NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	
	)	Appeal No. 00-0014
TYNES ENTERPRISES, Inc.,	)	
WABEY ENTERPRISES, Inc.,	)	
HJELLE ENTERPRISES, Inc.,	)	DECISION
F/V AMERICAN EAGLE,	)	
ADF&G # 00039	)	
Appellants	)	July 11, 2002
_____	)	

STATEMENT OF THE CASE

Appellants applied for an endorsement to harvest Bering Sea/Aleutian Islands [BSAI] *C. opilio* Tanner crab on the catcher vessel permit issued to the F/V AMERICAN EAGLE under the American Fisheries Act [AFA].[1] This endorsement is known as a "crab sideboard endorsement." The Restricted Access Management [RAM] Program issued an Initial Administrative Determination [IAD] denying the Appellants an *opilio* endorsement on the F/V AMERICAN EAGLE's AFA catcher vessel permit.

The Appellants are three companies: Tynes Enterprises, Inc., Wabey Enterprises, Inc., and Hjelle Enterprises, Inc. Each company owns a one-third interest in the F/V AMERICAN EAGLE. Hjelle Enterprises also owns another vessel, the F/V ALEUTIAN ROVER.

According to the official AFA record, the F/V AMERICAN EAGLE qualifies for an AFA inshore catcher vessel permit with endorsements to harvest Bristol Bay red king and *bairdi* crab. The Appellants argue that the F/V AMERICAN EAGLE's AFA catcher vessel permit should also be endorsed for *opilio* crab, based on the combined fishing histories of the F/V AMERICAN EAGLE and the F/V ALEUTIAN ROVER. RAM states that it has no authority to combine fishing histories of vessels in awarding AFA permits or endorsements on AFA permits under the crab sideboard regulation, 50 C.F.R. § 679.4(*l*)(3)(ii)(D).

The Appellants filed a timely appeal of the IAD. The Appellants can appeal the IAD because it directly and adversely affects their interests, as required by 50 C.F.R. § 679.43(b).

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[1] Div. C. Title II, Subtitle II, Pub. L. No. 105-277, 112 Stat. 2681-616 to 112 Stat. 2681-637 (Oct. 21, 1998). The AFA and the AFA regulations are on NMFS's website: http://www.fakr.noaa.gov. I will refer to BSAI *C. opilio* Tanner crab as *opilio* crab and BSAI *C. bairdi* Tanner crab as *bairdi* crab. The AFA provided that key sections of the AFA were repealed on December 31, 2004, unless adopted as part of a fishery management plan under the Magnuson-Stevens Act. AFA, section 213(a). Congress eliminated the repeal language in 2001. Section 211, Department of Commerce and Related Agencies Appropriations Act, 2002, Pub. L. 107-77, 115 Stat. 748 (Nov. 28, 2001).

ISSUES

I. Does NMFS have the authority to endorse the AFA catcher vessel permit for the F/V AMERICAN EAGLE for *opilio* crab, based on the combined fishing history of the F/V AMERICAN EAGLE and the F/V ALEUTIAN ROVER, under the crab sideboard regulation, 50 C.F.R. § 679.4(*l*)(3)(ii)(D)?

II. Have the Appellants met the requirements for a hearing on their appeal in 50 C.F.R. § 679.43(g)?

SUMMARY

The IAD is affirmed. The crab sideboard regulation, 50 C.F.R. § 679.4(*l*)(3)(ii)(D), does not authorize NMFS to combine fishing histories of two vessels in awarding an endorsement on an AFA catcher vessel permit. This interpretation is based on the clear language of the regulation, the purpose of the regulation and agency implementation of the AFA. Each AFA catcher vessel must qualify for an endorsement on its AFA catcher vessel permit based on that vessel's own fishing history, subject to an extremely limited exception, specified in the AFA itself, for vessels that replace sunk or lost AFA vessels [2]

This interpretation of the crab sideboard regulation, 50 C.F.R. § 679.4(*l*)(3)(ii)(D), is consistent with agency practice in the Vessel Moratorium Program for Groundfish and Crab [Moratorium Program] and the North Pacific Groundfish and Crab License Limitation Program [LLP]. RAM did not combine fishing histories of different vessels in awarding moratorium permits or LLP licenses, except when authorized by specific regulations to do so. RAM did *not* combine the fishing histories of the F/V ALEUTIAN ROVER and the F/V AMERICAN EAGLE when it issued the Appellants a moratorium permit. Even if NMFS were to combine fishing histories for permits in other programs, the AFA and the AFA regulations would dictate the requirements for AFA permits.

Appellants have not met the requirements in 50 C.F.R. § 679.43(g) for a hearing on their appeal. According to 50 C.F.R. § 679.43(g)(3)(i), a hearing may not be ordered on an issue of law. The proper interpretation of the crab sideboard regulation is an issue of law. According to 50 C.F.R. § 679.43(g)(3)(iv), a hearing may not be ordered unless the Appellants have alleged facts which, if true, entitle them to relief. Appellants have not alleged facts which would justify estopping or preventing the government from applying the crab sideboard regulation to Appellants' application for an *opilio* endorsement on their AFA catcher vessel permit.

[2] AFA, § 208(g).

