



679.4(k)(9)(v)(B)(4). Norquest's harvests of Pacific cod for crab bait does not satisfy this provision, because it was a personal bait harvest, not a commercial bait harvest.

## ISSUE

Does Norquest satisfy the requirement in the hardship provision for a BSAI Pacific cod gear endorsement at 50 C.F.R. § 679.4(k)(9)(v)(B)(4)?

## ANALYSIS

### **A. Regulatory background of the P cod gear regulation: 50 C.F.R. § 679.4(k)(9).**

The LLP was implemented pursuant to the Magnuson-Stevens Fishery Conservation and Management Act<sup>4</sup> and amendments to the fishery management plans (FMPs) adopted under the Act.<sup>5</sup> The LLP "is the first stage in fulfilling the Council's commitment to develop a comprehensive and rational management program for the fisheries in and off Alaska."<sup>6</sup> The Council refers to the North Pacific Fishery Management Council, which is one of the eight regional fishery management councils established by the Magnuson-Stevens Act.

NMFS promulgated the main body of LLP regulations in October 1998.<sup>7</sup> It promulgated the LLP regulations on permit applications and transfers in August 1999.<sup>8</sup> The LLP regulations went into effect as of January 1, 2000, which means that a vessel needed an LLP license to conduct directed fishing for license limitation groundfish or crab as of that date. The LLP groundfish regulations, as originally adopted, did not have any species or gear endorsements. An LLP license enabled the license holder to harvest any species of LLP groundfish with any legal gear.

In April 2000, the Council recommended a species/gear endorsement for Pacific cod on LLP groundfish licenses.<sup>9</sup> The Council's recommendation became Amendment 67 to the FMP for the

---

<sup>4</sup> 16 U.S.C. §§ 1801 - 1883.

<sup>5</sup> For background to the LLP, see Final LLP rule, 63 Fed. Reg. 52,642, 52,642 - 52,643 (1998). The original LLP regulations implemented Amendment 39 to the FMP for the Groundfish Fishery for BSAI, Amendment 41 to the FMP for Groundfish in the Gulf of Alaska and Amendment 5 to the FMP for the Commercial King and Tanner Crab fisheries in BSAI. *Id.* at 52,642.

<sup>6</sup> *Id.*

<sup>7</sup> Final LLP rule, 63 Fed. Reg. 52,642 (October 1, 1998).

<sup>8</sup> Final LLP rule, 64 Fed. Reg. 42,826 (August 6, 1999)

<sup>9</sup> Council Newsletter, April 2000 at 2, available at the Council website, <http://www.fakr.noaa.gov/npfmc>

## BSAI Groundfish Fishery:

Amendment 67 to the FMP was recommended by the Council to address the concern that fishermen who have made significant long-term investments and have long catch histories in the hook-and-like or pot gear BSAI Pacific cod fisheries needed protection from fishermen who have no or limited history in those fisheries. This concern increased after implementation of Amendment 64 to the FMP, which divided a portion of the BSAI Pacific cod total allowable catch (TAC) among the hook-and-line and pot gear sectors (i.e., catcher vessels and catcher/processors). The specific provisions of that action can be found in the final rule implementing Amendment 64 (65 FR 51553, August 24, 2000)[50 C.F.R. § 679.4(k)(3)(iv)].

Amendment 67 is a continuation of the License Limitation Program (LLP). The LLP was recommended by the Council and approved and implemented by NMFS to address concerns of excess fishing capacity in the groundfish and crab fisheries off Alaska.<sup>10</sup>

Amendment 67 was adopted into federal regulation at 50 C.F.R. § 679.4(k)(9). Under that regulation, for a catcher-processor to receive a BSAI Pacific cod pot gear endorsement, it must have harvested 300,000 pounds of Pacific cod in BSAI in each of any two years from 1995 to 1998.<sup>11</sup> For a catcher vessel to receive a BSAI Pacific cod pot gear endorsement, it must have harvested 100,000 pounds of Pacific cod in BSAI in each of any two years from 1995 to 1999.<sup>12</sup> The F/V SOUTHERN WIND has operated both as a catcher vessel and a catcher-processor vessel.

