

**NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
ALASKA REGIONAL OFFICE**

In re Application of

██████████
Appellant

)
)
)
)
)

Appeal No. 11-0080

ORDER REVERSING DECISION

**REGIONAL ADMINISTRATOR'S ORDER REVERSING THE DECISION
ISSUED BY THE NATIONAL APPEALS OFFICE IN THIS MATTER**

I have reviewed the National Appeals Office (NAO) Decision dated March 7, 2012, *In Re Application of* ██████████ Appeal No. 11-0080 (Decision), and subsequent Order Denying Motion for Reconsideration, dated May 9, 2012. I review the record in this appeal pursuant to 50 C.F.R. § 679.43(o).

Upon review of the record in this appeal, I conclude that, pursuant to 50 C.F.R. 679.4(k)(3)(ii)(c), Appellant requested a change in the vessel designation on his LLP license (██████████) from catcher/processor to catcher, that NOAA Fisheries should make that change and that, with that change in vessel designation, Appellant meets the eligibility requirement in 50 C.F.R. § 679.4(k)(10) to receive a Pacific cod endorsement for the Central Gulf and Western Gulf on ██████████

This appeal presents the following issue: does Appellant qualify to receive a Pacific cod endorsement for the Central Gulf and Western Gulf on ██████████?

Appellant is the license holder of License Limitation Program (LLP) Groundfish License ██████████. ██████████ currently has a vessel designation as catcher/processor vessel; area endorsements for Bering Sea, Central Gulf, Western Gulf and Southeast Outside; gear endorsements of non-trawl in all areas; and a maximum length overall (MLOA) of fifty-nine feet.¹

Effective April 21, 2011, if an LLP license holder wants to use an LLP license to conduct directed fishing for Pacific cod with non-trawl gear in the Central Gulf or Western Gulf, the LLP license must have a Pacific cod endorsement for the Central Gulf or the Western Gulf.² This new endorsement was the result of a recommendation by the North Pacific Fishery Management Council (Council) pursuant to the Magnuson-Stevens Fishery

¹ ██████████ (Issue Date, April 21, 2011), RAM Application file. The MLOA means that ██████████ may not be used on a vessel that has a length overall greater than 59 feet. 50 C.F.R. § 679.4(k)(3)(i)(A).

² Final Rule, 55 Fed. Reg. 15,826 (March 22, 2011).

Conservation and Management Act³ and regulations promulgated by NOAA Fisheries pursuant to that Act.⁴

The eligibility requirements for a Pacific cod endorsement are published in a table at 50 C.F.R. § 679.4(k)(10)(ii). The eligibility period for the new Pacific cod endorsement is the same for all LLP license holders: January 1, 2002, through December 8, 2008. The amount of Pacific cod that the LLP license holder must have harvested in that time period to meet the eligibility requirement is different based on the MLOA on the LLP license, based on whether the LLP license has a catcher vessel designation or a catcher/processor vessel designation and, in some instances, based on whether the harvests were with jig gear rather than hook-and-line gear or pot gear.⁵

If the LLP license has a catcher vessel designation, if the LLP license has an MLOA of less than sixty feet, and if the harvests were with hook-and-line gear, the license holder must have landed *10 metric tons* of Pacific cod in the Central Gulf to receive a Pacific cod endorsement for the Central Gulf⁶ and *10 metric tons* of Pacific cod in the Western Gulf to receive a Pacific cod endorsement for the Western Gulf.⁷

If the LLP license has a catcher/processor vessel designation, and the harvests were with hook-and-line gear, the license holder must have landed *50 metric tons* of Pacific cod in the Central Gulf to receive a Pacific cod endorsement for the Central Gulf⁸ and *50 metric tons* of Pacific cod in the Western Gulf to receive a Pacific cod endorsement for the Western Gulf.⁹

According to the official record and evidence produced by Appellant, Appellant landed at least 10 metric tons in the eligibility period with hook-and-line gear in the Central Gulf and the Western Gulf with [REDACTED].¹⁰ But according to the official record, which is not disputed by Appellant, he did not harvest 50 metric tons in the eligibility period with [REDACTED] in the Central Gulf or Western Gulf.