APPLICABLE LAW

The AFA crab sideboard regulation, 50 C.F.R. § 679.4(*l*)(3)(ii)(D), provides, in part:

> (D) *Vessel crab activity information required for crab sideboard endorsements.* The owner of an AFA catcher vessel wishing to participate in any BSAI king or Tanner crab fishery must apply for a crab sideboard endorsement authorizing the catcher vessel to retain that crab species. An AFA catcher vessel permit may be endorsed for a crab species if the owner requests a crab sideboard endorsement; the owner provides supporting documentation that the catcher vessel made the required legal landing(s) of a crab species; and the Regional Administrator verifies the legal landing(s) according to the following criteria: . . .
>
> (6) Opilio Tanner crab: A legal landing of *Chionoecetes (C.) opilio* Tanner crab in each of 4 or more years from 1988 to 1997.[3]

ANALYSIS

I. Does NMFS have the authority to endorse the AFA catcher vessel permit for the F/V AMERICAN EAGLE for *opilio* crab, based on the combined fishing history of the F/V AMERICAN EAGLE and the F/V ALEUTIAN ROVER, under the crab sideboard regulation, 50 C.F.R. § 679.4(*l*)(3)(ii)(D)?

Appellants argue that they should be able to receive an *opilio* endorsement for the F/V AMERICAN EAGLE based on the combined landings of the F/V AMERICAN EAGLE and the F/V ALEUTIAN ROVER. Between 1988 and 1997, the F/V AMERICAN EAGLE landed *opilio* in 1995 only. The F/V ALEUTIAN ROVER landed *opilio* in 1990, 1991 and 1996.[4] Neither vessel, by itself, made *opilio* landings in four or more years from 1988 to 1997. Appellants are correct that, taken together, these two vessels made *opilio* landings in four or more years from 1988 to 1997.

The question is whether the crab sideboard regulation [50 C.F.R. § 679.4(*l*)(3)(ii)(D)] authorizes NMFS to combine the fishing histories of two vessels in awarding an endorsement on an AFA catcher vessel permit. Appellants argue that it does. RAM concluded that it does not have that

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[3] 50 C.F.R. § 679.4(*l*)(3)(ii)(D)(6). The other subsections – (D)(1) - (5) and (D)(7) – specify the landings required for the crab sideboard endorsements for other crab species.

[4] For purposes of this Decision, I accept Appellants' statements as to the F/V ALEUTIAN ROVER's fishing history and ownership of the F/V ALEUTIAN ROVER.

authority.

I conclude that RAM's interpretation of the crab sideboard regulation is correct. The crab sideboard regulation [50 C.F.R. § 679.4(*l*)(3)(ii)(D)] does not authorize NMFS to award a crab sideboard endorsement by combining the fishing histories of two vessels. Each catcher vessel must qualify for an endorsement on an AFA permit based on that vessel's own fishing history, subject to an extremely limited exception, specified in the AFA itself, for vessels that replace sunk or lost AFA vessels.[5]

To interpret a regulation, I examine the language of the regulation, construed in light of the history and purpose of the regulation and NMFS's implementation of the regulation. I also examine Appellants' assertion that NMFS combined the fishing histories of different vessels in the Moratorium Program and the License Limitation Program and Appellants' other arguments.

Appellants assert that the crab sideboard regulation is ambiguous. A statute or regulation is ambiguous if it is "capable of being understood by reasonably well-informed persons in two or more different senses."[6] The language of a regulation can suggest more than one meaning, or the history or purpose of a regulation can suggest more than one meaning.[7]

A. Language of the regulation.

The starting point for interpretation is always the language of the regulation or statute. The language of the crab sideboard regulation, 50 C.F.R. § 679.4(*l*)(3)(ii)(D), strongly supports RAM's interpretation. The title of the regulation is "**Vessel crab activity required for crab sideboard endorsements**." It states that:

> **The owner of an AFA catcher vessel wishing to participate in any BSAI king or Tanner crab fishery** must apply for a crab sideboard endorsement authorizing **the catcher vessel** to retain that crab species. An AFA catcher vessel permit may be endorsed for a crab species if the owner requests a crab sideboard endorsement; **the owner provides supporting documentation that the catcher vessel made the required legal landing(s) of a crab species**; and the Regional Administrator verifies the legal landing(s) according to the following criteria: . . .

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[5] AFA, section 208(g). But even replacement vessels do not receive an AFA permit based on the *combined* fishing history of the lost vessel and the replacement vessel. The replacement vessel receives a permit based on the lost vessel's fishing history.

[6] 2A NORMAN SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.02 at 11-12 (6th ed. 2000 revision)

[7] *See C.I.R. v. Mercantile National Bank at Dallas*, 276 F.2d 58, 61 (5th Cir. 1960).

(6) Opilio Tanner crab: A legal landing of *Chionoecetes (C.) opilio* Tanner crab in each of 4 or more years from 1988 to1997. [50 C.F.R. § 679.4(*l*)(3)(ii)(D)(6)]

The language appears fairly straightforward, namely the owner of the AFA catcher vessel wishing to participate in the BSAI king or Tanner crab fishery must prove, and RAM must verify, that the AFA catcher vessel wishing to participate in those fisheries made the required landings in those fisheries. The question is which catcher vessel must have made the required landings. In the phrase, "the owner provides supporting documentation that the catcher vessel made the required legal landing(s) of a crab species," RAM interprets the phrase, "the catcher vessel," as referring to the only catcher vessel identified in the regulation, namely the "AFA catcher vessel wishing to participate in any BSAI king or Tanner crab fishery."

