

Islands endorsements in either the general qualification period [GQP] or endorsement qualification period [EQP]. MGF states that it caught Pacific cod in 1991 and 1993 and used it for crab bait. These harvests are not commercial fishing because they did not involve a transaction between two entities. Therefore, these harvests cannot be the basis for MGF to receive an LLP commercial fishing license.

Second, MGF is not eligible for an LLP groundfish license with Bering Sea and Aleutian Islands endorsements under the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), because MGF did not make the harvests required by the regulation: a groundfish harvest between January 1, 1988 and February 9, 1992 and, for the Aleutian Islands endorsement, a groundfish harvest in the Aleutian Islands before June 17, 1995 and, for the Bering Sea endorsement, a groundfish harvest in the Bering Sea before June 17, 1995.

Third, MGF is not eligible for an LLP groundfish license based on Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a). To receive a license under the Rehabilitation Act, an applicant must prove that, if NMFS made a reasonable accommodation for Mr. Stewart's disability, MGF would receive an LLP groundfish license with Bering Sea and Aleutian Islands endorsements.

MGF proposes, as a reasonable accommodation, that an applicant should receive an LLP license, if the applicant can prove that, but for a disability, the applicant would have made the harvests necessary for the LLP license sought by the applicant. This is not a reasonable modification of the LLP because it waives an essential requirement of the LLP: ownership of a vessel which made the harvests required for an LLP groundfish license with Bering Sea and Aleutian Islands endorsements either by the standard criteria for this license at 50 C.F.R. § 679.4(k)(4)(i) or the unavoidable circumstance criteria at 50 C.F.R. § 679.4(k)(8)(iv).

ISSUES

1. Did MGF make the documented harvests required for an LLP groundfish license with Bering Sea and Aleutian Islands endorsements in 50 C.F.R. § 679.4(k)(4)?
2. Did MGF make the documented harvests required for an LLP groundfish license with Bering Sea and Aleutian Islands endorsements in the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv)?
3. Has MGF shown it is eligible for an LLP groundfish license with Bering Sea and Aleutian Islands endorsements pursuant to the Rehabilitation Act of 1973, 29 U.S.C. 794(a)?

ANALYSIS

1. Did MGF make the documented harvests required for an LLP groundfish license with Bering Sea and Aleutian Islands endorsements in 50 C.F.R. § 679.4(k)(4)? No.

To receive an LLP license, an applicant must be an “eligible applicant.”² Federal regulation 50 C.F.R. § 679.2 defines “eligible applicant” as follows:

Eligible applicant means (for purposes of the LLP program) a qualified person who submitted an application during the application period announced by NMFS and:

(1) **For a groundfish license or crab species license, who owned a vessel on June 17, 1995, from which the minimum number of harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5), unless the fishing history of that vessel was transferred in conformance with the provisions in paragraph (2) of this definition; or**

(2) For a groundfish license or crab species license, to whom the fishing history of a vessel from which the minimum number of documented harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5) has been transferred or retained by the express terms of a written contract that clearly and unambiguously provides that the qualifications for a license under the LLP have been transferred or retained; or

(3) [applies only to an LLP crab license with a Norton Sound red and blue king endorsement] . . . ;or

(4) For a scallop license, who qualified for a scallop license as specified at § 679.4(g)(2) of this part; or

(5) **Who is an individual that can demonstrate eligibility pursuant to the provisions of the Rehabilitation Act of 1973 at 29 U.S.C. 794(a).**[emphasis added]

For an LLP crab or groundfish license, the “qualifying periods” are a general qualification period [GQP] and an endorsement qualification period [EQP]. According to the official LLP record, MGF meets the GQP and the EQP requirements for an LLP crab license based on the fishing history of the F/V POLAR LADY.

The official LLP record is information prepared by the Regional Administrator for the NMFS Alaska Region on vessels that participated during the qualifying periods for the LLP.³ NMFS

² 50 C.F.R. § 679.4(k)(4)(groundfish license); 50 C.F.R. § 679.4(k)(5)(crab license).

