NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 02-0025
	)	
HANSEN ENTERPRISES, INC.,	)	DECISION
Appellant	)	
	)	December 14, 2004
	)	

STATEMENT OF THE CASE

Hansen Enterprises, Inc. [Hansen] appeals an Initial Administrative Determination [IAD] by the Restricted Access Management Program [RAM] under the North Pacific Groundfish and Crab License Limitation Program [LLP].[1]

Hansen applied for an LLP groundfish license and an LLP crab license based on the fishing history of the F/V NORTHWESTERN, ADFG No. 29962, USCG No. 587816. It is a catcher vessel with a length overall of 126 feet, which puts it in vessel length category "A." The IAD determined that Hansen was the eligible applicant for all LLP licenses based on the fishing history of this vessel.

The IAD determined that, based on the fishing history of the F/V NORTHWESTERN, Hansen would receive an LLP groundfish license with a Bering Sea area endorsement and an LLP crab license with three area/species endorsements: Bristol Bay red king crab, St. Matthew blue king crab and Bering Sea/Aleutian Islands [BSAI] *C. opilio* and *C. Bairdi* [Tanner] crab.

The IAD concluded that Hansen was not eligible to receive an Aleutian Islands area endorsement or a Western Gulf area endorsement on its LLP groundfish license.

Hansen can appeal the IAD because it directly and adversely affects Hansen's interests, as required by 50 C.F.R. § 679.43(b). The record has sufficient information to decide this appeal, as required by 50 C.F.R. § 679.43(g)(2). I therefore close the record and decide this appeal.

SUMMARY

The IAD is affirmed. Hansen is not eligible to receive an LLP groundfish license with an Aleutian Islands endorsement based on the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv). An applicant must meet every requirement of the unavoidable circumstance regulation. Hansen did not harvest groundfish in the Aleutian Islands after the claimed unavoidable circumstance and before June 17, 1995, as required by section (E) of the

[1] IAD, May 15, 2003. The LLP is in 50 C.F.R. § 679, primarily 50 C.F.R. § 679.4(k). The NMFS Alaska region website, http://www.fakr.noaa.gov/regs/summary.htm, has the LLP regulations.

unavoidable circumstance regulation. I do not decide whether Hansen meets the other requirements of the unavoidable circumstance regulation, including whether Hansen's inability to find a floating processor to take its catch in 1994 and 1995 was "unique" to Hansen or its vessel.

Hansen claimed the Western Gulf endorsement because it met the harvest requirement for that endorsement that was published in the LLP rule in October 1998: one documented harvest of license limitation groundfish in the Western Gulf between January l, 1992 and June 17, 1995.[2] This rule had an error in the text, namely it omitted the phrase "in each of any 2 calendar years" before the phrase "between January l, 1992 and June 17, 1995." NMFS published a correcting amendment to the LLP rule in May 2000 that restored the omitted phrase and provided that the requirement for a Western Gulf endorsement for a catcher vessel in category length A is one documented harvest of license limitation groundfish in the Western Gulf *in each of any 2 calendar years* between January l, 1992 and June 17, 1995. Hansen does not meet that requirement because it harvested groundfish only in 1995.

To receive a Western Gulf endorsement, Hansen must meet the requirement in current federal regulation: one documented harvest of license limitation groundfish in the Western Gulf *in each of any two calendar years* between January l, 1992 and June 17, 1995. The North Pacific Fishery Management Council approved this requirement when it took final action on the LLP. NMFS published this requirement for a Western Gulf endorsement when it published the proposed LLP rule. By judging Hansen's application according to this requirement, NMFS is not subjecting Hansen to a retroactive regulation.

ISSUES

1. Did RAM correctly deny Hansen an Aleutian Islands endorsement under the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv), because the F/V NORTHWESTERN did not harvest groundfish in the Aleutian Islands after the claimed unavoidable circumstance and before June 17, 1995?

2. Did RAM correctly deny Hansen a Western Gulf endorsement on its LLP license because the F/V NORTHWESTERN did not make one documented harvest *in each of any two calendar years* between January l, 1992 and June 17, 1995?

ANALYSIS

1. Did RAM correctly deny Hansen an Aleutian Islands endorsement under the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv), because the F/V NORTHWESTERN did not harvest groundfish in the Aleutian Islands after the claimed unavoidable circumstance and before June 17, 1995?

[2] Final Rule, 63 Fed. Reg. 52,642, 52,655 (Oct. 1, 1998).

To receive an Aleutian Islands [AI] endorsement on an LLP groundfish license, an applicant must have made a documented harvest of license limitation groundfish in a general qualification period [GQP].[3] For an AI endorsement, the basic GQP requirement is one groundfish harvest in BSAI between January l, 1988 and June 27, 1992.[4] According to the official LLP record, the F/V NORTHWESTERN made ten documented groundfish harvests in the Aleutian Islands between January l, 1988 and June 27, 1992, with the last one occurring on November 30, 1989.[5] Therefore, Hansen meets this requirement.

To receive an Aleutian Islands endorsement on an LLP license, an applicant must also meet the standard requirement for harvests in the endorsement qualification period [EQP] or must meet the alternative requirements in the unavoidable circumstance regulation. The standard EQP requirement for an AI endorsement is one groundfish harvest in the Aleutian Islands between January l, 1992 to June 17, 1995.[6]

Hansen admits it does not satisfy that requirement, but states it should receive an Aleutian Islands endorsement under the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv), which 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 l, 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.

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[3] 50 C.F.R. § 679.4(k)(4)(i). To count toward an LLP license, an applicant must prove "documented harvests" of "license limitation groundfish." Both terms are defined in 50 C.F.R. § 679.2. When I refer to harvests, I mean documented harvests. When I refer to groundfish, I mean license limitation groundfish.

