NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 01-0002
	)	
OCEAN SPRAY PARTNERSHIP,	)	DECISION [Corrected]*
Appellant	)	
_____	)	April 13, 2001

STATEMENT OF THE CASE

On March 8, 2001, Ocean Spray Partnership [Ocean Spray] filed a timely appeal of an Initial Administrative Determination [IAD] that the Restricted Access Management Program [RAM] had issued on January 8, 2001. This appeal concerns Ocean Spray's rights under the American Fisheries Act [AFA],[1] as modified by Title V of Public Law No. 106-562.[2]

Mr. Walt Raber, acting on behalf of Ocean Spray, applied for an AFA catcher vessel permit with an inshore sector endorsement for the F/V PROVIDIAN on December 27, 2000. Fairly read, Mr. Raber's application, together with other materials he submitted,[3] requested that RAM substitute the catch history of the F/V OCEAN SPRAY in 1992, 1993 and 1994 for the catch history of the F/V PROVIDIAN in 1995, 1996 and 1997. Mr. Raber indicated that the F/V PROVIDIAN wished to join the Peter Pan Fleet Cooperative. The F/V PROVIDIAN subsequently joined the Peter Pan Fleet Cooperative.

The IAD granted Ocean Spray's application in part and denied it in part. First, it granted Ocean Spray an AFA catcher vessel permit with an inshore sector endorsement. Second, the IAD stated that RAM was adding the catch history of the F/V OCEAN SPRAY to the catch history of the F/V PROVIDIAN for the purpose of eligibility and allocations under the AFA. Third, it stated that the F/V PROVIDIAN was eligible to join the Peter Pan Fleet Cooperative, a catcher vessel cooperative that has an AFA inshore cooperative permit. Fourth, it denied Ocean Spray's request to increase the allocation on the Peter Pan Fleet Cooperative's inshore cooperative permit by adding the best two out

[1] Div. C. Title II, Subtitle II, Pub. L. No. 105-277, 112 Stat. 2681 (Oct. 21, 1998). The AFA and the AFA regulations can be found on the NMFS website: http://www.fakr.noaa.gov. The AFA can also be found in the 1998 U.S. Code Congressional and Administrative News (U.S.C.C.A.N.), 112 Stat. 2681-616 to 112 Stat. 2681-637. The AFA has 13 sections: § 201 through § 213. This decision will cite the AFA by section number only.

[2] 114 Stat. 2794, 2807 (Dec. 23, 2000).

[3] A copy of Pub. L. No. 106-542 and Senator Snowe's statement in the Congressional Record of December 15, 2000.

* This corrected Decision provides for an effective date and changes typographical errors. There are no substantive changes to the original Decision.

of three years of the F/V OCEAN SPRAY's pollock catch history from 1992 to 1994. Ocean Spray appeals the fourth determination. Ocean Spray claims that Title V of Pub. L. No. 106-562 requires that NMFS determine the catch history of the F/V PROVIDIAN in 1995 - 1997 by substituting the catch history of the F/V OCEAN SPRAY in 1992 - 1994. If NMFS does this, it will result in an increase in the allocation to the Peter Pan Fleet Cooperative. This Office granted Ocean Spray's request for expedited consideration of its appeal.

On March 21, 2001, I entered an Order Concerning the Record on Appeal. The Order granted, in part, Ocean Spray's request for information on how RAM calculated the F/V HAZEL LORRAINE's catch history[4] and asked RAM to provide a copy of the contract filed by the Peter Pan Fleet Cooperative as required by 50 C.F.R. § 679.61(b). RAM provided that information on March 22, 2001. On March 23, 2001, I entered an order setting a deadline for Ocean Spray to respond to RAM's submissions and, in response to a query by Ocean Spray, a subsequent order clarifying the subjects Ocean Spray could address in its response. Ocean Spray filed a supplemental argument on March 28, 2001.

Ocean Spray did not request a hearing and I did not order a hearing. The question before me is a legal question: the interpretation of a statute. The facts are not in dispute. This appeal therefore does not meet the requirements for a hearing in 50 C.F.R. § 679.43(g).

ISSUES

I. Does Title V of Pub. L. No. 106-562 require NMFS to substitute the catch history of the F/V OCEAN SPRAY for 1992-1994 in place of the catch history of the F/V PROVIDIAN for 1995-1997 when NMFS makes allocations under section 210(b) of the American Fisheries Act?

