

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of ) Appeal No. 03-0002  
)  
AGATE PASS PARTNERSHIP, L.L.P., ) DECISION  
Appellant )  
) July 1, 2008  
\_\_\_\_\_ )

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program denied the Appellant's application, under the North Pacific Groundfish and Crab license limitation program (LLP), for an LLP groundfish license with area endorsements for the Central Gulf and Western Gulf of Alaska.<sup>1</sup> The Appellant's claim is based on its ownership of the fishing history of the catcher vessel F/V STARRIGAVAN (ADF&G No. 27044; USCG No. 551458).<sup>2</sup> The Appellant acquired the vessel and its fishing history from Alaska Cod Fishing Ventures, Inc., on November 6, 1996.<sup>3</sup> The Appellant was issued a nontransferable LLP groundfish license (LLG4439) with both endorsements for vessel category C, pending a final agency action.

The Appellant filed a timely appeal of RAM's Initial Administrative Determination (IAD) on February 13, 2003. The Appellant can file an appeal because the IAD directly and adversely affects the Appellant's interest.<sup>4</sup> I conducted an oral hearing by telephone on February 16, 2006. Witnesses at the hearing were Mr. Michael Saturno, the vessel's chief engineer; and Mr. James Beaton, a partner in Agate Pass Partnership, L.L.P. and a principal in Alaska Cod Fishing Ventures, Inc. Agate Pass Partnership was represented by its managing partner, Attorney R. Bruce Johnston of Bainbridge Island, Washington.

ISSUES

1. Does the Appellant qualify for an LLP groundfish license with a Central Gulf area endorsement, based on the fishing history of the F/V STARRIGAVAN?

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<sup>1</sup> Initial Administrative Determination No. 02-166 (Dec. 16, 2002).

<sup>2</sup> The IAD gives the ADF&G number as 27055. RAM's records show the ADF&G number as 27044. Both sources show the USCG number as 551458.

<sup>3</sup> Copy of Bill of Sale, November 6, 1996.

<sup>4</sup> 50 C.F.R § 679.43(b).

2. Does the Appellant qualify for an LLP groundfish license with a Western Gulf area endorsement, based on the unavoidable circumstance provision in the LLP regulations?

#### ANALYSIS

### **1. Does the Appellant qualify for an LLP groundfish license with a Central Gulf area endorsement, based on the fishing history of the F/V STARRIGAVAN?**

To qualify for an LLP groundfish license with a particular endorsement, an applicant's qualifying vessel must have a fishing history that satisfies minimum documented harvest requirements during a general qualifying period (GQP), and an endorsement qualifying period (EQP) for the endorsement in question.<sup>5</sup> It is undisputed that the F/V STARRIGAVAN satisfies the general qualifying period (GQP) requirements.<sup>6</sup> The question is whether it meets the EQP requirements for a Central Gulf groundfish area endorsement.<sup>7</sup>

The EQP requirements for a Central Gulf endorsement differ, depending on the overall length (LOA) of the vessel on June 17, 1995, or if the vessel was under reconstruction on that date, then the date reconstruction was completed. If the vessel was under 60 feet long, it is classified as a category C vessel; if it was between 60 feet and 124 feet, it is a category B vessel.<sup>8</sup> To qualify for a Central Gulf endorsement, a category C vessel need only have made one documented harvest of LLP groundfish in the Central Gulf between January 1, 1992, and June 17, 1995.<sup>9</sup> A category B vessel, however, must have made either a documented harvest in two different years during that same period, or four documented harvests between January 1 and June 17, 1995.<sup>10</sup>

The NMFS official LLP record indicates that the length overall of the F/V STARRIGAVAN was 60 feet on June 17, 1995.<sup>11</sup> The Appellant acknowledges that the vessel had a length overall of at least 60 feet on June 17, 1995, and was not under reconstruction on that date.<sup>12</sup> In spite of this, the Appellant argues that the F/V STARRIGAVAN should still be assigned to vessel category "C" because both James Beaton, the primary owner of the vessel, and NMFS believed

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<sup>5</sup> 50 C.F.R. § 679.4(k)(4)(i) and (ii).

<sup>6</sup> IAD at 5-6.

<sup>7</sup> *Id.*

<sup>8</sup> 50 C.F.R. § 679.4(k)(3)(iii)(B) and (C).

<sup>9</sup> 50 C.F.R. § 679.4(k)(4)(ii)(D)(3).