³ 50 C.F.R. § 679.2 (definition of official LLP record).

based the official LLP record on State of Alaska fish tickets and federal Weekly Production Reports.⁴ The official LLP record is presumed to be correct. If the applicant's claim differs from the official LLP record, the applicant has the burden of proving that the applicant's claim, rather than the official LLP record, is correct.⁵

According to the official LLP record, the F/V POLAR LADY did not make any documented harvests of groundfish in the Aleutian Islands from 1988 through 1999, the period covered by the official LLP record.⁶ According to the official LLP record, the F/V POLAR LADY did not harvest groundfish in the Bering Sea from January 1, 1988 through April 7, 1999.⁷ On April 8, 1999, it harvested approximately 6,000 pounds of Pacific cod in the Bering Sea and it harvested a total of approximately 400,000 pounds of groundfish in the Bering Sea in 1999.⁸

A. Does MGF meet the GQP requirement for an LLP groundfish license? No.

For an LLP groundfish license, the basic general qualification period requirement is one harvest of license limitation groundfish between January 1, 1988 and June 27, 1992.⁹ According to the official LLP record, the F/V POLAR LADY did not make such a harvest.

The alternative GQP requirement for an LLP groundfish license is for crab vessels that participated in the general qualification period under the Vessel Moratorium Program [VMP], the predecessor of the LLP, and crossed over or harvested groundfish in the endorsement qualification period under the VMP.¹⁰ To qualify under the "crossover" provision for an LLP

⁴ Final Rule, 64 Fed. Reg. 42,826, 42,826 (1999). NMFS also relied on processor annual reports and observer reports. *Id.*

⁵ 50 C.F.R. § 679.4(k)(6)(v).

⁶ *Order Stating Contents of the Official LLP Record for the Fishing History of the F/V POLAR LADY* (Oct. 29, 2004). The Order gave MGF the opportunity to object to the description of the official LLP record. MGF lodged no objection.

⁷ The official LLP record shows a harvest of 2,000 pounds of Pacific cod in October 1997, and 2,500 pounds of Pacific cod in October 1998, both in the Bering Sea, but the delivery code was "whole fish, retained for bait, not sold." To count toward an LLP license, a harvest must be the result of commercial fishing. Fish retained for bait and not sold is *not* commercial fishing. *See* pages 5 - 6 *infra*.

⁸ The vessel also harvested 1,803 pounds of groundfish in the Central Gulf in November 1999.

⁹ 50 C.F.R. § 679.4(k)(4)(i)(A)(1)&(B)(1)A. The difference between *license limitation groundfish* and *groundfish* is small and has no significance for this appeal. 50 C.F.R. § 679.2. Another way to meet the GQP applies only to vessels less than 60 feet. 50 C.F.R. § 679.4(k)(4)(A)(2)&(B)(2).

¹⁰ Final Rule, 60 Fed. Reg. 40,763 (1995). The VMP was eliminated from federal regulation after the LLP came into effect. Final Rule, 65 Fed. Reg. 45,316 (2000). For a commentary on the LLP

groundfish license, a vessel had to harvest [1] LLP crab between January 1, 1988 and February 9, 1992; [2] license limitation groundfish between January 1, 1988 and June 17, 1995; and [3] groundfish between February 10, 1992 and December 11, 1994.¹¹

The F/V POLAR LADY easily meets the requirement for a crab harvest. Between January 1, 1988 and February 9, 1992, it harvested approximately 3.9 million pounds of LLP crab.¹² Between January 1, 1988 and June 17, 1995, it harvested approximately 6.4 million pounds of LLP crab.¹³ But the F/V POLAR LADY made no documented harvests of groundfish between January 1, 1988 and June 17, 1995.¹⁴ It was a crab vessel but it did not cross over into groundfish in the special extended GQP for crab vessels.

MGF argues that, even though the official LLP record shows no groundfish harvests in that time period, it harvested Pacific cod in 1991 and 1993. MGF offers handwritten documents that it states are lists of pots that Mr. Stewart set from the F/V POLAR LADY in 1991 and 1993 to catch cod for crab bait.¹⁵ Gary Stewart is an owner and principal of MGF Fisheries and, when he was not incapacitated by illness, operated the vessel. I assume that MGF set cod pots for crab bait, caught cod and used it for bait in 1991 and 1993.

Since it is quite common for crab vessels to catch Pacific cod for crab bait, this issue has arisen in several appeals. This Office concluded that Pacific cod caught and used by an applicant for crab bait may not count toward an LLP groundfish license because the harvests were not the result of commercial fishing.¹⁶ The basis for these decisions is that the Magnuson-Stevens

“crossover” provision, see the final LLP Rule. 63 Fed. Reg. 52,642, 52,643 (1998). *See also Magne Nes*, Appeal No. 02-0044 at 4 - 5 (March 5, 2004) (NMFS withdrew broad crossover provisions in original proposed VMP rule as violating the Magnuson-Stevens Act).