II. Must NMFS recalculate the allocations it made under section 210(b) of the American Fisheries Act for the year 2001?

SUMMARY OF THE DECISION

On December 23, 2000, Congress enacted Title V of Pub. L. No. 106-562, a statute which amended the American Fisheries Act. The controlling principle of statutory interpretation is to determine legislative intent or purpose. The purpose of Title V of Pub. L. No. 106-562, as it affects this appeal, was to enable the F/V PROVIDIAN to participate in the Bering Sea pollock fishery under the AFA. To accomplish this legislative purpose, Congress intended that NMFS substitute the catch history of the F/V OCEAN SPRAY from 1992 - 1994 for the catch history of the F/V PROVIDIAN from 1995 -

[4] The F/V HAZEL LORRAINE was the other vessel that was the subject of Pub. L. No. 106-562.

1997 when NMFS makes allocations to inshore cooperatives under section 210(b) of the AFA. This interpretation of Title V of Pub. L. No. 106-562 is necessary to avoid frustration of Congressional intent and making the statute a nullity.

Title V of Pub. L. No. 106-562 does not, however, require that NMFS recalculate the cooperative allocations it has already made for the year 2001 under section 210(b). NMFS did not take final agency action on this appeal by December 15, 2000, as required by 50 C.F.R. § 679.4 *l*(8)(v). When Congress enacted Title V of Pub. L. No. 106-562, it did not intend to require that NMFS depart from the orderly administration of the AFA cooperative allocation process and disturb the settled expectations of cooperative permit holders based on the allocations already made for 2001.

BACKGROUND

1. Ocean Spray's situation

Ocean Spray states the undisputed facts which form the background for this appeal:

> The fishing vessel *Ocean Spray* actively participated in the Alaska pollock fishery between 1984 and 1994, with a total pollock catch history of over 35,000 mt. The average annual pollock harvest of the vessel between 1992 and 1994 was well over 2000 metric tons. In 1994, a major storm in the Bering Sea during the fall pollock season resulted in the loss of the *Ocean Spray*. The owner of the *Ocean Spray*, Ocean Spray Partnership immediately embarked upon the complicated process of financing and building a replacement vessel. Ocean Spray Partnership fully complied with all legal requirements necessary for the license, permit and catch history of the *Ocean Spray* to transfer to a replacement vessel. The Applicant built the replacement vessel *Providian*, despite several events outside of its control that significantly delayed the process, including the bankruptcy of the shipyard originally commissioned to build the *Providian*. The *Providian* was completed in late 1998.[5]

The requirements for a replacement vessel to which Ocean Spray refers are the requirements in the Vessel Moratorium Program for Groundfish and Crab, which was in effect from January l, 1996

[5] Ocean Spray Appeal at 3-4 (March 8, 2001)(footnote omitted). For purposes of this appeal, I have generally accepted the facts as alleged in Ocean Spray's Appeal, Ocean Spray's Supplemental Argument, dated March 28, 2001, and Mr. Raber's letter to the North Pacific Fishery Management Council, dated May 31, 1999. [Exhibit 7].

through December 31, 1999.[6] A moratorium permit was necessary to harvest Bering Sea pollock, as well as other species. The catch history of the F/V OCEAN SPRAY enabled Mr. Raber to receive a moratorium qualification certificate, even though the vessel had sunk in 1994.[7] Mr. Raber met the requirements to keep alive the moratorium qualification of the F/V OCEAN SPRAY by transferring it to another vessel in 1997. That vessel made a landing. The F/V OCEAN SPRAY's moratorium qualification was transferred back to the F/V PROVIDIAN in 1998, enabling the vessel to fish for Bering Sea pollock.[8]

Effective January l, 2000, the License Limitation Program or LLP replaced the Moratorium Program.[9] Mr. Raber received a transferable LLP crab and groundfish license, based on the catch history of the F/V OCEAN SPRAY.[10] Mr. Raber can use this on the F/V PROVIDIAN or any other catcher vessel that does not exceed 113 feet, the maximum length overall on his LLP licenses.[11] A LLP license is required to harvest BSAI [Bering Sea and Aleutian Islands] pollock, as well as other species.

2. American Fisheries Act

In October 1998, Congress passed the American Fisheries Act, which made profound changes to the

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[6] 50 C.F.R. § 679.4(c)(9)(iii), Final Rule, 60 Fed. Reg. 40,763, 40,773 (Aug. 10, 1995). The regulations for the Moratorium Program were originally at 50 C.F.R. §§ 676.1 - 676.6. The regulation for vessels lost between 1989 and 1995 was originally 50 C.F.R. § 676.4(a). The Moratorium Program regulations were renumbered and placed at 50 C.F.R. § 679.1 - 679.7 as part of a consolidation of the regulations, 61 Fed. Reg. 31,228 (1996), and then eliminated from the Code of Federal Regulations after the License Limitation Program came into effect. Final Rule, 65 Fed. Reg. 45,316 (July 21, 2000). For the background of the Moratorium Program, see the Proposed Rule for the Moratorium Program, 60 Fed. Reg. 25,677, 25,677 -25,683 (May 12, 1995) and the Final Rule, 60 Fed. Reg. 40,763, 40,763-40,770 (Aug. 10, 1995).