The language on its face does not suggest more than one meaning. The language on its face does not suggest Appellants' interpretation. Appellants interpret "the catcher vessel" as "the catcher vessels." Appellants interpret RAM's obligation as verifying whether a collection of vessels made the required landings. But which catcher vessel must have made the required landings, if not the catcher vessel that has the AFA permit and wants the endorsement? The regulation provides no other reference point for the catcher vessel that had to have the required landings *except* the catcher vessel that has the AFA permit and wants the endorsement on the permit. The regulation has *no* language telling RAM how it would combine fishing histories of different vessels in awarding AFA permits. I examine this in the next section.

B. Lack of criteria for combining fishing histories.

It is relatively obvious how NMFS determines whether one vessel made four *opilio* landings in each of four years from 1988 to 1997. It is not obvious at all how NMFS would determine whether a collection or group of catcher vessels made four *opilio* landings in each of four years from 1988 to 1997.

To issue permits based on combined fishing histories, NMFS would have to resolve questions such as the following. If NMFS could combine the fishing histories of two vessels, could it combine the fishing histories of three or four vessels? Would the vessels have to be owned by the same owner? If the vessels could be owned by different owners, would the owners each have to agree? Would the agreement have to be in a written document? What would happen if the owners didn't agree? Why would the catcher vessel with the AFA permit have to have made *any* of the landings for the crab sideboard endorsement? The F/V AMERICAN EAGLE did make one *opilio* landing but why is that necessary under the Appellants' interpretation of the crab sideboard regulation?

It is not that questions like these are impossible to address but they are ***not*** addressed: not in the crab sideboard regulation, not in any other AFA regulation, not in the AFA itself. This strongly suggests that NMFS does not have the authority to combine fishing histories of different vessels

in awarding a crab sideboard endorsement. The regulations or the AFA itself would have told NMFS how to do it.

In fact, the AFA specifies the only situation where NMFS can award an AFA permit to one vessel based on another vessel's catch history: vessels that replace lost or sunk AFA vessels.[8] In the event of the "actual total loss or constructive loss" of the AFA eligible vessel, an owner may obtain an AFA permit for a replacement vessel provided that the loss of the AFA eligible vessel "was caused by an act of God, an act of war, a collision, an act or omission of a party other than the owner or agent of the vessel, or any other event not caused by the willful misconduct of the owner or agent" and that the replacement vessel meets specific requirements.[9]

AFA regulation 50 C.F.R. § 679.4(*l*)(7) implements this section of the AFA and clearly tells vessel owners, NMFS and the general public how a vessel owner may obtain a permit for a replacement vessel. If NMFS had the authority to award AFA permits by combining fishing histories of different vessels, the AFA and an AFA regulation would have told vessel owners, NMFS and the general public how a vessel owner could obtain an AFA permit based on the combined fishing history of two or more vessels. The fact that neither the AFA nor an AFA regulation specifies rules for combining fishing histories of vessels is strong evidence that NMFS does not have the authority to do that.

C. History and purpose of the crab sideboard regulation.

The next question is whether the history or purpose of the crab sideboard regulation suggests or supports Appellants' interpretation. It does not.

The history of the regulation is tied to the history of the AFA itself. In the AFA, Congress allocated the BSAI pollock catch between catcher vessels delivering inshore and those delivering offshore.[10] The AFA granted inshore catcher vessel cooperatives a suballocation of the inshore

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[8] Subsequent to the AFA, Congress enacted Pub. L. 106-562 which awarded an AFA catcher vessel permit to the F/V OCEAN SPRAY and which, as interpreted on appeal, directed NMFS to determine the contribution of the F/V OCEAN SPRAY to its catcher vessel cooperative based on the the 1992 - 1994 catch history of the F/V PROVIDIAN. Ocean Spray Partnership, Appeal 01-0002, Decision, April 13, 2001, Decision on Reconsideration, June 15, 2001.

[9] AFA, § 208(g). The requirements include length, horsepower and that the vessel was American-built. The AFA has 13 sections: § 201 through § 213. I will cite the AFA by section number only. Even for replacement vessels, RAM does not *combine* the fishing histories but, in effect, *substitutes* the fishing history of the lost vessel for the replacement vessel.

[10] AFA, § 206.

pollock catch.[11] Congress foresaw that co-op vessels would be able to trade or sell their rights to fish pollock to other co-op vessels. Congress was concerned that AFA co-op vessels which had traded their pollock rights to other vessels would increase their participation in other (non-pollock) fisheries, including the BSAI crab fisheries.[12] Congress wished to protect non-AFA vessels from AFA vessels with time and capacity on their hands. In the AFA itself, Congress specifically directed the North Pacific Fishery Management Council to recommend measures to protect non-AFA fisheries from potential adverse effects of the AFA and AFA catcher vessel cooperatives.[13]

After the AFA was enacted, the Council recommended protective measures and forwarded them to NMFS.[14] NMFS drafted regulations, including the crab sideboard regulation, based on the Council's recommendations. The metaphor is the sideboards of a pickup truck. The crab sideboard regulation contains the AFA fleet and restrains it from unduly spilling over into non-AFA fisheries.

NMFS explained the approach of the sideboard regulation in the Federal Register:

> With respect to BSAI crab fisheries, NMFS is limiting participation by AFA catcher vessels through AFA catcher vessel permit endorsements. **Only AFA catcher vessels with a demonstrated history in a particular crab fishery may continue participating in that fishery**. A catcher vessel that lacks the appropriate sideboard endorsements is prohibited from retaining BSAI king and Tanner crab. These crab sideboards have been implemented under the emergency interim rule to implement AFA permit requirements (65 FR 380, January 5, 2000).[15]

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[11] AFA, § 210. This section specified requirements the cooperatives had to meet to receive this suballocation.