### **B. Hardship provision in the P cod gear regulation: 50 C.F.R. § 679.4(k)(9)(v)(B).**

Norquest acknowledges that the F/V SOUTHERN WIND does not satisfy the standard harvest requirements for a Pacific cod endorsement as a catcher processor or a catcher vessel but claims that it meets the hardship exception to those requirements at 50 C.F.R. § 679.4(k)(9)(v)(B):

(B) *Hardship provision.* A license holder may be eligible for a Pacific cod endorsement because of unavoidable circumstances if he or she meets the requirements in paragraphs (k)(9)(v)(B)(1)-(4) of this section. For purposes of this hardship provision, the term license holder includes the person whose landings were used to meet the eligibility requirements for the license holder's groundfish license, if not the same person.

(1) The license holder at the time of the unavoidable circumstance held a specific intent to conduct directed fishing for BSAI Pacific cod in a manner sufficient to meet the

---

<sup>10</sup> Final Rule, 67 Fed. Reg. 18,129, 130 (April 15, 2002).

<sup>11</sup> 50 C.F.R. § 679.4(k)(9)(ii).

<sup>12</sup> *Id.*

landing requirements in the table at paragraph (k)(9)(ii) of this section but that this intent was thwarted by a circumstance that was:

(i) Unavoidable.

(ii) Unique to the license holder, or unique to the vessel that was used at the basis of eligibility for the license holder's groundfish license;

(iii) Unforeseen and reasonably unforeseeable to the license holder.

(2) The circumstance that prevented the license holder from conducting directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in paragraph (k)(9)(ii) actually occurred;

(3) The license holder took all reasonable steps to overcome the circumstance that prevented the license holder from conducting directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in paragraph (k)(9)(ii) of this section; and

**(4) Any amount of Pacific cod was harvested in the BSAI aboard the vessel that was used as the basis of eligibility for the license holder's groundfish license after the vessel was prevented from participating by the unavoidable circumstance but before April 16, 2000. [emphasis added]**

To receive credit for a harvest under the hardship provision, an applicant must satisfy each requirement. Since I conclude that Norquest does not meet subsection (4) of the hardship provision, I assume, but do not decide, that the facts asserted by Norquest are true and that Norquest meets the requirements in subsection (1), (2) and (3).<sup>13</sup>

Norquest asserts that the prior owner, Tyson Seafoods [Tyson], undertook an ambitious and expensive project of converting the F/V SOUTHERN WIND from a catcher vessel to a catcher-processor in 1990 and 1991. Unbeknownst to Tyson, new rules by the American Bureau of Shipping [ABS] came into effect for catcher-processors and the F/V SOUTHERN WIND did not meet them. Tyson was informed of this by the United States Coast Guard in 1996 and had to mothball the vessel because of the extreme expense in meeting the new ABS standards. In 1998, Norquest bought the vessel and converted the vessel back to a catcher vessel, because a catcher vessel does not require an ABS classification. Norquest asserts:

This rebuild took many months and a couple years to complete and considerable amount of money and time. No part of the vessel was left untouched. It was like it was a new vessel. Only the name stayed the same. Its first fishery was 1999 Opilio. It then came back for more rebuild work and then fished only crab in 2000, as the rebuild was not complete. In May of 2000 a refrigerated seawater system was installed so that it could go fish for Cod. In 2001 the vessel was supposed to go fish cod out in Adak but do [due] to

---

<sup>13</sup> I base this description of the facts on the Letter from Norquest to NMFS, October 7, 2002 and the Letter from Norquest to OAA, August 13, 2003.

changing market the opportunity fell apart and the vessel did not go.<sup>14</sup>

The claimed unavoidable circumstances are the new ABS standards as they affected the F/V SOUTHERN WIND and Norquest's conversion of the F/V SOUTHERN WIND back to a catcher vessel. As I have stated, *if* Norquest met subsection (4) in the hardship provision, I would decide whether, as a matter of law and fact, Norquest met the requirements in subsection (1), (2) and (3). But since I conclude Norquest does not meet subsection (4), I need not decide whether Norquest satisfies subsections (1), (2) and (3).

