

if NMFS awarded him an LLP license based on [1] Mr. Duncan’s participation in groundfish fisheries in 1979 and 1991 as a skipper and State of Alaska permit holder and [2] a determination that he *would have owned* a vessel with an LLP-qualifying history on June 17, 1995 but for the onset of his disability. This would be a major change because the LLP only awards licenses to applicants who actually did own a vessel on June 17, 1995 that made the documented harvests necessary for an LLP license or own the fishing history apart from the vessel. A major change to a government benefit or program is not a reasonable accommodation and is therefore not authorized under the Rehabilitation Act.

Mr. Duncan is not eligible to receive an LLP license based on the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv). Mr. Duncan does not meet at least three requirements of the unavoidable circumstance regulation. First, he did not own a vessel on June 17, 1995 – and does not now own the fishing history – that harvested groundfish between January 1, 1988 and February 9, 1992. Second, Mr. Duncan did not own a vessel on June 17, 1995 – and does not now own the fishing history of a vessel – that harvested groundfish in the Western Gulf and Central Gulf after the unavoidable circumstance and before June 17, 1995. Third, Mr. Duncan did not allege facts from which he could prove that he had a specific intent to conduct directed fishing for groundfish in the Western Gulf or Central Gulf in a specific time period between January 1, 1992 and June 17, 1995, the endorsement qualification period for those endorsements. Mr. Duncan stated that his disability prevented him from participating in those fisheries beginning in 1992. The unavoidable circumstance regulation does not excuse applicants with a disability from proving specific intent.

ISSUES

1. Is Mr. Duncan eligible for an LLP groundfish license pursuant to section 504 of the Rehabilitation Act of 1973?
2. Is Mr. Duncan eligible for an LLP groundfish license based on the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv)?

ANALYSIS

To receive an LLP license, an applicant must be an “eligible applicant.”² Federal regulation 50 C.F.R. § 679.2 defines “eligible applicant” as follows:

Eligible applicant means (for purposes of the LLP program) a qualified person [³] who submitted an application during the application period announced by NMFS and:

² 50 C.F.R. § 679.4(k)(4); 50 C.F.R. § 679.4(k)(5).

³ A qualified person for the LLP means “a person who was eligible on June 17, 1995, to document a fishing vessel under chapter 121, Title 46, USC.” 50 C.F.R. § 679.2.

(1) **For a groundfish license or crab species license, who owned a vessel on June 17, 1995, from which the minimum number of harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5), unless the fishing history of that vessel was transferred in conformance with the provisions in paragraph (2) of this definition; or**

(2) **For a groundfish license or crab species license, to whom the fishing history of a vessel from which the minimum number of documented harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5) has been transferred or retained by the express terms of a written contract that clearly and unambiguously provides that the qualifications for a license under the LLP have been transferred or retained; or**

(3) **For a crab species license, who was an individual who held a State of Alaska permit for the Norton Sound king crab summer fishery in 1993 or 1994, and who made at least one harvest of red or blue king crab in the relevant area during the period specified in § 679.4(k)(5)(ii)(G) [for a Norton Sound blue and red king crab endorsement] or a corporation that owned or leased a vessel on June 17, 1995 that made at least one harvest of red or blue king crab in the relevant area during the period in § 679.4(k)(5)(ii)(G), and that was operated by an individual who was an employee or temporary contractor; or**

(4) **For a scallop license, who qualified for a scallop license as specified at § 679.4(g)(2) of this part; or**

(5) **Who is an individual that can demonstrate eligibility pursuant to the provisions of the Rehabilitation Act of 1973 at 29 U.S.C. 794(a).** [emphasis added]

Mr. Duncan does not meet the first definition of eligible applicant. He did not own a vessel with an LLP-qualifying fishing history as of June 17, 1995. He has never owned the F/V URSA MINOR. And the F/V URSA MINOR did not have an LLP-qualifying history.⁴ It made a documented harvest of groundfish in the basic general qualification period for an LLP groundfish license, which is January 1, 1988 to June 27, 1992,⁵ but it did not harvest groundfish in the Central Gulf or the Western Gulf during the endorsement qualification period, which is January 1, 1992 to June 17, 1995.⁶ Mr. Duncan does not meet the second definition of eligible

⁴ Notice of Opportunity to Submit Evidence (Jan 25, 2000).

⁵ 50 C.F.R. § 679.4(k)(4)(i)(A)(1)&(B)(2).