[7] Letter from Walt Raber to NPFMC, May 31, 1999 [Exhibit 7].

[8] Certificate of Moratorium Qualification for F/V PROVIDIAN, May 30, 1998 [Exhibit 3], Vessel Moratorium Permit for F/V PROVIDIAN, May 30, 1998 [Exhibit 6].

[9] LLP Regulations are found at 50 C.F.R. § 679.4(k). For background on the LLP, see the Proposed LLP Rule, 62 Fed. Reg. 43,866, 43,866 - 43,872 (1997) and the Final Rule, 63 Fed. Reg. 52,642, 52,642 - 52,651 (1998).

[10] Mr. Raber signed as agent for Trident Maritime Co. as the licenseholder on LLG 2272, a groundfish license with area endorsements for Bering Sea, Western Gulf and Central Gulf, and LLC 2273, a crab species license with species/area endorsements for [1] Bristol Bay Red King Crab and [2] opilio and bairdi, commonly known as Tanner crab. [Exhibit 4, Exhibit 5]

[11] 50 C.F.R. § 679.4(k)(8)(iii).

BSAI pollock fishery. Section 206 of the Act divided the total allowable catch [TAC] through "directed fishing allowances" of the catch. Off the top, 10 percent goes to the Alaska community development quota (CDQ) program.[12] Section 206(b) divides the remaining 90 percent: 50 percent to catcher vessels harvesting pollock for processing by the inshore component; 40 percent to catcher/processors and catcher vessels harvesting pollock for processing by catcher/processors in the offshore component; 10 percent to catcher vessels harvesting pollock for processing by motherships in the offshore component.[13]

Section 208 requires that vessels wishing to harvest BSAI pollock must have an additional federal fishing permit. Section 208(a) specifies the requirements that catcher vessels must meet to receive an AFA catcher vessel permit for the inshore sector. A vessel 60 feet or more [14] had to have delivered at least 250 metric tons of pollock for inshore processing in 1996, 1997 or between January l, 1998 and September l, 1998. The vessel had to be eligible to harvest pollock under an LLP license. And the vessel could not be one of the seven catcher vessels, specifically named in the Act, that could harvest the 40 percent offshore pollock allowance.[15]

Section 210 was the real innovation in the Act. Although fishery cooperatives have existed for a long time,[16] section 210 vastly expands their role in the BSAI pollock fishery. Section 210 grants to a catcher vessel cooperative a suballocation of the inshore pollock harvest. Section 210(b)(1) originally required that NMFS calculate a cooperative's allocation by the catch history of cooperative members in the years 1995, 1996 and 1997. Section 213(c) provides that the Council may recommend changes in this formula. The Council recommended that, rather than alocate all the landings in 1995 and 1996 and 1997, each vessel can contribute to a cooperative the best catch history in two out of those three years. The Secretary of Commerce adopted that recommendation.[17]

Any contract implementing a fishery cooperative must allow the owners of qualified catcher vessels to join the cooperative as long as they join before the calendar year in which fishing will begin and under the same terms and conditions as the owners who entered into such contract upon filing with the

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[12] AFA § 206(a).

[13] AFA § 206(b).

[14] The F/V PROVIDIAN is 113 feet LOA.

[15] AFA section § 208(a)(1)(2)(3).

[16] Act of June 25, 1934, 15 U.S.C. § 521.

[17] 50 C.F.R § 679.61 (e), Emergency Interim Rule, 65 Fed. Reg. 4520, 4525-26, 4542 (Jan. 28, 2000).

Council and NMFS.[18] A catcher vessel whose catch history has not been attributed to a co-op may participate in the "open access" sector.[19]

The open access sector is minuscule compared to the co-op sector. For example, of the 241,902 metric tons of the Bering Sea pollock TAC available in the 2001 A/B season, 944 metric tons are allocated to the open access sector and 240,976 metric tons to the co-op sector.[20] The advantages of the co-op sector are that co-op members can, and do, freely trade their rights under the cooperative contract with each other. An article in the April issue of *Pacific Fishing* states: "Co-op vessels wheeled and dealed all through the 2000 season, leasing pollock and cod as needed to meet their particular objectives, according to reports the 10 co-ops filed with the North Pacific Fishery Management Council."[21] The article further notes: "In the inshore sector, which also began co-op management in 2000, 7 of 83 member boats delivering pollock to shore plants sold most or all of their fish to other boats."[22]

3. Title V of Pub. L. No. 106-562

The F/V OCEAN SPRAY sank in 1994. The F/V PROVIDIAN was not built until late 1998. Ocean Spray's problem was that neither vessel had a catch history that enabled Ocean Spray to receive an AFA permit under section 208 or to receive rights to part of a cooperative allocation under section 210. Mr. Raber, who has moved the F/V PROVIDIAN to Bath, Maine, to participate in the herring fishery there, sought the assistance of Senator Olympia Snowe [ME].

