



**1. Did RAM properly calculate the Appellant's 2002 halibut IFQ account for regulatory area 2C?**

The question of whether RAM properly calculated the Appellant's 2002 halibut IFQ account for regulatory area 2C depends on whether RAM correctly applied the so-called "underage carryover" provision.<sup>3</sup> Underage is the amount of a QS holder's annual IFQ allocation that was not fished during the season for which it was authorized. The underage provision reads as follows:

(e) Underages. Underages of up to 10 percent of a person's total annual IFQ account for a current fishing year will be added to that person's annual IFQ account in the year following determination of the underage. This underage adjustment to the annual IFQ allocation will be specific to IFQ species, IFQ regulatory area, and vessel category for which an IFQ is calculated, and will apply to any person to whom the affected IFQ is allocated in the year following determination of an underage.

In this case, no one disputes that during the 2001 fishing season,<sup>4</sup> Mr. Sarff fished all but 31 pounds of the area 2C halibut that he was authorized to harvest. Also, it is undisputed that the 31 pounds represents far less than 10 percent of Mr. Sarff's annual IFQ account or allocation for 2001.

When RAM approved the transfer of QS from Mr. Sarff to Ms. Coulter on January 23, 2002, it also approved the transfer of the 31 pounds, which RAM characterized as "the balance of the pounds remaining on his [Sarff's] 2001 IFQ permit."<sup>5</sup> RAM then issued to Ms. Coulter an IFQ permit for the 2001 fishing season, which indicated that she now had 31 "Transfers Lbs." or "Fishable IFQ Pounds."

On January 31, 2002, in accordance with IFQ regulations, RAM calculated Ms. Coulter's 2002 annual IFQ allocation as 3,787 pounds.<sup>6</sup> RAM adjusted the allocation by adding 3 pounds of underage, which represented 10 percent of the 31 pounds in Ms. Coulter's 2001 annual IFQ account.<sup>7</sup> On appeal, Ms. Coulter argues that RAM should have credited her 2002 account with

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<sup>3</sup>50 C.F.R. §679.40(e).

<sup>4</sup>The halibut season ran from March 15, 2001, to November 15, 2001. See International Pacific Halibut Commission news release (Jan. 26, 2001) and the IAD at 3.

<sup>5</sup>IAD at 4.

<sup>6</sup>See 50 C.F.R. §679.40(c)(1).

<sup>7</sup>IAD at 4.

the full 31 pounds of underage that she purchased from Mr. Sarff.<sup>8</sup>

Despite the unclear drafting of the underage provision, it is clear enough to me that it requires RAM to adjust a QS holder's annual IFQ allocation by adding underage from the previous fishing season, but the amount of pounds added cannot exceed 10 percent of the person's allocation for the previous year.

In applying the underage provision in this case, RAM started with the assumption that it should apply the 10 percent limit to the 31 pounds on Ms. Coulter's 2001 IFQ permit. I find that RAM erred, in the first instance, by issuing a 2001 IFQ permit to Ms. Coulter. RAM asserts that IFQ permits are issued and "viable" for a full twelve months, from 12 o'clock noon on January 31 of a given year until 12 o'clock noon of the following year.<sup>9</sup> Yet, by regulation, IFQ permits are effective only from the date of issuance until the end of the specified fishing year.<sup>10</sup> A fishing year, by definition, goes from January 1 through December 31.<sup>11</sup> RAM does not have the regulatory authority to issue an IFQ permit for a fishing year that has already ended.

RAM erred again by treating the 31 pounds that were transferred to Ms. Coulter as IFQ pounds that were fishable in 2001. It is clear that Ms. Coulter was not authorized to fish any IFQ pounds in 2001. The 31 pounds that remained in Mr. Sarff's IFQ account at the end of the fishing season (November 15, 2001) could no longer be fished in 2001, or in January 2002, by Mr. Sarff, by Ms. Coulter, or by anyone else. The 31 pounds could only be used as an underage adjustment.

The underage provision, like any regulation, should be construed in light of its purpose.<sup>12</sup> The purpose of the underage provision is "to encourage persons not to harvest IFQ species when they are very close to their annual IFQ account limit. Allowing unused IFQ to be placed in the following year's account is intended to provide adequate incentive to encourage this behavior."<sup>13</sup> If an underage adjustment or carryover is to provide any incentive to avoid exceeding the annual harvest limit, it makes sense only if the underage is measured against the account of persons who had the opportunity, or were legally authorized, to harvest the IFQ during the fishing year for which it was issued.