¹¹ 50 C.F.R. § 679.4(k)(4)(i)(A)(3) & (B)(3); 50 C.F.R. § 679.4(k)(4)(iv); 50 C.F.R. § 679.4(k)(5)(v). LLP crab are BSAI king or Tanner crab. 50 C.F.R. § 679.2.

¹² *Order Stating Contents of the Official LLP Record for the Fishing History of the F/V POLAR LADY* (Oct. 29, 2004).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Exhibit A; Exhibit B. I assume that MGF could authenticate the documents. The documents are very rough: they are handwritten, do not mention the F/V POLAR LADY, have many items crossed out, have unclear dates and do not state the reporting area where the cod was caught.

¹⁶ *Willard S. Ferris*, Appeal No. 01-0004 (Jan.18, 2002); *Paula 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). *See Norquest Seafoods, Inc.*, Appeal No. 02-0048 at 5 - 8 (Oct. 23, 2004) (personal use bait groundfish harvests do not satisfy hardship provision in Pacific cod endorsement regulation). All decision of this Office are available on the NMFS Alaska Region website,

Fishery Conservation and Management Act regulates commercial fishing.¹⁷ The LLP, adopted pursuant to the Act, regulates commercial fishing. Commercial fishing must involve commerce and that requires a commercial transaction between two parties. If an applicant catches fish and uses it for bait, that is not a commercial transaction. The applicant is therefore not engaged in commercial fishing and may not receive an LLP license based on this fishing.¹⁸

The North Pacific Fishery Management Council [Council] and NMFS have taken action that supports this conclusion. When the Council and NMFS adopted a Pacific cod species/gear endorsement for LLP groundfish licenses in 2002, they specifically provided that an applicant could not qualify for a Pacific cod endorsement based on cod harvests for personal use bait.¹⁹

I conclude, therefore, that MGF has not shown that the official LLP record is incorrect. I conclude that MGF does not meet the basic GQP requirement or the extended GQP requirement for crab crossover vessels.

B. Does MGF meet the EQP requirement for an Aleutian Islands endorsement? No.

The EQP requirement for an Aleutian Islands endorsement is one documented harvest of license limitation groundfish in the Aleutian Islands between January 1, 1992 and June 17, 1995.²⁰ According to the official LLP record, the F/V POLAR LADY harvested no groundfish in the Aleutian Islands for the entire period covered by the official LLP record: from 1988 through 1999. The Pacific cod bait harvests in 1993, if they occurred in the Aleutian Islands, do not meet the EQP requirement for the same reason these harvests do not meet the GQP requirement. Harvests of fish for personal use bait do not constitute commercial fishing and therefore cannot count toward an LLP commercial fishing license. I therefore conclude that MGF does not meet the EQP requirement for an Aleutian Islands endorsement.

C. Does MGF meet the EQP requirement for a Bering Sea endorsement? No.

The reasoning on the Bering Sea endorsement is the same. The EQP requirement for a Bering Sea endorsement is one documented harvest of license limitation groundfish in the Bering Sea

<http://www.fakr.noaa.gov/appeals/default.htm>.*Id.*

¹⁷ 16 U.S.C. §§ 1801 - 1883. Section 3 of the Act defines commercial fishing. 16 U.S.C. § 1802.

¹⁸ But neither does the applicant need an LLP license to continue the practice.

¹⁹ Final Rule, 72 Fed. Reg. 18,129, 18,131, 18,138 (2002), *adopting* 50 C.F.R. § 679.4(k)(9)(iii)(C).

²⁰ 50 C.F.R. § 679.4(k)(4)(ii)(A).

between January 1, 1992 and June 17, 1995.²¹ According to the official LLP record, the F/V POLAR LADY harvested no groundfish in the Bering Sea in this period. The Pacific cod bait harvests in 1993, if they occurred in the Bering Sea, do not meet the EQP requirement because they do not constitute commercial fishing. I therefore conclude that MGF does not meet the EQP requirement for a Bering Sea endorsement.

2. Did MGF make the documented harvests required for an LLP groundfish license with Bering Sea and Aleutian Islands endorsements in the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv)? No.

