



that the proper interpretation of the unavoidable circumstances regulation, as applied to a Bering Sea or an Aleutian Islands endorsement, is that the applicant had to harvest groundfish in the Bering Sea or the Aleutian Islands *within a reasonable time* after the lifting of the unavoidable circumstances, *not before the specific date of June 17, 1995*.

## SUMMARY

The IAD is affirmed. To receive an LLP license under the unavoidable circumstance regulation at 50 C.F.R. § 679.4(k)(8)(iv), an applicant must meet *all* the requirements of the regulation, including section (E). Section (E) requires that the unavoidable circumstance applicant have harvested crab or groundfish – in the particular area of the desired endorsement – after the unavoidable circumstance and *before* June 17, 1995. Since Bowlden did not harvest groundfish in the Bering Sea or the Aleutian Islands after its boat suffered damage in February 1995 but before June 17, 1995, Bowlden cannot receive an LLP groundfish license with a Bering Sea or an Aleutian Islands endorsement under the unavoidable circumstance regulation.

I reach this conclusion even though it means that the unavoidable circumstance provision may not be used by applicants seeking a Bering Sea endorsement, an AI endorsement or any other groundfish endorsement that requires one documented harvest in the endorsement qualification period or EQP: January 1, 1992 to June 17, 1995. If the applicant made a harvest by June 17, 1995, and thereby met section (E), the applicant would meet the EQP requirement and would not need the unavoidable circumstance provision.

Even though this result is anomalous, I cannot reasonably interpret section (E), which on its face requires a harvest *before June 17, 1995*, as being met by a harvest on December 30, 1995, which is *after June 17, 1995*, even if December 30, 1995 was a reasonable time after the unavoidable circumstance ended. I base this conclusion on the clear language of section (E) and the consistent evidence in the LLP regulatory record that the North Pacific Fishery Management Council (Council) and NMFS intended to establish June 17, 1995 as an absolute cutoff date for a harvest by the unavoidable circumstance applicant. If the Council and NMFS wish a different rule for Bering Sea, Aleutian Island and other groundfish endorsements that require only one documented harvest in the EQP, they must change the regulation and state a different rule.

I deny Bowlden's request for a hearing on whether it meets sections (A) through (D) of the unavoidable circumstance regulation. Assuming Bowlden meets sections (A) through (D), I can not grant Bowlden an LLP groundfish license with a Bering Sea or AI endorsement because it does not meet section (E). Bowlden therefore does not meet the requirement in 50 C.F.R. § 679.43(g)(3)(iv) for a hearing because Bowlden can not possibly receive the endorsements that it seeks as a result of a hearing.

## ISSUES

1. May Bowlden receive an LLP groundfish license with a Bering Sea or Aleutian Islands endorsement based on the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), even though it did not harvest groundfish in the Bering Sea or the Aleutian Islands after the

unavoidable circumstance but before June 17, 1995?

2. May Bowlden receive a hearing on whether it meets sections (A) through (D) of the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv), if it did not satisfy section (E)?

#### ANALYSIS

**1. May Bowlden receive an LLP groundfish license with a Bering Sea or Aleutian Islands endorsement based on the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), even though it did not harvest groundfish in the Bering Sea or the Aleutian Islands after the unavoidable circumstance but before June 17, 1995?**

The official LLP record shows no documented harvests of groundfish from the F/V VALIANT in the Aleutian Islands or the Bering Sea (or the Gulf of Alaska) between January 1, 1992 and June 17, 1995.<sup>4</sup> Bowlden therefore does not meet the endorsement qualification period (EQP) requirement for an LLP license with an Aleutian Islands or Bering Sea endorsement.<sup>5</sup>

Bowlden argues on appeal that it should receive an LLP groundfish license with Bering Sea and Aleutian Islands endorsements based on the unavoidable circumstances regulation. That regulation is 50 C.F.R. § 679.4(k)(8)(iv) and 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 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

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<sup>4</sup> The LLP is generally based on harvests of license limitation groundfish and an LLP license is required to harvest license limitation groundfish, a term defined in 50 C.F.R. § 679.2. When I refer to groundfish, I mean license limitation groundfish, unless I note otherwise.