Norquest states that it meets the requirement in subsection (4) because it caught Pacific cod and used it for bait between the unavoidable circumstance and April 16, 2000. The official LLP record does not show any Pacific cod harvests from the F/V SOUTHERN WIND in 1995, 1996, 1997, 1998 or 1999 or 2000. The only BSAI Pacific cod harvests in the official LLP record are BSAI Pacific cod harvests in June, July, August and September **1992**, which were reported on State of Alaska fish tickets and federal Weekly Production Reports.<sup>15</sup>

Norquest asserts that the F/V SOUTHERN WIND did harvest Pacific cod between 1996 and April 16, 2000. Norquest states that it caught Pacific cod and used it for crab bait and submits copies of the vessel's pot logs to prove it. The pot logs are dated January 23, 1999, February 3, 1999, February 15, 1999, February 17, 1999, March 1, 1999, April 1, 2000 and April 4, 2000.<sup>16</sup>

I assume that these logs are accurate and that Norquest caught Pacific cod from the F/V SOUTHERN WIND, as recorded in the vessel logs, and used it for its own crab bait. Norquest does not assert, and the official LLP record does not reflect, that Norquest sold this Pacific cod.

**C. Whether harvests of P cod for personal bait can satisfy person bait can satisfy 50 C.F.R. § 679.4(k)(9)(v)(B).**

The question is whether the harvests of P cod between January 23, 1999 and April 4, 2000, as recorded in the vessel's pot logs, can meet the requirement in 50 C.F.R. § 679.4(k)(9)(v)(B) that Norquest harvested Pacific cod after the unavoidable circumstance but before April 16, 2000. I conclude that the Pacific cod harvests in these logs cannot satisfy subsection (4) because

---

<sup>14</sup> Appeal Letter from Norquest to NMFS, October 7, 2002. Norquest amplified this argument in its letter to this Office, dated August 13, 2003.

<sup>15</sup> Memorandum from Mukhya Khalsa to Mary Alice McKeen, August 4, 2003 (Exhibit 1)(partly confidential). I cannot release the data in the official LLP record from State of Alaska fish tickets because Norquest has not shown it was the State of Alaska permitholder that submitted the fish tickets or that it has a release from the permitholder. *See* Reciprocal Data Access Agreement between the National Oceanic and Atmospheric Administration (NOAA) and the [State of] Alaska Department of Fish and Game and the [State of Alaska] Commercial Fisheries Entry Commission, Sept. 9, 1999.

<sup>16</sup> Letter from Norquest to Office of Administrative Appeals, August 13, 2003.

Norquest caught and used this Pacific cod for its own personal use.<sup>17</sup>

I interpret a regulation in light of the language of the regulation, other LLP regulations and the history and purpose of the regulation. The language of the regulation is the prime evidence of the intent of the adopting body. Although the Secretary of Commerce adopts fishery management plans, amendments to plans and implementing regulations under the Magnuson-Stevens Act, he does so upon the recommendation of the regional management fishery council.<sup>18</sup> Since the Secretary adopted the original LLP regulations, and the P cod gear regulation, without comment, I assume that the Secretary's intent is the same as the Council's intent and I will refer only to the Council's intent and NMFS's intent.

The language of 50 C.F.R. § 679.4(k)(9)(v)(B)(4), quoted in full at page 3, simply requires that the applicant have harvested Pacific cod between the unavoidable circumstance and April 16, 2000. The language of this provision, standing by itself, does not exclude harvests of Pacific cod for personal use. But several other provisions of the Pacific cod gear regulation directly bear on this question. Most telling is the provision that prevents an applicant from using personal bait harvests to meet the harvest/landing requirements – the 300,000 pounds for a catcher-processor and 100,000 pounds for a catcher vessel – in the table at 50 C.F.R. § 679.4(k)(9)(ii). The Pacific cod regulation at 50 C.F.R. § 679.4(k)(9)(iii) specifically provides:

(C) Pacific cod harvested for personal bait use will not count toward eligibility amounts in the table at paragraph (k)(9)(ii) of this section.

(D) A legal landing of Pacific cod in the BSAI for commercial bait will count toward eligibility amounts in the table at paragraph (k)(9)(ii) of this section.