MGF argues that it faced an unavoidable circumstance that began in 1991 when Gary Stewart was diagnosed with brain abscesses. Mr. Stewart had to be hospitalized several times in 1991 and 1992. It caused Mr. Stewart to suffer, for the first time in his life, from severe vertigo, dizziness and seasickness. Mr. Stewart continued to go crab fishing on the F/V POLAR LADY but he was frequently unable to stay on deck and, in 1993, had to turn over substantial responsibilities for running the boat to a relief skipper, Jeff Morehouse. MGF states that it purchased 40 cod pots in 1993 and intended to fish for Pacific cod after the 1993 crab crab season but, because of Mr. Stewart's illness, MGF was unable to fish Pacific cod. I accept MGF's assertions as true, for purposes of this appeal.²²

MGF seeks an LLP groundfish license with Bering Sea and Aleutian Islands endorsements under the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv). It provides:

A qualified person who owned a vessel on June 17, 1995, **that made a documented harvest of license limitation groundfish, or crab species if applicable, between January 1, 1988, and February 9, 1992**, but whose vessel was unable to meet all the [documented harvest] criteria in paragraph (k)(4) of this section for a groundfish license or paragraph (k)(5) of this section for a crab species license because of an unavoidable circumstance (i.e., the vessel was lost, damaged, or otherwise unable to participate in the license limitation groundfish or crab fisheries) may receive a license if the qualified person is able to demonstrate that:

(A) The owner of the vessel at the time of the unavoidable circumstance held a specific intent to conduct directed fishing for license limitation groundfish or crab species with that vessel during a specific time period in a specific area.

(B) The specific intent to conduct directed fishing for license limitation groundfish or crab species with that vessel was thwarted by a circumstance that

²¹ 50 C.F.R. § 679.4(k)(4)(ii)(B).

²² MGF submitted extensive medical records from physicians who treated Mr. Stewart and from Ballard Community Hospital, as well as statements from Mr. Stewart himself, Evelyn Stewart, Jeffrey Morehouse and Charles Hjortset. MGF also provided invoices for cod pots bought on December 18, 1992 and June 13, 1994. Affidavit of Mark Scheer (Nov. 8, 2002) with attachments.

was:

(1) Unavoidable.

(2) Unique to the owner of that vessel, or unique to that vessel.

(3) Unforeseen and reasonably unforeseeable to the owner of the vessel.

(C) The circumstance that prevented the owner from conducting directed fishing for license limitation groundfish or crab species actually occurred.

(D) Under the circumstances, the owner of the vessel took all reasonable steps to overcome the circumstance that prevented the owner from conducting directed fishing for license limitation groundfish or crab species.

(E) **Any amount of license limitation groundfish or appropriate crab species was harvested on the vessel in the specific area that corresponds to the area endorsement or area/species endorsement for which the qualified person who owned a vessel on June 17, 1995, is applying and that the license limitation groundfish or crab species was harvested after the vessel was prevented from participating by the unavoidable circumstance but before June 17, 1995.** [emphasis added]

An applicant must meet each requirement of the unavoidable circumstance regulation.²³ I accept, for purposes of this decision, that if I held a hearing, MGF could prove the facts required by subsections A through D.²⁴ But the unavoidable circumstance regulation does not excuse the applicant from all documented harvests. The highlighted portions of the regulation requires that an applicant must have made two documented harvests: one between January 1, 1988 and February 9, 1992, and one after the unavoidable circumstance and before June 17, 1995.

The Council and NMFS required the first harvest because they chose to restrict the unavoidable circumstance regulation to vessels that participated in the Vessel Moratorium Program.²⁵ The

²³ The language of the regulation, on its face, requires an applicant to meet every requirement. The commentary to the final LLP rule supports that interpretation: “*If all these criteria are met* to the satisfaction of NMFS, a license may be issued for the relevant fishery and endorsement area. This [unavoidable circumstance] provision is not designed to be a ‘loop hole’ through which an eligible applicant that does not meet the qualification requirements can be issued a license.” Final Rule, 63 Fed. Reg. 52,642, 52,647 (1998)(emphasis added).

²⁴ MGF would have to prove that its intent to commercially harvest groundfish in 1993 was thwarted by Mr. Stewart’s disability even though [1] MGF harvested personal use bait cod in 1993 and [2] MGF harvested approximately 900,000 pounds of crab in 1993.

²⁵ *St George Marine, Inc.*, Appeal No. 02-0024 at 6 - 7 (Feb. 19, 2004). In moving to adopt the unavoidable circumstance provision, Council Member Dave Benton stated:

The first point I’d like to take up is the issue of lost vessels or vessels which left the fishery due to factors beyond the control of the owner, but which were conforming with the rules. I would make the following motion: **I’d move that vessels which qualified under the moratorium, and were lost, damaged, or otherwise out of the fishery due**

basic qualifying period in the VMP was January 1, 1988 to February 9, 1992.²⁶ According to the official LLP record, MGF did not harvest groundfish between January 1, 1988 and February 9, 1992. MGF's bait harvests cannot satisfy this requirement because they are not commercial fishing. I therefore conclude MGF cannot receive an LLP groundfish license under the unavoidable circumstance provision because it did not harvest groundfish between January 1, 1988 and February 9, 1992.