⁶ 50 C.F.R. § 679.4(k)(4)(ii)(C), (D), (E), (F), (G), (H), (I), (J), (K). The number of documented harvests that is required varies with the size of the vessel, the area endorsement and the function of the

applicant: he does not own the LLP-qualifying fishing history of a vessel. The third definition of eligible applicant is irrelevant to Mr. Duncan because he did not apply for a Norton Sound blue and red king crab endorsement. The fourth definition of eligible applicant is irrelevant to Mr. Duncan because he did not apply for a scallop license. Mr. Duncan claims an LLP license under the fifth definition of eligible applicant: that he can demonstrate eligibility pursuant to the provisions of the Rehabilitation Act of 1973 at 29 U.S.C. § 794(a), which is known as section 504 of the Act.

1. Has Mr. Duncan shown he is eligible for an LLP groundfish license pursuant to section 504 of the Rehabilitation Act of 1973? No.

Section 504 of the Rehabilitation Act of 1973 provides in relevant part:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, **solely by reason of her or his disability**, be excluded from the participation in, **be denied the benefits of, or be subjected to discrimination under any program** or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.⁷ [emphasis added]

This Office analyzed what an applicant would have to prove to be eligible for an LLP license under the Rehabilitation Act in four decisions: *Jonathan Schumacher (Schumacher I)*, Appeal No. 00-0010 (September 16, 2002); *Jonathan Schumacher (Schumacher II)*, Appeal No. 02-0058 (March 24, 2003); *Charles G. West*, Appeal No. 03-0011 (July 28, 2004); *MGF Fisheries, Inc.*, Appeal No. 02-0047 at 11 - 15 (December 28, 2004).⁸

For a Rehabilitation Act claim, an applicant must show four things: first, the applicant is an individual with a disability as defined by the Act;⁹ second, apart from the disability, the applicant is otherwise qualified for an LLP license; third, the applicant is being denied an LLP license solely by reason of his disability; fourth, the LLP is a program conducted by a federal Executive

vessel – catcher vessel or catcher/processor vessel.

⁷ 29 U.S.C. § 794(a).

⁸ I informed Mr. Duncan about these decisions, and their availability, on the NMFS Alaska Region website at <http://www.fakr.noaa.gov/appeals/default.htm>. Memorandum (e-mail) to Rex Duncan (Jan. 26, 2005).

⁹ The definition of “individual with a disability” in the Rehabilitation Act is at 29 U.S.C. § 705(20). A “disability” is a physical or mental impairment that “constitutes or results in a substantial impediment to employment” or “substantially limits one or more major life activities.” 29 U.S.C. § 705(9)(A)(B).

agency.¹⁰ Mr. Duncan meets the fourth requirement. The LLP is a program conducted by an Executive agency, namely the National Marine Fisheries Services or NOAA Fisheries [National Oceanic Atmospheric Administration], which is part of the U.S. Department of Commerce.

To show he meets the first requirement, Mr. Duncan submitted his own statements and other documents to RAM and to this Office. Mr. Duncan labeled as “articles” the documents he submitted to this Office. I have reviewed each statement and document. These documents include:

- A statement by S.B. McConnell, M.D., Psychiatry, dated December 9, 1992, that Mr. Duncan is disabled with a chronic mental disorder (Attention Deficit Disorder) and will be unable to work for the rest of his lifetime (article 16);
- A form filled out by Examiner R. Sano, dated January 17, 1996, that Mr. Duncan should continue to receive SSI Adult, a government program, because of bipolar disorder (article 20);
- A Medical Consultant’s Review of Psychiatric Review Technique Form by Mintauts Vitols, M.D., dated January 22, 1996, indicating agreement with another evaluation and the other evaluation’s rating of Mr. Duncan’s functional limitations (article 19);
- A Proof of Disability Form, dated August 13, 2001, by Stuart McConnell, M.D., with a diagnosis of Attention Deficit Hyperactivity Disorder (article 21). Dr. O’Connell stated that Mr. Duncan’s disability started on October 14, 1992 and is expected to last indefinitely.
- Report of Psychiatric Evaluation, dated July 19, 2002, by Aron Wolf, M.D., that he has a mental disability that began in 1984 and resulted in him being unable to engage in any work by 1992 until the date of the evaluation (article 22).

