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

In re Application of	)	
	)	Appeal No. 11-0080
[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.[1]

This case comes before NAO based on a timely appeal filed by [redacted] (Appellant). Appellant appeals an Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management (RAM) program in the Alaska Regional office.[2] In the IAD, RAM denied Appellant a Western and/or Central Gulf of Alaska Pacific cod species, area, gear, and operation type endorsement (endorsement), under the License Limitation Program (LLP).[3]

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) to inform Appellant that under the new LLP regulations he would not be receiving an endorsement.[4] RAM informed Appellant in the Notice he had until May 27, 2011, to submit additional information or evidence to establish his eligibility for an endorsement.[5] On July 8, 2011, Appellant's wife responded to RAM's Notice on his behalf.[6] In the letter, Appellant's wife explained that although her office had received the letter in May 2011, at that time Appellant was "heading to the fishing grounds in the Bering Sea and did not return …until mid June." Other events, according to Appellant,

[1] 50 C.F.R. § 679.43
[2] Case File, Pleadings Tab, Appellant's appeal submission received September 19, 2011; Original File Tab, IAD dated July 19, 2011.
[3] Original File Tab, IAD dated July 19, 2011.
[4] 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.
[5] 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.
[6] Original File Tab, Letter from Appellant signed by his wife dated July 8, 2011.

also prevented him from responding sooner.[7] Appellant's wife attached to the letter copies of two fish tickets to illustrate deliveries in federally directed fishing areas.[8]

On July 19, 2011, RAM issued the IAD at issue in this appeal.[9] In the IAD, RAM denied Appellant's application for an endorsement.[10] RAM noted the Official Record does not show Appellant has sufficient pacific cod landings history to be eligible for an endorsement. RAM explained Appellant's landing history reflected in the Official Record was "14.356 metric tons (mt) of round pacific cod harvested with HAL [hook and line] gear in 2008 for the CG, and 10.973 mt in that same year for the WG." However, the regulations require at least 50 mt in Appellant's situation.[11] Although RAM declined to accept Appellant's late claim of July 8, 2011, RAM noted that even if it did accept the information on the fish tickets [10,758 pounds (4.879 mt) and 25,706 pounds (11.660 mt) landed],[12] that would not be sufficient to show Appellant met the requisite 50 mt landing history.

On March 7, 2011, NAO received Appellant's timely appeal of the IAD.[13] In the appeal, Appellant indicates he filed his appeal late because he was out to sea during the thirty-day evidentiary period.[14] Appellant further claims sometimes he operated as just a "Catcher," not a "Catcher/Processor." Appellant explains he did not want to change his permit status to "Catcher" because that would impede on his business model and decrease his ability to be more diversified with operations and markets. Appellant also did not want to compromise his Catcher/Processor operations in the Individual Fishing Quota fishery and other groundfish he harvests. He feels he is being penalized for the designation on his permit and now wants NMFS to change the designation to Catcher only.

Appellant further contends he met the requirements for an endorsement as a Catcher vessel. He states his operation is unique to the Alaska fleet inasmuch as his vessel can process, freeze and catch product simultaneously, and he would like this fact to be weighed in his favor for an endorsement. Appellant also requests an oral hearing. Appellant believes an oral hearing is necessary to explain his operation. He also would like to explain his qualifying history. Appellant wants to clarify how his catch history conflicts with the regulations governing endorsements. Appellant thinks an oral hearing would help him explain how the earlier LLP certificate meshed with other fisheries and his participation in harvesting pacific cod.

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[7] Original File Tab, Letter from Appellant signed by his wife dated July 8, 2011.
[8] Original File Tab, Letter from Appellant signed by his wife dated July 8, 2011.
[9] Original File Tab, IAD dated July 19, 2011.
[10] Original File Tab, IAD dated July 19, 2011.
[11] Original File Tab, IAD dated July 19, 2011.
[12] Conversions from pounds to mt available at http://www.france-property-and-information.com/metric_conversion_table.htm. 1 pound = .00045359237 metric tons.
[13] Pleadings File Tab, Appellants' type-written appeal letter received on September 19, 2011.
[14] Pleadings File Tab, Appellants' type-written appeal letter received on September 19, 2011.

On November 4, 2011, NAO acknowledged receipt of Appellant's appeal and provided Appellant until November 25, 2011 to supplement the record.[15] NAO received no additional documentation from Appellant.