<sup>5</sup> 50 C.F.R. § 679.4(k)(4)(ii)(A)&(B). Bowlden does not dispute the vessel's fishing history but argues it should receive the endorsements even though it did not harvest groundfish [1] in the Bering Sea or Aleutian Islands during the EQP or [2] after the unavoidable circumstance but before June 17, 1995. If Bowlden wishes a printout of the vessel's fishing history as contained in NMFS's official LLP record, it should inform me.

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]**

#### **A. RAM's interpretation and Bowlden's interpretation.**

The unavoidable circumstances regulation does not excuse the lack of all harvests. Under the first sentence of the regulation, an applicant still must have harvested crab or groundfish, depending on the license sought, between January 1, 1988 and February 9, 1992.<sup>6</sup> Bowlden meets that requirement. According to the official LLP record, it recorded a harvest of pollock in the Bering Sea and Pacific cod in the Aleutian Islands on a fish ticket dated September 13, 1989.

Under the last sentence of the regulation – section (E) – an applicant must have harvested crab or groundfish in the specific area for which an endorsement is sought after the unavoidable circumstance and before June 17, 1995. Bowlden did not harvest groundfish in the Bering Sea or the Aleutian Islands after the F/V VALIANT suffered damage in February 1995 but before June 17, 1995.

RAM denied Bowlden's unavoidable circumstance claim for this reason. RAM relied on decisions by this Office that an applicant, as a matter of law, may not receive credit for a harvest under the unavoidable circumstances regulation if the applicant did not meet section (E): if the applicant did not harvest groundfish or crab – in the particular area of the desired endorsement – after the unavoidable circumstance and before June 17, 1995.<sup>7</sup>

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<sup>6</sup> That was the qualifying period under the Vessel Moratorium Program, the predecessor to the LLP. Final Rule, 60 Fed. Reg. 40,763, 40,773 (1995). This requirement is for a groundfish harvest, not a license limitation groundfish harvest.

<sup>7</sup> *Little Ann, Inc.*, Appeal No. 01-0022 at 3 at (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). Since the IAD, this Office has affirmed that position. *St.*

Bowlden argues that RAM's interpretation of section (E) is incorrect. Bowlden argues that, since the Aleutian Islands and the Bering Sea endorsements require only *one* groundfish harvest between January 1, 1992 and June 17, 1995, a requirement that a vessel have harvested groundfish after the unavoidable circumstance but before June 17, 1995 means that the unavoidable circumstance provision is unavailable to applicants seeking a Bering Sea or Aleutian Islands endorsement. Bowlden argues that the test should be whether the applicant harvested groundfish in the Bering Sea or Aleutian Islands within a *reasonable time* after the lifting of the unavoidable circumstance, *not before* June 17, 1995.<sup>8</sup>

## **B. Undisputed facts and facts alleged by Bowlden.<sup>9</sup>**

Bowlden has an extensive crab fishing history with the F/V VALIANT. In late 1994 or early 1995, Bowlden learned through the Alaska Crab Coalition that if it harvested groundfish before the Council meeting in Dutch Harbor on June 15 - 17, 1995, it would receive an LLP groundfish license. Bowlden contacted Trident Seafoods and, according to the Trident Seafoods Crab Fleet Manager, Bowlden "was given a cod market from Trident Seafoods where he could deliver to the Akutan Plant [in the Bering Sea after the *opilio* opening in 1995], but I could not give him an answer on the Aleutian Island area."<sup>10</sup> After Bowlden fished *opilio* in January and February 1995, it intended to fish Pacific cod. But the F/V VALIANT suffered significant damage in February 1995 and could not safely fish for Pacific cod. Instead, the F/V VALIANT underwent repairs in Seattle from approximately February 26, 1995 to June 27, 1995.<sup>11</sup>

The official LLP record covers the years 1988 to 1999.<sup>12</sup> According to the official LLP record, Bowlden did not make a documented harvest of groundfish in the Bering Sea until December 30, 1995 and then it consistently fished groundfish – primarily Pacific cod – in the Bering Sea in 1996, 1997, 1998 and 1999.