[12] 144 Cong. Rec. S12696-03, S12708 (Oct. 20, 1998)(statement of Sen. Murray); 144 Cong. Rec. S12741-04, S12781 (Oct. 21, 1998)(statement of Sen. Stevens).

[13] AFA, § 211(a).

[14] North Pacific Fishery Management Council, June 1999 Newsletter, at 1 - 2, available at the Council website, http://www/fakr/noaa.gov/npfmc/Newsletters/699news.htm. For an analysis of the Council's recommendations, see chapter 7 of the "Secretarial Review of the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis of the American Fisheries Act Sideboard Measures," January 7, 2000, also available at the Council website, http://www.fakr.noaa.gov/npfmc/reports/afaea.pdf.

[15] Emergency Interim Rule, 65 Fed. Reg. 4,520, 4,528 (January 28, 2000)(emphasis added). This emergency regulation was extended in June 2000, 65 Fed. Reg. 39,107 (June 23, 2000), and July

The crab sideboard regulation provides for seven endorsements to an AFA catcher vessel permit, by species of crab.[16] The "demonstrated history" that a vessel must show varies with each endorsement. For the particular endorsement at issue here – the *opilio* fishery – the vessel had to show a history of a landing of *opilio* crab in each of 4 or more years from 1988 to 1997. 50 C.F.R. § 679.4(*l*)(3)(ii)(D)(6). The F/V AMERICAN EAGLE did not have this demonstrated history: it had one landing of *opilio* in this nine-year time period. Appellants state this was because the vessel was fishing pollock pursuant to a contract during this time period, which is why the vessel received an AFA pollock permit.

Appellants' interpretation makes no sense in terms of the history and purpose of the regulation. It *includes* many more AFA vessels in the BSAI crab fisheries, even though the purpose of the crab sideboard regulation is to *exclude* some AFA vessels, namely vessels without a demonstrated history in the particular crab fishery. Appellants would allow AFA vessels, such as the F/V AMERICAN EAGLE, that do not have a demonstrated history in the *opilio* fishery, to continue fishing *opilio,* by getting credit for *opilio* landings made by another vessel. Appellants' interpretation circumvents the purpose of the regulation.

RAM's interpretation furthers the purpose of the crab sideboard regulation. Nothing in the regulatory history remotely suggests that Congress or the Council or NMFS intended that an AFA vessel that did not make the required landings for a crab endorsement on its AFA permit should be able to borrow landings from another vessel and compensate for landings the applicant vessel did not make. RAM's interpretation means that an AFA catcher vessel that does not have a demonstrated history in the *opilio* fishery may not continue in the *opilio* fishery.

Thus, the history and purpose of the crab sideboard regulation do not suggest more than one meaning and do not suggest Appellants' interpretation, namely that the catcher vessel seeking the *opilio* endorsement is *not* the catcher vessel that must have made the required *opilio* landings.

D. Section 203(b) of the AFA.

Appellants argue that section 203(b) of the AFA states that regulations implementing the AFA shall "minimize disruptions to the commercial fishing industry" and that preventing the F/V AMERICAN EAGLE from fishing *opilio* is a disruption to the commercial fishing industry.[17] Appellants offer no argument, based on the language or history of section 203, that Congress

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2001, 66 Fed. Reg. 35,911 (July 10, 2001).

[16] The seven crab endorsements are Bristol Bay red king, St. Matthew Island blue king, Pribilof Island red and blue king, Aleutian Islands brown king, Aleutian Islands red king, Opilio Tanner and Bairdi Tanner. 50 C.F.R. § 679.4(*l*)(3)(D).

[17] Appeal at 16.

intended "disruptions" to mean excluding an AFA vessel from a non-AFA fishery.

The "disruptions" that Congress meant to minimize were disruptions from the other half of the AFA, which enacted new standards for vessel owners to prove their vessels are American-owned. Section 203(b), in its entirety, states:

> (b). REGULATIONS. Final regulations to implement **this subtitle** shall be published in the Federal Register by April l, 2000. The regulations to implement **this subtitle** shall prohibit impermissible transfers of ownership or control, specify any transactions which require prior approval of an implementing agency, identify transactions which do not require prior agency approval, and to the extent practicable, minimize disruptions to the commercial fishing industry, to the traditional financing arrangements of such industry, and to the opportunity to form fishery cooperatives.[18]

"This subtitle" is subtitle I, entitled "Fishery Endorsements," which adopts the new standards for American ownership. Subtitle II is entitled "Bering Sea Pollock Fishery" and contains all the provisions for AFA permits. Senator Stevens explained: "The implementation process set out in subsection (b) [of section 203] will provide an 18 month period for the Secretary of Transportation to promulgate regulations and fully review public comments, followed by an 18 month period in which the fishing industry can obtain letter rulings before the new requirements take effect **to avoid disruptions wherever possible."**[19]

Section 203 does not support Appellants' position that the regulation is ambiguous. It has no bearing on whether the crab sideboard regulation authorizes NMFS to combine fishing histories.

