

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 02-0038
)
PAVLOF, Inc.,) DECISION
Appellant)
) July 8, 2004
_____)

STATEMENT OF THE CASE

Pavlof, Inc., (Pavlof) appeals an Initial Administrative Determination (IAD) by the Restrictive Access Management Program (RAM) issued under the North Pacific Groundfish and Crab License Limitation Program (LLP) concerning a Bering Sea/Aleutian Islands (BSAI) Pacific cod endorsement.¹ Pavlof can appeal the IAD because it directly and adversely affects Pavlof's interest, as required by 50 C.F.R. § 679.43(b). The record provides sufficient information to determine Pavlof's appeal, as required by 50 C.F.R. § 679.43(g)(2).

The IAD concluded that Pavlof met the requirements for a BSAI Pacific cod *catcher vessel* pot gear endorsement on its LLP license (LLG1739) but not a BSAI Pacific cod *catcher/processor* pot gear endorsement. The IAD concluded that Pavlof did not meet the requirements for the catcher/processor endorsement because, according to the official LLP record, Pavlof had not harvested 300,000 pounds of Pacific cod in the BSAI Pacific cod directed fishery from the F/V PAVLOF (ADFG 37374) in each of any two years 1995 through 1998.

ISSUE

Does Pavlof, Inc., qualify for a BSAI Pacific cod *catcher/processor* pot gear endorsement on LLP license LLG1739?

ANALYSIS

To qualify for a BSAI Pacific cod *catcher/processor* pot gear endorsement, Pavlof must show that the F/V PAVLOF harvested **300,000 pounds** (or more) of Pacific cod in the BSAI Pacific cod directed fishery with pot or jig gear in each of any two of the years 1995, 1996, 1997, and 1998.² The IAD concluded that Pavlof did not meet that requirement.

¹ IAD (Aug. 14, 2003). The LLP is located in 50 C.F.R. § 679, primarily 50 C.F.R. § 679.2 (definitions) and 50 C.F.R. § 679.4(k)(license requirements). The BSAI Pacific cod gear/species endorsement is at 50 C.F.R. § 679.4(k)(9). The LLP regulations are on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/regs/summary.htm>.

² 50 C.F.R. § 679.4(k)(9)(B) & (D). This requirement has three exceptions, none of which affect this appeal. First, Pavlof could use BSAI Pacific cod harvests from another vessel if it owned the

The IAD concluded that Pavlof did meet the requirement for a BSAI Pacific cod *catcher vessel* pot gear endorsement, which only requires that Pavlof have harvested **100,000** pounds of Pacific cod with pot or jig gear in the BSAI Pacific cod directed fishery in each of any two of the years 1995, 1996, 1997 and 1998. But Pavlof seeks to operate in the BSAI Pacific cod directed fishery as a catcher/processor.

A. The criterion for whether a harvest is in the BSAI Pacific cod directed fishery.

Since a licenseholder only gets credit toward the eligibility amounts for harvests within the BSAI Pacific cod directed fishery,³ RAM had to decide whether each harvest was within the BSAI Pacific cod directed fishery. Neither the BSAI Pacific cod regulation itself nor any source in the regulatory history specifies a criterion for determining whether a harvest is in the BSAI Pacific cod directed fishery,⁴ although the fishery regulations define directed fishing generally.⁵

The documented harvest data in the official LLP derives from two sources: State of Alaska fish tickets and federal Weekly Production Reports (WPRs).⁶ In determining whether a harvest was made in the BSAI Pacific cod directed fishery, RAM used a 50% presumptive rule: it presumed that BSAI Pacific cod reported on a fish ticket or Weekly Producton Report was harvested in the directed fishery if 50% or more of the catch on the fish ticket or WPR was BSAI Pacific cod. RAM stated that it used this rule because this is what the staff of the North Pacific Fishery

endorsement-qualifying fishing history of the other vessel at the same time it owned the fishing history of the F/V PAVLOF. 50 C.F.R. § 679.4(k)(9)(iii)(F)(2). Second, a licenseholder can receive a BSAI Pacific cod endorsement if it meets the requirements of the hardship/unavoidable circumstances provision. 50 C.F.R. § 679.4(k)(9)(v)(B). Third, a legal landing of BSAI Pacific cod for commercial bait counts toward eligibility even if not in the BSAI Pacific cod directed fishery. 50 C.F.R. § 679.4(k)(9)(iii)(D). Since I conclude Pavlof made the requisite harvests of BSAI Pacific cod applying RAM's criteria for whether a harvest is in the BSAI Pacific cod directed fishery, Pavlof need not claim harvests from another vessel, unavoidable circumstances or bait harvests-not-in-the-directed-fishery.

³ 50 C.R.F. § 679.4(k)(9)(iii)(G).

⁴ I examined the minutes of Council meetings; minutes of the Council's Advisory Panel meetings; the BSAI Groundfish Fishery Management Plan (FMP); the Environmental Assessment (EA) for Amendment 67 to the BSAI Groundfish FMP, which adopted the BSAI Pacific cod gear endorsement; the proposed rule for the BSAI Pacific cod gear endorsement, Proposed Rule, 66 Fed. Reg. 49,908 (2001); and the final rule, Final Rule, 67 Fed. Reg. 18129 (2002). The minutes, the FMP and the EA are available on the Council's website, <http://www.fakr.noaa.gov/npfmc/default.htm>, or from the Council.

⁵ Directed fishing, as defined in 50 C.F.R. § 679.2, refers to the maximum retainable amount for that species as calculated in 50 C.F.R. § 679.20, which in turn refers to Table 11 to Part 679.