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*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).

<sup>8</sup> Even under Bowlden's interpretation, Bowlden would not receive an Aleutian Islands endorsement. *See* note 17 *infra*.

<sup>9</sup> The undisputed facts are the fishing history of the F/V VALIANT as contained in the official LLP record. The facts alleged by Bowlden are contained in the Statement of Jay Bowlden (Dec. 17, 1999) (Exhibit 1) and Letter from Jay Bowlden to RAM (June 21, 2000)(Exhibit 2), unless I state another source. For purposes of this decision, I assume that the facts, as alleged by Bowlden, are true.

<sup>10</sup> Statement of Ray Nomura (Dec. 6, 1999)(Exhibit 3).

<sup>11</sup> Statement of Donald Lindblad, President, FVO Marine Ways (Dec. 15, 1999)(Exhibit 4).

<sup>12</sup> 50 C.F.R. § 679.2 (definition of official LLP record).

According to the official LLP record, Bowlden’s only groundfish harvest in the Aleutian Islands in the years 1988 to 1999 is *September 13, 1989*. Therefore, Bowlden did not harvest groundfish in the Aleutian Islands between September 13, 1989 and December 31, 1999.

**C. RAM’s interpretation is correct.**

I interpret a regulation in light of the language of the regulation, regulatory history and purpose.<sup>13</sup> The language of the statute or regulation is the most important evidence of the intent of the adopting body and of the meaning of the regulation.<sup>14</sup> The Secretary of Commerce is the official who adopted the LLP regulations pursuant to his authority under the Magnuson-Stevens Fishery Conservation and Management Act.<sup>15</sup> The Secretary adopted the LLP regulations as forwarded to him by the North Pacific Fishery Management Council and NMFS.<sup>16</sup> I will therefore rely on Council and NMFS intent as the Secretary’s intent.

Applying these principles, I conclude that RAM’s interpretation of section (E) of the unavoidable circumstance regulation is correct. I conclude that the Council and NMFS intended to impose a cutoff date of June 17, 1995 as the date by which an applicant must make a harvest after the lifting of the unavoidable circumstance. I conclude that Bowlden cannot satisfy section (E) by a harvest that occurred *after* June 17, 1995, even if that harvest occurred within a reasonable time after the lifting of the unavoidable circumstance.<sup>17</sup> I reach this conclusion even though it means that the unavoidable circumstance provision is not available to applicants seeking an Aleutian Islands endorsement, a Bering Sea endorsement or any other groundfish endorsement that requires only one harvest in the endorsement qualification period.

**1) Language of the regulation.**

The language of the unavoidable circumstances provision unequivocally supports the conclusion

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<sup>13</sup> “As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve.” *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). The principles of statutory interpretation generally apply to regulations.

<sup>14</sup> See SINGER NORMAN, J., SUTHERLAND STATUTORY CONSTRUCTION 2A §§ 46:01 to 46:07 (6<sup>th</sup> ed. 2000)

<sup>15</sup> Magnuson-Stevens Fishery Conservation Management Act, 16 U.S.C. § 1854(b).

<sup>16</sup> Final Rule, 63 Fed. Reg. 52,642 (1998).

<sup>17</sup> Even under Bowlden’s interpretation, Bowlden would not receive an Aleutian Islands endorsement because it did not harvest groundfish in the Aleutian Islands within a reasonable time after the lifting of the unavoidable circumstance. Bowlden did not harvest groundfish in the Aleutian Islands between June 27, 1995, when the F/V VALIANT was repaired, and December 31, 1999: a period of four and a half years. Bowlden’s evidence was that it had an agreement to deliver Pacific cod to Trident Seafoods *in the Bering Sea*, but not the Aleutian Islands. Statement of Ray Nomura (Exhibit 3).

that section (E) requires a harvest by June 17, 1995 as a condition for meeting the unavoidable circumstance regulation. The regulation states that a person “whose vessel was unable to meet all the criteria in paragraph (k)(4) of this section for a groundfish license . . . because of an unavoidable circumstance . . . may receive a license *if the qualified person is able to demonstrate that*” and the regulation then lists the requirements in sections (A), (B), (C), (D) *and* (E). The natural reading of the language is that an applicant can meet the unavoidable circumstance regulation *if* and only if it satisfies sections (A), (B), (C), (D) and (E).

