

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
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BLUE DUTCH, L.L.C.,)
Appellant)
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Appeal No. 02-0050
DECISION
January 28, 2005

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on August 21, 2002, that the Appellant qualifies under the North Pacific Groundfish and Crab License Limitation Program (LLP)¹ for a groundfish license, with endorsements for the Bering Sea and Aleutian Islands groundfish fisheries, based on the fishing history of the F/V BLUE DUTCH (ADFG #54865). The IAD determined that the Appellant's groundfish license (#LLG3845) is not entitled to endorsements for the Southeast Alaska outside, Western Gulf of Alaska, and Central Gulf of Alaska groundfish fisheries. The denial was based on the fact that the NMFS official LLP record contains no evidence that the F/V BLUE DUTCH was used to make the required documented harvests in any of the three endorsement areas during the endorsement qualification period (EQP), January 1, 1992, through June 17, 1995.²

RAM issued a second Initial Administrative Determination (IAD) on October 3, 2002, which determined that the Appellant's groundfish license (#LLG3845) does not qualify for a pot gear endorsement for the Pacific cod fishery in the Bering Sea and Aleutian Islands (BSAI), based on the fishing history of the F/V BLUE DUTCH, a catcher/processor vessel. The denial was based on the fact that the NMFS official LLP record shows no documented harvests of Pacific cod in the BSAI on the F/V BLUE DUTCH during the eligibility period for a pot gear endorsement, 1995 through 1998. The Appellant does not claim a Pacific cod hook-and-line gear endorsement.

Appellant filed timely appeals of both IADs. Appellant can file an appeal because the IAD directly and adversely affects its interests. [50 C.F.R § 679.43(b)] The Appellant did not request an oral hearing, and I did not hold one. The record contains sufficient information to render a decision, so I am closing the record and issuing this decision. [50 C.F.R. § 679.42(m)(4)]

¹The LLP is at 50 C.F.R. § 679, primarily 50 C.F.R. § 679.4(k), and can be found on the NMFS Alaska Region website, <http://www.fakr.noaa.gov/regs/summary.htm>.

²The IAD also approved the Appellant's claim to an LLP crab license, endorsed for the Bristol Bay red king crab and the Bering Sea/Aleutian Islands *C. opilio* and *C. bairdi* (Tanner) crab fisheries. Both the crab license and the groundfish license include all the endorsements claimed by the Appellant and are nontransferable until there is a final agency action in this appeal.

ISSUES

1. Does Appellant's LLP groundfish license qualify for area endorsements for the Western Gulf of Alaska, the Central Gulf of Alaska, or the Southeast Outside management areas, based on the fishing history of the F/V BLUE DUTCH?
2. Does Appellant's LLP groundfish license qualify for a BSAI Pacific cod pot gear endorsement, based on the fishing history of the F/V BLUE DUTCH?

ANALYSIS

1. Does Appellant's LLP groundfish license qualify for area endorsements for the Western Gulf of Alaska, the Central Gulf of Alaska, or the Southeast Outside management areas, based on the fishing history of the F/V BLUE DUTCH?

To qualify for the Western Gulf of Alaska, the Central Gulf of Alaska, and the Southeast Outside LLP groundfish license area endorsements, the Appellant must show that the F/V BLUE DUTCH was used to make at least one documented harvest of groundfish in each of the appropriate endorsement areas in each of any two calendar years, from January 1, 1992, through June 17, 1995.

The NMFS official LLP record for the F/V BLUE DUTCH shows no harvests of groundfish in the Western Gulf of Alaska, the Central Gulf of Alaska, or the Southeast Outside management areas at any time during the period January 1, 1992, through June 17, 1995. The Appellant has produced no evidence of such landings.

Therefore, based on a preponderance of evidence in the administrative record, I find that the F/V BLUE DUTCH (formerly the F/V KISKA ENTERPRISE) did not make any documented harvests of groundfish in the Western Gulf of Alaska, the Central Gulf of Alaska, or the Southeast Outside management areas at any time during the period January 1, 1992, through June 17, 1995. Therefore, I conclude that the Appellant's LLP groundfish license (#LLG3845) does not qualify for area endorsements for the Western Gulf of Alaska, the Central Gulf of Alaska, or the Southeast Outside management areas.

2. Does Appellant's LLP groundfish license qualify for a BSAI Pacific cod pot gear endorsement, based on the fishing history of the F/V BLUE DUTCH?