E. Magnuson-Stevens Act.

Appellants argue that the Magnuson Stevens Act is integrated into the terms of the AFA.[20] The Magnuson-Stevens Act has ten national standards for fishery management plans and regulations that implement a fishery management plan. National Standard 8 states that conservation and management measures shall "consistent with the conservation requirements of this Act . . . , take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize

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[18] AFA, sectcion 203(b).

[19] 114 Cong. Rec. S12741-04, S12778 (Oct. 21. 1998)(section-by-section analysis of the AFA submitted by Senator Stevens).

[20] Appeal at 17 - 19. The Magunson-Stevens Act is at 16 U.S.C. §§ 1801 - 1883.

adverse economic impacts on such communities."[21] Appellants argue that denying them an *opilio* endorsement violates National Standard 8 because it denies them the right to sustained participation in the *opilio* fishery.

The question before me is the proper interpretation of the crab sideboard regulation. Appellants offer no evidence from the language or history of the crab sideboard regulation that National Standard 8 bears on interpreting this regulation. Assuming that National Standard 8 is relevant, Appellants offer no evidence in favor of their interpretation of National Standard 8, namely that a conservation and management measure can violate this standard because it excludes an *individual* member of a fishing community – one vessel owner, one vessel – from a fishery. National Standard 8 requires that NMFS "take into account the importance of fishery resources to **fishing communities**."

If Appellants are arguing that the crab sideboard regulation is invalid because it violates National Standard 8 of the Magnuson-Stevens Act, that question is not before me. As an Appeals Officer, I do not have the authority to decide whether a regulation violates a statute.

F. Implementation of the AFA.

The IAD states at page 4:

> There is nothing in the AFA, in the regulations, nor in the information provided to the fleet that suggests that the fishing history of one vessel may be used to qualify another vessel for a Catcher Vessel Permit (or an endorsement thereto) under the AFA. AFA Catcher Vessel Permits with accompanying endorsements are issued to qualifying vessels premised on the unique activity of such qualifying vessel.

The AFA application form states:

> Under regulations implementing the AFA, a vessel is ineligible to participate in any BSAI crab fishery **unless that specific vessel participated in a specific crab fishery during certain qualifying years**. [Appeal at Exhibit 7, page 5]

Although Appellants say they believed they could combine vessel histories, Appellants offer no argument that they believed this based on the way NMFS implemented the AFA. Through published regulations and the AFA permit application, I conclude that NMFS has delivered a consistent message: a vessel owner can receive a crab endorsement on an AFA catcher vessel permit if the owner shows that the AFA catcher vessel seeking the endorsement made the required landings.

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[21] Section 301(a)(8) of the Magnuson-Stevens Act, 18 U.S.C. § 1851(a)(8).

G. Implementation of the Moratorium Program and the License Limitation Program.

Appellants primarily argue that RAM's interpretation of the crab sideboard regulation is incorrect because it contradicts how NMFS's "longstanding" practice of allowing vessels to combine fishing histories in the Moratorium Program and the License Limitation Program.[22] This argument fails for three reasons. First, assuming, for a moment, that Appellants accurately describe the Moratorium Program and the LLP, Appellants do not show why NMFS's practices in the Moratorium Program or the LLP are relevant to the meaning of a regulation under the American Fisheries Act. Appellants point to no evidence that Congress or the Council or NMFS intended to pattern AFA permits after moratorium permits or LLP licenses.

Second, it is not true that NMFS combined fishing histories in the Moratorium Program or the License Limitation Program. The regulations implementing the Moratorium Program did not authorize NMFS to combine fishing histories of different vessels in awarding moratorium permits.[23] This Office held in a moratorium appeal:

> The regulations [of the Moratorium Program] do not permit an applicant to combine vessel histories. Each vessel stands or falls on its own landings history or the landings history of the vessel from which it receives a moratorium qualification by transfer. Since neither the F/V HIGH SPIRIT nor the F/V CLOVERLEAF meet the requirements for an endorsement to harvest groundfish with hook gear, the regulations do not allow issuance of a permit with that endorsement.[24]

Although Appellants assert that "[LLP] applicants are allowed to combine fishing histories to meet those standards set forth in the regulation" and that "the LLP Application and accompanying instructions" allow combining of fishing histories,[25] it is simply not true. Appellants do not cite any specific regulation, section in the LLP application or section in the LLP application instructions that allows RAM to combine fishing histories. The instructions that accompanied the LLP application state:

> Please note that, to entitle a person for a license, the qualifying historic

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[22] Appeal at 3, 7, 8, 11 - 13.

[23] Final Rule, 60 Fed. Reg. 40,763 (Aug. 10, 1995). The regulations for the Moratorium Program were originally at 50 C.F.R. § 676.1 - 679.6. They were relocated to 50 C.F.R. § 679.1 - 679.7, Final Rule, 61 Fed. Reg. 31,228 (1996), and eliminated from the Code of Federal Regulations after the LLP came into effect. Final Rule, 65 Fed. Reg. 45,316 (2000).

[24] In re High Spirits, Inc., Appeal No. 96-0049 at 6 (Nov. 24, 1999). This Decision, and all OAA decisions, are published on the NMFS website, http://www/fakr/gov/appeals/default/htm.

[25] Appeal at 11.