Section (E) itself states that the applicant must show that it harvested any amount of license limitation groundfish or appropriate crab species “after the vessel was prevented from participating by the unavoidable circumstance *but before June 17, 1995.*” The language of the regulation, standing by itself, does not support the interpretation that the requirement for a harvest *before* June 17, 1995 can be satisfied by a harvest *after* June 17, 1995. Before does not mean after. I cannot say that a groundfish harvest in the Bering Sea on December 30, 1995 meets the requirement for a groundfish harvest in the Bering Sea before June 17, 1995.

## 2) LLP regulatory history and purpose.

The LLP regulatory history strongly supports RAM’s interpretation. In commentary on the unavoidable circumstance regulation, NMFS stated that “an applicant may be found eligible to receive a license, even though the vessel fishing history on which that eligibility is based does not meet the standard eligibility criteria for a license.”<sup>18</sup> NMFS then explained the alternate criteria in sections (A) through (E) of the unavoidable circumstance regulation: “If *all* these criteria are met to the satisfaction of NMFS, a license may be issued for the relevant fishery and endorsement area.”<sup>19</sup>

The LLP regulatory history shows that the purpose of section (E) was to establish a cutoff date for the unavoidable circumstance applicant to have participated in the particular fishery for which it wants an LLP endorsement. And that cutoff date was the date of final Council action on the LLP, which turned out to be June 17, 1995. When Council Member Dave Benton moved the Council to adopt an unavoidable circumstance provision, he stated:

I’d move that vessels which qualified under the moratorium, and were lost damaged, or otherwise out of the fishery due to factors beyond control of the owner, and which were replaced or otherwise reentered the fisheries in accordance with the moratorium rules **and which 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

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<sup>18</sup> Final Rule, 63 Fed. Reg. 52,642, 52,646 (1998).

<sup>19</sup> Final Rule, 63 Fed. Reg. 52,642, 52,646 - 52,647 (1998).

for a general license and area endorsement for that fishery.<sup>20</sup>

In discussing the motion, Council Member Don Collinsworth stated: “We do need some fairly bright-line clarification of . . . what the cutoff date is intended.”<sup>21</sup> Council Member Benton explained:

The cutoff date would conform with the cutoff date of when we take final action here. Right now, we’re using June 15, 1995. I guess that would be the date that we would use, unless we decide when we finally approved this package on today or whatever it be. That would be my intent that would deal with that.<sup>22</sup>

The motion passed without objection.<sup>23</sup>

When NMFS proposed the LLP in the Federal Register, the only comment on the unavoidable circumstances regulation was Comment 17, which stated that the requirement for a harvest by June 17, 1995 was “unfair to a person who could have used the provision except that he or she did not have a documented harvest before prior to June 17, 1995.” 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 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.<sup>[24]</sup> 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,

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<sup>20</sup> Transcript (uncertified), North Pacific Fishery Management Council Meeting, June 15 - 17, 1995 at 69. The transcript is available on the Administrative Appeals section of the NMFS Alaska region website under “Other Documents,” <http://www.fakr.noaa.gov/appeals/default.htm>.

<sup>21</sup> *Id.* at 70.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 73.