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<sup>8</sup>Sigurd Rutter, Notice of Appeal letter at 4 (received June 11, 2002).

<sup>9</sup>IAD at 4.

<sup>10</sup>50 C.F.R. §679.4(a)(1)(i)(B).

<sup>11</sup>50 C.F.R. §679.2 (definition of "fishing year").

<sup>12</sup>See, e.g., *Norton Sound Economic Development Corp.*, Appeal No. 03-0022 at 7 (Nov. 26, 2004).

<sup>13</sup>Proposed Rule, 60 Fed. Reg. 2,935, 2,936 (Jan. 12, 1995).

Ms. Coulter had no opportunity or legal authorization to harvest IFQ during the 2001 fishing year. The underage provision could not serve as an incentive to her to refrain from exceeding the 2001 harvest limit. Calculating Ms. Coulter's 2002 underage adjustment as only 10 percent of *her* 2001 IFQ account does not further the purpose of the underage provision. The purpose of the underage provision, in this case, was already achieved when Mr. Sarff stopped fishing 31 pounds short of his 2001 harvest limit. NMFS has no legitimate interest in reducing the underage carryover after it has already been established as 31 pounds. Ms. Coulter should receive the full benefit of the underage carryover that she purchased from Mr. Sarff after the 2001 season and fishing year had ended.

RAM emphasizes in the IAD that the timing of the QS transfer is critical in determining the amount of underage carryover available to Ms. Coulter.<sup>14</sup> RAM states that if only the parties had delayed their transfer application until after the January 31, 2002, calculation of the 2002 IFQ allocations, Mr. Sarff would have received a 31-pound underage adjustment to his 2002 IFQ account. Then he could have transferred all of his 2002 IFQ, including the full 31-pound underage, to Ms. Coulter. But because RAM approved the transfer eight days before calculating the 2002 IFQ allocations, RAM treated the 31 pounds in Ms. Coulter's hands as if she had held them in her IFQ account during the 2001 fishing season. RAM then applied the underage provision in a way that eliminated 90 percent of the benefit to Ms. Coulter.

I fail to see the purpose or the need for drastically reducing an underage carryover simply because it has been transferred, when there has been no intervening opportunity or authorization to fish the IFQ after the transfer and before the next annual IFQ allocation. Once the fishing season is over, unharvested IFQ remaining in an account cannot be transferred as fishable pounds for that season. They can only be transferred as underage. I can see no reason why a post-season transfer of underage should trigger a 90 percent reduction. The underage provision should be applied in a way that avoids such an absurd result. Neither the text of the underage provision, nor its regulatory history,<sup>15</sup> suggest that the North Pacific Fishery Management Council or the Secretary of Commerce intended for NMFS to apply the underage provision in a way that discourages transfers of QS during certain times of the year. Nor do I find anything in the regulations or the transfer application form that advises parties to a transfer that their timing will affect the transferability or usability of underages. Rather, I believe parties to a QS transfer reasonably expect that transferred underages will simply be held in abeyance and kept intact until they can be applied to the next annual IFQ allocation.

I conclude that RAM did not correctly apply the underage provision in this case. Therefore, I conclude that RAM did not properly calculate Ms. Coulter's 2002 halibut IFQ account for regulatory area 2C. RAM should have added 31 pounds of Pacific halibut underage to Appellant's IFQ account in 2002, instead of 3 pounds.

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<sup>14</sup>IAD at 4-5.

<sup>15</sup>Proposed Rule, 60 Fed. Reg. 2,935 (Jan. 12, 1995); Final Rule, 60 Fed. Reg. 22,307 (May 5, 1995).

## **2. Is the Appellant entitled to an adjustment of her 2005 IFQ account?**

Although I have decided that Ms. Coulter was entitled to have 31 pounds of underage added to her 2002 IFQ account, a question remains whether she (or her successor, Mr. Rutter) is entitled to have that underage adjustment made to her 2005 IFQ account for regulatory area 2C. The underage provision was designed to carry over to the next fishing year. It does not, on its face, provide for using the underage in subsequent fishing years.

