

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

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| In re Application of |) | Appeal No. 02-0035 |
| |) | |
| KARIN LYNN FISHERIES, INC., |) | DECISION |
| Appellant |) | |
| |) | January 25, 2005 |
| _____ |) | |

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on July 25, 2002, that denied Appellant's application for a groundfish license under the North Pacific Groundfish and Crab License Limitation Program (LLP).¹ The IAD issued an interim LLP groundfish license (#LLG4587) to Appellant, subject to final agency action on Appellant's application.²

RAM issued another IAD on August 15, 2002, that determined that Appellant's LLP groundfish license could not be endorsed for Pacific cod with pot gear in the Bering Sea/Aleutian Islands (BSAI). Appellant applied for the LLP groundfish license and the Pacific cod endorsement based on the fishing history of the catcher vessel, the F/V KARIN LYNN (ADFG #00524).

Appellant filed a timely appeal of both IADs. Appellant can file an appeal because the IADs directly and adversely affect Appellant's interests. [50 C.F.R § 679.43(b)] I did not hold an oral hearing because there are no material facts in dispute. [50 C.F.R. § 679.43(g)(3)(i)³] The record contains sufficient information to render a decision, so I am closing the record and issuing this decision. [50 C.F.R. § 679.42(m)(4)]

ISSUES

1. Does Appellant qualify for an LLP groundfish license based on the fishing history of the F/V KARIN LYNN?
2. Does Appellant qualify for an LLP groundfish license because of adverse financial impacts?

¹The LLP is at 50 C.F.R. § 679, primarily 50 C.F.R. § 679.4(k), and can be found on the NMFS Alaska Region website, <http://www.fakr.noaa.gov/regs/summary.htm> .

²RAM also issued to the Appellant LLP crab license #LLC3332, based on the fishing history of the F/V KARIN LYNN. The Appellant's qualification for that license is not in dispute, but the license is not transferable until there is a final agency action regarding the Appellant's groundfish license.

³The regulation reads, in pertinent part: "The appellate officer may so order [that a hearing be conducted] only if the appeal demonstrates . . . (i) There is a genuine and substantial issue of adjudicative fact for resolution at a hearing."

ANALYSIS

1. Does Appellant qualify for an LLP groundfish license based on the fishing history of the F/V KARIN LYNN?

To qualify for an LLP groundfish license, Appellant must establish that the F/V KARIN LYNN made at least one documented harvest of groundfish in the BSAI area during the general qualification period (GQP) for the BSAI groundfish fisheries, January 1, 1988, through June 27, 1992;⁴ and at least one documented harvest of groundfish in the Bering Sea during the endorsement qualification period (EQP) for the Bering Sea groundfish fishery, January 1, 1992, through June 17, 1995.⁵

The NMFS official LLP record shows that the F/V KARIN LYNN made at least one documented harvest of groundfish in the Bering Sea during the GQP, but not during the EQP for that fishery. Citing one of our decisions,⁶ RAM determined that the Appellant's claimed harvests of Pacific cod, which were made from the F/V KARIN LYNN while engaged in the BSAI crab fisheries, and which the Appellant retained on board and used as crab bait, did not constitute commercial fishing of groundfish and, therefore, could not be credited as documented harvests for the purpose of qualifying for an LLP groundfish license or endorsement.⁷

Despite the denial of a groundfish license, the Appellant may continue to fish Pacific cod as it has done in the past.⁸ The chief effect of denying the groundfish license is that it prevents the Appellant from gaining entry into the BSAI commercial groundfish fisheries under the LLP.

The Appellant argues that a "documented harvest," as defined in NMFS regulations, does not require a commercial harvest. It only requires that the harvest be lawful and "recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting."⁹ The Appellant claims that the F/V KARIN LYNN harvested Pacific cod using pot gear in the Bering Sea between 1992 and 1995. The Appellant states that the harvests were recorded in the vessel's fishing logs,¹⁰ and were used exclusively aboard the vessel as bait for the

⁴50 C.F.R. § 679.4(k)(4)(i)(A)(1).

⁵50 C.F.R. § 679.4(k)(4)(ii)(B).

⁶Williard S. Ferris, Appeal No. 01-0004 (Jan. 18, 2002).

⁷IAD at 3-4.

⁸*See* 50 C.F.R. § 679.5(a)(1)(iii)(B)(1).

⁹50 C.F.R. § 679.2 (definition of "documented harvest").