<sup>24</sup> The ending date for the EQP for all groundfish endorsements is June 17, 1995. 50 C.F.R. § 679.4(k)(4)(ii). Thus, section (E) does *not* extend the EQP for groundfish endorsements. The ending date for the EQP for all crab endorsements is December 31, 1994. 50 C.F.R. § 679.4(k)(5)(ii). Therefore, section (E) actually *does* extend the EQP for crab applicants because it gives them until June 17, 1995 to make this harvest.



indicated a participant's good 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.<sup>25</sup>

This comment contradicts Bowlden's assertion that "[w]hat the regulations do not contemplate is the situation where the unavoidable circumstance is *not* overcome in time to allow the owner to make a documented harvest of groundfish prior to June 17, 1995."<sup>26</sup> NMFS considered and rejected the argument some unavoidable circumstance applicants should receive *longer* than June 17, 1995 to make a harvest under the unavoidable circumstance regulation. The response to Comment 17 is strong evidence that the Council and NMFS made "a deliberate policy choice to adopt an across-the-board requirement for a documented harvest by June 17, 1995 that does not take into account the applicant's individual circumstances."<sup>27</sup>

### **3) RAM's interpretation does not produce an absurd result or render the unavoidable circumstance regulation meaningless.**

Bowlden cites the rule of statutory construction that a statute or regulation should be interpreted to avoid an absurd result. Bowlden also cites a rule of statutory construction that a statute or regulation should not be interpreted so that it is superfluous. These rules of interpretation are based on the reasonable assumption that the legislature or the agency does not intend to adopt something that is absurd or meaningless.

I agree with *Sutherland on Statutory Construction*, the leading text on statutory construction and the text cited by Bowlden: "[T]he absurd results doctrine should be used sparingly because it entails the risk that the judiciary will displace legislative policy on the basis of speculation that the legislature could not have meant what it unmistakably said."<sup>28</sup> The underlying question is what interpretation is most faithful to the Council and NMFS intent. The rules of interpretation are merely aids to determine legislative or administrative intent.

I acknowledge that the result of RAM's interpretation is somewhat anomalous: the unavoidable circumstance provision is categorically unavailable to a class of LLP groundfish applicants. I acknowledge this is some evidence in favor of Bowlden's interpretation. I acknowledge that it would have been better if the Council and NMFS had explicitly stated they were establishing a June 17, 1995 cutoff in the unavoidable circumstances provision even though it meant that any applicant seeking a groundfish endorsement that requires only one harvest will not be able to use

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<sup>25</sup> Final Rule, 63 Fed. Reg. 52,642, 52,651 (1998).

<sup>26</sup> Bowlden's Appeal of IAD at 6 (emphasis in original).

<sup>27</sup> *St. George Marine, Inc.*, Appeal No. 02-0024 at 13 - 15 (Feb. 19, 2004).

<sup>28</sup> SINGER NORMAN, J., SUTHERLAND STATUTORY CONSTRUCTION 2A §§ 46:07 at 199 (6<sup>th</sup> ed. 2000)(footnote omitted).

the provision.

But this is the only evidence in favor of Bowlden's interpretation. The clear preponderance of evidence is that the Council and NMFS adopted section (E) to establish a cutoff date of June 17, 1995 for a harvest by the unavoidable circumstance applicant. That evidence is the unambiguous language of section (E) that requires a harvest *before* June 17, 1995, the statements in Council deliberations that the provision established a cutoff date for a harvest, NMFS's statements in commentary to the LLP regulations that an applicant had to meet all the criteria of the unavoidable circumstance regulation and NMFS's explicit response to Comment 17 that the Council did not intend a harvest after June 17, 1995 to qualify an applicant for an LLP license.

Further, the result of RAM's interpretation is not so aberrant that I could classify it as absurd. Although the unavoidable circumstance exception is unavailable to a class of LLP groundfish applicants, it is still available to many groundfish applicants: all applicants applying for a groundfish endorsement that requires more than one harvest in the EQP.<sup>29</sup>

And the reason it is unavailable to Bowlden and others seeking a Bering Sea or Aleutian Islands endorsement is precisely *because* those endorsements require only one documented harvest in the EQP. Put another way, the unavoidable circumstance exception is only unavailable to applicants who made *no* groundfish harvests for approximately two and a half years: January 1, 1992 to June 17, 1995. The Council and NMFS could have intended that, when the endorsement only requires one harvest in a two and a half year period, they will not allow any reason to excuse not meeting a fairly minimal requirement.