⁶ Supplementary Information, Final Rule, 64 Fed. Reg. 42,826, 42,826 (1999). NMFS also consults State of Alaska processor annual reports and its own observer data. *Id.*

Management Council used when it analyzed the BSAI Pacific cod regulation for the Council.⁷

I need not decide whether this 50% presumptive rule is required, or authorized, by the regulations since Pavlof receives the endorsement if NMFS applies the 50% rule or any less percentage for defining whether a harvest was in the BSAI Pacific cod directed fishery.

B. BSAI Pacific cod pot gear harvests from the F/V PAVLOF in 1995.

On appeal, Pavlof submitted a Daily Cumulative Production Log Summary, and copies of the logs, from the F/V PAVLOF for 1995.⁸ Pavlof's logs showed that the F/V PAVLOF harvested 929,798.23 pounds of BSAI Pacific cod with pot gear in 1995.

I asked RAM for the fishing history of the F/V PAVLOF for BSAI Pacific cod in 1995, as contained in the official LLP record. RAM provided the fishing history of the F/V PAVLOF for BSAI Pacific cod, as reported in fish tickets and WPRs. Neither source showed any harvests from the F/V PAVLOF in 1995.

RAM indicated that its records for 1995 were incomplete and referred me to the Sustainable Fisheries Division (SF), NMFS Alaska Region for 1995 data.⁹ The SF data showed the F/V PAVLOF harvested approximately 1.3 million pounds of BSAI Pacific cod in 1995.¹⁰ After reviewing the SF data, RAM agreed that Pavlof qualifies for the BSAI Pacific cod catcher/processor pot gear endorsement.¹¹

I therefore find that Pavlof harvested over 300,000 pounds of Pacific cod in the BSAI in 1995. I conclude that the official LLP record should be amended to contain the documented harvests made from the F/V PAVLOF in 1995 as contained in the Weekly Production Report database of

⁷ Response to Order to RAM (June 28, 2004).

⁸ Letter from Mundt MacGregor LLP to Office of Administrative Appeals (Oct. 15, 2002). It is not clear whether Pavlof received a preliminary notice from RAM that RAM did not believe Pavlof met the requirements for a BSAI catcher/processor pot gear endorsement. The IAD stated that RAM sent a notice but the RAM file provided to this Office did not have a copy and Pavlof did not have a copy. Memorandum to File from Mary Alice McKeen (June 30, 2004).

⁹ Memorandum (e-mail) from Mukhya Khalsa, RAM Computer Specialist, to Mary Alice McKeen (May 20, 2004); Memorandum (e-mail) from Tracy Buck, RAM Permit Operations Manager, to Mary Alice McKeen (June 7, 2004).

¹⁰ The exact number was 596.12 metric tons or 1,314,220 pounds.

¹¹ Response to Order to RAM (June 28, 2004).

the Sustainable Fisheries Division.¹²

C. BSAI Pacific cod pot gear harvests from the F/V PAVLOF in 1996.

All four sources of data agree that the F/V PAVLOF harvested over 300,000 pounds of BSAI Pacific cod in 1996:

Pavlof's Daily Cumulative Production Logs:	308,904 pounds
RAM's fish ticket database:	366,687 pounds ¹³
RAM's WPR database:	1,039,369 pounds (471.45 metric tons)
SF's WPR database:	828,232 pounds (375.68 metric tons)

I therefore find that the F/V PAVLOF harvested over 300,000 pounds of BSAI Pacific cod with pot gear in 1996. Since the F/V PAVLOF harvested 300,000 pounds of BSAI Pacific cod with pot gear in 1995 and 1996, I conclude that Pavlof qualifies for a BSAI catcher/processor pot gear endorsement on LLP license LLG1739.

FINDINGS OF FACT

1. The F/V PAVLOF harvested 300,000 pounds of Pacific cod in the BSAI with pot gear in 1995.
2. The F/V PAVLOF harvested 300,000 pounds of Pacific cod in the BSAI with pot gear in 1996.

CONCLUSIONS OF LAW

1. Pavlof, Inc., qualifies for a BSAI Pacific cod catcher/processor pot gear endorsement on LLP license LLG1739.
2. The official LLP record should be amended to contain documented harvests made from the F/V PAVLOF in 1995 in the Weekly Production Report database maintained by the Sustainable Fisheries Division.

¹² 50 C.F.R. § 679.4(k)(6)(vi) (“If the Regional Administrator determines that the additional information or evidence meets the applicant’s burden of proving that the inconsistent claims in his or her application is correct, the official LLP record will be amended and the information will be used in determining whether the applicant is eligible for a license.”)

¹³ This Office totaled the pounds from the RAM and SF printouts. I include these numbers to show that the totals exceed 300,000 pounds. Some of the pounds in the RAM fish ticket and WPR databases may overlap.

DISPOSITION AND ORDER

The IAD that is the subject of this appeal is VACATED and RAM is ORDERED to amend the official LLP record for the F/V PAVLOF to reflect the documented harvests made from the F/V PAVLOF in 1995 in the Weekly Production Report database maintained by the Sustainable Fisheries Division. This decision takes effect on August 8, 2004, unless by that date the Regional Administrator orders review of this decision.

Pavlof, Inc., 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, July 19, 2004. A motion for reconsideration must be in writing, must specify one or more material matters of fact or law that the appeals officer overlooked or misunderstood and must be accompanied by a written statement in support of the motion.

Mary Alice McKeen
Appeals Officer