¹⁰*See* the F/V KARIN LYNN's fishing logs (Nov. 17, 1992 - Feb. 12, 1995).

commercial fishing of crab.¹¹ The Appellant argues that these were lawful harvests and that the logs submitted on appeal were “the only recording or documenting that was required” in order to be in compliance with Federal and state commercial fishing regulations in effect at the time of the harvesting. Therefore, the Appellant argues, their Pacific cod harvests meet the definition of documented harvest and should be credited toward qualification for a groundfish license.¹²

The answer to this argument is that these Pacific cod harvests were not recorded *in compliance* with Federal commercial fishing regulations in effect at the time of the harvests. During the period of time these harvests are alleged to have been made, they were not subject to Federal groundfish recordkeeping and reporting requirements. This explains why NMFS has no record of the harvests. In addition, a Federal groundfish permit was not required for groundfish taken in pot gear by a vessel participating in an open crab season and used aboard the vessel for crab bait.¹³ NMFS exempted such harvests because it did not (and still does not) consider them to be the commercial fishing of groundfish.

As we stated in another decision, one must be engaged in the regulated activity (and lawfully so) to be considered in compliance with the applicable regulations. Where a person’s activity was exempted from commercial fishing regulations, the person was not engaged in commercial fishing.¹⁴ Thus, I find that, while the Appellant’s voluntary recording of the Pacific cod harvests in the logbooks is evidence that the harvests actually took place, it does not constitute *recording in compliance with Federal and state commercial fishing regulations in effect at the time of the harvests*. Therefore, I conclude that the Appellant’s Pacific cod harvests did not constitute documented harvests and cannot be credited toward qualification for an LLP groundfish license.

Even if the Appellant’s logbook entries did constitute recording in compliance with Federal regulations, this office has ruled in several decisions¹⁵ that, to be a documented harvest of groundfish under the LLP, the harvest must have resulted from lawful *commercial fishing*, although the word “commercial” does not appear in the definition of “documented harvest.”

In Williard S. Ferris,¹⁶ we stated:

¹¹Frederick M. “Tex” Showalter affidavit at 1 (Dec. 7, 1999).

¹²Appeal at 3.

¹³NMFS Alaska Region News Release 92-107 (Sep. 4, 1992) [Exhibit 1]. This exemption from Federal permit, recordkeeping, and reporting requirements is codified at 50 C.F.R. §679.5(a)(1)(iii)(B)(1).

¹⁴Prowler Partnership v. Samuelson, Decision on Reconsideration (Part II), Appeal No. 95-0084 at 21-22 (Sept. 29, 1997).

¹⁵*See, e.g.*, Williard S. Ferris, Appeal No. 01-0004 (Jan. 18, 2002); Paula J. Brogdon, Appeal No. 00-0011 (Feb. 26, 2002); Ronald J. Tennison, Appeal No. 00-0012 (April 5, 2002); Darjen, Inc., Appeal No. 00-0015 (Dec. 31, 2002); and Stephen L. Lovejoy, Appeal No. 02-0023 (Feb. 26, 2003).

¹⁶Appeal No. 01-0004 at 1-2 (Jan. 18, 2002) [some footnotes omitted].

A “documented harvest” is defined as a “lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at time of harvesting.”¹⁷ Implicit in this definition is the idea that the lawful harvest must be a lawful *commercial* harvest. Otherwise it would make no sense to require that the harvest be recorded in compliance with commercial fishing regulations. ...

This view -- that a documented harvest must result from commercial fishing is consistent with the LLP’s purpose of regulating the commercial fishing of LLP groundfish and crab.¹⁸ This view is also supported by our statement in another appeals decision that compliance with commercial fishing regulations requires that one be lawfully engaged in commercial fishing. Section 3 of the Magnuson-Stevens Fishery Conservation and Management Act defines “commercial fishing” as “fishing in which the fish harvested, either in whole or part, are intended to enter commerce or enter commerce through sale, barter, or trade.”¹⁹

In various decisions,²⁰ we have said that using one’s own catch for bait on one’s own vessel cannot be reasonably construed as a sale, barter, or trade, as envisioned by the Magnuson-Stevens Fishery Conservation and Management Act.²¹ Nonetheless, the Appellant argues that its alleged harvests of Pacific cod for crab bait do constitute commercial fishing under the Magnuson-Stevens Act. The Appellant’s argument relies on the definition of “fishing” under the Act:

The term ‘fishing’ means -- (A) the catching, taking, or harvesting of fish; (B) the attempted catching, taking, or harvesting of fish; (C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or **(D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C).** Such term does not include any scientific research activity which is conducted by a scientific research vessel. [emphasis added]²²

Using this definition of “fishing,” the Appellant would have me read the definition of “commercial fishing” as follows:

(4) The term “commercial fishing” means **any operations at sea in support of,**

¹⁷50 C.F.R § 679.2 (definition of “documented harvest”).

¹⁸50 C.F.R. § 679.1(j).

¹⁹16 U.S.C. § 1802 (4) (1994).

²⁰See, e.g., Paula J. Brogdon, Appeal No. 00-0011 at 5 (Feb. 26, 2002).