In October 2000, Senator Snowe sponsored a floor amendment to the AFA as part of H.R. 3417, which eventually became Title V of Pub. L. No. 106-562. Title V of Pub. L. No. 106-562 had no Committee Report. Fortunately, Senator Snowe made a statement in support of the amendment on the Senate floor. Since it is the only documented legislative history of the portion of the statute in question, I will quote Senator Snowe's statement in its entirety:

> Title V of the bill makes a technical correction to the American Fisheries Act (AFA)

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[18] AFA § 210(b)(2). "Qualified catcher vessels" are defined in AFA § 210(b)(3). A regulation amended that definition. 50 C.F.R. § 679.2. *See* Emergency Interim Rule, 66 Fed. Reg. 7327 (Jan. 22, 2001).

[19] AFA § 210(b)(5).

[20] Emergency Interim Rule, 66 Fed. Re. 15656 (March 20, 2001).

[21] Wesley Loy, "Coops Shrink Pollock Fleet by 24 percent," *Pacific Fishing*, April 1991 at 16.

[22] *Id. at 17.*

with regard to two fishing vessels, the *Providian* (United States Official Number 1062183) and the *Hazel Lorraine* (United States Official Number 592211). The 1998 AFA authorized the participation of certain US-owned fishing vessels in the Bering Sea pollock fishery. The AFA was designed to work in conjunction with the license limitation provisions of the fishery management plan developed by the North Pacific Fishery Management Council. **Certain "qualifying years" were established in order to determine which vessels had earned a "fishing history" to allow them future access to pollock-fishing quotas. During the consideration of the AFA, the special circumstances of many vessels were taken into account. At that time, the fishing vessel *Providian* was being built in a U.S. shipyard as a replacement vessel for the pollock-fishing vessel *Ocean Spray*.**

In 1994, the *Ocean Spray* was lost at sea–fortunately without the loss of a single life. **Had the *Ocean Spray* not been lost, the vessel would have continued to fish for Bering Sea pollock during the years leading up to the development of the AFA**. After the loss of the *Ocean Spray*, the owner-operator followed the replacement guidelines in order to secure his federal fishing permits and endorsement for his new vessel, the *Providian*. According to landing records, it appears that the average pollock harvest of the *Ocean Spray* during the years 1992 through 1994, exceeded 2000 metric tons.

Since the construction of the *Providian* was completed, the owner decided to bring his vessel to Bath, Maine to work in the Maine herring fishery. The current location of this vessel does not eliminate the need to establish fairness and restore the vessel owner's pollock-fishing rights earned with the *Ocean Spray* during 1992-1994. **This amendment to the AFA is intended to provide the North Pacific Fishery Management Council and the National Marine Fisheries Service with the authority to qualify the *Providian* under the AFA with directed onshore pollock-fishing rights equivalent to those earned by the *Ocean Spray* during the years 1992-1994**.

Mr. President, the authors of the AFA certainly took into account the particular circumstances of other vessel owners and companies. This technical amendment simply qualifies two vessels, the *Providian* and the *Hazel Lorraine* under the AFA for fishing rights that they otherwise should have received allow [sic] for the participation of two additional catcher vessels in the Alaskan pollock fishery. These vessels were able to demonstrate that they should have been included in the Act when it passed in 1998. [emphasis added][23]

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[23] 146 Cong. Rec. S11893, S11894 (Dec. 15, 2000)(remarks of Sen. Snowe).