The Council and NMFS required a second harvest in section (E) of the unavoidable circumstance regulation: a harvest after the unavoidable circumstance and *before* June 17, 1995. The Council and NMFS required this harvest because they did not wish any applicant to receive an LLP license based on fishing that occurred after June 17, 1995, the date of final Council action on the LLP. During the notice-and-comment period on the proposed LLP rule, the only comment NMFS received on the unavoidable circumstance regulation was that a requirement for a harvest by June 17, 1995 was unfair to a person who could not use the provision solely because the person did not have a documented harvest before June 17, 1995.²⁷ NMFS responded:

Response: Based on the approved recommendation of the Council, NMFS narrowly crafted the unavoidable circumstances provision to grant eligibility only when the minimum requirements for eligibility under the EQP [endorsement qualification period] would have been met except that circumstances beyond the control of the owner of the vessel at that time prevented that vessel from meeting those requirements. However, the unavoidable circumstances provision was never intended to extend the EQP.^[28] **Unless a person can demonstrate his or her intent to remain an active participant in the groundfish fisheries through a documented harvest made from a vessel, or its replacement, and submitted after that vessel was lost, damaged, or unable to participate but before June 17, 1995, that person cannot use the unavoidable-circumstances provision.** A harvest before June 17, 1995, indicated a participant's good

to factors beyond the control of the owner, and which were replaced or otherwise reentered the fisheries in accordance with the moratorium rules and made a landing in a fishery any time between the time the vessel left the fishery and the date of final Council action on the license program will be qualified for a general license and area endorsement for that fishery. [emphasis added]

Transcript (uncertified), North Pacific Fishery Management Council Meeting, June 15 - 17, 1995 at pages 69 - 70, available on the Administrative Appeals section of the NMFS Alaska region website under "Other Documents," <http://www.fakr.noa.gov/appeals/default.htm>.

²⁶ Final Rule (VMP), 60 Fed. Reg. 40,763, 40,773 (1995).

²⁷ Supplementary Information, Final Rule, 63 Fed. Reg. 52,642, 52,651 (1998).

²⁸ The ending date for the EQP for all crab endorsements is December 31, 1994. 50 C.F.R. § 679.4(k)(5)(ii). Therefore, the unavoidable circumstances provision actually *does* give crab applicants longer than the crab EQP to make this harvest because it gives them until June 17, 1995.

faith effort to remain in the groundfish fisheries. **This requirement is not unfair because any participation after June 17, 1995, the date of final Council action, is not considered a qualifying harvest under the LLP.**²⁹

Thus, an applicant who did not harvest groundfish in the desired endorsement area before June 17, 1995 cannot receive an LLP groundfish license under the unavoidable circumstance regulation.³⁰

According to the official LLP record, MGF made no documented harvests of groundfish in the Bering Sea or the Aleutian Islands before June 17, 1995. MGF has not shown that the official LLP record is incorrect. I therefore conclude MGF cannot receive an LLP groundfish license with a Bering Sea or Aleutian Islands endorsement under the unavoidable circumstance provision because it did not harvest groundfish in the Bering Sea or Aleutian Islands before June 17, 1995.³¹

3. Has MGF shown that it is eligible for an LLP groundfish license with Bering Sea and Aleutian Islands endorsements pursuant to the Section 504 of the Rehabilitation Act, 29 U.S.C. 794(a)? No.

MGF did not make a documented harvest of groundfish in the Bering Sea from January 1, 1988 to April 8, 1999, a period of eleven and a half years. MGF made no documented harvests of groundfish in the Aleutian Islands from January 1, 1988 to December 31, 1999, a period of twelve years. But MGF claims that it is eligible for an LLP groundfish license with Bering Sea and Aleutian Islands endorsements because it is “an individual that can demonstrate eligibility

²⁹ Supplementary Information, Final Rule, 63 Fed. Reg. 52,642, 52,651 (1998)(emphasis added).