I assume, for purposes of this decision, that Mr. Duncan is an individual with a disability. I do not decide this question because I have concluded that, even if Mr. Duncan is an individual with a disability, he does not meet the second and third requirement for a Rehabilitation Act claim and therefore could not receive an LLP license based on the Rehabilitation Act.

What must an applicant prove to show that he is “otherwise qualified” for an LLP license and is being denied “solely by reason of her or his disability” – the second and third requirements for a Rehabilitation Act claim? The Supreme Court has interpreted these requirements to mean that the government has a duty of “reasonable accommodation” or “reasonable modification” toward

¹⁰ *Jonathan Schumacher (Schumacher I)*, Appeal No. 00-0010 at 5 (Sept. 16, 2002).

an individual with a disability.¹¹ *Schumacher I* explains:

The government violates the Rehabilitation Act when a person can show that he or she would receive a government benefit if the government made **reasonable accommodations** for the person's disability. If an applicant could participate in a government program only if the government made substantial modifications or fundamental alterations in the program, the applicant is *not* "otherwise qualified" for the program and is *not* being denied solely based on a disability. The fundamental nature of the program, not the individual's disability, is causing the individual to be denied.¹²

The Department of Commerce regulations implementing the Rehabilitation Act adopt this standard. The regulations define an otherwise qualified individual as one who meets "the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity."¹³ Under these regulations, a measure cannot be a reasonable accommodation if it changes a fundamental requirement of a program.¹⁴

Mr. Duncan does not identify what reasonable accommodation he is proposing. Instead, Mr. Duncan gives reasons why he believes he should receive an LLP license. He stated in a letter to RAM that his claim "is based on a disability, Intent and past participation in the Pacific cod fisheries."¹⁵ He stated in his appeal:

As I have explained and presented evidence in several letters to N.M.F.S. L.L.P. my intent was clear. I have a lifelong 3rd generation fishing history and was active in several fisheries and strived to become viable in the 100 ft. class Miscellaneous Fin Fisheries.

N.M.F.S. is obviously bias [sic] on the behalf of the Official L.L.P. Record and will not look into the prevailing reason why Rex Duncan's non-completion of owning is [sic] own vessel and actively being able to participate in the given Official L.L.P record time table of June 17, 1995.

N.M.F.S. could never show proof that I could possibly have not qualified. Due to

¹¹ *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Alexander v. Choate*, 469 U.S. 287 (1985); *School Bd. of Nassau County v. Arline*, 408 U.S. 273 (1987).

¹² *Jonathan Schumacher (Schumacher I)*, Appeal No. 00-0010 at 6 (Sept. 16, 2002) (emphasis in original).

¹³ 15 C.F.R. § 8c.3, definition of "qualified individuals with handicaps", subsection (2).

¹⁴ Final Rule, 53 Fed. Reg. 19,270, 19,272 (1988)(Department of Commerce commentary).

¹⁵ Statement by Rex Duncan (Oct. 11, 2002) (article 4).

the facts of an ongoing disability, past fishing history in the Pacific Cod fishery and my last attempt in 1991 on the F/V Ursa Minor showed further intent. As The Fisherman's journal, Article # 15, tells of the sinking of my fishing vessel, "Jeremiah", in 1980. I was the only vessel in Kodiak fishing Pacific gray Cod, as an experimental fishery for Western Alaska Seafood's, Ken Allreed, agreed to buy my Cod as an experimental market.

As psychiatric reports show from 1984 an ongoing disability held me down. Always wanting to continue in the Ground Fisheries, my intentions were able to carry forth again and my hopes of being viable in Miscellaneous Fin Fisheries continued forward again in 1991.¹⁶

Mr. Duncan did not own a vessel on June 17, 1995 with a fishing history that supported an LLP groundfish license. He does not state that he owns any vessel on that date. Mr. Duncan described his participation in Alaska fisheries from 1972 to 1991, mostly as a crew member or a skipper, a few years as a vessel owner.¹⁷ He fished in the salmon, halibut, dungeness crab, herring, king and Tanner crab fisheries. He describes his only participation in the groundfish fishery as occurring in the years 1979 and 1991:

In 1979 I took this 42' combination vessel to Kodiak and engaged in an experimental Pacific cod Fishery for Ken Allread at Western Alaska Fisheries. In route from Kodiak to Homer to ready my boat for the 1980 halibut season. I had an engine room fire. The vessel was a total loss at sea, but we had no personal injuries due to the loss of my boat. I was unable to fish halibut, salmon, dungeness, or any other fishery in 1980. I worked as a journeyman pipe fitter at an oil refinery.