[4] 50 C.F.R. § 679.4(k)(4)(i)(A)(1). Since Hansen meets the requirement this way, I do not discuss the alternate ways to meet the GQP. *See* 50 C.F.R. § 679.4(k)(4)(i)(A)(2), (A)(3) and 50 C.F.R. § 679.4(k)(4)(v).

[5] The official LLP record shows two documented harvests of groundfish in the Aleutian Islands on November 13, 1988 and December 4, 1988; one on July 17, 1989, August 3, 1989, August 19, 1989 and November 14, 1989; and two on November 30, 1989.

[6] 50 C.F.R. § 679.4(k)(4)(ii)(A).

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

Hansen alleges the following facts in support of its unavoidable circumstance claim, which I take as true for purposes of this decision.[7] The F/V NORTHWESTERN is a catcher vessel and therefore requires a processing facility – stationery or floating – to process the fish it catches. The Aleutians Islands had no processing facility in 1994 and 1995, even though Hansen made all reasonable efforts to persuade Trident Seafoods and Yardarm Knot Seafoods to send a processor in 1994 and 1995. It was not until March 22, 1996 that Hansen was able to harvest groundfish in the Aleutian Islands because Hansen convinced Yardarm Knot Seafoods to send a processor to the Aleutian Islands for a month to buy pot cod. Thus, Hansen does not dispute that it did not harvest groundfish in the Aleutian Islands before June 17, 1995.

The issue in this appeal is the correct interpretation of section (E). Hansen states that the unavoidable circumstance lasted beyond June 17, 1995. Hansen interprets the unavoidable circumstance regulation so that an applicant whose unavoidable circumstance lasts after June 17, 1995 should still be able to receive an endorsement based on the unavoidable circumstance regulation.

RAM's interpretation of section (E) is that NMFS has no authority to examine why an applicant did not harvest groundfish in the desired endorsement area before June 17, 1995 and to extend the time for a harvest beyond June 17, 1995 based on a determination as to why the applicant did not make a harvest by June 17, 1995. RAM interprets section (E) as a mandatory requirement which has no exceptions.

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[7] These facts are based on the two affidavits of Sigurd Hansen and the affidavits of Paul Padgett of Trident Seafoods, Kjetil Solberg of Adak Fisheries and Al Chaffee of Yardarm Knot Seafoods.

I conclude that RAM's interpretation of section (E) is correct. Hansen cannot receive an endorsement based on the unavoidable circumstance regulation because it does not meet section (E). I therefore need not decide, and do not decide, whether Hansen meets sections (A) through (D) because, even if it did, it would not receive an Aleutian Islands endorsement.[8]

To analyze whether RAM's or Hansen's interpretation is correct, I examine the language of the regulation in light of the purpose and history of the regulation. I also examine how the agency has interpreted the regulation. The language or text of a regulation is unquestionably the most important evidence of the meaning of a regulation.

The unavoidable circumstance regulation was adopted as part of the LLP by the Secretary of Commerce under the Magnuson-Stevens Fishery Conservation and Management Act.[9] The Secretary did not make any changes in the LLP regulation as transmitted to him by the North Pacific Fishery Management Council [Council] and NMFS.[10] I will therefore treat the Council and NMFS intent as the Secretary's intent.

First, the language of the unavoidable circumstance regulation, standing alone, strongly supports RAM's interpretation. The first sentence of the regulation states that the applicant "may receive a license *if* the qualified person is able to demonstrate," and then lists the requirements in sections (A) through (E).

Section (E), on its face, requires a license limitation groundfish harvest "in the specific area that corresponds to the area endorsement . . . for which the qualified person . . . is applying" and requires that the harvest be made "after the vessel was prevented from participating by the unavoidable circumstance but *before* June 17, 1995." Hansen did not harvest AI groundfish until March 22, 1996, which is after June 17, 1995. A harvest *after* June 17, 1995 does not satisfy the requirement for a harvest *before* June 17, 1995. Before does not mean after.

Second, the purpose and regulatory history support a mandatory interpretation of section (E). In adopting the LLP regulation, NMFS explained how the unavoidable circumstance regulation would work: "If *all* these criteria [in the unavoidable circumstance regulation] are met to the

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[8] If Hansen met section (E), I would analyze whether Hansen met the other sections, including section (B)(2) which requires that the unavoidable circumstance – in this case the lack of a processing facility in the Aleutian Islands – is unique to Hansen or the F/V NORTHWESTERN. Hansen claimed it was a unique circumstance because it only affected a small number of catcher vessels and because Hansen tried to persuade Trident and Yardarm Knot to send processors to the AI. *But see Pequod, Inc.*, Appeal No. 00-0013 at 7 - 8 (April 12, 2002)(lack of AI processing facilities not unique circumstance).

[9] 16 U.S.C. §§ 1801 - 1883.

[10] Final Rule, 63 Fed. Reg. 52,642, 52-642 - 52,643 (Oct. 1, 1998).

satisfaction of NMFS, a license may be issued for the relevant fishery and endorsement area."[11]

During the notice-and-comment period on the proposed LLP rule, the only comment NMFS received on the unavoidable circumstance regulation was that a requirement for a harvest before 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 June 17, 1995.[12] NMFS labeled that as Comment 17 and responded:

> *Response:* Based on the approved recommendation of the Council, NMFS narrowly crafted the unavoidable circumstances provision to grant eligibility only when the minimum requirements for eligibility under the EQP [endorsement qualification period] would have been met except that circumstances beyond the control of the owner of the vessel at that time prevented that vessel from meeting those requirements. However, the unavoidable circumstances provision was never intended to extend the EQP.[13] **Unless a person can demonstrate his or her intent to remain an active participant in the groundfish fisheries through a documented harvest made from a vessel, or its replacement, and submitted after that vessel was lost, damaged, or unable to participate but before June 17, 1995, that person cannot use the unavoidable-circumstances provision.** A harvest before June 17, 1995, indicated a participant's good 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.**[14]

This is compelling evidence that the Council and NMFS made a deliberate policy choice to impose an across-the-board requirement for the unavoidable circumstance applicant to make a harvest in the desired endorsement area by June 17, 1995. The Council and NMFS intended that any harvests after June 17, 1995 could not qualify an applicant to receive an LLP license.

