

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

In re Application of

████████████████████

Appellant

)  
)  
)  
)  
)  
)

Appeal No. 11-0078

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. The undersigned is the administrative judge assigned to review and decide this matter.<sup>1</sup>

████████████████████ (Appellant) filed the appeal under review. Appellant is appealing an Initial Administrative Decision (IAD) issued by NMFS's Restricted Access Management Program (RAM). In the IAD, RAM denied Appellant a Central and/or Western Gulf of Alaska Pacific cod species, area, gear, and operation type endorsement (endorsement), under the License Limitation Program (LLP).<sup>2</sup>

On April 27, 2011, RAM sent Appellant a Notice of Changes to the LLP Program/ Notice of Preliminary Determination and Notice of Opportunity to Challenge Preliminary Determination (Notice).<sup>3</sup> In the Notice, RAM informed Appellant that new regulations governing LLP established eligibility criteria for an LLP license to be endorsed for fishing Pacific cod in the Central and/or Western Gulf of Alaska in the federally managed directed Pacific cod fisheries in those areas.<sup>4</sup> RAM further informed Appellant that his LLP license ██████████ (LLG) had not met eligibility criteria for an endorsement. Appellant was given until May 27, 2011 to challenge RAM's Notice.<sup>5</sup>

---

<sup>1</sup> 50 C.F.R. § 679.43.

<sup>2</sup> Original File Tab, IAD dated June 7, 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.

In response to RAM's Notice, Appellant submitted a letter explaining the resources that he had expended in building his business and personal problems that he was dealing with at the time.<sup>6</sup>

On June 7, 2011, RAM sent Appellant the IAD at issue in this appeal.<sup>7</sup> In its IAD, RAM denied Appellant an endorsement because he lacked the minimum harvest requirements as explained in the Notice. RAM noted Appellant had the right to appeal the IAD to OAA and that any appeal must be received by August 8, 2011. On August 8, 2011, OAA received Appellant's appeal.<sup>8</sup> On September 4, 2011, Appellant submitted a letter explaining personal problems that prevented him from landing the necessary tonnage of Pacific cod.<sup>9</sup> Along with that letter, Appellant provided a copy of the letter he sent in response to RAM's Notice.<sup>10</sup> On November 4, 2011, NAO acknowledged receipt of Appellant's appeal and provided Appellant until November 25, 2011, to submit additional evidence in support of his appeal.<sup>11</sup> NAO received no additional documentation to support Appellant's appeal subsequent to November 4, 2011.

I have reviewed Appellant's appeal and the case record, and have determined that the record contains sufficient information on which to reach final judgment. Because Appellant's record contains sufficient information on which to reach final judgment, a hearing is not needed in his case. A hearing may only be ordered if Appellant demonstrated a genuine and substantial issue of adjudicative fact for resolution.<sup>12</sup> Appellant did not articulate a material issue of fact, which if he proved, would help him prevail in his appeal. Although Appellant did raise legal and policy issues in his appeal, a hearing may not be ordered on issues of policy or law.<sup>13</sup> Accordingly, I close the record and issue this decision without ordering a hearing.<sup>14</sup>

## ISSUES

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

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

---

<sup>6</sup> Original File Tab, Appellant's type-written letter dated June 6, 2011.

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

<sup>8</sup> Pleadings Tab, Letter of Appeal from Appellant to OAA dated August 8, 2011, received August 8, 2011.

<sup>9</sup> Pleadings Tab, Letter from Appellant to OAA dated September 4, 2011.

<sup>10</sup> Original File Tab, Appellant's type-written letter dated June 6, 2011.

<sup>11</sup> Appeals Correspondence Tab, NAO letter dated November 4, 2011.

<sup>12</sup> 50 C.F.R. § 679.43(g)(3)(i).

<sup>13</sup> 50 C.F.R. § 679.43(g)(3)(i).

<sup>14</sup> 50 C.F.R. § 679.43 (g)(2), (k).

## FINDING OF FACT

1. From January 1, 2002, until December 8, 2008, Appellant harvested 9.642 metric tons of Pacific cod in the Central Gulf directed federal fishery.<sup>15</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 LLP license use, and if earned will be added to LLP licenses.