ANALYSIS

The question before us is the proper interpretation of Title V of Pub. L. No. 106-562, which Congress enacted on December 23, 2000. The entire statute is one paragraph:

> SEC. 501. TREATMENT OF VESSEL AS AN ELIGIBLE VESSEL.
>
> Notwithstanding paragraphs (1) through (3) of section 208(a) of the American Fisheries Act (title II of division C of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (Pub. L. No. 105-277; 112 Stat. 2681-624), the catcher vessel HAZEL LORRAINE (United States Official Number 592211) and the catcher vessel PROVIDIAN (United States Official Number 1062183) shall be considered to be vessels that are eligible to harvest the directed fishing allowance under section 206(b)(1) of that Act pursuant to a Federal fishing permit in the same manner as, and subject to the same requirements and limitations on that harvesting as apply to, catcher vessels that are eligible to harvest that directed fishing allowance under section 208(a) of that Act.[24]

I. Does Title V of Pub. L. No. 106-562 require NMFS to substitute the catch history of the F/V OCEAN SPRAY for 1992-1994 in place of the catch history of the F/V PROVIDIAN for 1995-1997 when NMFS makes allocations under section 210(b) of the American Fisheries Act?

A. Competing interpretations of Title V of Pub. L. No. 106-562

The IAD and Ocean Spray offer competing interpretations of Title V of Pub. L. No. 106-562. Both the IAD and Ocean Spray agree that Congress intended that NMFS grant the F/V PROVIDIAN an AFA inshore catcher vessel permit, notwithstanding that the F/V PROVIDIAN does not have a catch history that meets the requirements of section 208. Both the IAD and Ocean Spray agree that intent was clearly expressed in Pub. L. No. 106-562. The IAD therefore issued the F/V PROVIDIAN an AFA inshore catcher vessel permit.

Simply having a permit does not entitle a vessel to actually harvest any pollock. The structure of the Act is that a vessel's individual catch history is only translated into the right to harvest actual BSAI pollock after NMFS calculates the vessel's catch history and attributes it to a co-op or the open access sector. A vessel's catch history, in combination with the catch history of other vessels that have joined a cooperative, determines how much pollock that cooperative, or group of vessels, can harvest. The Peter Pan Cooperative's contract has a harvest schedule that grants each member a right to a certain

[24] 114 Stat. 2794, 2807 (Dec. 23, 2000).

percentage of the co-op's allocation. That percentage is based on the catch history contributed by each member.[25] Under the cooperative's contract, the F/V PROVIDIAN has the right to harvest 0.00% of the co-op's allocation since it contributed 0.00% of the catch history that formed the basis for the co-op's allocation.[26]

The dispute between RAM and Ocean Spray is over whether Pub. L. No. 106-562 requires NMFS to **substitute** the catch history of the F/V OCEAN SPRAY for 1992 - 1994 for the catch history of the F/V PROVIDIAN for 1995 - 1997 when allocating under section 210(b). The IAD simply **adds** the catch history of the F/V OCEAN SPRAY to the catch history of the F/V PROVIDIAN. If NMFS **substitutes** the catch history of the F/V OCEAN SPRAY in 1992 - 1994 for the catch history of the F/V PROVIDIAN for 1995 - 1997, the allocation to F/V PROVIDIAN's will increase. If NMFS simply **adds** the two histories together but still uses 1995 - 1997 to determine the allocation to the F/V PROVIDIAN's cooperative, the allocation to the F/V PROVIDIAN's cooperative will not increase because neither the F/V PROVIDIAN nor the F/V OCEAN SPRAY made any landings in 1995, 1996 and 1997.

To put it in operational terms, the IAD interprets Title V of Pub. L. No. 106-562 as requiring NMFS to do the following:

> [1] issue the F/V PROVIDIAN an inshore permit even though the F/V PROVIDIAN does not meet the requirement of section 208;
>
> [2] change the AFA Official Record of the F/V PROVIDIAN so that it now also has the catch history of the F/V OCEAN SPRAY;
>
> [3] acknowledge that the F/V PROVIDIAN has a right to join the Peter Pan Fleet Cooperative; [27] and
>
> [4] calculate the allocation to the F/V PROVIDIAN's cooperative by using the catch history of the F/V OCEAN SPRAY and the F/V PROVIDIAN from 1995 to 1997, when neither vessel made any landings.

Ocean Spray interprets Title V of Pub. L. No. 106-562 to require NMFS to do the following:

> [1] issue the F/V PROVIDIAN an inshore permit even though the F/V PROVIDIAN does not

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[25] Exhibit 10.

[26] Exhibit 9.

[27] No entity, including the Peter Pan Fleet Cooperative, has contested this.

meet the requirement of section 208(a)(1);

[2] substitute the catch history of the F/V OCEAN SPRAY in 1992, 1993 and 1994 for the zero catch history of the F/V PROVIDIAN in 1995, 1996 and 1997 in determining AFA allocations;

[3] acknowledge that the F/V PROVIDIAN has a right to join the Peter Pan Fleet Cooperative; and

[4] calculate the allocation to the F/V PROVIDIAN's cooperative by using the catch history of the F/V OCEAN SPRAY in 1992, 1993 and 1994, when the F/V OCEAN SPRAY had pollock landings.