Third, RAM has consistently applied the mandatory interpretation to section (E) and this Office

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[11] Supplementary Information, Final Rule, 63 Fed. Reg. 52,642, 52,647 (Oct. 1, 1998)(emphasis added).

[12] *Id.* at 52,651.

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

[14] Supplementary Information, Final Rule, 63 Fed. Reg. 52,642, 52,651 (Oct. 1, 1998)(emphasis added).

has affirmed that interpretation.[15] In fact, this Office has ruled on this issue more than any other single issue in LLP appeals. This Office has concluded, in each appeal, that even if an LLP applicant met, or could meet, the other requirements in the unavoidable circumstance regulation, the applicant could receive an endorsement *only* if the applicant harvested the particular crab or groundfish species after the unavoidable circumstance and before June 17, 1995.

Against this backdrop, I will review Hansen's arguments. Hansen argues that the use of the word "may" in the lead-in language of the unavoidable circumstance regulation suggests that the requirements that follow the "may" are not mandatory.[16] The use of the word "may" refers to the fact that the applicant "may receive" an endorsement only *if* the applicant proves all the facts required in sections (A) through (E).

Hansen argues that the lack of semi-colons between the sections and the lack of the word "and" between the sections (D) and (E) is evidence that the sections are not mandatory requirements.[17] Semi-colons and "ands" are not the only way to communicate mandatory requirements. The lead-in language to the provision – that the applicant may receive the license "if the qualified person is able to demonstrate that" – followed by a list is an effective way of communicating that the applicant must meet each requirement.[18]

Hansen argues that the purpose of the unavoidable circumstance provision is to help vessel owners whose vessels were lost, damaged or otherwise out of the fishery. That is true, but the remedy adopted by the Council and NMFS for those vessel owners is not open-ended. It has within it the requirement for a harvest by June 17, 1995.

Hansen argues that the purpose of section (E) is to prevent rewarding speculative ventures.[19] That is one purpose of section (E), but the method the Council and NMFS chose to prevent

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[15] *Erla-N, LLC*, Appeal No. 01-0026 (Sept. 16, 2004); *Pacific Rim Fisheries, Inc.*, Appeal No. 01-0009 (Sept. 10, 2004); *Notorious Partnership*, Appeal No. 03-0015 (Aug. 9, 2004); *Bowlden, Inc.*, Appeal No. 02-0037 (July 7, 2004); *St. George Marine, Inc.*, Appeal No. 02-0024 at 13 - 15 (Feb. 19, 2004); *Mark Donovick*, Appeal No. 02-0008 at 8 - 9 (Sept. 27, 2002); *Little Ann, Inc.*, Appeal No. 01-0022 at 3 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). These decisions, and all decisions of the Office of Administrative Appeals, are on the NMFS Alaska Region website at http://www.fakr.noaa.gov/appeals/default.htm.

[16] Hansen's Appeal Brief at 22 - 24.

[17] *Id.*

[18] 1A SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 21:14 at 191 (Norman Singer, ed., 6th ed. 2002 rev.).

[19] Hansen's Appeal at 16, 18.

reward of speculative ventures was a clear and unambiguous requirement for a harvest before June 17, 1995, the date of final Council action on the LLP. The Council and NMFS did not adopt the method urged by Hansen: individualized fact-finding as to why an applicant did not participate in the fishery before June 17, 1995; a determination of how soon after June 17, 1995 the applicant did participate in the fishery; and an award of an endorsement only if NMFS determined that the applicant participated in the fishery after June 17, 1995 not as a speculative venture. They adopted instead a requirement for a harvest by June 17, 1995.

Hansen says it is significant that the last half of section (E) does not repeat the reference to an area. Hansen argues that section (E) requires two harvests and that the second harvest – the harvest before June 17, 1995 – need only be of groundfish but not in any specific area.[20] To analyze this argument, I repeat section (E) and divide it into two bracketed halves:

> (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].

Hansen cites no support in the regulatory history for the idea that section (E) requires two harvests. And the first half of section (E), standing alone, does not make sense. The first half of section (E) answers the questions: *What* must be harvested? And *where*? The what is "license limitation groundfish." The where is the 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." But the first half of section (E) does not answer the question: *When* must the harvest have occurred? The second half of section (E) supplies the when: "after the vessel was prevented from participating by the unavoidable circumstance but before June 17, 1995."

Hansen argues that it meets section (E) because it harvested groundfish in the Bering Sea after the unavoidable circumstance and before June 17, 1995.[21] The Aleutian Islands and the Bering Sea are separate area endorsements on an LLP groundfish license.[22] Hansen is applying for an Aleutian Islands endorsement. A harvest in the Bering Sea therefore does not "correspond[] . . . to the area/species endorsement for which [Hansen Enterprises] is applying."[23]

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[20] Hansen's Appeal at 17 - 20.

[21] Hansen's Appeal Brief at 19 - 20.

[22] 50 C.F.R. § 679.4(k)(4)(ii)(A)&(B).

[23] 50 C.F.R. § 679.4(k)(8)(iv)(E).

