

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 02-0029
)
DEEP SEA FISHERIES, INC.,) DECISION
Appellant)
) April 26, 2004
_____)

STATEMENT OF THE CASE

The Appellant, Deep Sea Fisheries, Inc., filed a timely appeal of an Initial Administrative Determination on Reconsideration (Reconsideration IAD) issued on July 29, 2002, by the Restricted Access Management (RAM) Program. The Reconsideration IAD affirmed an Initial Administrative Determination (IAD), issued on October 24, 2001, in which RAM had revoked the Appellant's crab license #LLC1418 under the License Limitation Program (LLP). Deep Sea Fisheries can appeal the IAD because it directly and adversely affects its interest, as required by 50 C.F.R. §679.43(b).

The Appellant's license had derived from the fishing history of the F/V JODY ANN, which sank on February 25, 1994, while fishing *opilio* crab in the Bering Sea.¹ In the IAD, RAM revoked the license on the grounds that the F/V JODY ANN was not used to make a documented harvest of any BSAI crab during the Recent Participation Period (RPP), which extended from January 1, 1996 through February 7, 1998. In the Reconsideration IAD, RAM analyzed the Appellant's claim under so-called "Exemption 4."² RAM determined that the Appellant did not meet the requirements of the exemption and, therefore, that license #LLC1418 should still be revoked.

Deep Sea Fisheries did not submit an appeal brief. I review the IAD and Reconsideration IAD based on the facts and submissions already in the record.

ISSUE

Should the Appellant's LLP crab license #LLC1418 be revoked?

¹U.S. Coast Guard report of injury or death for F/V JODY ANN (Deep Sea Fisheries, Inc.'s submissions in RAM file). The Appellant states that the vessel sank in February 1995, but the USCG reports the date as February 25, 1994.

²50 C.F.R. §679.4(k)(5)(iv).

ANALYSIS

Federal regulation 50 C.F.R. §679.4(k)(5)(iii)(B)(3) provides:

(B) Exceptions to the RPP. A person does not need to meet the documented harvest requirements in paragraph (k)(5)(iii)(A) of this section if he or she deployed a vessel that met the documented harvest requirements in paragraph (k)(5)(i) of this section, if applicable, paragraph (k)(5)(ii) of this section, and:

* * *

(3) The vessel used to meet the document [sic] harvest requirements in paragraphs (k)(5)(i) and (k)(5)(ii) of this section was lost or destroyed, and he or she made a documented harvest of crab species any time during the period beginning after the vessel was lost or destroyed but before January 1, 2000.³

RAM does not dispute the facts stated by Deep Sea Fisheries.⁴ Among these facts are that John Boggs and Richard Hastings, the two owners of Deep Sea Fisheries, Inc., are also the two owners of Sanko Fisheries, LLC; that Sanko held a bareboat charter of the F/V ENDURANCE for the period September 30, 1997, through the completion of the 1998 spring *opilio* crab season; that the F/V ENDURANCE made a documented harvest of Bristol Bay red king crab on November 6, 1997, and another documented harvest of *opilio* snow crab in the Bering Sea on January 21, 1998; and that at the time of both harvests, the F/V ENDURANCE was fishing under the moratorium permit derived from the fishing history of the F/V JODY ANN.

Applying the exception in 50 C.F.R. §679.4(k)(5)(iii)(B)(3) to these facts, I find that the Appellant made a documented harvest of crab species after the F/V JODY ANN was lost or destroyed and before January 1, 2000. RAM, in issuing the LLP crab license #LLC1418 to Deep Sea Fisheries, has already determined that the Appellant deployed a vessel that met the documented harvest requirements of 50 C.F.R. §679.4(k)(5)(i) and (ii). Therefore, I conclude that Deep Sea Fisheries meets the requirements of 50 C.F.R. §679.4(k)(5)(iii)(B)(3) and is exempt from the Recent Participation Period requirements in 50 C.F.R. §679.4(k)(5)(iii)(A). Consequently, I conclude that LLP crab license #LLC1418 should not be revoked.

FINDINGS OF FACT

³Paragraph (3), and the omitted paragraphs (1) and (2), are alternative exemptions to the RPP documented harvest requirement, even though they lack a connecting “or,” which suggests that a person must meet the requirements of all three paragraphs to qualify for an exemption. It is clear from the preamble to the Final Rule that these are three separate exemptions. *See*, Final Rule, 66 Fed. Reg. 48,814 (September 24, 2001). Also, the heading of 50 C.F.R. §679.4(k)(5)(iii)(B) uses the plural “exceptions.”

⁴Reconsideration IAD, at 6.

1. The Appellant deployed a vessel that met the documented harvest requirements of 50 C.F.R. §679.4(k)(5)(i) and (ii).
2. The Appellant made a documented harvest of crab species after the F/V JODY ANN was lost or destroyed and before January 1, 2000.

CONCLUSIONS OF LAW

1. Deep Sea Fisheries meets the requirements of 50 C.F.R. §679.4(k)(5)(iii)(B)(3) and is exempt from the Recent Participation Period requirements in 50 C.F.R. §679.4(k)(5)(iii)(A).
2. LLP crab license #LLC1418 should not be revoked.

DISPOSITION AND ORDER

The IAD and Reconsideration IAD that are the subjects of this Decision are VACATED. RAM is ORDERED to reissue crab license #LLC1418 to Deep Sea Fisheries, Inc., as a transferable license. This Decision takes effect May 26, 2004, unless by that date the Regional Administrator orders review of this 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, May 6, 2004. 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, or points and authorities, in support of the motion.

Edward H. Hein
Chief Appeals Officer