I will analyze these competing interpretations based on the language of the statute construed in light of its purpose and well-established principles of statutory interpretation.

B. The language of the statute

The language of Title V of Pub. L. No. 106-562 offers some support for the IAD's interpretation. It states "notwithstanding paragraphs (1) through (3) of section 208(a) of the American Fisheries Act." It thus explicitly states that the F/V PROVIDIAN does not have to meet the requirements of section 208. The IAD correctly notes that Title V of Pub. L. No. 106-562 does not do that with respect to section 210. Title V of Pub. L. No. 106-562 does not explicitly modify section 210, as it applies to the F/V PROVIDIAN.

The language of the statute offers some support for Ocean Spray's interpretation. It names specifically the F/V PROVIDIAN. Congress therefore clearly intended to grant some relief or some benefit to the F/V PROVIDIAN. But the statute on its face is ambiguous as to what relief Congress intended.[28] It

[28] A statute is ambiguous if it is "capable of being understood by reasonably well-informed persons in two or more different senses." 2A NORMAN SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.02 at 11-12 (6th ed. 2000 revision) The language of a statute itself can suggest more than one meaning or the legislative history of a statute can suggest more than one meaning. *C.I.R. v. Mercantile National Bank at Dallas*, 276 F.2d 58, 61 (5th Cir. 1960). *See* Children's Hospital and Health Center v. Belshe. 188 F.3d 1090, 1096 (9th Cir. 1999), *cert. den.* 210 S. CT. 2197 (2000) ("To determine the plain meaning of a statutory provision, we examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy.")(citation omitted); J. Mertens, THE LAW OF FEDERAL INCOME TAXTION § 3:07 (1997-1999)("The construction of a statute need not be sought alone in the language of the statute, for its setting in the history of the development of our laws and the purpose Congress sought to serve by its enactment bear importantly on the meaning of the language of the statute.")

states that the F/V PROVIDIAN shall be considered a vessel that is "eligible to harvest" AFA inshore pollock in the same manner and subject to the same requirements as other AFA catcher vessels. What does "eligible to harvest" mean in Title V of Pub. L. No. 106-562?

The IAD interprets that phrase as meaning simply that the F/V PROVIDIAN receives an AFA catcher vessel permit with an inshore sector endorsement. An AFA catcher vessel permit is a legal requirement that the F/V PROVIDIAN must meet to legally harvest BSAI pollock. It is necessary but not sufficient. To harvest pollock, the practical reality is that a catcher vessel must have legal rights to harvest part of an inshore cooperative allowance.

Ocean Spray interprets the phrase "eligible to harvest pollock" as meaning that the F/V PROVIDIAN is entitled to receive what it actually needs to harvest pollock, namely the right to harvest part of a co-op's allocation. The statute, on its face, is silent as to how NMFS should determine a catch history for the F/V PROVIDIAN that it could contribute to a cooperative. NMFS cannot use the standard criteria in section 210, namely catch history in 1995, 1996 and 1997, because the F/V PROVIDIAN did not exist until 1998, as Congress clearly understood.

The legislative history of this statute supplies the means by which NMFS should determine a catch history for the F/V PROVIDIAN that could be used to actually enable the vessel to harvest Bering Sea pollock: substitute the catch history of the F/V OCEAN SPRAY in 1992, 1993 and 1994 for the catch history of the F/V PROVIDIAN in 1995, 1996 and 1997. Senator Snowe stated:

> This amendment to the AFA is intended to provide the North Pacific Fishery Management Council and the National Marine Fisheries Service with the authority to qualify the *Providian* under the AFA with directed onshore pollock-fishing rights equivalent to those earned by the *Ocean Spray* during the years 1992-1994.

I turn next to the purpose of the statute.

C. Purpose and legislative history of Title V of Pub. L. No. 106-562

I conclude that the purpose of Title V of Pub. L. No. 106-562 was to solve the problem that Ocean Spray brought to Congress's attention, namely [1] Congress passed the AFA and granted rights to harvest Bering Sea pollock only to vessels with a Bering Sea pollock fishing history in 1995, 1996 and 1997; [2] Ocean Spray had a vessel, the F/V OCEAN SPRAY, with a considerable pollock fishing history that sank in 1994; and [3] Ocean Spray built a replacement vessel, the F/V PROVIDIAN, that was not ready until 1998. I conclude that the purpose of Title V of Pub. L. No. 106-562 was to give the F/V PROVIDIAN full rights accorded catcher vessels under the AFA.