I conclude that the harvest of Pacific cod recorded in the F/V SOUTHERN WIND's vessel logs constitutes personal bait, not commercial bait, because Norquest used the Pacific cod itself and did not sell it to any other entity. I base this conclusion on the analysis of "commercial fishing" in *Application of Paula Brogdon*:

The terms "sale, barter or trade" in the definition of "commercial fishing" in the Magnuson-Stevens Act are not defined, but their plain meaning is that something is exchanged between two or more distinct parties. Ms. Brogdon's argument that she

---

<sup>17</sup> I do not analyze whether a vessel's Pacific cod pot logs could be "other valid documentation" of a documented harvest of license limitation groundfish within 50 C.F.R. § 679.4(k)(4), *if* the vessel's Pacific cod harvests constituted commercial fishing.

<sup>18</sup> 16 U.S.C. § 1853 (c); 16 U.S.C. § 1854. *See* Final Rule, 67 Fed. Reg. 18,129, 18,132 (2002) ("NMFS policy prevents partial approval of fishery management plan amendments that establish a limited access system, because such an action would be tantamount to NMFS developing a limited access system without that system first being approved by a majority of the voting members of the appropriate fishery management council, an action prohibited by 16 U.S.C. 1854(c)(3)(Section 304 (c)(3) of the Magnuson-Stevens Act.")

“sold” the cod to herself or “traded” them is not persuasive. Using one’s own catch for bait on one’s own vessel cannot reasonably be construed as “sale, barter or trade” as envisioned in the Magnuson-Stevens Act. The cod never changed hands, and ownership of the cod was never transferred to another party. Therefore, it cannot be said that the cod were intended to be, or actually were sold, bartered, or traded. As a result, the alleged harvesting and use of the cod were not commercial activities, and the cod did not and were not intended to enter commerce. Consequently, the alleged harvests of cod did not constitute “commercial fishing” within the meaning of the Magnuson-Stevens Act. Therefore, I conclude that the alleged harvests of cod cannot constitute documented harvests of groundfish for purposes of qualifying for an LLP groundfish license or endorsement.<sup>19</sup>

Thus, RAM could *not* count the Pacific cod recorded in the F/V SOUTHERN WIND’s vessel logs toward Norquest meeting the standard harvest requirements for a Pacific cod endorsement. For Norquest to succeed in this appeal, it would have to show that the Council intended that Pacific cod harvested for personal bait *could not establish eligibility* under the standard harvest provision but *could establish eligibility* under the hardship provision. It is hard to articulate a sensible or coherent purpose in favor of that interpretation. It is hard to imagine why the Council would award the hardship applicant an endorsement based on a type of harvest that the standard applicant cannot use at all.

I conclude that the Council wished to protect the applicant who, through circumstances not of the applicant’s making, was prevented from participating in the Pacific cod fishery. The purpose is to put the hardship applicant on an equal footing with the applicant who was not facing the hardship. The Council in subsection (4), however, put a limit on the protection afforded the hardship applicant. It is not open-ended. The applicant must have returned to the fishery for which the applicant is seeking an endorsement by April 16, 2000.<sup>20</sup> That fishery is the *commercial* BSAI Pacific cod fishery.

It is most consistent with the purpose of the hardship provision that the applicant facing the hardship had to make by April 16, 2000 the same type of bait harvest that an applicant who did not face hardship had to make between 1995 to 1999. Otherwise, the hardship applicant is put in a superior, not an equal, position to the standard applicant. Otherwise, the hardship applicant would receive a Pacific cod endorsement based on a type of harvest that the standard applicant is specifically forbidden from using.

---

<sup>19</sup> *Application of Paula Brogdon*, Appeal No. 00-0011 at 5 (Feb. 26, 2002).

<sup>20</sup> The structure of this unavoidable circumstances provision – requiring the applicant prove certain things about the unavoidable circumstances but nonetheless requiring the applicant make a harvest by a specific date – is the structure common to the unavoidable circumstances provisions in the LLP. The original LLP regulations required a harvest after the unavoidable circumstances but before June 17, 1995. 50 C.F.R. § 679.4(k)(8)(iv)(E). The LLP crab recency regulation required a harvest after the unavoidable circumstances but before January 1, 2000. 50 C.F.R. § 679.4(k)(5)(v)(E).