Hansen points out that the Council and NMFS, in 2002, combined the Bering Sea and the Aleutian Islands into a single area for issuing a BSAI Pacific cod gear/species endorsement to an LLP license. This does not help Hansen. To receive a BSAI Pacific cod endorsement on an LLP license, the applicant must first have an LLP groundfish license with a Bering Sea area endorsement *and* an Aleutian Islands area endorsement.[24] Nothing in the text or history of the BSAI Pacific cod regulation suggests that the Council and NMFS intended to combine the Aleutian Islands and the Bering Sea into one area and create a combined BSAI area endorsement for an LLP groundfish license.[25]

Hansen argues that prior OAA decisions do not apply to Hansen's situation because Hansen experienced an unavoidable circumstance that started before June 17, 1995 and lasted after June 17, 1995. This argument fails for two reasons. First, prior OAA decisions were not based on any specific facts about the applicant's situation, including whether the unavoidable circumstance started before or after June 17, 1995. Each decision was based on the simple fact that the applicant did not make a harvest before June 17, 1995.[26]

Second, Hansen is incorrect. Many applicants did experience an unavoidable circumstance that started before June 17, 1995 and continued after June 17, 1995. In *Pequod, Inc.,* the applicant presented the very same circumstance argued here: the lack of processing facilities in the Aleutian Islands.[27] In *St. George Marine, Inc.*, the applicant's vessel disappeared in January 1992, the applicant was unable to obtain a replacement vessel until January 1995 and the Pribilof crab fishery was not open until September 1995.[28] In *Bowlden, Inc.*, the applicant's vessel suffered significant damage in February 1995 and was not back in the water until after July 1995.[29] It did not matter if these applicants had good reasons for not making a documented

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[24] *"In addition to other requirements of this part* . . . a license holder must have a Pacific cod endorsement on his or her groundfish license to conduct directed fishing for Pacific cod with hook-and-line or pot gear in the BSAI." 50 C.F.R. § 679.4(k)(9)(i) (emphasis added). "[E]ach vessel within the GOA or the BSAI must have an LLP groundfish license on board at all times it is engaged in fishing activities defined in § 679.2 as directed fishing for license limitation groundfish. This groundfish license . . . authorizes a license holder to deploy a vessel to conduct directed fishing for license limitation groundfish *only in accordance with the specific area and species endorsements* the vessel and gear designations, and the MLOA specified on the license." 50 C.F.R. § 679.4(k)(1)(i)(emphasis added).

[25] 50 C.F.R. § 679.4(k)(9)(BSAI Pacfic cod gear regulation); Proposed Rule, 66 Fed. Reg. 49,908 (Oct. 1, 2001); Final Rule, 67 Fed. Reg. 18,129 (April 15, 2002).

[26] *See* note 15 *supra.*

[27] *Pequod, Inc.,* Appeal No. 00-0013 at 7 (April 12, 2002).

[28] *St. George Marine, Inc.,*Appeal No. 02-0024 at 13 - 15 (Feb. 19, 2004).

[29] *Bowlden, Inc.,* Appeal No. 02-0037 (July 7, 2004).

harvest by June 17, 1995 because section (E) of the unavoidable circumstance regulation "does not make an exception for any reason."[30]

Hansen argues that the requirement for a harvest before June 17, 1995 is a deadline which should be "equitably tolled."[31] The doctrine of equitable tolling permits an agency to toll or suspend an application deadline, if the applicant was unable to file a timely application for reasons beyond the applicant's control. It is reserved for truly catastrophic situations.[32] The doctrine of equitable tolling has no relevance to this appeal. It permits an agency to toll or suspend an *application deadline*. It lets an agency judge an application on the merits rather than deny it as late.

The requirement for a harvest before June 17, 1995 is different. It is not an application deadline but a substantive requirement for an LLP license, just like the requirement for a harvest within a general qualification period and an endorsement qualification period. NMFS does not toll or suspend the requirements for harvests by a certain date. Once the merits of an application are before NMFS, NMFS must judge that application according to the requirements in federal regulation that apply to that application.

Hansen argues that the requirement for a harvest by June 17, 1995 makes the unavoidable circumstance provision unavailable for any groundfish endorsement that requires only one harvest in the endorsement qualification period because the EQP ends on June 17, 1995.[33] If the applicant made a harvest by June 17, 1995, it would not need to use the unavoidable circumstance provision. Hansen is correct, but this does not mean that I have the authority to ignore or change the June 17th provision. I analyzed that argument in *Bowlden, Inc.*, and concluded:

> 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

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[30] *Notorious Partnership,* Appeal No. 03-0015 at 5 (Aug. 9, 2004).

[31] Hansen's Appeal Brief at 25 - 26.

[32] *John T. Coyne,* Appeal No. 94-0012 (Jan. 31, 1996); Decision on Reconsideration, *John T. Coyne*, Appeal No. 94-0012 (May 24, 1996)(applicant in isolated drug treatment program); *Estate of Kinberg*, Appeal No. 95-0035 (Aug. l, 1997)(death of applicant's husband followed by severe depression); *Christopher O. Moore*, Appeal No. 95-0044 (Sept. 5, 1997)(murder of applicant's mother followed by extensive publicity and lengthy criminal trial of applicant's stepfather).

[33] Hansen's Appeal Brief at 28 - 29.

> 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 the provision.
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> 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.
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> 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.
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> 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 l, 1992 to June 17, 1995. [34] The Council and NMFS could have intended that, when the endorsement only requires one harvest in a two and a half year period [35], they will not allow any reason to excuse not meeting a fairly minimal requirement.[36]

Hansen states that NMFS must apply section (E) of the unavoidable circumstance regulation consistently with the national standards in the Magnuson-Stevens Act that conservation and management measures shall not discriminate between residents of different States and shall be fair and equitable to all such fishermen.[37]

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[34] The time period January l, 1992 to June 17, 1995 is actually three and a half years.