<sup>10</sup> 50 C.F.R. § 679.4(k)(4)(ii)(D)(2).

<sup>11</sup> IAD at 4.

<sup>12</sup> Appeal pleading at 3 (Feb. 13, 2003).

that the vessel's length overall was less than 60 feet "at all times until 1998."<sup>13</sup>

Mr. Beaton testified at the hearing that he applied for halibut quota shares for the F/V STARRIGAVAN believing that the vessel's length overall was under 60 feet.<sup>14</sup> He said he had not actually measured the boat himself, but based his belief on paperwork. He further stated that he was unaware that the vessel's length was actually over 60 feet until an Alaska Fish and Game enforcement agent at King Cove, Alaska, inspected and measured the vessel in 1998. Mr. Beaton testified that he then had three feet cut from the bow of the vessel to reduce the length overall to 59.8 feet, and that the agent allowed him to continue fishing with the class C halibut shares.<sup>15</sup>

The record shows that James Beaton submitted a Request for Application (RFA) for Quota Share under the Pacific halibut and sablefish IFQ program as an individual on June 20, 1994.<sup>16</sup> On RFA Form D, the vessel information form, Mr. Beaton listed the F/V STARRIGAVAN's length overall as 63 feet 6 inches.<sup>17</sup> At Mr. Beaton's request, quota share for the F/V STARRIGAVAN was issued in 1995 to his company, Alaska Cod Fishing Ventures, Inc.<sup>18</sup> The shares were issued for vessel category C.<sup>19</sup> Under the Pacific halibut and sablefish IFQ program, category C is assigned to vessels of less than or equal to 60 ft (18.3 m) LOA.<sup>20</sup>

A Quota Share Data Summary issued to Alaska Cod Fishing Ventures in January 1995 shows that RAM determined that the F/V STARRIGAVAN's length overall at the time was 55 feet, but it is not clear on what basis RAM made this determination.<sup>21</sup> The company's quota share application file contains a 1987 Stability Report by Jensen Maritime Consultants, Inc., which shows the vessel's length overall as 63.19 feet, and the waterline length at 55.75 feet.<sup>22</sup> Perhaps RAM based its determination on the waterline length in that report. NMFS regulations in effect

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<sup>13</sup> Assertion of Mr. Bruce Johnston, attorney for Appellant, at tape 2, side a, of oral hearing.

<sup>14</sup> Hearing, tape 2/A.

<sup>15</sup> *Id.*

<sup>16</sup> Exhibit 1, at 3-5.

<sup>17</sup> *Id.* at 4.

<sup>18</sup> Exhibit 1, at 1.

<sup>19</sup> Initial Issuance Quota Share Data from Jessica Gharrett, RAM (June 30, 2008). Exhibit 2.

<sup>20</sup> 50 C.F.R. § 679.40(a)(5)(ii).

<sup>21</sup> Quota Share Data Summary, Alaska Cod Fishing Ventures, at 2 (Jan. 30, 1995). Exhibit 3

<sup>22</sup> IAD at 3, n.2.

in January 1995 defined length overall of a vessel for the IFQ program differently than its current regulations define the term for the LLP.<sup>23</sup> That fact, however, does not explain why RAM did not use the stability report's length overall measurement of 63 feet.

Mr. Beaton's testimony that until 1998 he believed the vessel's length overall was under 60 feet is contradicted by his representation on the 1994 Quota Share Request for Application that the vessel was 63 feet 6 inches. Even if Mr. Beaton held a good faith but mistaken belief about the vessel's length, he can have no reasonable reliance that would bind NMFS to its determination made under the IFQ program and that would entitle the Appellant to a category C vessel designation under the LLP. The LLP regulation specifying how a vessel's length overall is to be determined makes no exception for an owner's good faith belief. Length overall is based on an objective measurement.

The Appellant admits that the best evidence of the F/V STARRIGAVAN's length overall from 1987 to 1998 was 63.19 feet.<sup>24</sup> That length clearly places the vessel in category B under the LLP. Even if NMFS were to use the 1998 shortened length of 59.8 feet, the length overall would still be 60 feet because, by definition, LOA measurements are rounded to the nearest foot. Under the LLP, a 60-foot vessel is a category B vessel, even though it would be a category C vessel under the IFQ program.