³ 16 U.S.C. § 1801 *et seq.*

⁴ Final Rule, 76 Fed. Reg. 15,826 (Mar. 22, 2011), codified primarily at 50 C.F.R. § 679.4(k)(10).

⁵ 50 C.F.R. § 679.4(k)(10)(ii)(A) – (P).

⁶ 50 C.F.R. § 679.4(k)(10)(ii)(A). All amounts must be legal landings of Pacific cod in the directed Pacific cod fishery.

⁷ 50 C.F.R. § 679.4(k)(10)(ii)(C).

⁸ 50 C.F.R. § 679.4(k)(10)(ii)(K).

⁹ 50 C.F.R. § 679.4(k)(10)(ii)(L). There is no different eligibility requirement for LLP licenses with a catcher/processor vessel designation based on the MLOA on the license.

¹⁰ Email from Tracy Buck, Supervisory Permit Specialist, to Jessica Gharrett, RAM Program Administrator (July 8, 2011); Letter from Appellant to RAM Program Administrator (July 8, 2011) with copies of two tickets.

Appellant's LLP License [REDACTED] currently has a catcher/processor vessel designation. If his eligibility for a Pacific cod endorsement is based on the eligibility amount for an LLP license with a catcher/processor designation, he will not receive a Pacific cod endorsement for either the Central Gulf or the Western Gulf on [REDACTED]. However, if his eligibility for a Pacific cod endorsement is based on the eligibility amount for an LLP license with a *catcher vessel designation*, he will receive a Pacific cod endorsement for the Central Gulf and the Western Gulf on [REDACTED].

Although [REDACTED] currently has a catcher/processor vessel designation, Appellant requested a change in that vessel designation to catcher vessel in his appeal letter on September 16, 2011.¹¹ In the Decision, the appellate officer stated that she was not authorized to change the designation on the permit from catcher/processor to catcher.¹² In the Order Denying Reconsideration, the appellate officer stated that "the new LLP regulations direct the agency to look at a permit holder's eligibility for an endorsement based on the vessel-designation on a business's permit."¹³

I conclude that, pursuant to federal regulation 50 C.F.R. § 679.4(k)(3)(ii)(C), Appellant may, at any time, change the vessel designation on [REDACTED] from catcher/processor to catcher vessel by requesting that change. Appellant has made that request.

The NOAA Fisheries regulation at 50 C.F.R. § 679.4(k)(3)(ii)(C) provides as follows:

(C) Changing a vessel designation. A person who holds a groundfish license or a crab species license with a catcher/processor vessel designation may, upon request to the Regional Administrator, have the license reissued with a catcher vessel designation. The vessel designation change to a catcher vessel will be permanent, and that license will be valid for only those activities specified in the definition of catcher vessel designation at § 679.2.

This provision was published in the original LLP rule in 1998, and has been unchanged since then.¹⁴ This provision does not limit when an LLP license holder can request the change. Moreover, this provision does not require the LLP license holder prove anything in order for NOAA Fisheries to change the vessel designation on the LLP license and reissue it.

¹¹ Letter from Appellant to NOAA Fisheries Service, NMFS, Office of Administrative Appeals (dated Sept. 13, 2011, received by fax, Sept. 16, 2011).

¹² Decision at 4.

¹³ Order Denying Reconsideration at 2 (May 9, 2012).

¹⁴ Final Rule, 63 Fed. Reg. 52,642, 52,654 (Oct. 1, 1998) adopting 50 C.F.R. § 679.4(i)(3)(ii)(C). The only change was renumbering the entire LLP rule from section 679.4(i) to section 679.4(k). Correcting Amendments, 63 Fed. Reg. 64,878 (Nov. 24, 1998). The LLP went into effect on January 1, 2000. Final Rule, 63 Fed. Reg. at 52,642.