Thus, I conclude that RAM's interpretation does not render the unavoidable circumstance provision absurd, superfluous, meaningless or, on its face, unreasonable.

#### **4) Bowlden misunderstands the “reasonable steps” requirement in section (D) of the unavoidable circumstances regulation.**

Bowlden urges me to construct sections (D) and (E) together. It is true that section (D) does refer to the owner taking “all reasonable steps to overcome the circumstance that prevented the owner from conducting directed fishing for license limitation groundfish or crab species.” But section (D) requires that the owner prove that the owner took all reasonable steps but, despite the owner's best efforts, was still *unable* to fish. Section (E) serves a completely different purpose. It establishes a deadline by which the owner had to fish. I cannot interpret these two sections

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<sup>29</sup> The table in Appendix A shows which groundfish endorsements may and may not be earned under the unavoidable circumstance provision. The unavoidable circumstance regulation is also available to applicants for an *LLP crab license*. It is available to applicants for an AI brown king endorsement or an *opilio/bairdi* endorsement because those endorsements require more than one documented harvest. It is available to crab applicants for *all* endorsements because the EQP for all crab endorsements ends on December 31, 1994. Section (E) gives all crab applicants who have suffered unavoidable circumstances until June 17, 1995, rather than December 31, 1994, to make an endorsement-qualifying harvest

together as alternate requirements.

**5) The remedy in the unavoidable circumstances has within it a cutoff date of June 17, 1995.**

Bowlden argues that the unavoidable circumstance provision is remedial and should be given a liberal interpretation. But the remedy in this regulation is not open-ended. It has within it a cutoff date of June 17, 1995. The remedy is only for LLP applicants that harvested crab or groundfish in the desired endorsement area by June 17, 1995.

The remedy sought by Bowlden is that the applicant must have made a harvest “within a reasonable time” after the lifting of the unavoidable circumstance. This is different in character from the remedy adopted by NMFS and the Council, which requires that the applicant have made a harvest by the cutoff date of June 17, 1995. It is a different policy choice and I am not empowered to make a different policy choice under the guise of interpretation. If the Council and NMFS wish to adopt a different approach for the unavoidable circumstance provision for a Bering Sea or Aleutian Islands endorsement, they must evaluate that approach, and adopt it, in a new regulation.<sup>30</sup>

I therefore conclude that section (E) of the unavoidable circumstance regulation means that Bowlden cannot receive an LLP endorsement with a Bering Sea or Aleutian Islands endorsement because it did not harvest groundfish in the Bering Sea or the Aleutian Islands after February 1995 but before June 17, 1995.

**2. May Bowlden receive a hearing on whether it meets sections (A) through (D) of the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv), if it did not satisfy section (E)?**

Bowlden requests a hearing on whether it meets sections (A) through (D). I deny that request because I have decided, as a matter of law, that Bowlden cannot satisfy the unavoidable circumstance regulation because it does not meet section (E).

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<sup>30</sup> The Council and NMFS have adopted a different approach to unavoidable circumstances in two recent regulations. They have still given the unavoidable circumstance applicant a deadline but a *later* deadline than the standard applicant. For a Pacific cod gear endorsement, the unavoidable circumstance applicant has until April 16, 2000 to make a harvest after the lifting of the unavoidable circumstance and the standard applicant has until December 31, 1998 or December 31, 1999 to make qualifying harvests. *Compare* 50 C.F.R. § 679.4(k)(9)(v)(B)(4) *with* 50 C.F.R. § 679.4(k)(9)(i). For an LLP crab license, the unavoidable circumstance applicant has until January 1, 2000 to make a recent crab harvest after the lifting of the unavoidable circumstance and the standard applicant has until February 7, 1998. *Compare* 50 C.F.R. § 679.4(k)(5)(iii)(A) *with* 50 C.F.R. § 679.4(k)(5)(v)(E). In neither regulation did the Council and NMFS simply require the unavoidable circumstance applicant to make a harvest within a *reasonable time* after the unavoidable circumstance ended.

