement.

CONCLUSIONS OF LAW

Appellant landed less than 10 metric tons (22,066 pounds) of Pacific cod in a directed federal Pacific cod fishery in the WG between January 1, 2002 and December 8, 2008.

The IAD is consistent with the LLP regulations.

---

[9] 50 C.F.R. § 679.4(k)(10)(iii).
[10] 50 C.F.R. § 679.4(k)(10)(v)(2)(B).
[11] 50 C.F.R. 679.4(k)(10) Original File Tab, LLP Fish Tickets by Vessel & License dated May 26, 2011.

ORDER

The IAD dated June 7, 2011 is upheld. This decision takes effect thirty days from the dated issued, April 6, 2012, 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, remand, or modify this decision pursuant to 50 C.F.R. § 679.43(k), (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 Standard Time, on the tenth day after the date of this Decision, March 19, 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 of points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.

[redacted]

Eileen G. Jones
Chief Administrative Judge

Date Issued: March 7, 2012