But since the AFA does not give any catcher vessel the right to harvest unlimited amounts of Bering Sea pollock, and since the F/V PROVIDIAN's AFA harvest rights could not be determined by the standard AFA criteria of a vessel's catch history from 1995, 1996 and 1997 because the F/V PROVIDIAN had no catch history in those years, Congress had to select an alternative measure to determine the F/V PROVIDIAN's harvest rights under the AFA. Based on the statute's legislative history, I conclude that the means Congress intended NMFS to use was substitution of the F/V OCEAN SPRAY's catch history from 1992, 1993 and 1994 for the F/V PROVIDIAN's non-existent catch history from 1995, 1996 and 1997.

In examining a statute's legislative history, Committee Reports are the best indication of congressional intent or purpose. If there are no Committee reports, the floor statements of the bill's sponsor are the best evidence of legislative intent.[29] Title V of Pub. L. No. 106-562 had no Committee Report. Fortunately, the bill's sponsor clearly described on the Senate floor the problem that the statute was intended to solve and the solution adopted by the statute. Senator Snowe's statement unequivocally supports Ocean Spray's interpretation of Pub. L. No. 106-562 and its characterization of the statute's purpose.

Senator Snowe characterizes Title V as a "technical correction to the American Fisheries Act (AFA) with regard to two fishing vessels, the *Providian* (United States Official Number 1062183) and the *Hazel Lorraine* (United States Official Number 592211)" and notes that "[d]uring the consideration of the AFA, the special circumstances of many vessels were taken into account." She notes at the end of her statement: "These vessels were able to demonstrate that they should have been included in the Act when it passed in 1998."

This indicates that Pub. L. No. 106-562 was corrective legislation that grants these two vessels full AFA rights: all the rights they would have had if Congress has taken their special circumstances into consideration when enacting the AFA[30] and all the rights that other AFA catcher vessels received. A

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[29] "Committee Reports represent the most persuasive indicia of congressional intent in enacting a statute. . . . However, where no committee report accompanies the enactment of a statute, the court looks to the statements made by the sponsors of the legislation on the floor of Congress for an expression of legislative intent." 2A NORMAN SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48:06 at 441, 444 (footnotes omitted).

[30] The legislative history says nothing about the special circumstances of the F/V HAZEL LORRAINE. We do know that RAM determined the F/V HAZEL LORRAINE's contribution to its cooperative by the vessel's catch history in 1995, 1996 and 1997 [Exhibit 8, Affidavit of Jessica Gharrett]. We do not know if use of that formula resulted in nothing being added to the F/V HAZEL LORRAINE's cooperative, which is the complaint of the F/V PROVIDIAN. The fact that neither the F/V HAZEL LORRAINE nor the Akutan Catcher Vessel Association, the co-op which the F/V HAZEL LORRAINE joined, has appealed RAM's determination of the Akutan co-op's allocation suggests that the F/V HAZEL LORRAINE received some tangible benefit from Pub. L. No. 106-562 and contributed

key benefit that catcher vessels received under the AFA was they could form cooperatives and those cooperatives would receive a suballocation of the inshore pollock allowance based on the catch history of the co-op's vessels.

An essential part of the right to join a catcher vessel co-op is the right to add a vessel's catch history to the co-op's allocation. If the F/V PROVIDIAN cannot add its catch history to a cooperative, it has no meaningful rights under the AFA. Since it is a co-op member, it could buy rights from other co-op members. But without any catch history to contribute to a cooperative, the F/V PROVIDIAN is definitely a second class citizen under the AFA. That is not correcting the omission of the F/V PROVIDIAN from the AFA. It is continuing it. The legislative history of Pub. L. No. 106-562 contains no suggestion that Congress was seeking to grant the F/V PROVIDIAN fewer rights or benefits (or obligations) than other AFA catcher vessels.

Senator Snowe notes that the AFA established "certain 'qualifying years'. . . to determine which vessels had earned a 'fishing history' to allow them future access to pollock-fishing quotas." She states: "Had the *Ocean Spray* not been lost, the vessel would have continued to fish for Bering Sea pollock during the years leading up to the development of the AFA." She notes: "According to landing records, it appears that the average pollock harvest of the *Ocean Spray* during the years 1992 through 1994, exceeded 2000 metric tons." She specifically notes:

> The current location of this vessel [in Bath, Maine, for the herring fishery] does not eliminate the need to establish fairness and restore the vessel owner's pollock-fishing rights earned with the *Ocean Spray* during 1992-1994. This amendment to the AFA is intended to provide the North Pacific Fishery Management Council and the National Marine Fisheries Service with the authority to qualify the *Providian* under the AFA with directed onshore pollock-fishing rights equivalent to those earned by the *Ocean Spray* during the years 1992-1994.