The most likely reason why there are no additional eligibility requirements for making the change is that every LLP license that met the eligibility requirement for a catcher/processor vessel designation also met the requirement for a catcher vessel designation. When NOAA Fisheries initially issued LLP licenses, every LLP license was assigned either a catcher/processor vessel designation or a catcher vessel designation. A license was assigned a catcher/processor vessel designation if the original qualifying vessel – that is, the vessel whose fishing history was the basis for initial issuance of the LLP license – processed groundfish between January 1, 1994 through June 17, 1995 or, for certain licenses, January 1, 1995, through June 17, 1995.¹⁵ If the original qualifying vessel did not meet the criterion for a catcher/processor vessel designation, the resulting LLP license received a catcher vessel designation.¹⁶ Every LLP license that NOAA Fisheries issues with a catcher/processor vessel designation also allows the license holder to operate a vessel as a catcher vessel.¹⁷

The appellate officer correctly stated that the eligibility requirement depends on the vessel designation on the LLP license. The eligibility requirement in 50 C.F.R. § 679.4(k)(10)(ii) states that “[i]f a license holder’s license has a catcher vessel designation,” then NOAA Fisheries applies the eligibility requirement of 10 metric tons of Pacific cod landed from January 1, 2002 through December 8, 2008. But this regulation does not state that the LLP license has a catcher vessel designation as of a certain date, such as the ending date of the eligibility period, which was December 8, 2008; or the date that RAM sent Appellant the notice of its preliminary determination that he did not meet the eligibility requirements to receive a Pacific cod endorsement for the Central Gulf and Western Gulf on [REDACTED], which was April 27, 2011;¹⁸ or the date that the applicant filed his appeal, which was September 16, 2011.¹⁹ I see no reason to interpret the language that the license “has a catcher vessel designation” to eliminate Appellant’s ability to change the vessel designation on his LLP license after a certain date – in this matter, the date when Appellant filed his appeal.

¹⁵ 50 C.F.R. § 679.4(k)(3)(ii)(A)(1).

¹⁶ 50 C.F.R. § 679.4(k)(3)(ii)(B).

¹⁷ Appellant also has a Federal Fisheries Permit (FFP) for his vessel, [REDACTED], that has two operation categories: catcher and catcher/processor. [REDACTED] effective Jan. 28, 2008 to Dec. 31, 2008 (RAM Application File). The record does not show when Appellant made the landings that meet the eligibility requirement of 10 metric tons but Appellant states, and the record contains no evidence to the contrary, that his FFP has been endorsed for a catcher vessel and catcher/processor vessel for all periods when he made the qualifying landings. Letter of Appeal from Appellant to NMFS, Office of Administrative Appeals (Sept. 13, 2011); Letter asking for Reconsideration of Decision from Appellant to National Appeals Office (March 19, 2011).

¹⁸ Notice of Changes to the LLP Program, Notice of Preliminary Determination by NMFS, Notice of Opportunity to Challenge Preliminary Determination (April 27, 2011).

¹⁹ Letter of Appeal Letter from Appellant to NOAA Fisheries Service, NMFS, Office of Administrative Appeals (dated Sept. 13, 2011, received by fax, Sept. 16, 2011).

A contrary interpretation would undermine the primary purpose of the Pacific cod endorsement, which was to eliminate “latent licenses” from the Pacific cod fishery in the Central Gulf and Western Gulf.²⁰ Latent licenses are licenses that were not used at all in the Pacific cod fishery in the Central Gulf or Western Gulf in the eligibility period or were used at such a low level that the Council determined that the holders of these licenses were not active participants in the fishery. The Council was concerned that “as management measures are implemented for other fisheries that limit access to those fisheries, such as limited access privilege programs that allocate specific exclusive harvest privileges, latent LLP holders could enter fisheries such as the GOA [Gulf of Alaska] Pacific cod fixed gear fishery.”²¹ The Analysis of the Council’s Action noted “a large number of latent LLP licenses do exist, and their entry into the Pacific cod fishery would destabilize current fishery participants.”²²

Appellant’s license [REDACTED] was not a latent license. Appellant used [REDACTED] to land at least 10 metric tons of Pacific cod in both the Central Gulf and the Western Gulf between January 1, 2002, and December 8, 2008, meeting the eligibility requirement applicable to catcher vessels. Although the Council did not expressly consider Appellant’s situation, allowing Appellant to change the vessel designation on his LLP license from a catcher/processor to a catcher vessel fulfills the purpose of the Pacific cod endorsement for the Central Gulf and Western Gulf. It removes a catcher/processor vessel from the Pacific cod fishery in the Central Gulf and Western Gulf because the LLP license holder did not meet the minimum landing requirements that apply to a catcher/processor vessel, but allows the vessel to continue operating as a catcher vessel in the Pacific cod fishery in the Central Gulf and Western Gulf.