> participation must be the participation of one vessel (there is one limited exception to this general rule, explained herein[26]). Another way of saying that is that one may not obtain a license by "piecing together" or assembling different parts of the fishing histories of different vessels in order to obtain a history that qualifies the owner of the various histories for a license. This is true, even though ownership of a vessel's fishing history may be separated from the owner of the vessel by sale (of either the fishing history or the vessel).[27]

For the License Limitation Program, NMFS issued a statement labeled "Clarification of a Complete Fishing History for License Eligibility" in the Federal Register:

> A partial fishing history (i.e, a fishing history that does not meet all of the eligibility criteria) generally cannot be joined with another partial fishing history to form a complete one. . . .
>
> In summary, a person must have a complete fishing history, which must have been created on a single vessel, with two exceptions. The first exception is for crab licenses. A person can combine a documented harvest of crab species that occurred during the period beginning January l, 1998, through February 7, 1998, with the fishing history of another vessel that meets the requirements of the GQP [general qualification period] and the EQP [endorsement qualification period] (see Exception 4 above). The second applies to lost or destroyed vessels. [Appeal at Exhibit 6 at page 8]

Subsequent to this announcement in the Federal Register, NMFS promulgated regulations for Pacific cod endorsements on LLP groundfish licenses. The regulation describes in detail the one situation where a vessel owner can combine landings of a sunken vessel with a replacement vessel, but has the following caveat: "No other combination of landings will satisfy the eligibility amounts in the table at paragraph (k)(9)(ii) of this section." 50 C.F.R. § 679.4(k)(9)(v)(A).

Third, Appellants only offer one supposed instance of NMFS combining fishing histories in the

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[26] The LLP application notes: "The exception to the 'one vessel = one history = one license' rule is a limited one, and applies only to applicants seeking licenses for the crab fisheries. If a person can demonstrate that a documented harvest of crab species was made from his or her vessel during the period beginning January l, 1996 through February 7, 1998, s/he may 'join' that history with another fishing history from another vessel whose fishing history meets all the requirements for a crab license except for the recent participation requirement. However, the history of the other vessel must have been acquired (or a contract to acquire it must have been executed) by 8:36 a.m., Pacific Standard Time, on October 10, 1998." The tremendous detail explaining this exception to the general rule *against* combining fishing histories is further evidence that if Congress or the Council wanted NMFS to combine fishing histories, it would have given NMFS detailed instructions how to do it.

[27] Page 8 of Exhibit 6, Appeal.

LLP or Moratorium Program, namely RAM issued a moratorium qualification and a moratorium permit to the Appellants. Appellants misinterpret and mischaracterize RAM's actions.

RAM issued Moratorium Qualification 4754 and a moratorium permit to Hjelle based on the fishing history of the F/V ALEUTIAN ROVER. RAM did not issue this permit by combining the fishing history of the F/V ALEUTIAN ROVER with the fishing history of the F/V AMERICAN EAGLE. The F/V ALEUTIAN ROVER, by itself, had the landings necessary for a moratorium qualification and permit. RAM *transferred* Moratorium Qualification 4754, the moratorium qualification based on the fishing history of the F/V ALEUTIAN ROVER, from Hjelle Enterprises to the Appellants. RAM then issued a moratorium permit to the Appellants. Again, RAM did not issue this permit by combining the fishing history of the F/V ALEUTIAN ROVER with the fishing history of the F/V AMERICAN EAGLE. **The Appellants confuse the *transferability* of a moratorium permit with the *combining* of one vessel's fishing history with another vessel's fishing history**.

Thus, the regulations and practice under the Moratorium Program and the License Limitation Program do not suggest more than one meaning in the crab sideboard regulation and do not support Appellants' interpretation. If anything, these programs support RAM's interpretation because it would be unprecedented to generally award permits or licenses to one vessel based on anything but the fishing history of that vessel. NMFS awards moratorium permits and LLP licenses based on the history of one vessel and only makes an exception to that rule if a regulation spells out the exception in detail.

H. Appellants' other arguments.

I examine Appellants' four other arguments. **First**, Appellants assert that, in June 1998, they agreed to purchase the F/V ALEUTIAN ROVER's crab fishing history from Hjelle Enterprises so the F/V AMERICAN EAGLE could obtain a moratorium permit, which did occur, *and* a crab endorsement on its AFA permit, which did not occur**.**

To support this claim, Appellants submit a document entitled, "**Transfer of F/V Aleutian Rover Moratorium Permit, Number 1804B, to F/V AMERICAN EAGLE**," which states that Wabey Enterprises will pay Hjelle Enterprises $30,000 for a one third interest "**in the transferred permit.** " The document does not mention the American Fisheries Act or a crab endorsement on an AFA permit. Congress did not pass the AFA until October 1998, the Council did not make crab sideboard recommendations until June 1999, NMFS did not issue AFA permits until January 2000. I will assume that Appellants could prove that, in June 1998, they agreed to purchase a crab endorsement on a moratorium permit *and* a crab endorsement on an AFA permit for $30,000. [28]

[28] *Cf. R.J. Fierce Packer, LLC*, Appeal No. 00-0004 at 16 (Dec. 18, 2000)(it was credible that Fierce Packer agreed to purchase the fishing history necessary for an LLP license, not merely the fishing

Assuming this is true, Appellants do not show that it bears on the interpretation of the crab sideboard regulation. The proper interpretation of a statute or regulation relies on documents in the public domain, not testimony from individuals – even legislators – as to their personal interpretation of what they thought a statute or regulation meant.[29] A person's beliefs or intentions can affect the interpretation of a regulation, only if the person communicated those views in the public record, typically through public comment or testimony, and the administrative agency incorporates those views in drafting the regulation. Appellants do not show their private actions or beliefs became part of the regulatory history for the crab sideboard regulation.