In 1991 beginning January 21st I began skippering the 86' power scow "Ursa Minor" for pot cod fishing; delivering to "Cook Inlet Processing" in Kodiak.

I shipped aboard the F/V ROGUE in the spring of 1991 as a relief skipper and crew member for New West Fish. I started with the boat the Unakleet, skippered the boat in Naknek River and False Pass. I was engaged in Bristol Bay salmon tendering in False Pass and Southeastern seine fisheries and returned to Bellingham, Washington. I was slated to be a skipper aboard the Rogue for 1991 king and tanner crab seasons in the Bering Sea. I left the boat due to unsafe stability conditions.¹⁸

¹⁶ Statement by Rex Duncan (June 7, 2004).

¹⁷ Statement of Rex Duncan's Fishing History, submitted with LLP application (Dec. 15, 1999).

¹⁸ Statement of Rex Duncan's Fishing History, submitted with LLP application (Dec. 15, 1999).

In 1991, Mr. Duncan states that he was the State of Alaska permit holder – as well as the skipper – for the F/V URSA MINOR.¹⁹ Mr. Duncan seeks a license, even though he submitted no evidence that he ever participated in the LLP groundfish fishery as a vessel owner and he only claims participation in an Alaska groundfish fishery as a skipper and State of Alaska permit holder on a Pacific cod vessel in 1979 and 1991. Mr. Duncan argues that his disability “held him down” and that NMFS has an obligation to look into the prevailing reason for his “non-completion” of owning his own vessel by June 17, 1995 and for his failure to establish himself as viable in the groundfish fisheries by that date.

Mr. Duncan’s proposed reasonable accommodation is implicit in his argument. Mr. Duncan proposes as a reasonable accommodation that NMFS award an LLP license if the applicant has Mr. Duncan’s degree of past participation in the groundfish fishery and can prove that, but for a disability, the applicant *would have owned a vessel that made the harvests necessary for an LLP license*.²⁰ This is not a reasonable accommodation because it changes an essential requirement of the program: ownership of a vessel *that made the harvests necessary for the particular LLP license sought by the applicant*, or ownership of that fishing history apart from the vessel.²¹ I base this conclusion on four reasons.

First, the award of LLP licenses to vessel owners was a fundamental policy choice in the LLP. As *Schumacher I* explained:

The definition of “eligible applicant” for the LLP in federal regulation 50 C.F.R. § 679.2 requires *ownership* – of a qualifying vessel or the qualifying fishing history – except in the narrowly circumscribed exception applicable to the Norton Sound red and blue king fishery in 1993 or 1994. Apart from the Norton Sound exception, the LLP regulations award licenses to vessel owners, not lessees, not skippers, not permitholders.

The regulatory history shows that award of LLP licenses to vessel owners was a deliberate policy choice. The Council, when it approved the LLP, unanimously adopted motions for both crab and groundfish licenses that licenses would be issued to “current owners (as of 6/17/95) of qualified vessels.” In making the motion to adopt the crab provision, Council member Dave Benton noted: “Through the discussion [of LLP], both groundfish and crab, the Council has heard again extensive testimony regarding the need to award licenses to current

¹⁹ Statement of Rex Duncan (April 3, 2000) with a printout “Rex Duncan Catch Record.”

²⁰ I assume without deciding that Mr. Duncan could prove that, but for his disability, he would have owned an LLP-qualifying vessel on June 17, 1995. I do not decide this because I conclude that, even if that were true, Mr. Duncan would not receive an LLP license because Mr. Duncan is seeking a waiver of an essential feature of the LLP rather than reasonable accommodation for his disability.

²¹ 50 C.F.R. § 679.2 (first and second definition of eligible applicant).

owners and I think this is consistent with public testimony and with the Council's discussions on this matter at numerous Council meetings."²²

This Office observed in *Magne Nes*: "Under the LLP, the owner of the vessel, or the owner of the vessel's fishing history, receives credit for the documented harvests made from a vessel, not the captain nor the State of Alaska permit holder who recorded the crab harvests."²³ Mr. Duncan's proposal that he receive an LLP license violates an essential feature of the LLP because he was not an owner of an LLP-qualified vessel or the fishing history of a vessel.