The LLP regulations require an LLP groundfish license to be specifically endorsed for Pacific cod with pot gear to conduct directed fishing for Pacific cod with that gear in the BSAI.³ The North Pacific Fishery Management Council adopted the Pacific cod pot gear endorsement requirement to address the problem of excess capacity in the fishing of Pacific cod with pot and

³50 C.F.R. § 679.4(k)(9)(i).

longline gear in the BSAI.⁴

Appellant currently holds a nontransferable LLP groundfish license (#LLG3845), with a catcher/processor vessel designation, based on the fishing history of its qualifying vessel, the F/V BLUE DUTCH (formerly the F/V KISKA ENTERPRISE), which Appellant acquired from Tyson Enterprise Seafoods, Inc., on December 21, 1998.⁵

To qualify for a BSAI Pacific cod pot gear endorsement on the license, the Appellant must establish that the F/V BLUE DUTCH made at least 300,000 pounds of documented harvests of Pacific cod in the BSAI with pot gear in each of any two of the years 1995 through 1998.⁶ Evidence of a documented harvest must be demonstrated by a state fish ticket, a Federal catch report, or other valid documentation.⁷

The NMFS official LLP record contains no evidence that the F/V BLUE DUTCH made any documented harvests of Pacific cod with pot gear in the BSAI from 1995 through 1998.⁸ The Appellant did not produce a state fish ticket, a Federal catch report, or documentation (valid or otherwise) to support its claim.⁹ I find, by a preponderance of the evidence in the administrative record, that the F/V BLUE DUTCH did not make at least 300,000 pounds of documented harvests of Pacific cod in the BSAI with pot gear in each of any two of the years 1995 through 1998. I conclude Appellant's LLP groundfish license (#LLC3845) does not qualify for a BSAI Pacific cod pot gear endorsement, based on the fishing history of the catcher/processor vessel, the F/V BLUE DUTCH.

With respect to both IADs in this appeal, the Appellant states that it has not been able to obtain the fishing history of the F/V BLUE DUTCH from the former owner and skippers of the vessel.¹⁰ Even if that is true, Appellant still bears the ultimate responsibility for proving that its groundfish license qualifies for the endorsements it seeks.¹¹ The Appellant asked for an

⁴See Proposed Rule for the LLP Pacific cod gear endorsements, 66 Fed. Reg. 49,908 - 49,909 (October 1, 2001); and Final Rule, 67 Fed. Reg. 18,130 - 18,134 (April 15, 2002).

⁵Bill of Sale for the F/V KISKA ENTERPRISE, December 21, 1998.

⁶50 C.F.R. § 679.4(k)(9)(ii)(D).

⁷50 C.F.R. § 679.4(k)(9)(i) and 50 C.F.R. § 679.4(k)(4).

⁸IAD at 2.

⁹Capt. James Mize's letter to NMFS, on behalf of Appellant, October 21, 2002.

¹⁰Capt. James Mize letter to NMFS, on behalf of Appellant, October 21, 2002.

¹¹50 C.F.R. § 679.2 (definition of "Official License Limitation Program (LLP) record") reads, in part: "An applicant for a license under the LLP will have the burden of proving the validity of information submitted in an application that is inconsistent with the official LLP record."

opportunity to review the fish ticket data in the NMFS official LLP record; however, the Appellant did not produce a release for any of the fishing history of the F/V BLUE DUTCH (or the F/V KISKA ENTERPRISE). Therefore, neither RAM nor this Office has the authority to release the fish ticket data in the official LLP record to the Appellant without the permission of the persons who harvested the fish under a state commercial fishing permit.¹²

FINDINGS OF FACT

1. The F/V BLUE DUTCH did not make any documented harvests of groundfish in the Western Gulf of Alaska, the Central Gulf of Alaska, or the Southeast Outside management areas at any time during the period January 1, 1992, through June 17, 1995.
2. The F/V BLUE DUTCH did not make at least 300,000 pounds of documented harvests of Pacific cod in the BSAI with pot gear in each of any two of the years 1995 through 1998.

CONCLUSIONS OF LAW

1. The Appellant's LLP groundfish license (#LLG3845) does not qualify for area endorsements for the Western Gulf of Alaska, the Central Gulf of Alaska, or the Southeast Outside management areas.
2. The Appellant's LLP groundfish license (#LLC3845) does not qualify for a BSAI Pacific cod pot gear endorsement, based on the fishing history of the catcher/processor vessel, the F/V BLUE DUTCH.

DISPOSITION

The IADs that are the subjects of this appeal are AFFIRMED. This Decision takes effect on February 28, 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, February 7, 2005, the tenth day after this Decision. 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.

Randall J. Moen
Appeals Officer

¹²AS 16.05.815 and *Reciprocal Data Access Agreement: Memorandum of Agreement Between the National Oceanic and Atmospheric Administration (NOAA) and the Alaska Department of Fish and Game and the Commercial Fisheries Entry Commission* (September 23, 1999).