Upon review of the case record including Appellant's appeal, I have determined the record contains sufficient information on which to reach a final judgment. There is no reason to hold a hearing to obtain oral testimony on the facts surrounding an unavoidable circumstance, since the LLP regulations do not include a provision for an unavoidable circumstances claim.[16] Appellant also has not provided a written statement raising genuine and substantial issues of adjudicative fact requiring an oral hearing.[17] Even if I assume all facts asserted by Appellant are true, as explained more fully in the Analysis section of this Decision, I am not authorized to waive provisions of the LLP regulations, including the deadline for filing a claim for an endorsement. I therefore am exercising my discretion to not hold an oral hearing and issue a decision based on the case record. Accordingly, I close the record and issue this Decision. [18]

ISSUES

At issue in this appeal is whether RAM correctly denied Appellant's application for an endorsement. To resolve this issue, I must evaluate the following:

Did Appellant establish by a preponderance of the evidence he filed his claim within the thirty-day evidentiary period specified in the regulations?

If the answer to the question is "no," I must uphold the IAD and conclude Appellant did not timely file his claim for an endorsement.

FINDINGS OF FACT

1. On April 27, 2011, RAM sent Appellant the Notice.[19]

2. In the Notice, RAM indicated Appellant had thirty-days or until May 27, 2011, to submit additional information.

3. On July 8, 2011, RAM received Appellant's response, which is included in the record of this appeal.[20]

4. On July 19, 2011, RAM issued Appellant the IAD at issue in this appeal.

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[15] Appeals Correspondence Tab, NAO letter dated November 4, 2011.
[16] Original File, IAD page 8.
[17] *See* 50 C.F.R. § 679.43 (f)
[18] *See* 50 C.F.R. § 679.43 (g) and (k).
[19] Original File.
[20] Original File.

PRINCIPLES OF LAW

Under the new LLP regulations, NMFS assigns a Pacific cod fishery endorsement to an LLP license based on landings in the Pacific cod fishery in the Gulf of Alaska. The Regional Administrator is required to specify by letter a thirty-day evidentiary period during which an applicant may provide additional information or evidence to amend or challenge the information in the official record. The applicant is limited to one thirty-day period. Additional information or evidence received after the thirty-day evidentiary period specified in the letter has expired will not be considered for purposes of the IAD.[21]

ANALYSIS

The regulations governing the LLP require applicants to respond to the Notice within a thirty-day window.[22] On April 27, 2011, RAM sent Appellant his Notice for filing a claim. In the Notice, RAM informed Appellant he could submit evidence by May 27, 2011. Appellant concedes his office personnel did receive the Notice timely. Thus, Appellant was on notice that he had received the Notice. Moreover, the applicable regulations do not provide an exception or equitable authority for NAO to waive the LLP regulations. In pertinent part the regulations provide: "Additional information or evidence received after the 30-day evidentiary period specified in the letter [Notice]…will not be considered…."[23] I conclude Appellant's claim was not filed in a timely manner and RAM correctly followed its regulations and properly denied Appellant's claim for an endorsement.

Like RAM, I also looked at the two fish tickets Appellant submitted in support of his claim. Even with those tickets. Appellant does not show a history of 50 mt. In the absence of the requisite history, Appellant is not eligible for an endorsement.

In making this Decision, I have carefully reviewed the entire case file. I acknowledge Appellant's concerns about the adverse affects this Decision will have on his operation, the uniqueness of his operation, particularly with respect to the size of his vessel and its functionality, and that when his permit was designated as a Catcher/Processor that was so that his business was flexible. However, I may not deviate from the regulations, and NAO does not have equitable power. Under the applicable regulations, a Catcher/Processor designee with hook and line gear needs a history of at least 50 mt landed between January 1, 2002 and December 8, 2008. Appellant does not have that history, and I am not authorized to change the designation on his permit from Cather/Processor to Catcher. Further, Appellant filed his claim beyond the deadline set by regulations.

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[21] 50 C.F.R. § 679.4(k)(10)(v)(2)(E).
[22] 50 C.F.R. §300.67(h)(1); 75 Fed. Reg. 1595 (January 12, 2010).
[23] 50 C.F.R. § 679.4(k)(10)(v)(2)(E).

CONCLUSIONS OF LAW

Appellant did not timely file his claim for an endorsement.

RAM correctly followed its regulations governing the LLP when it denied Appellant's claim for an endorsement.

ORDER

The IAD dated July 19, 2011 is upheld. This decision takes effect thirty days from the date issued, April 6, 2012,[24] 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) 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, 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 in support of the motion.

[redacted]

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Eileen G. Jones
Chief Administrative Judge

Date Issued: March 7, 2012

[24] 50 C.F.R. § 679.43(k) and (o).