[35] It is a three and a half year period.

[36] *Bowlden, Inc.*, Appeal No. 02-0037 at 10 (July 7, 2004)(emphasis in original)(footnote omitted).

[37] Hansen's Appeal Brief at 27 - 29, *citing* 16 U.S.C. § 1851(a)(4)(A).

If Hansen is arguing that section (E) violates the Magnuson-Stevens Act, I do not have authority to rule on that question. The Secretary of Commerce reviews proposed regulations to determine whether they are consistent with the Magnuson-Stevens Act.[38] By publishing the LLP regulations, the Secretary determined that they were consistent with the Act.[39] The Magnuson-Stevens Act provides for judicial review of regulations but the petition for review must be filed within 30 days after the date the regulation is published in the Federal Register.[40]

I do have the authority to interpret and apply the regulations that govern Hansen's application. I have reviewed RAM's interpretation of the unavoidable circumstance regulation. I have concluded that RAM's interpretation is correct and implements the intent of the Council and NMFS and, therefore, the Secretary of Commerce.

Finally, Hansen argues that the lack of processing facilities in the Aleutian Islands made it very difficult for catcher vessels to obtain an AI endorsement on an LLP groundfish license. Hansen asserts that only one active BSAI Pacific cod pot gear catcher vessel has received a final, transferable LLP license.[41] Hansen argues that fairness, equity and public policy justify Hansen receiving an AI endorsement. If BSAI pot gear catcher vessels need special consideration, that is a policy call and can only be made, under the Magnuson-Stevens Act, through a new regulation adopting new requirements for an Aleutian Islands endorsement for catcher vessels using pot gear.

All of Hansen's arguments are insufficient to overcome the clear language of section (E), reinforced by the regulatory purpose and history of the provision. It is clear to me that the Council and NMFS adopted a requirement that "does not take into account the applicant's individual circumstances."[42] Whatever the pros and cons of this approach as a policy, it is in a duly promulgated regulation. I must follow it and NMFS must follow it.

Since Hansen did not harvest Aleutian Islands groundfish before June 17, 1995, I conclude that RAM correctly denied Hansen an Aleutian Islands endorsement on its LLP groundfish license under the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv).

2. Did RAM correctly deny Hansen a Western Gulf endorsement because Hansen did not

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[38] Magnuson-Stevens Act, § 304(b)(1), 16 U.S.C. § 1854 (b)(1).

[39] Magnuson-Stevens Act, § 304(b)(1)(A), 16 U.S.C. § 1854 (b)(1)(A).

[40] Magnuson-Stevens Act, § 305, 16 U.S.C. § 1855(f).

[41] Hansen's Appeal Brief at 30 - 31. Hansen based this number on how many vessels with a transferable LLP license had a BSAI Pacific cod pot gear catcher vessel endorsement.

[42] *St. George Marine, Inc.,* Appeal No. 02-0024 at 15 (Feb. 19, 2004).

make one documented harvest *in each of any two calendar years* between January l, 1992 and June 17, 1995?

Hansen seeks a Western Gulf area endorsement on its LLP license. The requirement for a Western Gulf catcher vessel endorsement for category A vessels is in federal regulation 50 C.F.R. § 679.4(k)(4)(ii), which provides:

A groundfish license will be assigned...	**If...**	**During the period...**	**In...**	**From a vessel in vessel length category**	**And that meets the requirements for a...**
(C)A Western Gulf area endorsement	at least one documented harvest of any amount of license limitation groundfish was made **in each of any two calendar years** [emphasis added]	beginning January l, 1992, through June 17, 1995	the Western GOA regulatory area or in waters shoreward of that area	"A"	catcher/processor designation or a catcher vessel designation;...

RAM denied Hansen this endorsement because Hansen harvested groundfish from the F/V NORTHWESTERN only in 1995. It had no groundfish harvests in 1992, 1993 or 1994. Therefore, Hansen did not harvest license limitation groundfish "in each of any *two* calendar years beginning January l, 1992, through June 17, 1995."

Hansen does not dispute this fact but argues that it should receive a Western Gulf endorsement because it met the requirement for a Western Gulf endorsement for category A vessels that was published in the Federal Register in October 1998:[43]

> For a license to be assigned a Western Gulf area endorsement based on the participation from a vessel in vessel length category "A," at least one documented harvest of any amount of license limitation groundfish must have been made from that vessel *from January l, 1992, through June 17, 1995,* in the Western Area of the Gulf of Alaska or in State waters shoreward of that area.[44]

The difference between the October 1998 regulation and the current regulation is that the

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[43] Hansen's Appeal Brief at 35 - 38.

[44] Final Rule, 63 Fed. Reg. 52,642, 52,655 (Oct. 1, 1998)(emphasis added), *adopting* 50 C.F.R. § 679.4(i)(4)(ii)(C)(1). All references to section 679.4(i) were changed to section 679.4(k) a month later. Correcting Amendments, 63 Fed. Reg. 64,878 (Nov. 24, 1998).

October 1998 regulation does not require one documented harvest of license limitation groundfish from January l, 1992, through June 17, 1995 "in each of any two calendar years" but merely one harvest from January l, 1992, through June 17, 1995. The F/V NORTHWESTERN harvested groundfish in February 1995 and therefore meets the October 1998 requirement but not the current requirement.