³⁰ *Arctic Baruna, L.L.C.*, Appeal No. 02-0024 at 4 (Dec. 22, 2004); *Hansen Enterprises, Inc.*, Appeal No. 02-0025 at 2 - 13 (Dec. 14, 2004); *Erla-N, LLC*, Appeal No. 01-0026 (Sept. 16, 2004); *Pacific Rim Fisheries, Inc.*, Appeal No. 01-0009 (Sept. 10, 2004); *Notorious Partnership*, Appeal No. 03-0015 (Aug. 9, 2004); *Bowlden, Inc.*, Appeal No. 02-0037 (July 7, 2004); *St. George Marine, Inc.*, Appeal No. 02-0024 at 13 - 15 (Feb. 19, 2004); *Mark Donovick*, Appeal No. 02-0008 at 8 - 9 (Sept. 27, 2002); *Little Ann, Inc.*, Appeal No. 01-0022 at 3 (July 10, 2002); *Ronald Tennison*, Appeal 00-0012 at 2, 6 (April 15, 2002); *Pequod, Inc.*, Appeal No. 00-0013 at 7, 24 (April 12, 2002); *Paula Brogdon*, Appeal No. 00-0011 at 3 (Feb. 26, 2002).

³¹ I have stated in previous decisions that the requirement for a harvest by June 17th in the unavoidable circumstance provision made the provision unusable by applicants seeking a Bering Sea or Aleutians Islands endorsement or any LLP groundfish endorsement that requires only *one* harvest in the EQP because the EQP ends on June 17, 1995. *Bowlden, Inc.*, Appeal No. 02-0037 at 10; *Hansen Enterprises, Inc.*, Appeal No. 02-0025 at 10-11. I realize this is inaccurate. The unavoidable circumstance provision is usable by applicants seeking such an endorsement if the applicant made the harvest-by-June 17, 1995 with a replacement vessel for a lost vessel. See *Mark Donovick*, Appeal No. 02-0008A at 7 (Sept. 27, 2002). MGF does not claim such a harvest.

pursuant to the Rehabilitation Act of 1973 at 29 U.S.C. 794(a).³² This is Section 504 of the Rehabilitation Act and it provides in relevant part:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, **solely by reason of her or his disability**, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. [emphasis added]

This Office has addressed the Rehabilitation Act in three prior decisions: *Jonathan Schumacher I*, *Jonathan Schumacher II* and *Charles West*.³³ I gave MGF an opportunity to comment on those decisions, which it did.³⁴

To state a claim under the Rehabilitation Act, an applicant must show four things: first, the applicant is an individual with a disability within the meaning of the Act;³⁵ second, apart from the disability, the applicant is otherwise qualified for an LLP license; third, the applicant is being denied an LLP license solely by reason of the disability; fourth, the LLP is a program conducted by a federal Executive agency. MGF meets the fourth requirement. The LLP is a program conducted by an Executive agency, namely the National Marine Fisheries Service within the National Oceanic and Atmospheric Administration, which is part of the Department of Commerce.

I assume that MGF meets the first requirement. I assume, without deciding, that Gary Stewart is an individual with a disability and that MGF Fisheries, Inc., a corporation, can use Mr. Stewart's disability to support its application for an LLP license. I do not decide these questions because I conclude that MGF does not meet the second and third requirements for a Rehabilitation Act claim.

Jonathan Schumacher I explained how a disabled individual meets the second and third requirements for a Rehabilitation Act claim:

³² 50 C.F.R. § 679.2(fifth definition of eligible applicant), quoted at page 2 - 3 *supra*.

³³ *Jonathan Schumacher I*, Appeal No. 00-0010 (Sept. 16, 2002); *Jonathan Schumacher II*, Appeal No. 02-0058 (March 24, 2003); *Charles West*, Appeal No. 03-0011 (July 28, 2004).

³⁴ *Order Setting Deadline for Further Argument and Evidence* (July 12, 2004); *Order Granting Extension* (July 28, 2004); *MGF's Supplemental Response* (Aug. 23, 2004).

³⁵ A "disability" is a physical or mental impairment that "constitutes or results in a substantial impediment to employment" or that "substantially limits one or more major life activities." 29 U.S.C. § 705(9)(A)(B).

The government violates the Rehabilitation Act when a person can show that he or she would receive a government benefit if the government made **reasonable accommodations** for the person's disability. If an applicant could participate in a government program only if the government made substantial modifications or fundamental alterations in the program, the applicant is *not* "otherwise qualified" for the program and is *not* being denied solely based on a disability. The fundamental nature of the program, not the individual's disability, is causing the individual to be denied.³⁶

The Department of Commerce regulations implementing the Rehabilitation Act adopt this standard. The regulations define an otherwise qualified individual as one who meets "the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity."³⁷ Under these regulations, a measure cannot be a reasonable accommodation if it changes a fundamental requirement of a program.³⁸