I note that the appellate officer also concluded that Appellant’s claim to a Pacific cod endorsement on [REDACTED] on any grounds was untimely because he did not submit evidence or argument to RAM on or before May 27, 2011,²³ the date for submitting evidence and argument contained in the “Notice of Changes to the LLP Program/Notice of Preliminary Determination and Notice of Opportunity to Challenge Preliminary Determination” that RAM sent to Appellant on April 27, 2011. The appellate officer relied on 50 C.F.R. § 679.4(k)(10)(v)(2)(E). That regulation provides as follows: “Additional information or evidence received after the 30-day evidentiary period specified in the letter has expired will not be considered *for purposes of the initial administrative determination (IAD)*.” I conclude that this regulation was not a basis for the appellate officer to decline to consider Appellant’s arguments or evidence on appeal.

²⁰ Proposed Rule, 75 Fed. Reg. 43,118, 43,120 – 43,124 (July 23, 2010); Final Rule, 76 Fed. Reg. 15,826, 15, 826 – 15,831 (March 22, 2011).

²¹ Proposed Rule, 75 Fed. Reg. at 43,120.

²² Proposed Rule, 75 Fed. Reg. at 43,120.

²³ Decision at 4 – 5.

The Restricted Access Management Program (RAM) has the authority to issue IADs. For purposes of issuing the IAD, RAM may decline to consider evidence submitted after the thirty-day period based on 50 C.F.R. § 679.4(k)(10)(v)(2)(E). Appellant filed a timely appeal of the denial of an assignment of a Pacific cod endorsement for the Central Gulf and the Western Gulf to [REDACTED]. The authority of the appellate officer is determined by the appeal regulation, 50 C.F.R. § 679.43. The appellate officer has authority to decide the issues stated in the appeal.²⁴ In his letter of appeal, Appellant requested a Pacific cod endorsement for the Central Gulf and the Western Gulf to [REDACTED] and specifically requested to change the vessel designation on [REDACTED] pursuant to 50 C.F.R. § 679.4(k)(3)(ii)(C).²⁵ The appellate officer had the authority to decide that request under 50 C.F.R. § 679.43.

For purposes of adjudicating this appeal, the appellate officer was not limited to the argument or evidence that Appellant submitted to RAM on or before May 27, 2011. If the appellate officer was limited to that evidence, that would turn the appeal into a review of a closed record. But pursuant to 50 C.F.R. § 679.43, on appeal, an appellant may submit additional evidence and argument into the record in support of his or her appeal. It is only when the appellate officer determines that the record is sufficient to render a decision that the appellate officer closes the record.²⁶

I reverse the Decision of the National Appeals Office in this appeal and remand this matter to RAM for further action consistent with this Order.

IT IS SO ORDERED.

[REDACTED]

6/6/12

for James W. Balsiger, Ph.D., Regional Administrator

Date

²⁴ 50 C.F.R. § 679.43(f) states in part: "The appellate officer will limit his/her review to the issues stated in the appeal; all issues not set out in the appeal will be waived." This regulation has not been interpreted to require that an applicant advance in his initial statement of appeal every legal theory in support of his appeal of an initial administration determination. *Cf. In re Application of* [REDACTED] Regional Administrator's Remand of the Decision Issued by the National Appeals Office on October 21, 2011 at 3, "The appeal regulations do not expressly preclude appellants from presenting a specific legal theory on appeal that was not presented in the application submitted to the Restricted Access Management division. Consistent with established policy, I decline to impose such a limitation."

²⁵ Letter from Appellant to NOAA Fisheries Service, NMFS, Office of Administrative Appeals (dated Sept. 13, 2011, received by fax, Sept. 16, 2011).

²⁶ 50 C.F.R. § 679.43(k) ("The appellate officer will close the record and issue a decision after determining there is sufficient information to render a decision on the record and that all procedural requirements have been met.")