Second, the criterion of vessel ownership, or vessel fishing history ownership, does not discriminate against applicants who have a disability. The Rehabilitation Act embodies a "nondiscrimination principle."²⁴ The basic purpose of section 504 is "to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others."²⁵ Section 504 seeks to assure "evenhanded treatment of qualified handicapped persons" in government programs, not "affirmative efforts to overcome the disabilities caused by handicaps."²⁶ If a proposed change goes beyond what is necessary to eliminate discrimination, or the effects of discrimination, it is not a reasonable accommodation under the Rehabilitation Act.²⁷

The criterion of vessel ownership, or vessel fishing history ownership,

does not result from outdated or archaic assumptions about what disabled persons can and cannot do. It does not require that an applicant prove that he or she can perform any of the physical activities in operating a boat. A disabled person can own a vessel. Even a corporation – a legal entity only – can own a vessel. The criteria of vessel ownership has no intrinsic relationship to an applicant's disability or lack of disability.

Many reasons exist why an applicant might not have owned a vessel on June 17, 1995: a financial setback, poor fishing season, personal problems such as divorce or death in the family, boat breakdown, a natural disaster, a withdrawal of

²² *Jonathan Schumacher (Schumacher I)*, Appeal No. 00-0010 at 10 - 11 (Sept. 16, 2002) (footnotes omitted). The Council means the North Pacific Fishery Management Council.

²³ *Magne Nes*, Appeal No. 02-0044 at 9 (March 5, 2004).

²⁴ *Jonathan Schumacher (Schumacher I)*, Appeal No. 00-0010 at 7 (Sept. 16, 2002).

²⁵ *School Bd. of Nassau County v. Arline*, 408 U.S. 273, 282 (1987).

²⁶ *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979).

²⁷ *Id.*

promised financial support from a partner or bank or, as Mr. Schumacher has argued, onset of a disability. NMFS does not examine why any applicant did not own a vessel on June 17, 1995 and does not award an LLP license based on *any* reason why an applicant did *not* own a vessel on June 17, 1995.

In essence, Mr. Schumacher asks NMFS to conduct such an inquiry for disabled persons only. This does not redress discrimination or the effects of discrimination. This would result in disabled persons receiving special treatment because of their disabilities, rather than equal or even-handed treatment which takes into account their disabilities. The change is therefore not a reasonable modification under section 504 of the Rehabilitation Act.²⁸

I therefore conclude that NMFS does not have an obligation to determine why Mr. Duncan did not own an LLP-qualifying vessel by June 17, 1995.

Third, Mr. Duncan proposes an award of LLP licenses that is not based on any clear standard. The North Pacific Fishery Management Council (Council) and NMFS painstakingly specified different documented harvests requirements for LLP licenses with five area endorsements, three vessel length categories and two vessel designations.²⁹ The five area endorsements are Aleutian Islands, Bering Sea, Western Gulf, Central Gulf and Southeast Outside.³⁰ The three vessel categories are category A, vessels over 125 feet length overall; category B, vessels greater than 60 feet and less than 125 feet; and category C, vessels less than 60 feet.³¹ The two vessel designations are catcher vessels and catcher/processor vessels.³²

For a Western Gulf endorsement, for a catcher vessel, in category B, the endorsement qualification period [EQP] requirement is one documented harvest in the Western Gulf between January 1, 1992 through June 17, 1995. Mr. Duncan asks that NMFS award him an LLP license based, in part, on his past participation in the Alaska groundfish fisheries. But Mr. Duncan does not have the past participation that the Council and NMFS explicitly required for a Western Gulf endorsement for a catcher vessel in category B.

In essence, Mr. Duncan asks me to craft another set of past participation requirements – one that would include an applicant who participated as a skipper and State permit holder in the Pacific cod fisheries in 1979 and 1991. Neither the LLP regulation, nor the history of the regulation,

²⁸ *Jonathan Schumacher (Schumacher I)*, Appeal No. 00-0010 at 9 (Sept. 16, 2002).

²⁹ 50 C.F.R. § 679.4(k); Final Rule, 63 Fed. Reg. 52,642, 52,643 - 52,646 (1998) (commentary).

³⁰ 50 C.F.R. § 679.4(k)(4)(ii).

³¹ 50 C.F.R. § 679.4(k)(3)(iii).

³² 50 C.F.R. § 679.4(k)(3)(ii).

makes any mention of what *different* levels of past participation an individual with a disability would have to prove to qualify for an LLP license.³³ I would simply be making them up out of thin air.