²¹16 U.S.C. § 1801 - 1883.

²²16 U.S.C. § 1802 (15).

or in preparation for, fishing in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter or trade.

The Appellant reasons that because the crab harvests were clearly commercial harvests, and the Pacific cod harvests used for bait supported that commercial fishing, then the Pacific cod harvests themselves constituted commercial fishing.²³

It is not disputed that the Appellant's crab harvests constituted commercial fishing. It is also true that operations at sea in support of harvesting fish can, in themselves, constitute fishing. But the question in this case is whether the Appellant engaged in the commercial fishing of groundfish, not the commercial fishing of crab, for the Appellant is seeking an LLP groundfish license, not an LLP crab license. Harvesting Pacific cod for one's own use as bait in support of commercial crab fishing could only be considered part of the commercial *crab* fishing operation. It would not constitute the commercial fishing of *groundfish*, since the Pacific cod were not intended to be, nor were they actually, sold, bartered, or traded.

I conclude that the Appellant's claimed harvests of Pacific cod were not *commercial* harvests of Pacific cod. Since the Appellant did not produce any other evidence of groundfish harvests made by the F/V KARIN LYNN during the EQP for the Bering Sea groundfish fishery, I conclude that the F/V KARIN LYNN did not make any documented harvests of Pacific cod during the EQP for the Bering Sea groundfish fishery. I conclude, therefore, that the Appellant does not qualify for an LLP groundfish license based on the fishing history of the F/V KARIN LYNN.

2. Does Appellant qualify for an LLP groundfish license because of adverse financial impacts?

Appellant further argues that the F/V KARIN LYNN has been fishing for Pacific cod in Alaska since the vessel was built in 1978, and that Appellant and crew will be adversely affected if the Appellant does not qualify for an LLP groundfish license. Such a direct and adverse effect on its interests gave the Appellant a basis for filing this appeal, but does not in itself entitle the Appellant to relief on appeal. The LLP regulations do not provide for a financial hardship exception to the harvest requirements for an LLP groundfish license, and I do not have the authority to create an exception. Therefore, Appellant cannot qualify for an LLP groundfish license based on adverse financial impacts.

²³Appeal at 5.

Appellant's Pacific cod gear endorsement claim

Because the Appellant does not qualify for an LLP groundfish license in this case, the question of whether the Appellant qualifies for a BSAI Pacific cod pot gear endorsement on that license is moot. It appears on the merits, however, that the license would not be eligible for a Pacific cod pot gear endorsement.²⁴ Nonetheless, the Appellant does not need an LLP groundfish license or a Pacific cod gear endorsement to harvest Pacific cod for personal use bait.²⁵

FINDINGS OF FACT

1. The Pacific cod harvested by the F/V KARIN LYNN during the EQP for the Bering Sea fishery were not recorded in compliance with Federal commercial fishing regulations in effect at the time of the harvests.
2. The Pacific cod harvested by the F/V KARIN LYNN and used by the Appellant exclusively as bait on the same vessel were not intended to be, nor were they actually, sold, bartered, or traded.
3. The LLP regulations do not provide for a financial hardship exception to the harvest requirements for an LLP groundfish license, and an Appeals Officer does not have the authority to create an exception.
4. The Appellant did not produce any other evidence of groundfish harvests made by the F/V KARIN LYNN during the EQP for the Bering Sea groundfish fishery.

CONCLUSIONS OF LAW

1. The Pacific cod harvested by the F/V KARIN LYNN during the EQP for the Bering Sea fishery did not constitute documented harvests because they were not recorded in compliance with Federal and state commercial fishing regulations in effect at the time of the harvests.
2. The Pacific cod harvested by the F/V KARIN LYNN during the EQP for the Bering Sea fishery did not constitute documented harvests because they were not commercially harvested.
3. The Appellant does not qualify for an LLP groundfish license based on the fishing history of the F/V KARIN LYNN.

²⁴The NMFS official LLP record and the record on appeal indicate that the F/V KARIN LYNN did not harvest at least 100,000 pounds of Pacific cod with pot gear in the BSAI in each of any two years between 1995 and 1999. For the requirements for a BSAI Pacific cod pot gear endorsement, *see* 50 C.F.R. § 679.4(k)(9)(ii)(B). Furthermore, the Pacific cod harvested for personal bait use does not count toward eligibility for a Pacific cod endorsement. 50 C.F.R. § 679.4(k)(9)(iii)(C).

²⁵*See* 50 C.F.R. § 679.4(k)(9)(iv)(C).

4. The Appellant cannot qualify for an LLP groundfish license based on adverse financial impacts.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on February 24, 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, February 4, 2005, the tenth day after this Decision. 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.

Randall J. Moen
Appeals Officer