MGF states that, but for Mr. Stewart's debilitating illness, it would have harvested Pacific cod in the Bering Sea and the Aleutian Islands in 1993. Therefore, MGF's proposed reasonable accommodation is that a person should receive an LLP license, if the person can prove that, but for a disability, the person *would have made* the harvests necessary for an LLP license even if the person did not make the harvests necessary for an LLP license. This is not a reasonable accommodation because it changes an essential requirement of the program: ownership of a vessel *that made the harvests necessary for the particular LLP license sought by the applicant*, or ownership of that fishing history apart from the vessel.³⁹

The fundamental structure of the LLP is a detailed description of the harvests that a vessel must have made for NMFS to award an LLP license based on that vessel's history.⁴⁰ The only exception to that statement is the unavoidable circumstance provision, which does allow some applicants to receive credit for harvests that they would have made, but did not, due to an unavoidable circumstance.⁴¹ But the Council and NMFS quite intentionally and consciously required two documented harvests by the unavoidable circumstance applicant: one between

³⁶ *Jonathan Schumacher I*, Appeal No. 00-0010 at 6 (Sept. 16, 2002)

³⁷ 15 C.F.R. § 8c.3, definition of "qualified individuals with handicaps", subsection (2).

³⁸ Supplementary Information, Final Rule, 53 Fed. Reg. 19,270, 19,272 (May 27, 1988).

³⁹ 50 C.F.R. § 679.2 (first and second definition of eligible applicant).

⁴⁰ 50 C.F.R. § 679.4(k); Final Rule, 63 Fed. Reg. 52,642, 52,643 - 52,646 (1998) (supplementary information).

⁴¹ 50 C.F.R. § 679.4(k)(8)(iv).

January 1, 1988 and February 9, 1992 and a second before June 17, 1995.⁴² It is not credible that the Council and NMFS intended to say no to applicants under the unavoidable circumstance provision and yes to the same applicants, based on the very same facts, under the Rehabilitation Act provision.

MGF states that it is different from the applicants in *Jonathan Schumacher I*, *Jonathan Schumacher II* and *Charles West* because it owned a vessel which qualified for an LLP license. It is true that the applicants in those appeals never owned a vessel and did not own a vessel which qualified for any LLP license. The fact that MGF owned a vessel which made the harvests necessary for an LLP *crab* license does not mean that it is a reasonable accommodation to issue MGF an LLP *groundfish* license, when MGF did not own a vessel that made the harvests necessary for an LLP groundfish license.

As in *Jonathan Schumacher I*, *Jonathan Schumacher II* and *Charles West*, MGF is not being denied “solely by reason of [Mr. Stewart’s] disability.”⁴³ MGF is being denied because it did not own a vessel that made the documented harvests of groundfish *necessary for the LLP license that it seeks*. This criterion

does not discriminate against disabled persons. It does not result from outdated or archaic assumptions about what disabled persons can and cannot do. It does not require that an applicant prove that he or she can perform any of the physical activities in operating a boat. A disabled person can own a vessel. Even a corporation – a legal entity only – can own a vessel. The criteria [sic] of vessel ownership has no intrinsic relationship to an applicant’s disability or lack of disability.⁴⁴

MGF argues that if an applicant can be an “eligible applicant” only by owning a vessel that made the required harvests for an LLP license, or by owning the fishing history apart from the vessel, the Rehabilitation Act definition of eligible applicant is “completely ineffectual.” I analyzed that argument in *Charles G. West* and concluded:

[T]he mere presence of the Rehabilitation Act definition of eligible applicant does *not* mean that the other definitions of eligible applicant violate the Rehabilitation Act. I conclude that the purpose of the Rehabilitation Act definition of eligible applicant is to restate the non-discrimination principle of the Rehabilitation Act and the Department of Commerce regulations implementing the Act. The

⁴² See pages 9 - 11 *supra*.

⁴³ Section 504 of the Rehabilitation Act, 29 U.S.C. 794(a).

⁴⁴ *Jonathan Schumacher I* at 9. After the onset of Mr. Stewart’s disability in 1991, the F/V POLAR LADY harvested over three million pounds of LLP crab. *Order Stating Contents of the Official LLP Record for the Fishing History of the F/V POLAR LADY* (Oct. 29, 2004).