I find that the length overall of the F/V STARRIGAVAN on June 17, 1995, was at least 60 feet and I conclude that the vessel is properly classified as a category B vessel for LLP purposes. Consequently, to qualify for an LLP groundfish license with a Central Gulf area endorsement the Appellant must prove that the F/V STARRIGAVAN made either a documented harvest in two different years during the endorsement qualification period of January 1, 1992, and June 17, 1995, or four documented harvests between January 1 and June 17, 1995.<sup>25</sup> The NMFS official LLP record shows that the vessel made documented harvests of groundfish in the Central Gulf only in 1992.

The Appellant claims that the F/V STARRIGAVAN also made at least one documented harvest of groundfish in the Central Gulf in 1994 and that, therefore, it meets the requirements for an

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<sup>23</sup> The IFQ definition provided that "Length overall of a vessel means the horizontal distance, rounded to the nearest foot, between the foremost part of the stem and the aftermost part of the stern, excluding bowsprits, rudders, outboard motor brackets, and similar fittings or attachments (Figure1)." 50 C.F.R. § 672.2 (1994). [Exhibit 4, at 4.] Under the LLP, "Length overall (LOA) of a vessel means the centerline longitudinal distance, rounded to the nearest foot, measured between: (1) The outside foremost part of the vessel visible above the waterline, including bulwarks, but excluding bowsprits and similar fittings or attachments, and (2) The outside aftermost part of the vessel visible above the waterline, including bulwarks, but excluding rudders, outboard motor brackets, and similar fittings or attachments (see Figure 6 to this part)." Definition of "length overall" at 50 C.F.R. §679.2.

<sup>24</sup> Appeal pleading at 3 (Feb. 13, 2003).

<sup>25</sup> 50 C.F.R. § 679.4(k)(4)(ii)(D)(2).

LLP groundfish license with a Central Gulf endorsement for a category B vessel.

The LLP regulations define a “documented harvest” of LLP groundfish as a “lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting.”<sup>26</sup> LLP regulations provide that evidence of a documented harvest of LLP groundfish must be demonstrated by a state fish ticket, Federal Weekly Production Report, or other valid documentation that indicates the amount of license limitation groundfish harvested, the vessel and gear type used, and the date of harvesting, landing, or reporting.<sup>27</sup>

The Appellant produced three Alaska state fish tickets as evidence that the F/V STARRIGAVAN made documented harvests of Central Gulf groundfish in 1994. Fish ticket P94-011920 [Appellant’s Exhibit B3] shows a landing of halibut by Andre Beaton on June 8, 1994. Halibut is not an LLP groundfish species, so this fish ticket is not evidence of a documented harvest of LLP groundfish.

Fish ticket G94-021502 [Appellant’s Exhibit B] shows a landing date of May 20, 1994; fish ticket G94-021509 [Appellant’s Exhibit B2] shows a landing date of May 25, 1994. Both landings were at the Wards Cove processing facility at Alitak, Alaska. Both fish tickets are signed by Michael Saturno, as the commercial fisherman, and Jennifer Bender, as the receiver of the fish. The tickets show that the fish were harvested in state statistical areas 525600 and 535602, adjacent areas just south of Kodiak Island in the Central Gulf of Alaska regulatory area.<sup>28</sup> The fish tickets show that the F/V STARRIGAVAN made commercial harvests of sablefish during those trips, but sablefish is not an LLP groundfish. The LLP groundfish listed on the fish tickets include thornyhead rockfish, demersal rockfish, grenadier, arrowtooth flounder, Greenland turbot, and skates. The tickets show that Wards Cove did not purchase any of the LLP groundfish.

All the LLP groundfish on both tickets are marked with condition code 98, which means discarded at sea.<sup>29</sup> Groundfish discarded at sea cannot be considered a “documented harvest” for two reasons. First, to constitute a “harvest” under the LLP, the fish must be caught and retained.<sup>30</sup> Fish discarded at sea are not retained by the fisherman and, therefore, have not been

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<sup>26</sup> 50 C.F.R. § 679.2.

<sup>27</sup> 50 C.F.R. § 679.4(k)(4).

<sup>28</sup> “Central GOA Regulatory Area means that portion of the GOA EEZ that is contained in Statistical Areas 620 and 630 (see Figure 3 to this part).” Definition of “Central GOA Regulatory Area” at 50 C.F.R. §679.2. Both areas are within federal statistical area 630. (Fig. 3 to 50 C.F.R. Part 679).