What would I require? Participation in the years 1979 and 1991? Participation in what capacity? Participation as a captain and a State permit holder? I have no basis to adopt that standard. And what about another applicant with a disability who participated in 1979 and 1991 as a vessel owner *and* a skipper and a State permit holder? What about an applicant with a disability who participated as a vessel owner in 1980 to 1985 and never again? I have no basis to differentiate between different levels of participation by applicants with a disability – when that participation does not meet the level of participation that the Council and NMFS have required for a particular endorsement. The LLP regulation only gives me a basis to distinguish between applicants who meet the level of past participation that the regulation requires for a license and those who do not.

The other leg of Mr. Duncan's claim is that he intended to participate in the groundfish fishery and, but for his disability, he would have owned an LLP-qualified vessel on June 17, 1995. This standard does not require that the applicant ever have made any documented harvests in any LLP fishery as long as the applicant proves that, but for a disability, the applicant would have participated in a groundfish fishery.

The standard adopted by the Council and NMFS for award of LLP licenses was actual, documented harvests by a specific vessel that the applicant owned on June 17, 1995 or the ownership of the fishing history apart from the vessel. If the Council and NMFS intended to adopt a different standard for awarding LLP licenses to applicants who had a disability – a standard based on a different level of past participation and a standard based on the applicant proving something about what would have happened but for their disability – the Council and NMFS would have said they were doing that and they would have specified what an applicant had to prove.

In fact, when the Council and NMFS made a limited exception to the requirement of actual harvests, they explicitly said they were doing that in the commentary to the proposed and final LLP rule. They *were* very specific and they did *not* do away completely with the requirement of actual harvests. In the unavoidable circumstance regulation, the Council and NMFS adopted the only LLP provision that allows an applicant, in certain circumstances, to get credit for a harvest the applicant would have made but did not make.³⁴ But, even there, the Council and NMFS were very clear that the applicant still had to make a harvest between January 1, 1988 and February 9,

³³ Proposed Rule, 62 Fed. Reg. 43,866, 43,866 - 43,872, 43,882 - 43,889 (1997); Final Rule, 63 Fed. Reg. 52,642 (1998).

³⁴ 50 C.F.R. § 679.4(k)(8)(iv). For the history of the unavoidable circumstance regulation, see Proposed Rule, 62 Fed. Reg. 43,866, 43,871 (1997); Final Rule, 63 Fed. Reg. 52,642, 52,646, 52,651 (1998).

1992 and a harvest by June 17, 1995, and they were very specific as to what the applicant had to prove.³⁵

Fourth, Mr. Duncan proposes a reasonable accommodation that undermines the purpose of the Rehabilitation Act provision in the LLP. Every interpretation of a regulation has a purpose, or purposes, implicit in the interpretation. The purpose of the Rehabilitation Act provision implicit in Mr. Duncan’s interpretation is that NMFS must judge an LLP application from an individual with a disability by a different set of requirements than NMFS judges an LLP application from an individual who does not have a disability. If the Council and NMFS intended to do that, it would be significant and there would be evidence of that purpose in the history and text of the regulation. There is none.

The proposed LLP rule did not have the Rehabilitation Act provision.³⁶ In the final LLP rule, the North Pacific Fishery Management Council (Council) and NMFS added the Rehabilitation Act with this brief explanation:

The definition of “eligible applicant” is revised to add a paragraph to accommodate individuals that can demonstrate eligibility of the LLP pursuant to the provisions of the Rehabilitation Act of 1973 at 29 U.S.C. 794(a). This addition clarifies that otherwise qualified individuals may avail themselves of appropriate provisions of the Rehabilitation Act of 1973 when applying for licenses under the LLP.³⁷

In *MGF Fisheries, Inc.*, I concluded that this explanation, through brief, does

shed light on the Rehabilitation Act definition of eligible applicant. It supports the approach taken in *Charles West*, *Jonathan Schumacher I* and *Jonathan Schumacher II*, which was to use the case law developed under the Rehabilitation Act to evaluate an applicant’s claim to an LLP license based on the Rehabilitation Act. I conclude that the purposes of the Rehabilitation Act provision are [1] to incorporate the Rehabilitation Act jurisprudence into the LLP and to alert applicants and the agency to the existence and applicability of the Rehabilitation Act to the LLP and [2] to alert applicants and the agency that the Rehabilitation

³⁵ 50 C.F.R. § 679.4(k)(8)(iv). I analyze this regulation and quote it in full at pages 13 - 14 *infra*.