Rehabilitation Act provision in the LLP informs LLP applicants that the Act applies and that they have the right not to be discriminated against based on disability.⁴⁵

I note two points regarding the regulatory history of the Rehabilitation Act provision. First, *West* referred to one statement in the commentary to the final LLP rule on the Rehabilitation Act provision: “Also, an otherwise qualified individual who can demonstrate eligibility pursuant to the provisions of the Rehabilitation Act of 1973 would be considered an eligible applicant.”⁴⁶ *West* overlooked a second statement on the Rehabilitation Act provision in the section, “Changes to the Final Rule:”

The definition of “eligible applicant” is revised to add a paragraph to accommodate individuals that can demonstrate eligibility of the LLP pursuant to the provisions of the Rehabilitation Act of 1973 at 29 U.S.C. 794(a). This addition clarifies that otherwise qualified individuals may avail themselves of appropriate provisions of the Rehabilitation Act of 1973 when applying for licenses under the LLP.⁴⁷

Second, *West* stated that the LLP regulatory history “does not shed any light on the purpose of the Rehabilitation Act definition of LLP eligible applicant.”⁴⁸ The additional statement does shed light on the Rehabilitation Act definition of eligible applicant. It supports the approach taken in *Charles West, Jonathan Schumacher I* and *Jonathan Schumacher II*, which was to use the case law developed under the Rehabilitation Act to evaluate an applicant’s claim to an LLP license based on the Rehabilitation Act. I conclude that the purposes of the Rehabilitation Act provision are [1] to incorporate the Rehabilitation Act jurisprudence into the LLP and to alert applicants and the agency to the existence and applicability of the Rehabilitation Act to the LLP and [2] to alert applicants and the agency that the Rehabilitation Act applies to the LLP

MGF notes that it meets the definition of “qualified person” in the LLP regulations, namely that MGF or Mr. Stewart is “a person who was eligible on February 8, 1999, to document a fishing vessel under Chapter 121, Title 46, U.S.C. [United States Code].”⁴⁹ The fact that Mr. Stewart is a “qualified person,” as defined by this part of the LLP rule, does not mean he is “otherwise qualified” within the meaning of the Rehabilitation Act. An individual is “otherwise qualified”

⁴⁵ Appeal No. 03-0011 at 9 (July 28, 2004)(emphasis in original).

⁴⁶ *Charles G. West*, Appeal No. 03-0011 at 4 & n. 9 (July 28, 2004) *citing* Final Rule, 63 Fed. Reg. 52,642, 52646 (Oct. 1, 1998).

⁴⁷ Final Rule, 63 Fed. Reg. 52,642, 52,648 (1998).

⁴⁸ *Charles G. West*, Appeal No. 03-0011 at 3 (July 28, 2004).

⁴⁹ 50 C.F.R. § 679.2 (definition of qualified person for LLP).

if the individual meets *all* the essential eligibility requirements of the program. Being eligible to document a vessel on February 8, 1999 is *one* eligibility requirement for an LLP license.

But the fundamental requirement for an LLP license is [1] owning a vessel on June 17, 1995 which has a fishing history that meets the requirements for the LLP license sought by the applicant or [2] owning the fishing history apart from the vessel. Since the Rehabilitation Act does not authorize NMFS to abridge a fundamental requirement of a government program, Mr. Stewart is not eligible for an LLP groundfish license based on the Rehabilitation Act.

FINDINGS OF FACT

1. MGF did not make any documented harvests of groundfish or license limitation groundfish between January 1, 1988 and June 17, 1995.
2. MGF made a documented harvest of license limitation groundfish from the F/V POLAR LADY in the Bering Sea on April 8, 1999.
3. MGF did not make any documented harvests of groundfish or license limitation groundfish in the Aleutian Islands between January 1, 1988 and December 31, 1999.
4. The Pacific cod that MGF harvested in 1991 and 1993 was not the result of commercial fishing.
5. MGF did not sell, barter or transfer any Pacific cod it caught in 1991 and 1993 to any other entity.

CONCLUSIONS OF LAW

1. MGF did not make the documented harvests required for an LLP groundfish license with Bering Sea and Aleutian Islands endorsements in 50 C.F.R. § 679.4(k)(4).
2. MGF did not make make the documented harvests required for an LLP groundfish license with Bering Sea and Aleutian Islands endorsements in the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv).
3. MGF has not shown it is eligible for an LLP license with Bering Sea and Aleutian Islands endorsements pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a).
4. The Rehabilitation Act does not require, as a reasonable accommodation, that NMFS grant a disabled person an LLP license if the disabled person proves that he or she would have made the harvests required for an LLP license but for his or her disability.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect January 27, 2005, unless by that date the Regional Administrator orders review of the Decision.

Any party 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 7, 2005. A motion for reconsideration must be in writing, must specify one or more material matters of fact or law that I have overlooked or misunderstood, and must be accompanied by a written statement in support of the motion.

Mary Alice McKeen
Appeals Officer