<sup>29</sup> *Fish Ticket System Codes* (Pamphlet), Alaska Department of Fish and Game, Division of Commercial Fisheries (April 2001).

<sup>30</sup> Definition of “harvesting or to harvest” at 50 C.F.R. § 679.2.

harvested for LLP purposes.<sup>31</sup> Second, a documented harvest must result from commercial fishing. Fish discarded at sea have not entered commerce, nor are they intended to enter commerce. Therefore, they do not constitute commercial fishing.<sup>32</sup>

The Appellant argues that the groundfish in the Appellant's fish tickets were incorrectly recorded as discarded at sea and that the fish actually were delivered and offered for sale as whole fish to the processor at the Ward's Cove Plant in Alitak Bay, Alaska. The Appellant asserts:

Those Groundfish were taken by the STARRIGAVAN to the Wards Cove Plant in Alitak and offered for sale. The crew of the STARRIGAVAN pitched the fish off to the Wards Cove Plant and were told only that the Plant would not pay for the Groundfish, but Wards Cove took possession of the fish. The Designated "Cond. Code" on the Fish Tickets was filled out by Wards Cove as 98, and from the facts, should have been coded differently, probably 01. Given the location and the circumstances, the STARRIGAVAN had no choice but to leave the Groundfish without compensation. However, the STARRIGAVAN caught the fish and made a good faith effort to sell them.<sup>33</sup>

In several decisions, this Office has held that an incorrectly recorded fish ticket can, under some circumstances, be corrected on appeal. In *Charles A. Adamonis*,<sup>34</sup> we used vessel log book entries to supply the missing gear type in a Pacific halibut state fish ticket. In *Roderick Dexter*,<sup>35</sup> we used vessel log book entries to correct the statistical area in a sablefish fish ticket. In *S.Y.B Fisheries*,<sup>36</sup> we used the pilot log of a vessel to supply the missing statistical area for a sablefish

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<sup>31</sup> See, *John A. Karuza*, Appeal No. 02-0055 at 3-4 (July 21, 2005); *Arctic Sole Seafoods, Inc.*, Appeal No. 05-0005 at 5, n. 15 (Nov. 29, 2006).

<sup>32</sup> In several decisions, this Office has ruled that to be considered a "documented harvest" of groundfish under the LLP, the harvest of the fish must have been a lawful *commercial* harvest (as the result of a commercial fishing of groundfish); and that to be considered a commercial harvest of groundfish under the Magnuson-Stevens Fishery Conservation and Management Act, the groundfish must have been, or intended to be, sold, bartered or traded. 16 U.S.C. § 1802(4), definition of "commercial fishing." See, e.g., *Williard S. Ferris*, Appeal No. 00-0004 (Jan. 18, 2002); *Paula J. Brogdon*, Appeal No. 00-0011 (Feb. 26, 2002); *Ronald J. Tennison*, Appeal No. 00-0012 (Apr. 5, 2002); *Darjen, Inc.*, Appeal No. 00-0015 (Dec. 31, 2002); and *Stephen L. Lovejoy*, Appeal No. 02-0023 (Feb. 26, 2003).

<sup>33</sup> Appeal pleading at 4 (Feb. 13, 2003).

<sup>34</sup> Appeal No. 95-0133 (Apr. 5, 1996).

<sup>35</sup> Appeal No. 95-0089 (Jan. 25, 1996).

<sup>36</sup> Appeal No. 95-0141 (Apr. 7, 1998).

ticket. And in *Brian Merritt*<sup>37</sup> we used the testimony of the vessel's owner and the owner's partner, both of whom who had fished together; an affidavit from the processor of the fish; and information from the fish ticket itself to correct the vessel name in a halibut fish ticket. In each of those cases we accepted the Appellant's corroborating documentation as sufficient evidence that a mistake had been made in the recording of a fish ticket.

In this case, the Appellant's fish tickets do not suggest that there is anything amiss. The fish tickets are exactly as one would expect to find them if, in fact, the LLP groundfish had been discarded at sea. The fish tickets are not missing any required information. As required by ADF&G regulation, the tickets are signed by the commercial fisherman and the processor's representative; they contain a vessel name, statistical catch area, and gear type; an embossed fisherman's commercial fishing permit number; the price and dollar amount for the sablefish that was purchased. The species, weight, and condition code of the discarded LLP groundfish are recorded, as well as a zero price and no total dollar amount for the LLP groundfish.