Bowlden argues that it might conserve NMFS's resources to hold a hearing to determine whether it can prove the facts required by sections (A) through (D). Bowlden argues that if I decide that it does not meet sections (A), (B), (C) or (D), it might not challenge NMFS's interpretation of section (E) in federal court. Bowlden states that, if it files a challenge and if the federal court agrees with Bowlden, NMFS will have already decided that Bowlden meets the other requirements of the unavoidable circumstance regulation. Bowlden further states that NMFS should hold a hearing now when evidence on its claim of unavoidable circumstance is fresh.

None of those reasons are sufficient for me to hold a hearing. Federal regulation 50 C.F.R. § 679.43(g)(3)(iv) states: "A hearing will not be ordered on factual issues that are not determinative with respect to the action requested." I have assumed that Bowlden has proved the facts it alleges about the damage suffered to the F/V VALIANT. But these facts "are not determinative with respect to the action requested." The action requested by Bowlden is a permanent LLP license with Bering Sea and Aleutian Islands endorsements. I have concluded that Bowlden will not receive an LLP license with Bering Sea and Aleutian Islands endorsements, even if the facts it alleges about the unavoidable circumstances are true.

Bowlden's reasons for holding a hearing are speculative: *if* I find that Bowlden does not meet sections (A) through (D), *if* it files suit in federal court, *if* it prevails. The rule in section 679.43(g) means that the time to hold a hearing is only when the applicant can actually receive an LLP license as a result of that hearing. Bowlden is on notice that it should preserve evidence of its unavoidable circumstance claim, if it prevails on its legal argument in another forum.

An applicant who appeals an IAD generally receives an interim license during the pendency of the appeal.<sup>31</sup> The rule in section 679.43(g) means that an appellant will not continue to fish on an interim license while the appeals officer holds a hearing that cannot possibly result in granting the appellant a permanent license. The rule also benefits appellants who have made factual claims that, if true, entitle them to LLP licenses. The rule directs the appeals officer to hold hearings for appellants who can receive LLP licenses as a result of a hearing.

#### FINDINGS OF FACT

1. Bowlden did not make a documented harvest of groundfish in the Bering Sea after February 26, 1995, the date that repairs to the F/V VALIANT began, and before June 17, 1995.
2. Bowlden made a documented harvest of groundfish in the Bering Sea on September 13, 1989.
3. Bowlden made a documented harvest of groundfish in the Bering Sea on December 30, 1995.
4. Bowlden did not make a documented harvest of groundfish in the Aleutian Islands after February 26, 1995 and before June 17, 1995.

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<sup>31</sup> 50 C.F.R. § 679.43(p).

5. Bowlden did not make a documented harvest of groundfish in the Aleutian Islands between September 13, 1989 and December 31, 1999.
6. Bowlden made a documented harvest of groundfish in the Aleutian Islands on September 13, 1989.

#### CONCLUSIONS OF LAW

1. Bowlden may not receive credit for a groundfish harvest in the Bering Sea or the Aleutian Islands under the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), because it did not harvest groundfish in the Bering Sea or the Aleutian Islands after the unavoidable circumstance but before June 17, 1995, as required by section (E) of that regulation.
2. Bowlden does not qualify for an LLP groundfish license with Bering Sea and Aleutian Islands endorsements.
3. Bowlden may not receive a hearing on whether it meets sections (A) through (D) of the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv), because it did not harvest groundfish in the Bering Sea or the Aleutian Islands after the unavoidable circumstance and before June 17, 1995, and therefore does not satisfy section (E) of the regulation.
4. Bowlden may not receive a hearing on its unavoidable circumstance claim because it has not alleged facts which, if true, enable me to take the action Bowlden requests, as required by 50 C.F.R. § 679.43(g)(3)(iv).

#### DISPOSITION

The IAD is **AFFIRMED**. This Decision takes effect August 6, 2004, 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, 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 were overlooked or misunderstood by the appeals officer and must be accompanied by a written statement in support of the motion.

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Mary Alice McKeen  
Appeals Officer

APPENDIX A: Table showing whether unavoidable circumstance [U.C.] provision is available

for LLP groundfish endorsements [attached]