A. History of Western Gulf endorsement for vessels in category length A.

The history of the Western Gulf endorsement is helpful to understand this issue. The North Pacific Fishery Management Council took final action on the LLP on June 17, 1995, when it adopted a preferred alternative for the LLP. For a Western Gulf endorsement, the Council approved:

> For the Western Gulf [WG] area, all vessels less than 125 feet which made at least one landing between 1/1/92 and 6/17/95 will receive an endorsement. Vessels which are greater than or equal to 125' must have made at least one landing in the WG *in any two of the four endorsement calendar years (1992, 1993, 1994, or 1995 through 6/17/95)* in order to receive an endorsement for the area.[45]

NMFS translated the Council's preferred alternative into a proposed LLP regulation, which it published in August 1997.[46] The commentary to the proposed rule stated:

> Vessel Length Category "A" vessels would require one landing of license limitation groundfish species harvested in the appropriate area *in each of any 2 calendar years* from January l, 1992, through June 17, 1995, for a Central Area endorsement, a Southeast Outside area endorsement, and a Western Gulf area endorsement.[47]

The actual proposed regulation stated:

> (E) *Western Gulf area endorsement*.
> (1) A vessel assigned to vessel category "A" must have made at least one legal landing of any amount of license limitation groundfish harvested *in each of any 2 calendar years* from January l, 1992, through June 17, 1995, in the Western Area of the Gulf of Alaska or in State waters shoreward of that area for a Western Gulf

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[45] North Pacific Fishery Management Council Newsletter, June 1995 at 6 (emphasis added), available on the Council's website at << http://www.fakr.noaa.gov/npfmc/Newsletters/695news.htm.>>

[46] Proposed Rule, 62 Fed. Reg. 43,866 (Aug. 15, 1997).

[47] *Id.* at 43,869 (emphasis added).

area endorsement.[48]

NMFS published a final LLP rule in October 1998.[49] The commentary to the final rule stated:

> For a vessel classified in vessel length category "A," at least one documented harvest of license limitation groundfish species made from that vessel in the appropriate area *in each of any 2 calendar years* from January l, 1992, through June 17, 1995, is necessary to qualify an eligible applicant for a Central Gulf area endorsement, a Southeast Outside area endorsement, or a Western Gulf area endorsement.[50]

The commentary to the final LLP rule summarized the comments on the fishery management plan (FMP) amendments and the proposed rule and provided NMFS's responses to the comments.[51] Not one of the 263 comments on the FMP or the 67 comments on the proposed rule requested a change in the landing requirement for a Western Gulf endorsement. The commentary recited all the changes in the final rule from the proposed rule and did not note any change in the requirement for a Western Gulf endorsement.[52]

But, as I have noted, the actual text of the final regulation omitted the phrase "in each of any 2 calendar years" so that the text of the final regulation stated:

> For a license to be assigned a Western Gulf area endorsement based on the participation from a vessel in vessel length category "A," at least one documented harvest of any amount of license limitation groundfish must have been made from that vessel from January l, 1992, through June 17, 1995, in the Western Area of the Gulf of Alaska or in State waters shoreward of that area.[53]

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[48] *Id.* at 43,887, *proposed* 50 C.F.R. § 679.4(i)(4)(ii)(E)(emphasis added) .

[49] Final Rule, 63 Fed. Reg. 52,642 (Oct. 1, 1998).

[50] *Id.* at 52,645.

[51] *Id.* at 52,642, 52,648-52,651.

[52] *Id.* at 52,648.

[53] *Id.* at 52,655, *adopting* 50 C.F.R. § 679.4(i)(4)(ii)(C)(1). NMFS issued a correcting amendment to this rule in November 1998, changing all the references from section 679.4(i) to section 679.4(k). Correcting Amendments, 63 Fed. Reg. 64,878 (Nov. 24, 1998).

NMFS published Correcting Amendments to the LLP rule on May 12, 2000.[54] NMFS recounted the history of the licensing requirement for a Western Gulf endorsement for category A vessels as one documented harvest in each of two calendar years between January l, 1992 through June 17, 1995. NMFS stated that its

> approval of the Council's LLP recommendation included approval of this particular licensing requirement as an integral part of the overall LLP. . . . However, the final rule text erroneously omitted the phrase, "in each of any 2 calendar years," and wrongly indicates that only one documented harvest of groundfish needs to be made by category "A" vessels during the period January 1992, through June 17, 1995, to satisfy the license endorsement criteria for the Western GOA area.[55]

NMFS therefore promulgated the following rule for a Western Gulf endorsement:

> For a license to be assigned a Western Gulf area endorsement based on the participation from a vessel in vessel length category "A," at least one documented harvest of any amount of license limitation groundfish must have been made from that vessel *in each of any 2 calendar years* from January l, 1992, through June 17, 1995, in the Western Area of the Gulf of Alaska or in State waters shoreward of that area.[56] [emphasis added]

The requirement has been unchanged since May 2000.[57] To summarize the history:

Action	**Requirement for Western Gulf endorsement, category vessel length A**
Final Action by NPFMC, June 17, 1995	one documented harvest in each of any two calendar years between January l , 1992, through June 17, 1995
Proposed LLP Rule, commentary, August 1997	one documented harvest in each of any two calendar years between January l , 1992, through June 17, 1995

[54] Correcting Amendments, 65 Fed. Reg. 30,549 (May 12, 2000).

[55] *Id.* at 30,549.

[56] *Id.* at 30,549, *adopting* 50 C.F.R. § 679.4(k)(4)(ii)(C)(1).

[57] The only change has been to format the requirements for LLP endorsements in tables rather than text. Final Rule, 66 Fed. Reg. 48,813, 48,815 (Sept. 24, 2001).