Michael Saturno, who signed the fish tickets on behalf of the vessel and whose permit is embossed on the tickets, testified that he did not know at the time he signed the fish tickets that the groundfish had been incorrectly recorded as discarded at sea. Mr. Saturno testified that the groundfish were delivered to the processor, but his testimony came twelve years after the fact and it is not corroborated by any documents made at or near the time of the landings or, as we shall see, by any documents at all.

James Beaton also testified. Although Mr. Beaton was the primary owner of the vessel, his only direct involvement with the vessel in May 1994 was that he helped repair the vessel before it departed for the Central Gulf fishing grounds. He had no first-hand knowledge of whether the groundfish listed on the Appellant's fish tickets were discarded at sea. He speculated that the processor mistakenly recorded the groundfish as discarded at sea and then gave it to Wards Cove employees.

The Appellant attempted to find Jennifer Bender, the person who wrote and signed the fish tickets for Wards Cove, and present her as a witness.<sup>38</sup> However, Ms. Bender did not testify at the hearing, nor did anyone else from Wards Cove testify.

The Appellant did produce a settlement sheet from Wards Cove for the May 25, 1994 landing on fish ticket G94-021509 [Appellant's Exhibit B4].<sup>39</sup> The settlement sheet lists a total of 8,107 pounds of sablefish purchased, which matches the amount on the fish ticket. As to the LLP groundfish, the settlement sheet shows only zero pounds of thornyhead rock fish and red

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<sup>37</sup> Appeal No. 95-0132 (Mar. 12, 1997).

<sup>38</sup> Appellant's Disclosure of Witnesses and Documents, at 2 (Jan. 18, 2006).

<sup>39</sup> The settlement sheet has the fish ticket number typed in as G94 021514. The final two digits have been corrected by hand from "14" to "09".

snapper, and zero dollars paid for them. The settlement sheet provides no support for the Appellant's contention that the LLP groundfish on fish ticket G94-021509 were mistakenly or improperly marked condition code 98. The listing of thornyhead rockfish and red snapper on the settlement sheet does not prove that those fish, or any LLP groundfish, were delivered. At most, the settlement sheet on its face shows only that Wards Cove did not purchase any pounds of thornyhead rockfish or red snapper. That fact is not inconsistent with the evidence on the fish ticket that the LLP groundfish were discarded at sea.

The Appellant also submitted an unsworn statement [Appellant's Exhibit E], by Andre Beaton, the operator of the F/V STARRIGAVAN in 1994.<sup>40</sup> The statement reads as follows:

IN REGARDS [sic] TO FISH TICKETS, AND SALES OF CATCH FROM 1994 ABOARD F/V STARRIGAVIN, [sic] ALITAK SEAFOODS WOULD NOT PURCHASE MISC. FINFISH. ALL MISC. FIN FISH WERE KEPT ON BOARD AND SORTED PER N.M.F.S. RETAINABLE PERCENTAGE REQUIREMENTS. I BELIEVE ALITAK SEAFOODS KEPT THE FISH GAVE 0.00 \$ AMOUNT ON FISH TICKET, AND LET THEIR PROCESSORS HAVE MISC. FISH FOR HOMEPACK/SUBSISTANCE AS MOST OF CANERY [sic] WORKERS WERE ALASKA NATIVE OR ASIAN.<sup>41</sup>

I will assume for this discussion that the "misc. fin fish" mentioned in Andre Beaton's statement refers to the LLP groundfish listed on the two fish tickets from May 20 and 25, 1994.<sup>42</sup> I do not give the statement much weight, however, because it was not made at or near the time of the alleged deliveries of the fish. Rather, it was made nine years later for purposes of this appeal. Andre Beaton's statement does not explain why he did not object at the time to the coding of the fish on the fish tickets as "discarded at sea," nor does it give any explanation of how or why Wards Cove would have falsified the fish ticket or mistakenly written code 98 seven times on the two fish tickets. There is nothing in the statement to indicate why or how Andre Beaton would

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<sup>40</sup> Andre Beaton was originally expected to testify at the oral hearing, but he died before the hearing was held. Appeal pleading at 4 (Feb. 13, 2003).

<sup>41</sup> Fax cover sheet to Bruce Johnston from Andre Beaton (Feb. 13, 2003).