Second, Appellants argue:

> Before submitting the AFA Application, the Appellant had submitted an application under the LLP Program. After receiving preliminary approval of an *opilio* crab endorsement under the LLP, the Appellant believed that it would have the same treatment with the AFA sideboards that were later developed by NMFS.[30]

This argument has the same failing as the prior argument. Appellants do not show how their private beliefs bear on interpreting this regulation.

I note that this allegation also does not show any improper action by RAM. RAM issued the Appellants an LLP license with an *opilio* endorsement, based on the fishing history of the F/V AMERICAN EAGLE, because Appellants met the requirements for an LLP license with an *opilio* endorsement. The AFA crab sideboard regulation imposed different requirements on RAM for issuing an *opilio* endorsement on an AFA catcher vessel permit.[31] RAM properly

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history necessary for one year of fishing under the Moratorium Program, because Fierce Packer paid $200,000). In that case, a private contract was relevant because the LLP regulations expressly grant an LLP license to an applicant who purchased by written contract the fishing history necessary for an LLP license. 50 C.F.R. § 679.2 (definition of "eligible applicant").

[29] Ocean Spray Partnership, Decision on Reconsideration at 20 & n.44 & n.45 (June 25, 2001).

[30] Appeal at 8.

[31] An LLP crab license has a combined *opilio* and *bairdi* endorsement. A vessel receives an LLP *opilio/bairdi* endorsement, if the vessel made three harvests of either *opilio* or *bairdi* between January l, 1992 and December 31, 1994 and met the recent participation requirement of one LLP crab harvest between January 1, 1996 and February 7, 1998. 50 C.F.R. § 679.4(k)(5)(ii)(B) & (iii). An AFA catcher vessel permit has separate endorsements for *opilio* and *bairdi* crab. An AFA vessel receives a *bairdi* endorsement on its AFA catcher vessel permit if the vessel made one landing of *bairdi* in 1995 or 1996. 50 C.F.R. § 679.4(*l*)(3)(7).

followed the AFA requirements in evaluating Appellants' AFA application. Appellants' argument points out the following. To fish *opilio* crab, an AFA catcher vessel needs an LLP license endorsed for *opilio* **and** an AFA catcher vessel permit endorsed for *opilio*. For an AFA catcher vessel, an LLP license is not enough.

In sum, Appellants argue that they believed they would receive a *opilio* endorsement on their AFA catcher vessel permit for a number of reasons: because RAM issued Hjelle Enterprises a moratorium permit; because Appellants made an agreement with Hjelle Enterprises in June 1998 to obtain an *opilio* endorsement on their AFA catcher vessel permit; because RAM issued Appellants a moratorium permit in August 1999; because RAM issued Appellants an LLP license with an *opilio* endorsement in January 2000.

If Appellants interpreted any of those events as meaning that they would receive an *opilio* endorsement on the F/V AMERICAN EAGLE's AFA catcher vessel permit, it was a misinterpretation of events, a misinterpretation that NMFS did not cause, encourage, promote or foster.

Third, Appellants argue that they can transfer their LLP license. Appellants do have an LLP crab license with an *opilio* endorsement, which they received based on the fishing history of the F/V AMERICAN EAGLE. Appellants argue that since they can use that LLP crab license on another vessel, or sell their LLP license to someone else, denying them an *opilio* endorsement to the F/V AMERICAN EAGLE will not decrease the number of vessels harvesting *opilio* crab. But it will decrease the number of **AFA vessels** harvesting *opilio* crab and that was the purpose of the regulation. Therefore, the transferability of the Appellants' LLP license does not suggest ambiguity in the crab sideboard regulation and does not support Appellants' interpretation.

Fourth, Appellants argue:

> Had Appellant known that the AFA sideboards, that are now being implemented, would exclude them and their long history in the BSAI fisheries, they would have insisted (or at least could have attempted to insist) that Unisea let the Appellant out of our contractual agreements, at least long enough to at least make deliveries of *opilio* crab each year.[32]

Appellants had a contract with Unisea to trawl for pollock from 1988 through at least 1997. Appellants argue that is why they made only one *opilio* landing during that time. Appellants' argument proves too much. Presumably, many AFA vessel owners would have harvested more *opilio* if they had known the AFA would be passed and AFA regulations would require a special *opilio* endorsement to continue harvesting *opilio*. The purpose of the *opilio* crab sideboard regulation was *not* to give owners of AFA catcher vessels advance notice of the AFA's

[32] Appeal at 8.

requirements so they *could* fish more *opilio* and get an *opilio* endorsement. The purpose was the opposite: to award *opilio* endorsements to AFA vessels that *had* fished *opilio* in at least four years from 1988 to 1997.

Therefore, I conclude that the crab sideboard regulation does not meet the legal test for ambiguity. It is not "capable of being understood by reasonably well-informed persons in two or more different senses."[33] Neither the language of the regulation, nor the history of the regulation, nor agency practice, nor any of Appellants' other arguments suggests more than one meaning of the crab sideboard regulation. All the evidence supports the interpretation that RAM issues a crab sideboard endorsement based on the catch history of the vessel seeking the endorsement, not the catch history of that vessel *and* some other unspecified vessels according to some set of unspecified rules.