Proposed LLP Rule, text, August 1997	one documented harvest in each of any two calendar years between January l , 1992, through June 17, 1995
Final LLP Rule, commentary, October 1998	one documented harvest in each of any two calendar years between January l , 1992, through June 17, 1995
Final LLP Rule, text, October 1998	one documented harvest between January l , 1992, through June 17, 1995
Correcting Amendments to Final Rule, May 2000	one documented harvest in each of any two calendar years between January l , 1992, through June 17, 1995
Current Rule, from May 2000 to October 2004	one documented harvest in each of any two calendar years between January l , 1992, through June 17, 1995

B. NMFS is not circumventing the Administrative Procedure Act.

Hansen argues that NMFS is circumventing the federal Administrative Procedure Act[58] because NMFS published a correcting amendment to the final LLP rule rather than publish a new rule. But what Hansen wants NMFS to do is to follow a requirement for a Western Gulf endorsement – one documented harvest in the Western Gulf between January l, 1992 through June 17, 1995 – that was never the subject of a proposed rule and was never subject to notice and comment by the public. Hansen's approach is equally open to the charge of circumventing the APA.

Hansen's position would circumvent the Magnuson-Stevens Act because it would require NMFS to award Hansen an LLP license based on a criterion that was never approved by the North Pacific Fishery Management Council, never found to be consistent with the Fishery Management Plan [FMP] for the North Pacific Groundfish Fishery and never found to be consistent with the national standards under the Magnuson-Stevens Act.

NMFS adopted the correcting amendment to the Western Gulf endorsement so that it would award that endorsement based on a criterion – one documented harvest in the Western Gulf *in each of any two calendar years* between January l, 1992, and June 17, 1995 – that had been approved by the Council, and found consistent with the FMP and with the national standards under the Magnuson-Stevens Act. And NMFS followed the requirements established by the Office of the Federal Register for correcting a substantive error in a regulation.[59]

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[58] 5 U.S.C. §§ 551 - 1305.

[59] Federal Register Document Drafting Handbook, Section 4.6, Corrections to a rule: nonsubstantive and substantive errors (October 1998 revision, supplement 2, May 1, 2004), available at <<http://www.archieves.gov/federal_register/document_drafting-handbook-suppl2.pdf>> *visited* December 10, 2004.

In the cases cited by Hansen, the government sought to penalize, through adjudication, conduct that was not penalized by a regulation. In *Ford Motor Company v. Federal Trade Commission*, the FTC sought to prevent a car dealership from keeping surplus monies from the sale of a repossessed car, even though the dealership was acting in accord with industry practice and no regulation told the dealership it could not keep the money.[60] In *Pfaff v. U.S. Department of Housing and Urban Development*, the government sought to fine a landlord and order the landlord to pay damages for not renting to a five-person family, even though no regulation told the landlord that it was discrimination not to rent to a family based on size of the family.[61] In *Patel v. Immigration and Naturalization Service* and *Ruangswang v. Immigration and Naturalization Service*, the government sought to deport alien residents even though they met investor requirements that were stated in a written regulation, because they did not meet an additional requirement that the INS sought to impose through adjudication.[62]

Unlike those cases, NMFS is not denying this endorsement based on a requirement it imposed through adjudication. NMFS is denying this endorsement based on a requirement in a formal, written regulation. NMFS is doing what the courts told the government it had to do: follow the requirements that have been adopted through a formal, written regulation.

C. NMFS is not subjecting Hansen to a retroactive rule.

Hansen argues that NMFS must apply the prior requirement because that was the regulation when Hansen applied for an LLP license on December 6, 1999, when RAM first evaluated Hansen's application on January 24, 2000 and when Hansen responded to RAM on March 31, 2000 that it met the requirement for a Western Gulf endorsement in federal regulation.[63]

RAM issued its decision on Hansen's application and issued an Initial Administrative Determination on August 20, 2002. RAM denied Hansen the Western Gulf endorsement because it applied the requirement in federal regulation on that date. I conclude that RAM applied the correct rule and did not subject Hansen to an impermissible retroactive rule.

A statute or regulation "is not made retroactive merely because it draws upon antecedent facts

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[60] 673 F.2d 1008 (9th Cir. 1981).

[61] 88 F. 3d 739 (9th Cir. 1996).

[62] *Patel v. INS*, 638 F. 2d 1199 (9th Cir. 1980); *Ruangswang v.* INS, 591 F.2d 39 (9th Cir. 1978).

[63] RAM's Notice of Opportunity to Submit Evidence to Hansen (Jan. 24, 2000); Hansen's Letter to RAM (March 30, 2000).

for its operation."[64] Even a cursory examination of valid government actions bears out this statement because almost every government regulation or statute draws upon prior facts for its operation.

A driver loses a driver's license because of drunk driving in the past. A parent has to pay child support in the future based on income earned in the past. A mine operator must get a certain type of permit based on the mine's past operations. Schools participate in a federal loan program based on a school's past loan default rates.[65] A phone company can charge customers in the future based on the company's past earnings.[66] A medical provider gets reimbursed according to costs of services rendered in the past.[67] And here, a vessel owner receives a license for future fishing based on how much of that type of fishing it did in the past, namely one groundfish harvest in each of any two years between January l, 1992, through June 17, 1995. None of these are retroactive regulations but are valid prospective regulations for a driver's license, a child support order, a mining permit, participation in a government loan program, a regulated phone rate, Medicaid reimbursement or a fishing license.

But Hansen is not arguing that NMFS is subjecting it to a retroactive rule merely because the rule looks at antecedent facts, namely Hansen's past fishing history. In fact, Hansen is arguing that NMFS *must* look at certain antecedent facts – whether Hansen made one documented harvest between January l, 1992 and June 17, 1995 – and *must not* look at other antecedent facts – whether Hansen made one documented harvest in each of two calendar years between January l, 1992 and June 17, 1995. The reason why Hansen argues that NMFS must not look at whether it made one documented harvest *in each of any two calendar years* between January l, 1992 and June 17, 1995 is that the regulation telling NMFS to award a Western Gulf endorsement based on those facts was not adopted as a final regulation until May 12, 2000.