In this case, because of the delay in reaching a decision, the opportunity to adjust Ms. Coulter's 2002 IFQ account has long passed. If this Decision becomes the final agency action on Ms. Coulter's claim to the 28 additional pounds, then the 2005 annual IFQ allocation will be the first opportunity for her to benefit from the final determination of her claim.

The IFQ regulations afford a right of appeal to any person whose interest is directly and adversely affected by an IAD.<sup>16</sup> Limiting the availability of the 2001 underage in this case to the 2002 fishing year would make Ms. Coulter's successful appeal a hollow victory, a right without a remedy. Because the regulation specifies that underages will be added to a person's annual IFQ account "in the year following determination of the underage," I conclude that this appeal Decision (if it becomes the final agency action) constitutes the determination of the underage, and therefore "the year following" would be the 2005 fishing year. Reading the underage provision any other way would effectively deprive an appellant of a right of appeal of an improper calculation of the underage carryover.

I conclude that the Appellant is entitled to an adjustment of her 2005 IFQ account by adding the 31 pounds of halibut underage carried over from the 2001 fishing year.

### **FINDINGS OF FACT**

1. RAM erred by issuing a 2001 IFQ permit to Ms. Coulter.
2. RAM erred by treating the 31 pounds that were transferred to Ms. Coulter as IFQ pounds that were fishable in 2001.
3. Ms. Coulter was not authorized to fish any IFQ pounds in 2001.
4. The 31 pounds that remained in Mr. Sarff's IFQ account at the end of the 2001 fishing season could no longer be fished in 2001, or in January 2002; they could only be used as an underage adjustment.
5. Ms. Coulter had no opportunity or legal authorization to harvest IFQ during the 2001 fishing year, so the underage provision could not serve as an incentive to her to refrain from exceeding

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<sup>16</sup>50 C.F.R. §679.43(b).

the 2001 harvest limit.

6. The purpose of the underage provision, in this case, was already achieved when Mr. Sarff stopped fishing 31 pounds short of his 2001 harvest limit.

7. NMFS has no legitimate interest in reducing underage carryover after it has already been established.

#### CONCLUSIONS OF LAW

1. Federal regulation 50 C.F.R. §679.40(e) requires RAM to adjust a QS holder's annual IFQ allocation by adding underage from the previous fishing season, but the amount of pounds added cannot exceed 10 percent of the person's allocation for the previous year.

2. IFQ permits are effective only from the date of issuance until the end of the specified fishing year.

3. A fishing year, by definition, goes from January 1 through December 31.

4. RAM does not have the regulatory authority to issue an IFQ permit for a fishing year that has already ended.

5. The underage provision, like any regulation, should be construed in light of its purpose.

6. Underage adjustments must be measured against the account of persons who had the opportunity, or were legally authorized, to harvest the IFQ during the fishing year for which it was issued.

7. Once the fishing season is over, unharvested IFQ remaining in an account cannot be transferred as fishable pounds for that season. They can only be transferred as underage.

8. The underage provision should be applied in a way that avoids an absurd result.

9. RAM did not properly calculate Ms. Coulter's 2002 halibut IFQ account for regulatory area 2C.

10. RAM should have added 31 pounds of Pacific halibut underage to Appellant's IFQ account in 2002, not 3 pounds.

11. The underage provision was designed to carry over to the next fishing year. It does not, on its face, provide for using the underage in subsequent fishing years.

12. This appeal Decision (if it becomes the final agency action) constitutes the determination of the underage, for purposes of 50 C.F.R. §679.40(e).

13. The Appellant is entitled to an adjustment of her 2005 IFQ account by adding the 31 pounds of halibut underage carried over from the 2001 fishing year.

#### DISPOSITION AND ORDER

The IAD that is the subject of this appeal is VACATED. RAM is ORDERED to adjust the Appellant's 2005 annual IFQ account for regulatory area 2C by adding the 31 pounds of halibut IFQ underage that were transferred to her in 2002. This Decision takes effect January 28, 2005, unless by that date the Regional Administrator orders review of the Decision.

The Appellant or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, January 10, 2005. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement in support of the motion.

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Edward H. Hein  
Chief Appeals Officer

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Randall J. Moen  
Appeals Officer