Thus, under the crab sideboard regulation, 50 C.F.R. § 679.4(*l*)(3)(ii)(D), an AFA catcher vessel receives an *opilio* crab sideboard endorsement if the owner proves "that the catcher vessel made the required legal landing(s)" of *opilio*. If an AFA catcher vessel has not made "a legal landing of [*opilio*] in each of four of more years from 1988 to 1997," NMFS does not have the authority to endorse that vessel's AFA permit for *opilio.*

II. Have appellants met the requirements for a hearing on their appeal?

I may order a hearing if the appeal demonstrates the following:

> (i) There is a genuine and substantial issue of adjudicative fact for resolution at a hearing. A hearing will not be ordered on issues of policy or law.
>
> . . . .
>
> (iv) Resolution of the factual issue in the way sought by the applicant is adequate to justify the action requested. A hearing will not be ordered on factual issues that are not determinative with respect to the action requested. [50 C.F.R. § 679.43(g)(3)(i)(iv)]

This rule benefits the government and the Appellants. It instructs an Appeals Officer not to conduct a hearing unless the hearing could result in the relief sought by the Appellants.

Appellants offer three reasons to hold a hearing. First, the Appellants wish to present evidence as to the circumstances surrounding the AFA and the AFA regulations.[34] Statutory and

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[33] 2A NORMAN SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.02 at 11-12 (6th ed. 2000 revision).

[34] The Appellants state their reasons in support of a hearing at page 9 of their Appeal.

regulatory interpretation is an issue of law.[35] I am not empowered to hold a hearing on a question of law under 50 C.F.R. § 679.43(g)(3)(i). Further, as I have noted, Appellants' private beliefs are not relevant to interpreting a statute or regulation.

Second, the Appellants wish to present evidence as to the history and operations of the F/V ALEUTIAN ROVER and the F/V AMERICAN EAGLE. I am assuming that Appellants can prove that they intended to purchase the *opilio* history of the F/V ALEUTIAN ROVER for use on the F/V AMERICAN EAGLE's catcher vessel permit and that they thought they did purchase the history. That is not adequate to justify the action requested. Under the crab sideboard regulation, the only relevant evidence of the history of the operations of the F/V AMERICAN EAGLE is whether it made *opilio* landings in four or more years from 1988 to 1997. RAM is not authorized to award an *opilio* endorsement merely because the Appellants thought they met the requirements for the endorsement.

Appellants may be arguing that the government should be prevented or "estopped" from applying the crab sideboard regulation to their application because NMFS misled the Appellants. This Office has never overturned an action by RAM based on government estoppel but we observed in Sherry Tuttle and Lori Whitmill, Appeal 96-0010:

> Under the doctrine of government estoppel, a party who reasonably and detrimentally relies on misinformation or wrong advice provided by a government agency and, as a result, fails to meet or comply with government requirements, may, under certain circumstances, preclude ("estop") the government from asserting the party's noncompliance. Among the circumstances that must be present for the doctrine of government estoppel to apply, is that the government agent must have engaged in affirmative misconduct. Appellants in this case do not allege or provide evidence of affirmative government misconduct.[36]

The same conclusion is true for this appeal. The facts alleged by Appellants, if true, come nowhere close to showing "affirmative government misconduct." Thus, resolution of the factual issue in the way sought by the Appellants is not adequate to justify the action requested. In fact, the record suggests no misadvice or misinformation from RAM at all. It simply suggests that the Appellants misinterpreted completely legitimate actions by RAM.

Third, the Appellants want to present evidence as to the "adverse effect" of RAM's decision, if not overturned by this Office. The adverse effect standard is the basis for a person to *file* an appeal: "Any person whose interest is directly and adversely affected by an initial administrative

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[35] *E.g., Amoco Oil v. U.S.,* 234 F.3d. 1374, 1377 (Fed. Cir. 2000); Ocean Spray Partnership, Decision on Reconsideration at 21 - 22 (June 15, 2001).

[36] Appeal No. 96-0010 at 2 (Dec. 3, 1999)(footnote omitted).

determination may file a written appeal." [50 C.F.R. § 679.43(b)] This Office accepted this appeal for filing. The "adverse effect" standard is not the standard for granting an *opilio* endorsement on an AFA catcher vessel permit. The standard for an *opilio* endorsement is documented historical participation in the *opilio* fishery.

FINDING OF FACT

The catcher vessel, F/V AMERICAN EAGLE, did not make a legal landing of BSAI *opilio* crab in each of four or more years from 1988 to 1997.

CONCLUSIONS OF LAW

1. The crab sideboard regulation, 50 C.F.R. § 679.4(*l*)(3)(ii)(D), is not legally ambiguous.

2. NMFS does not have the authority to endorse the AFA catcher vessel permit for the F/V AMERICAN EAGLE for *opilio* crab, based on the combined fishing history of the F/V AMERICAN EAGLE and the F/V ALEUTIAN ROVER, under the crab sideboard regulation, 50 C.F.R. § 679.4(*l*)(3)(ii)(D).

3. The Appellants have not alleged facts which, if true, justify preventing or "estopping" the government from applying the crab sideboard regulation, 50 C.F.R. § 679.4(*l*)(3)(ii)(D), to the Appellants' application for an *opilio* endorsement on the F/V AMERICAN EAGLE's AFA catcher vessel permit.

4. The Appellants have not met the requirements in 50 C.F.R. § 679.43(g) for a hearing on their appeal.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect August 9, 2002, 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, July 22, 2002. 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.

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MARY ALICE McKEEN
Appeals Officer