³⁶ Proposed Rule, 62 Fed. Reg. 43,866, 43,866 - 43,872, 43,882 - 43,889 (Aug. 15, 1997).

³⁷ Final Rule, 63 Fed. Reg. 52,642, 52,648 (1998). The only other reference in the final rule is a one-sentence paraphrase of the Rehabilitation Act provision in the commentary: “Also, an otherwise qualified individual who can demonstrate eligibility pursuant to the provisions of the Rehabilitation Act of 1973 would be considered an eligible applicant.” *Id.*

Act applies to the LLP.³⁸

Mr. Duncan's reasonable accommodation undermines this purpose because he does not propose a reasonable accommodation as that term has been defined in the context of the Rehabilitation Act.

I conclude that Mr. Duncan is not proposing a reasonable accommodation but a change in the fundamental structure of the LLP and a waiver of an essential requirement for a LLP license, namely ownership of a vessel on June 17, 1995 with an LLP-qualifying history or ownership of the fishing history apart from the vessel. I therefore conclude that Mr. Duncan has not shown he is eligible for an LLP license pursuant to section 504 of the Rehabilitation Act of 1973.

2. Is Mr. Duncan eligible for an LLP crab license based on the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv)?

Mr. Duncan seeks an LLP groundfish license with a Western Gulf and a Central Gulf endorsement under the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv). It provides:

A qualified person who owned a vessel on June 17, 1995, **that made a documented harvest of license limitation groundfish, or crab species if applicable, between January 1, 1988, and February 9, 1992**, but whose vessel was unable to meet all the [documented harvest] criteria in paragraph (k)(4) of this section for a groundfish license or paragraph (k)(5) of this section for a crab species license because of an unavoidable circumstance (i.e., the vessel was lost, damaged, or otherwise unable to participate in the license limitation groundfish or crab fisheries) may receive a license if the qualified person is able to demonstrate that:

(A) The owner of the vessel at the time of the unavoidable circumstance held a specific intent to conduct directed fishing for license limitation groundfish or crab species with that vessel during a specific time period in a specific area.

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

³⁸ *MGF Fisheries, Inc.*, Appeal No. 02-0047 at 14 - 15 (Dec. 28, 2004).

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]

An applicant must meet each requirement of the unavoidable circumstance regulation. Mr. Duncan does not meet the requirement in the first sentence of the regulation. He did not own a vessel on June 17, 1995 that made a documented harvest of groundfish between January 1, 1988 and February 9, 1992.

Mr. Duncan does not meet the requirement in paragraph (E) of the regulation. For a Western Gulf endorsement, paragraph (E) requires a documented harvest of groundfish in the Western Gulf after the unavoidable circumstance and before June 17, 1995. For a Central Gulf requirement, paragraph (E) requires a documented harvest of groundfish in the Central Gulf after the unavoidable circumstance and before June 17, 1995. This Office has ruled in many decisions that the harvest by June 17, 1995 is a mandatory requirement with no exceptions.³⁹ For those reasons, I conclude that Mr. Duncan is not eligible for an LLP crab license based on the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv).

I also conclude, as a matter of law, that Mr. Duncan does not meet the requirement in paragraph (A), namely he has not proven that “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.” The owner of the vessel refers to the owner of the qualifying vessel. Mr. Duncan does not meet that part of paragraph (A) because he did not own a vessel.

Beyond that, Mr. Duncan has not alleged facts from which he could prove that he held a specific

³⁹ *Raymond Bellamy*, Appeal No. 04-0040 at 5 (June 14, 2005); *Kona Kai, Inc.*, Appeal No. 04-0003 (Jan. 7, 2005); *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 Donovanick*, 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 are on the NMFS Alaska Region website: <<http://www.fakr.noaa.gov/appeals/default.htm>>.

intent to conduct directed fishing with a specific vessel during a specific time period in the endorsement qualification period, which was January 1, 1992 through June 17, 1995. He has not stated that he had a definite plan that a specific vessel would fish in a particular fishery at a specific time. He has not stated that he had taken substantial steps to carry out that plan – that he had a vessel that was properly equipped and licensed for the fishery, that the vessel was actually participating in the fishery, on its way toward the fishery or preparing for the fishery. He has not alleged that something unexpected happened that prevented him from carrying out his specific plan.