Another LLP regulation strongly supports this interpretation of the hardship provision. The LLP regulations specifically *exempt* any catch of Pacific cod for personal use bait from the requirement of a P cod endorsement on an LLP license.<sup>21</sup> It makes little sense that an applicant could use harvests of P cod for personal bait to get an endorsement that the applicant does not need in order to continue harvesting P cod for personal bait use. It makes more sense that there is symmetry between what the applicant has to prove and what the applicant wants to continue to do.

My interpretation of the hardship provision fits with the clear and consistent precedent of this Office. Even before the P cod gear designation on an LLP license, this Office had to decide whether P cod caught and used for the applicant's own bait could count as a documented harvest for purposes of an area endorsement on an LLP groundfish license.<sup>22</sup> This Office concluded that [1] for a harvest of groundfish to count toward an LLP license, it must be a commercial harvest, and [2] groundfish used as the applicant's own bait is not a commercial harvest.<sup>23</sup> After these OAA decisions, the Council and NMFS adopted explicitly the distinction between personal and commercial harvests in the P cod gear regulation. This action suggests that these OAA decisions correctly interpreted the Council's and NMFS's intent.

Therefore, I affirm the IAD. I conclude that Norquest is not entitled to a BSAI Pacific cod gear designation as a catcher-processor or a catcher vessel on its LLP license [LLG 3695]. Norquest did not meet the standard eligibility criteria for a BSAI Pacific cod endorsement in the table at 50 C.F.R. § 679.4(k)(9)(ii). Norquest may not receive a BSAI Pacific endorsement based on the hardship provision because it did not harvest Pacific cod after the unavoidable circumstance and before April 16, 2000, as required by 50 C.F.R. § 679.4(k)(9)(v)(B)(4).

#### FINDINGS OF FACT

1. Norquest caught Pacific cod from the F/V SOUTHERN WIND between January 23, 1999 and April 4, 2000 and used it for crab bait.
2. Norquest did not sell the Pacific cod that it caught from the F/V SOUTHERN WIND between January 23, 1999 and April 4, 2000.

---

<sup>21</sup> 50 C.F.R. § 679.4(k)(9)(iv)(C).

<sup>22</sup> The five potential area endorsements on an LLP groundfish license are Aleutian Islands, Bering Sea, Western Gulf, Central Gulf or Southeast Outside. 50 C.F.R. § 679.4(k)(4)(ii).

<sup>23</sup> *Willard S. Ferris*, Appeal No. 01-0004 (January 18, 2002); *Paula Brogdon*, Appeal No. 00-0011 (February 26, 2002); *Ronald J. Tennison*, Appeal No. 00-0012 (April 5, 2002), *Darjen, Inc.*, Appeal No. 00-0015 (December 31, 2002). These decisions are on the NMFS Alaska Region website, <http://www.fakr.noaa.gov/appeals/default.htm>.



## CONCLUSIONS OF LAW

1. Norquest used the Pacific cod it caught between January 23, 1999 and April 4, 2000 for personal bait use within the meaning of 50 C.F.R. § 679.4(k)(9)(iii).
2. Norquest did not harvest use the Pacific cod it caught between January 23, 1999 and April 4, 2000 for commercial bait within the meaning of 50 C.F.R. § 679.4(k)(9)(iii).
3. RAM could not count the Pacific cod that Norquest caught and used for personal bait as meeting the standard harvest requirements for a Pacific cod endorsement in the table at 50 C.F.R. § 679.4(k)(9)(ii).
4. RAM does not have authority to count the Pacific cod that Norquest caught and used for personal bait as meeting the hardship provision in 50 C.F.R. § 679.4(k)(9)(v)(B)(4).
5. Norquest does not satisfy the requirement in the hardship provision for a BSAI Pacific cod gear endorsement at 50 C.F.R. § 679.4(k)(9)(v)(B)(4).

## DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect November 24, 2003, 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, November 3, 2003. 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.

---

Mary Alice McKeen  
Appeals Officer