<sup>42</sup> The State of Alaska considers "miscellaneous finfish" to be eulachon smelt, surf smelt, capelin smelt, Arctic char, Dolly Varden, steelhead trout, pacific lamprey, and general sturgeon. See pamphlet entitled "Fish Ticket System Codes," Alaska Department of Fish and Game, Division of Commercial Fisheries. Those kind of fish are not considered LLP groundfish. See 50 C.F.R. § 679 Tables for the Fisheries of the Exclusive Economic Zone Off Alaska and the Final GOA harvest specifications published in the Federal Register at 65 Fed. Reg. 8298 (Feb. 18, 2000). Some of those kinds of fish (namely, euchalon smelt, surf smelt, capelin smelt ) are required to be sorted per NMFS retainable percentage requirements. See Notes to Table 10 to Part 679 – Gulf of Alaska Retainable Percentages. Mr. James Beaton, the father of Andre Beaton, testified that the term "miscellaneous finfish" means "rockfish, grey cod, and skate ... and whatever else we could sell." Absent further documentation, it is uncertain whether any of those were delivered to Wards Cove in this case.



have remembered the specifics of these two landings or whether, in fact, he was referring specifically to these particular landings.

The Appellant did not produce any documents showing that the F/V STARRIGAVAN retained, landed, or sold any of the LLP groundfish that were recorded on the fish tickets as discarded at sea. The Appellant did not produce the vessel's logbook, or a copy of the vessel's NMFS catcher vessel daily fishing logbook, for May of 1994.<sup>43</sup> Those documents could have shown whether the F/V STARRIGAVAN delivered or discarded the LLP groundfish listed on the fish tickets.<sup>44</sup>

Under the circumstances, it is difficult for me to envision how or why Wards Cove would have mistakenly or fraudulently recorded the LLP groundfish on these two tickets as discarded at sea if they had actually been delivered. Condition code 98 is handwritten next to each species of the groundfish on both fish tickets. The sablefish, which was purchased, is assigned condition code 08 (headed and gutted, eastern cut). One conceivable explanation is that Ms. Bender, the processor's representative, thought that condition code 98 meant something else, but I will not assume that. Another conceivable explanation is that the processor could have intentionally misrepresented the condition of the groundfish, but again, there is no evidence of that in the record. If the groundfish actually had been delivered, and then given to employees or discarded, the processor should have given the groundfish a different condition code, such as condition code 95 (personal use - not sold) or condition code 99 (discarded onshore - after delivery/before processing).

Looking at the evidence as a whole, I find that the Appellant has not produced enough evidence to convince me that the groundfish on the Appellant's fish tickets were, more likely than not, incorrectly recorded. The record contains no reliable documentary evidence to account for the fish other than their being discard at sea. Thus, I conclude that the F/V STARRIGAVAN did not make a documented harvest of groundfish in the Central Gulf of Alaska in 1994. Therefore, I conclude that the Appellant does not qualify for an LLP groundfish license with a Central Gulf area groundfish endorsement, based on the fishing history of the F/V STARRIGAVAN.

## **2. Does the Appellant qualify for an LLP groundfish license with a Western Gulf area endorsement, based on the unavoidable circumstance provision in the LLP regulations?**

To qualify for an LLP groundfish license with a Western Gulf area endorsement based on the

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<sup>43</sup> The Federal commercial fishing regulations in 1994 required the F/V STARRIGAVAN to record the vessel's groundfish harvests or discards in a NMFS catcher vessel daily fishing log, and to submit a copy of the document to NMFS by August 1, 1994. [See 50 C.F.R. § 672.5] Apparently that was not done. See, E-mail from Jerald Berger, NMFS, to Randall Moen, NMFS (Oct. 20, 2005).

<sup>44</sup> The operators of the F/V STARRIGAVAN previously recorded discarded halibut in its NMFS catcher vessel daily fishing logbook in 1992, and recorded discarded skates, idiots, grenadier, and halibut in its own fishing records in 1991. Appellant's Exhibits C and D1.

F/V STARRIGAVAN, the Appellant must demonstrate that the vessel made at least (1) one documented harvest of groundfish in the Gulf of Alaska or BSAI during the GQP, January 1, 1988, and June 27, 1992;<sup>45</sup> and (2) one documented harvest of Western Gulf of Alaska groundfish during the EQP for that fishery, January 1, 1992, and June 17, 1995.<sup>46</sup>

The NMFS official LLP record shows that the F/V STARRIGAVAN satisfies the GQP requirement, but does not satisfy the EQP requirement for a Western Gulf area endorsement.<sup>47</sup> The Appellant concedes that the vessel made no documented harvests of LLP groundfish in the Western Gulf area during the EQP. The Appellant states that it fished the vessel extensively in the Western Gulf in 1991 and intended to fish there in 1992, but was prevented by a severe hardship (unavoidable circumstance) that year and did not recover until after June 17, 1995.<sup>48</sup> The claimed hardship was financial difficulty caused by damage to the F/V STARRIGAVAN on or about June 2, 1992, and to another vessel owned by the Appellant, the F/V YUKON QUEEN, in 1993.

