

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 02-0019
)	
NORTHERN ORION, INC.,)	DECISION
Appellant)	
)	April 16, 2004
_____)	

STATEMENT OF THE CASE

The Appellant, Northern Orion, Inc., filed a timely appeal of an Initial Administrative Determination (IAD) issued on October 24, 2001, by the Restricted Access Management (RAM) Program. On December 20, 2001, Northern Orion asked RAM to reconsider its IAD, but RAM declined to reconsider. On February 19, 2002, RAM forwarded the matter to this office, but it did not arrive here until August 2002. In finding that the appeal was timely filed, I related the filing date back to December 20, 2001. Northern Orion can appeal the IAD because it directly and adversely affects its interest, as required by 50 C.F.R. §679.43(b).

In the IAD, RAM revoked Northern Orion's License Limitation Program (LLP) crab license #LLC5166, which had derived from the fishing history of the F/V ST. MATTHEW and was endorsed for the Pribilof red and blue king crab fishery, the St. Matthews blue king crab fishery, the Bristol Bay red king crab fishery, and the Bering Sea/Aleutian Islands *C. opilio* and *C. bairdi* crab fishery. RAM revoked the license on the grounds that the F/V ST. MATTHEW 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.

Northern Orion did not submit an appeal brief. I derive its arguments from the request for reconsideration it submitted to RAM on December 20, 2001. There Mark Maring, President of Northern Orion, Inc., asserts that the documented harvest need not have been made from the F/V ST. MATTHEW because Northern Orion is covered by exemption 4 of the RPP requirements.¹ Under that exemption, argues Mr. Maring, the RPP harvest need not have been made from the original qualifying vessel if he can prove that Northern Orion harvested LLP crab between January 1, 1998, and February 7, 1998 from a different vessel, and that Northern Orion obtained, or entered into a contract for, the qualifying fishing history of the original qualifying vessel by October 10, 1998.

After RAM issued the IAD and Northern Orion filed this appeal, NMFS revised the regulations that implemented the RPP requirements of Amendment 10.² These revised regulations, found at

¹50 C.F.R. §679.4(k)(5)(iv).

²Final Rule, 68 Fed. Reg. 46,117 - 46,118 (August 5, 2003).

50 C.F.R. §679.4(k)(5)(iii) and (iv), will be applied in this appeal. The revised regulations significantly change the rules regarding the RPP, and make obsolete the interpretations of, and arguments based on, the prior regulations.

ISSUE

Does Northern Orion, Inc., meet the Recent Participation Period (RPP) requirements of 50 C.F.R. §679.4(k)(5)(iii) or (iv), and should Northern Orion's LLP crab license #LLC5166 be revoked?

ANALYSIS

Federal regulation 50 C.F.R. §679.4(k)(5)(iii)(A), as revised, provides:

(iii) Recent participation period (RPP). (A) The RPP is the period from January 1, 1996, through February 7, 1998. To qualify for a crab species license, defined at §679.2, a person must have made at least one documented harvest of any amount of LLP crab species from a vessel during the RPP and must have held a[n] LLP qualifying fishing history at the time of that documented harvest. A[n] LLP qualifying fishing history meets the documented harvest requirements at paragraphs (k)(5)(i) and (k)(5)(ii) of this section.

This regulation took effect on September 4, 2003.³ Although by its wording the regulation appears to establish the qualifications for the initial issuance of an LLP crab license, it actually establishes a recent participation requirement for persons to whom one or more LLP crab licenses have already been issued. Thus, the question in this case is not whether Northern Orion qualifies to receive an LLP crab license. Rather, the question is whether an LLP crab license for which Northern Orion has already qualified, and which Northern Orion has held for several years, should now be revoked for failure to meet the new RPP requirements.

As this office stated in *Bella K of Seattle, LLC*,⁴

Section 679.4(k)(5)(iii)(A) on its face requires a person to have made only one documented harvest of any LLP crab species during the RPP to be considered a recent participant. This was obviously intended as a minimal threshold requirement for attaining the status of a recent participant. The regulation does not require LLP crab license holders to have made a separate harvest of each crab species for which they hold endorsements or for each license. Once it is established that the person is a recent participant, the person can retain every LLP crab license associated with the LLP qualifying fishing histories the person held

³Final Rule, 68 Fed. Reg. 46,117 (August 5, 2003).

⁴Appeal No. 02-0006, March 25, 2004, at 6.

at the time the RPP harvest was made or, under exception (iv), during the extended RPP.

Applying an earlier version of 50 C.F.R. §679.4(k)(5)(iii)(A), RAM determined that Northern Orion did not meet the documented harvest requirement because the harvest was made from the F/V NORTHERN ORION rather than from the F/V ST. MATTHEW, which is the original qualifying vessel for #LLC5166. Under the revised wording of §679.4(k)(5)(iii)(A), it is no longer required that the RPP documented harvest be made from the original qualifying vessel. Now any vessel will suffice.

In this appeal, the LLP license in question, #LLC5166, derived from the LLP qualifying fishing history of the F/V ST. MATTHEW. The administrative record contains a sales agreement, dated September 8, 1997, in which Northern Orion purchased this fishing history from Polar Shell Fisheries, Inc.⁵ RAM's records also show that at the same time, Northern Orion owned the F/V Northern Orion.⁶ A copy of a fish ticket in the administrative record shows that the F/V NORTHERN ORION made a harvest of LLP crab, specifically *C. opilio* snow crab, in January 1998.⁷ RAM does not dispute the validity of any of these documents.

Based on a preponderance of the evidence in the administrative record, I find that Northern Orion made a documented harvest of an LLP crab species from the F/V NORTHERN ORION in January 1998. Therefore, I conclude that Northern Orion was a recent participant under 50 C.F.R. §679.4(k)(5)(iii)(A). Because I find that Northern Orion held the LLP qualifying fishing history of the F/V ST. MATTHEW at the time of the harvest, I conclude that Northern Orion meets the requirements of 50 C.F.R. §679.4(k)(5)(iii)(A) and is entitled to retain LLP crab license #LLC5166.

FINDINGS OF FACT

1. Northern Orion, Inc., made a documented harvest of an LLP crab species with the F/V NORTHERN ORION in January 1998.
2. Northern Orion, Inc., held the LLP qualifying fishing history of the F/V ST. MATTHEW at the time of the documented harvest.

⁵Attachment 1 to Appellant's request for reconsideration to RAM.

⁶License Limitation Program Qualifications Summary, September 9, 1999.

⁷ADFG Fish Ticket No. C97 016757

CONCLUSIONS OF LAW

1. Northern Orion, Inc., meets the requirements of 50 C.F.R. §679.4(k)(5)(iii)(A).
2. Northern Orion, Inc., is entitled to retain LLP crab license #LLC5166.

DISPOSITION AND ORDER

The IAD that is the subject of this Decision is VACATED. RAM is ORDERED to reissue crab license #LLC5166 to Northern Orion, Inc., as a transferable license. This Decision takes effect May 17, 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, April 26, 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