

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

In re Application of

████████████████████

Appellant

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Appeal No. 11-0077

DECISION

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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.<sup>1</sup> This appeal comes before NAO based on a timely appeal filed by ██████████ (Appellant).

On April 27, 2011, NMFS's Restricted Access Management program (RAM) sent Appellant a Notice of Changes to the License Limitation Program (LLP) Program/ Notice of Preliminary Determination and Notice of Opportunity to Challenge Preliminary Determination (Notice).<sup>2</sup> In the Notice, RAM informed Appellant of new regulations governing the LLP. The new regulations established eligibility criteria for an LLP license to be endorsed for fishing Pacific cod in the Central Gulf (CG) in the federally managed directed Pacific cod fisheries.<sup>3</sup> RAM further informed Appellant his LLP license ██████████ (LLG) had not met eligibility criteria for an endorsement.<sup>4</sup> RAM advised Appellant he could submit information to challenge RAM's tentative decision. RAM set the deadline for doing so as May 27, 2011.<sup>5</sup>

In response to RAM's Notice, Appellant's attorney submitted a letter to RAM.<sup>6</sup> In the letter, Appellant's attorney stated Appellant disagreed with the Notice he received from

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<sup>1</sup> 50 C.F.R. § 679.43

<sup>2</sup> Original File Tab, Notice of Changes to the LLP Program/ Notice of Preliminary Determination /Notice of Opportunity to Challenge Preliminary Determination dated April 27, 2011.

<sup>3</sup> Original File Tab, Notice of Changes to the LLP Program/ Notice of Preliminary Determination /Notice of Opportunity to Challenge Preliminary Determination dated April 27, 2011.

<sup>4</sup> Original File Tab, Notice of Changes to the LLP Program/ Notice of Preliminary Determination /Notice of Opportunity to Challenge Preliminary Determination dated April 27, 2011.

<sup>5</sup> Original File Tab, Notice of Changes to the LLP Program/ Notice of Preliminary Determination /Notice of Opportunity to Challenge Preliminary Determination dated April 27, 2011.

<sup>6</sup> Original File Tab, Letter from Appellant's Attorney dated May 26, 2011.

RAM.<sup>7</sup> Appellant's attorney further stated he needed additional time to gather evidence to establish Appellant's eligibility.<sup>8</sup> However, RAM did not receive any additional documentation from Appellant or his attorney.<sup>9</sup>

On June 7, 2011, RAM issued the IAD under review in this appeal. In the IAD, RAM denied Appellant a Central Gulf of Alaska Pacific cod species, area, gear, and operation type endorsement under the LLP.<sup>10</sup>

On June 29, 2011, NAO received Appellant's appeal.<sup>11</sup> In the appeal, Appellant's attorney renews Appellant's claim that he disagrees with the Notice.<sup>12</sup> Appellant's attorney also requests a hearing on Appellant's behalf to show Appellant did meet the requirements or failed to do so because of unavoidable circumstances.<sup>13</sup>

On November 4, 2011, NAO acknowledged receipt of Appellant's appeal and provided Appellant until November 25, 2011 to supplement the record.<sup>14</sup> 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. As stated in the IAD, LLP regulations do not include an unavoidable circumstances provision.<sup>15</sup> Further, applicable regulations require an appellant who requests hearing to present "a concise written statement raising genuine and substantial issues of adjudicative fact for resolution and a list of available and specifically identified reliable evidence upon which the factual issues can be resolved."<sup>16</sup> Appellant has not provided a concise written statement raising genuine and substantial issues of adjudicative fact for a resolution but merely argument.<sup>17</sup> Appellant asserts he landed at least the 10 mt. minimum required for an endorsement, but does not present evidence to substantiate that claim. Under applicable regulations, a hearing will not be ordered "on the basis of mere allegations or denials or general descriptions of positions or contentions."<sup>18</sup> But that is what Appellant presented in his appeal. Therefore, I am exercising my discretion to not hold a hearing and issue a decision based on the available evidence in the case record.<sup>19</sup> Accordingly, I close the record and issue this decision.<sup>20</sup>

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<sup>7</sup> Original File Tab, Letter from Appellant's Attorney dated May 26, 2011.

<sup>8</sup> Original File Tab, Letter from Appellant's Attorney dated May 26, 2011.

<sup>9</sup> Original File, IAD page 2.

<sup>10</sup> Original File Tab, IAD dated June 7, 2011.

<sup>11</sup> Pleadings, Attorney's appeal letter on behalf of Appellant dated June 20, 2011.

<sup>12</sup> Pleadings, Attorney's appeal letter on behalf of Appellant dated June 20, 2011.

<sup>13</sup> Pleadings, Attorney's appeal letter on behalf of Appellant dated June 20, 2011.

<sup>14</sup> Appeals Correspondence Tab, NAO letter dated November 4, 2011.

<sup>15</sup> Original File, IAD page 8

<sup>16</sup> See 50 C.F.R. § 679.43(f).

<sup>17</sup> See 50 C.F.R. § 679.43(f).

<sup>18</sup> See 50 C.F.R. § 679.43(g)(3)(ii).

<sup>19</sup> See 50 C.F.R. § 679.43(g)(3)(ii).

<sup>20</sup> See 50 C.F.R. § 679.43(g) and (k).

## ISSUES

At issue in this appeal is whether Appellant is eligible for an endorsement. To resolve this issue, I must evaluate the following:

Did Appellant establish by a preponderance of the evidence he legally landed at least ten metric tons (mt.) of Pacific cod in the directed Pacific cod fishery between January 1, 2002 and December 8, 2008 in the Central Gulf of Alaska?

If the answer to the question is “no,” I must uphold the IAD and conclude Appellant is not eligible for an endorsement.