Unless specifically exempted, a license holder must have a CFE on his or her ground fish license to conduct directed fishing for Pacific cod in the Central and/or Western 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>16</sup> A license holder can only use the specific non-trawl gear(s) indicated on his or her license to conduct directed fishing for Pacific cod in the Central and/or Western Gulf of Alaska.<sup>17</sup>

Only Pacific cod harvested from federally-managed fisheries may be used for eligibility for the new endorsements.<sup>18</sup> This includes fisheries in federal waters and fisheries managed under the federal total allowable catch (TAC) “parallel waters fisheries” but excludes harvests from State of Alaska guideline harvest limit (GHL) fisheries.<sup>19</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 that they 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.<sup>20</sup>

All eligibility amounts will be determined based on round weight equivalents.<sup>21</sup> NMFS shall assign a legal landing to a groundfish license in an area based only on information contained in the official record.<sup>22</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

---

<sup>15</sup> Original File Tab, Official LLP CV Summary by License created June 6, 2011.

<sup>16</sup> 50 C.F.R. § 679.4(k)(10)(i).

<sup>17</sup> 50 C.F.R. § 679.4(k)(10)(i).

<sup>18</sup> 55 Fed. Reg. 15,829 (Mar. 22, 2011).

<sup>19</sup> 55 Fed. Reg. 15,829 (Mar. 22, 2011).

<sup>20</sup> 50 C.F.R. § 679.4(k)(10)(ii).

<sup>21</sup> 50 C.F.R. § 679.4(k)(10)(iii)(A).

<sup>22</sup> 50 C.F.R. § 679.4(k)(10)(iii)(B).

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>23</sup>

## ANALYSIS

The issue before me is whether Appellant has shown by a preponderance of the evidence that 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 and/or Western Gulf of Alaska.

Appellant does not contest that he harvested only 9.642 metric tons of Pacific cod in the Central Gulf of Alaska from January 1, 2002, until December 8, 2008. Rather, on appeal, Appellant argues unavoidable circumstances prevented him from harvesting at least ten metric tons of Pacific cod in the Pacific cod directory between January 1, 2002 and December 8, 2008 in the Central Gulf of Alaska.<sup>24</sup> First, Appellant's daughter was the victim of a serious crime causing Appellant to turn his focus away from fishing.<sup>25</sup> Second, Appellant argues a necessary engine replacement in his vessel, ██████████ ██████████ cost Appellant considerable time and resources, affording Appellant fewer opportunities to fish from January 1, 2002, through December 8, 2008.<sup>26</sup>

Although Appellant claims unavoidable circumstance thwarted his specific intent to operate a Pacific cod business in the Central and/or Western Gulf of Alaska region, there are no provisions in the applicable regulations allowing for an unavoidable circumstance claim in this fishing region.<sup>27</sup> I acknowledge Appellant's personal situation and the financial burden Appellant has shouldered to sustain his business. However, I am bound by the LLP regulations. Here, the meaning of the LLP regulations is clear—Appellant is required to have harvested at least ten metric tons of Pacific cod in the Central and/or Western Gulf of Alaska from January 1, 2002, until December 8, 2008, to be eligible for a Pacific cod endorsement.<sup>28</sup> As Appellant has not met that requirement, he is not eligible for a Pacific cod endorsement.

## CONCLUSIONS OF LAW

Appellant is not eligible for a Pacific cod endorsement under the basic requirements because he did not land ten metric tons of Pacific cod between January 1, 2002 and December 8, 2008. The IAD is consistent with the LLP regulations.

---

<sup>23</sup> 50 C.F.R. § 300.67(f)(5).

<sup>24</sup> Pleadings Tab, Letter from Appellant to OAA dated September 4, 2011.

<sup>25</sup> Pleadings Tab, Letter from Appellant to OAA dated September 4, 2011.

<sup>26</sup> Pleadings Tab, Letter from Appellant to OAA dated September 4, 2011.

<sup>27</sup> See 50 C.F.R. § 679.4.

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