The LLP regulations provide an alternative way for an applicant to qualify for an LLP groundfish license endorsement by satisfying all the criteria in the unavoidable circumstance provision of LLP regulation 50 C.F.R. § 679.4(k)(8)(iv).<sup>49</sup> Unfortunately for the Appellant, one requirement in the unavoidable circumstance provision is that the applicant's qualifying vessel must have made at least one documented harvest of groundfish in the relevant endorsement area *after* the alleged unavoidable circumstance but *before* June 17, 1995.<sup>50</sup> This office has ruled in several decisions that making a documented harvest after an unavoidable circumstance but before June 17, 1995 is an absolute requirement that must be satisfied to qualify an applicant

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<sup>45</sup> 50 C.F.R. § 679.4(k)(4)(i)(A) and (B).

<sup>46</sup> 50 C.F.R. § 679.4(k)(4)(ii)(D).

<sup>47</sup> IAD at 5-6.

<sup>48</sup> Appeal pleading at 8 (Feb. 13, 2003).

<sup>49</sup> The North Pacific Fishery Management Council adopted the unavoidable circumstance provision to provide relief to those commercial fishermen who were unable to make a documented harvest of LLP groundfish (or LLP crab) because of an unavoidable circumstance, but who were able to re-enter the LLP groundfish (or LLP crab) fishery after the unavoidable circumstance and make at least one documented harvest before the adoption of the LLP by June 17, 1995. *See* transcript (uncertified) of North Pacific Fishery Management Council Meeting, June 15 - 17, 1995 at 69-70, which is available on the Administrative Appeals section of the NMFS Alaska region website under "Other Documents," <http://www.fakr.noaa.gov/appeals/default.htm>.

<sup>50</sup> 50 C.F.R. § 679.4(k)(8)(iv)(E).

under the unavoidable circumstance provision.<sup>51</sup>

The Appellant acknowledges that the F/V STARRIGAVAN did not make the requisite documented harvest before June 17, 1995. Nonetheless, the Appellant argues that the unavoidable circumstance regulation should be interpreted and applied in a manner that grants relief in this case. The Appellant correctly points out that where qualification for an endorsement requires only one documented harvest during the EQP, the unavoidable circumstance regulation is of no help to an applicant, like Agate Pass, who has made no documented harvests during the entire EQP. This office has previously stated that the unavoidable circumstance provision does not apply in a claim for an endorsement that requires only one documented harvest.<sup>52</sup>

The Appellant states that endorsements that require only one documented harvest are generally for smaller vessels that fished in more remote areas, whereas endorsements requiring multiple documented harvests are generally larger vessels.<sup>53</sup> The Appellant argues that this scheme discriminates against smaller vessels and vessels fishing in more remote areas, contrary to National Standard 4 of the Magnuson-Stevens Act, 50 C.F.R. § 600.325, “which requires allocations to be Fair and Equitable and to avoid any individuals or groups from acquiring an excessive share of any allocation. The exclusion of any hardship exception for the smaller vessels and more remote locations violates the principles articulated in 50 C.F.R. § 600.325(C)(3).”<sup>54</sup>

Whether the unavoidable circumstance regulation violates National Standard 4 of the Magnuson-Stevens Act is a question beyond my authority to decide. As the Alaska Regional Administrator has stated about another program, but which is equally applicable here, the policies embodied in