This contrasts with applicants that have successfully made an unavoidable circumstance claim. In *Pequod, Inc.*, the applicant’s vessel was on its way to the Aleutian Islands brown king crab fishing grounds when it broke down and was out of commission for three months.⁴⁰ In *Raymond Bellamy*, the vessel was on its way to put on Pacific cod pots after crab fishing when the captain had to withdraw from vessel preparation because he had a flare up of cancer and had to undergo cancer treatment. This kept the captain off the vessel for two months and resulted in the vessel missing one out of four necessary Pacific cod harvests.⁴¹

Mr. Duncan submitted fish ticket records from 1979 and 1991 and State of Alaska finfish permits from 1979, 1990 and 1991. Mr. Duncan submitted no argument or evidence that he took specific steps to participate in any fishery between 1992 and 1995. In fact, he states that he could not fish beginning in 1992 because of the onset of his disability. Mr. Duncan states that “[i]n 1992 I was diagnosed with a chronic Mental disorder and was on a chemical medication that disallowed me to further my participation in the misc. fin fishery.”⁴² He states that “I am a disabled individual and was unable to continue participation in the fisheries because of my disability.”⁴³ I accept as true that Mr. Duncan’s disability prevented him from taking steps to participate in the groundfish fishery after 1991, even though he might have wanted to participate.

But the unavoidable circumstance regulation does not excuse any applicant – including an applicant with a disability – from proving a specific intent to fish with a specific vessel in a specific period in the endorsement qualification period for the license. I therefore conclude, as a matter of law, that Mr. Duncan did not have a specific intent to harvest groundfish in the Western Gulf and the Central Gulf in any specific time period between January 1, 1991 and June 17, 1995.

I conclude that Mr Duncan is not eligible for an LLP groundfish license based on the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv) because he did not make the

⁴⁰ *Pequod, Inc.*, Appeal No. 00-0013 (April 12, 2002).

⁴¹ *Raymond Bellamy*, Appeal No. 04-0040 at 7 - 10 (June 14, 2005).

⁴² Statement of Rex Duncan (April 3, 2000).

⁴³ Statement of Rex Duncan (April 4, 2000).

documented harvests required by the regulation and because he did not have a specific intent to harvest groundfish in the Western Gulf and the Central Gulf in any specific time period between January 1, 1992 and June 17, 1995.

FINDINGS OF FACT

1. Rex Duncan did not own on June 17, 1995 an vessel with an LLP qualifying history.
2. Rex Duncan does not now own an LLP qualifying history of a vessel, apart from the vessel.
3. Rex Duncan did not own a vessel on June 17, 1995 that made a documented harvest of groundfish between January 1, 1988 and February 9, 1992.
4. Rex Duncan did not own a vessel on June 17, 1995 that made a documented harvest of groundfish in the Western Gulf after an unavoidable circumstance and before June 17, 1995.
5. Rex Duncan did not own a vessel on June 17, 1995 that made a documented harvest of groundfish in the Central Gulf an unavoidable circumstance and before June 17, 1995 between January 1, 1988 and February 9, 1992.

CONCLUSIONS OF LAW

1. Rex Duncan is not eligible for an LLP license pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a).
2. The Rehabilitation Act does not authorize, as a reasonable accommodation, that NMFS grant a disabled person an LLP license if the disabled person would have made the harvests required for an LLP license but for his or her disability.
3. The Rehabilitation Act does not authorize, as a reasonable accommodation, that NMFS grant a disabled person an LLP license if the disabled person does not meet the past participation requirements that the Council and NMFS adopted for the particular LLP license the disabled person seeks.
4. Rex Duncan is not eligible for an LLP groundfish license under the unavoidable circumstance provision, 50 C.F.R. § 679.4(k)(8)(iv).
5. Rex Duncan did not have a specific intent to harvest groundfish in the Western Gulf or the Central Gulf with a specific vessel during a specific time period in the endorsement qualification period for these endorsements: January 1, 1992 to June 17, 1995.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect July 29, 2005, unless by that date the Regional Administrator orders review of the Decision.

Any party or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, July 10, 2005. A motion for reconsideration must be in writing, must specify one or more material matters of fact or law that I have overlooked or misunderstood, and must be accompanied by a written statement in support of the motion.

Mary Alice McKeen
Administrative Judge