## FINDINGS OF FACT

1. Appellant holds an LLP Groundfish License (License) for a vessel of forty-eight feet.<sup>21</sup>
2. In 2002, Appellant harvested 9,914 pounds (4.497 mt.) of Pacific cod in the CG directed federal fishery.<sup>22</sup>
3. In 2002, Appellant also harvested 2,037 pounds of Pacific cod by-catch during the IFQ halibut fishery.<sup>23</sup>

## PRINCIPLES OF LAW

In general, NMFS assigns an endorsement to a LLP license based on the landings in the directed Pacific cod fishery in the Gulf of Alaska between January 1, 2002 and December 8, 2008, made by vessels operating under the authority of that LLP license. The endorsements are based on a history of landings of Pacific cod pursuant to that LLP license.

Unless specifically exempted, a license holder must have an endorsement on his or her ground fish license to conduct directed fishing for Pacific cod in the Western Gulf of Alaska or Central Gulf of Alaska with hook and line gear, pot gear, or jig gear on a vessel using more than five jig machines, more than one line per machine and more than 30 hooks per line.<sup>24</sup>

Only Pacific cod harvested from federally-managed fisheries may be used for eligibility for the new endorsements.<sup>25</sup> This includes fisheries in federal waters and fisheries

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<sup>21</sup> Pleadings Tab, License Limitation Program Groundfish License dated April 21, 2011.

<sup>22</sup> Original File Tab, Official Record generated on May 31, 2011.

<sup>23</sup> Original File Tab, Official Record generated on May 31, 2011.

<sup>24</sup> 50 C.F.R. § 679.4(k)(10)(i).

<sup>25</sup> Text excerpt from Federal Register Vol 76, No. 55 published Tuesday, March 22, 2011 pg 15829.

managed under the federal total allowable catch (TAC) “parallel waters fisheries” but excludes harvests from State of Alaska guideline harvest limit (GHL) fisheries.<sup>26</sup>

If a license holder’s license has a catcher vessel less than sixty feet and the license holder harvested Pacific cod with hook-and-line gear, the license holder must demonstrate he or she legally landed at least ten mt. of Pacific cod in the directed Pacific cod directory between January 1, 2002 and December 8, 2008 in the Central Gulf of Alaska.<sup>27</sup>

All eligibility amounts will be determined based on round weight equivalents.<sup>28</sup> NMFS shall assign a legal landing to a groundfish license in an area based only on information contained in the official record.<sup>29</sup>

The non-trawl gear recent participation official record is the information NMFS prepared regarding the number of legal landings and amount of legal landings assigned to a ground fish license for purposes of the non-trawl gear designation participation requirements, which NMFS will use to implement the LLP program and evaluate applications for Pacific cod fishery endorsements.<sup>30</sup>

#### ANALYSIS

The issue before me is whether Appellant has shown by a preponderance of the evidence he legally landed at least ten metric tons of Pacific cod in the directed Pacific cod directory between January 1, 2002 and December 8, 2008 in the Central Gulf of Alaska.

According to the official record, Appellant harvested 4.497 metric tons of Pacific cod between January 1, 2002 and December 8, 2008. The 2,037 pounds of Pacific cod Appellant landed was by-catch during the Pacific halibut IFQ fishery; this was not landed in a Federal directed fishery for Pacific cod but during the Pacific halibut IFQ fishery and therefore not recognized in the regulations as landings data to establish the minimal ten mt.<sup>31</sup> Since what is recognized as creditable for an endorsement, 4.497 mt., is less than the required 10 mt., Appellant is not eligible for an endorsement. Although Appellant alleges the Official Record is in error, the burden is on Appellant to demonstrate that is the case.<sup>32</sup> That means Appellant must present evidence that shows the official record is wrong. If Appellant does not present such evidence, then he will not prevail. While Appellant’s attorney alleges Appellant met the ten metric ton requirement under LLP regulations, RAM and then NAO did not receive documentation from Appellant establishing he landed at least ten metric tons between January 1, 2002

<sup>26</sup> Text excerpt from Federal Register Vol 76, No. 55 published Tuesday, March 22, 2011 pg 15829.

<sup>27</sup> 50 C.F.R. § 679.4(k)(10)(ii).

<sup>28</sup> 50 C.F.R. § 679.4(k)(10)(iii)(A).

<sup>29</sup> 50 C.F.R. § 679.4(k)(10)(iii)(B).

<sup>30</sup> 50 C.F.R. § 300.67(f)(5).

<sup>31</sup> 50 C.F.R. § 679.4(k)(10)(ii).

<sup>32</sup> See 50 C.F.R. 679.4(k)(10)(v)(B).

and December 8, 2008. In short, Appellant has presented argument, but not evidence, to support the outcome he desires. Appellant has not met his burden of proof.

Appellant's attorney also states if Appellant did not meet the requirements it was due to unavoidable circumstances. The LLP regulations do not include an unavoidable circumstances provision as a basis for an applicant to receive an endorsement.

For the reasons stated above, under 50 C.F.R. § 679.4(k)(10) the Appellant has not established he is eligible for an endorsement. RAM did not err in the IAD when it notified Appellant his endorsement was denied.

#### CONCLUSIONS OF LAW

Appellant is not eligible for a Pacific cod endorsement under the basic requirements because he did not legally land at least ten mt. of pacific cod during the federal directed fishery for Pacific cod between January 1, 2002 and December 8, 2008.

The IAD is consistent with the LLP regulations.

#### ORDER

The IAD dated June 7, 2011 is upheld. This decision takes effect thirty days from the date 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 reverses, remands, or modifies 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.

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Eileen G. Jones  
Chief Administrative Judge

Date Issued: March 7, 2012