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<sup>51</sup> *Nuka Island, Inc.*, Appeal No. 02-0031 (Jan. 14, 2005); *MGF Fisheries, Inc.*, Appeal No. 02-0047 at 7 - 11 (Dec. 28, 2004); *Arctic Baruna LLC*, Appeal No. 02-0024 at 4 (Dec. 22, 2004); *Hansen Enterprises, Inc.*, Appeal No. 02-0025 (Dec. 14, 2004); *Erla-N, LLC*, Appeal No. 01-0026 (Sep. 16, 2004); *Pacific Rim Fisheries, Inc.*, Appeal No. 01-0009 (Sep. 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 (Sep. 27, 2002); *Little Ann, Inc.*, Appeal No. 01-0022 at 3 at (July 10, 2002); *Ronald Tennison*, Appeal 00-0012 at 2, 6 (Apr. 15, 2002); *Pequod, Inc.*, Appeal No. 00-0013 at 7, 24 (Apr. 12, 2002); *Paula Brogdon*, Appeal No. 00-0011 at 3 (Feb. 26, 2002); *Rex W. Duncan*, Appeal No. 04-0006 (June 29, 2005). These decisions are on the NMFS Alaska Region website: <<http://www.fakr.noaa.gov/appeals/default.htm>>.

<sup>52</sup> *Bowlden, Inc.*, Appeal No. 02-0037 at 6 (July 7, 2004): “[T]he unavoidable circumstance provision is not available to applicants seeking an Aleutian Islands endorsement, a Bering Sea endorsement or *any other groundfish endorsement that requires only one harvest in the endorsement qualification period.*” [Emphasis added.]

<sup>53</sup> Appeal pleading at 7 (Feb. 13, 2003).

<sup>54</sup> Appeal pleading at 8 (Feb. 13, 2003).

a NMFS fishery management program:

. . . are the policies of the [North Pacific Fishery Management] Council and the Secretary of Commerce developed during the long enactment process of this program. This process involved numerous opportunities for public input and comment. More to the point, these “policies” were duly implemented through APA [Administrative Procedure Act] notice and comment rulemaking. As duly implemented regulations, it is wholly inappropriate for an administrative appeals officer to pass judgment on either the validity or the wisdom of such policies. It is for the Council and the Secretary to formulate policy. It is the function of administrative hearings officers to interpret and apply those policies an enacted into regulation: nothing more, and nothing less.

If an appellant is aggrieved by the policy embodied in duly promulgated regulation, his/her remedy is not to be found in the administrative appellate process. It is to [be] found before the Council.<sup>55</sup>

I conclude that the Appellant does not meet the documented harvest requirements of 50 C.F.R. § 679.4(k)(8)(iv)(E) and, therefore, does not qualify for an LLP groundfish license with a Western Gulf area endorsement based on the unavoidable circumstance provision in the LLP regulations.

#### FINDINGS OF FACT

I find by a preponderance of the evidence in the record that:

1. The length overall of the F/V STARRIGAVAN was at least 60 feet on June 17, 1995; and the vessel was under reconstruction on that date.
2. The Appellant has not produced a state fish ticket, a Weekly Production Report, or “other valid documentation” that shows the F/V STARRIGAVAN harvested groundfish in the Central Gulf of Alaska in 1994.
3. The groundfish in the Appellant’s fish tickets were correctly recorded as discarded at sea.
4. The F/V STARRIGAVAN made no LLP groundfish harvests in the Western Gulf of Alaska during the period January 1, 1992, and June 17, 1995.

#### CONCLUSIONS OF LAW

I conclude as a matter of law that:

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<sup>55</sup> *George M. Ramos*, Regional Administrator’s Decision on Review, Appeal No. 94-0008 at 4-5 (Apr. 21, 1995).

1. The F/V STARRIGAVAN is a vessel length category “B” vessel, for purposes of determining whether the vessel is a qualifying vessel for an LLP groundfish license.
2. The F/V STARRIGAVAN did not make a documented harvest of groundfish in the Central Gulf of Alaska in 1994.
3. The Appellant does not qualify for an LLP groundfish license with a Central Gulf area groundfish endorsement based on the fishing history of the F/V STARRIGAVAN
4. The F/V STARRIGAVAN did not make a documented harvest of Western Gulf area groundfish after the alleged unavoidable circumstance but before June 17, 1995.
5. The Appellant does not qualify for an LLP groundfish license with a Western Gulf area endorsement based on the unavoidable circumstance provision in 50 C.F.R. § 679.4(k)(8)(iv).

#### DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. The Appellant’s nontransferable LLP groundfish license LLG4439 should be revoked. This Decision takes effect on July 31, 2008, unless by that date the Regional Administrator takes further action pursuant to 50 C.F.R. § 679.43(o). 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 July 11, 2008, 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 Administrative Judge, and must be accompanied by a written statement in support of the motion.

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Randall J. Moen  
Administrative Judge