Courts invalidate rules as retroactive when they penalize conduct without notice and frustrate reasonable reliance and settled expectations. The fact that Hansen had merely applied for an LLP license significantly undermines its claim of retroactivity. As one court stated, "[T]he mere filing of an application is not the kind of completed transaction in which a party could fairly

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[64] *Landgraf v. USI Film Products*, 511 U.S. 244, 269 n. 24 (1994) *quoting Cox v. Hart*, 260 U. S. 427, 435 (1922).

[65] *Ass'n of Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859, 863 - 866 (D.C. Cir. 1992).

[66] *Bell Atlantic Telephone Companies v. FCC*, 79 F.3d 1195, 1207-08 (D.C. Cir. 1996).

[67] *Administrators of the Tulane Educational Fund in Shalala*, 987 F.2d 790, 798 (D.C. Cir. 1993); *National Medical Enterprises, Inc., v. Sullivan*, 957 F.2d 664 (9th Cir. 1992).

expect stability of the relevant laws as of the transaction date."[68] But even if Hansen had received an LLP license, it could not fairly expect stability in a regulation promulgated under the Magnuson-Stevens Act that was [1] contrary to what the North Pacific Fishery Management Council approved, [2] contrary to the proposed regulation and [3] a mistake.

What makes a regulation retroactive? A regulation is retroactive only if it "attaches new legal consequences to events completed before its enactment."[69] In *Bowen v. Georgetown University Hospital*, the U.S. Supreme Court said that the government could not take back money that hospitals received under a Medicare reimbursement formula, based on a new rule that the government adopted after the hospitals had already received the money.[70] In *Landgraf v. USI Film Products*, the Supreme Court said that the government could not require an employer to pay damages to an employee for discrimination, when the law at the time of the discriminatory act did not allow an employee to collect damages.[71]

This case would be like *Bowen* or *Landgraf* if NMFS were making Hansen pay back money Hansen earned fishing on licenses that were valid when Hansen fished or if NMFS were fining Hansen for past fishing that was lawful when it occurred. NMFS is not saying that any actions Hansen took in the past, and were legitimate in the past, should penalize Hansen or subject Hansen to liability. NMFS is simply using Hansen's past fishing history as a standard for a license for fishing in the future.

I note two additional points. First, if NMFS had to apply the requirement for a Western Gulf endorsement in federal regulation when Hansen applied, NMFS would have had to apply it to all applications for Western Gulf endorsements because the LLP application deadline was December 17, 1999 and NMFS did not correct the regulation until May 2000. That means NMFS would have had to judge every application for a Western Gulf endorsement by a requirement that was not subject to notice and comment rulemaking under the APA and did not comply with the requirements of the Magnuson-Stevens Act.

Second, Hansen refers to NMFS "revoking" its Western Gulf and Aleutian Islands endorsements. NMFS is not revoking any final endorsements on Hansen's LLP license. Hansen has never received a final LLP license with those endorsements. Hansen has had an interim LLP

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[68] *Pine Tree Medical Associates v. Secretary of Health & Human Services*, 127 F. 3d 118, 121 (1st Cir. 1997).

[69] *Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994).

[70] 488 U.S. 204 (1988). The new rule was the same as a rule that the Secretary of Health and Human Services had adopted but a federal court had invalidated because the Secretary had not provided notice and opportunity for public comment before issuing the rule. *Id.* at 206.

[71] 511 U.S. 244 (1994).

license with Western Gulf and Aleutian Islands endorsements since January l, 2000 – for five years – because it applied for those endorsements, because it appealed RAM's denial of those endorsements, and because it participated in the groundfish fisheries under the program that preceded the LLP.[72] This underscores the fact that the denial of Hansen's right to fish in these areas is purely prospective.

I conclude that RAM correctly denied Hansen a Western Gulf endorsement because Hansen did not harvest license limitation groundfish from the F/V NORTHWESTERN *in any two calendar years* between January l, 1992 and June 17, 1995.

FINDINGS OF FACT

1. Hansen Enterprises did not make a documented harvest of license limitation groundfish in the Aleutian Islands endorsement area before June 17, 1995.

2. Hansen Enterprises did not make a documented harvest of license limitation groundfish in the Western Gulf endorsement area in each of any two calendar years between January l, 1992, through June 17, 1995

CONCLUSIONS OF LAW

1. RAM correctly denied Hansen an Aleutian Islands endorsement under the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv), because the F/V NORTHWESTERN did not harvest groundfish in the Aleutian Islands after the claimed unavoidable circumstance and before June 17, 1995.

2. RAM correctly denied Hansen a Western Gulf endorsement on its LLP license because the F/V NORTHWESTERN did not make one documented harvest *in each of any two calendar years* between January l, 1992 and June 17, 1995.

3. RAM correctly evaluated Hansen's application for a Western Gulf endorsement by the requirement in current federal regulation 50 C.F.R. § 679.4(k)(4)(ii)(C).

4. By using the requirement for a Western Gulf endorsement in current federal regulation, NMFS is not circumventing the Administrative Procedure Act.

5. By using the requirement for a Western Gulf endorsement in current federal regulation, NMFS is not subjecting Hansen to a retroactive regulation.

DISPOSITION

[72] *See* 50 C.F.R. § 679.4(k)(8)(ix).

The IAD is AFFIRMED. This Decision takes effect January 13, 2005, 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, December 27, 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.

Mary Alice McKeen
Appeals Officer