This shows that Congress intended the F/V PROVIDIAN have the rights that the F/V OCEAN SPRAY would have had, if the F/V OCEAN SPRAY had continued fishing in the years before the AFA. If the F/V OCEAN SPRAY had continued fishing, it would have had full AFA rights. The F/V OCEAN SPRAY would have been able to increase the allocation of any co-op it joined by its catch history from the years 1995, 1996 and 1997. But since the F/V OCEAN SPRAY sank in 1994, and since its

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something to the Akutan co-op. If the F/V HAZEL LORRAINE had pollock landings in 1995, it would have contributed some catch history to its cooperative and would have benefitted tangibly from Pub. L. No. 106-562, even though RAM used the years 1995 - 1997 for determining the F/V HAZEL LORRAINE's catch history. I have concluded that this other vessel's situation is not relevant to resolving Ocean Spray's appeal. I have therefore not looked at the public documents and reports which the Akutan Catcher Vessel Association is required to file and which could be reviewed, if the F/V HAZEL LORRAINE's situation were deemed relevant to this appeal.

replacement vessel, the F/V PROVIDIAN, was not completed until 1998, Congress had to determine a mechanism by which to grant the owner of F/V PROVIDIAN the fishing rights it lost because neither of its vessels were able to fish from 1995 to 1997.

That mechanism was to grant the NMFS "the authority to qualify the *Providian* under the AFA with directed onshore pollock-fishing rights equivalent to those earned by the *Ocean Spray* during the years 1992 to 1994." Senator Snowe's statement as a whole, and this part in particular, strongly support the conclusion that Congress was telling NMFS to substitute the F/V OCEAN SPRAY's catch history for 1992, 1993 and 1994 for the F/V PROVIDIAN's catch history for 1995, 1996 and 1997 in determining any AFA pollock-fishing rights of the F/V PROVIDIAN. The Senator's description of the F/V OCEAN SPRAY's landing records from 1992 to 1994 makes no sense otherwise.

The key deficiency in the IAD is that it does not examine Congress's purpose in enacting Title V of Pub. L. No. 106-562. But any interpretation of a statute has, implicitly, a hypothesis as to Congressional intent. The assumption of Congressional intent that underlies the IAD is incoherent, legalistic, confused and partial. The IAD states that Congress intended only to give the F/V PROVIDIAN a permit but not what it needed to actually harvest any fish with that permit. The IAD implies that Congress's concern was to add catch history to the Official Record of the F/V PROVIDIAN but not to give the F/V PROVIDIAN any tangible benefit from that catch history. The IAD interprets the statute as giving the F/V PROVIDIAN relief on paper only: it now has more landings on its Official Record.

The IAD interprets the statute as giving the F/V PROVIDIAN the right to join a cooperative but not to increase the allocation to the cooperative. This is more relief on paper. The owners of the F/V PROVIDIAN can now sign the Peter Pan Fleet Cooperative's contract, which gives it 0.00% harvest rights because it contributed 0.00% of the cooperative's catch history. The key problem with the IAD is that it interprets Title V of Pub. L. No. 106-562 as not really solving the problem–the appellant's two vessels had no fishing history from 1995 to 1997– that Congress unequivocally sought to address. The IAD interprets the statute as granting illusory relief.

The IAD quotes the part of Senator Snowe's statement that the statute grants NMFS the authority to grant the F/V PROVIDIAN the "directed onshore pollock-fishing rights equivalent to those earned by the *Ocean Spray* during the years 1992 - 1994."[31] The IAD does not, however, give any real meaning to Senator Snowe's directive because the IAD states that the "directed onshore pollock-fishing rights equivalent to those earned by the *Ocean Spray* during the years 1992 to 1994" are no fishing rights. The IAD therefore interprets Pub. L. No. 106-562 as giving NMFS the authority to award the F/V PROVIDIAN nothing.

D. Principles of statutory construction

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[31] IAD at 3.

Well-established principles of statutory interpretation dictate that NMFS should adopt the interpretation of Title V of Pub. L. 106-562 which best accomplishes the statutory purpose.

1. A statute must be interpreted to accomplish its purpose.

The fundamental principle of interpreting any statute is to determine the legislative intent or purpose in enacting the statute.[32] The starting point to determine Congressional intent or purpose is always the language Congress used in the statute.[33] If the language of the statute is ambiguous, the interpretation should be chosen which best achieves the purpose of Congress. The United States Supreme Court put it this way: "As in all cases of statutory construction, our task is to interpret the words of the statute in light of the purposes Congress sought to serve."[34]

A summary of the law on statutory interpretation states:

> In the interpretation of statutes, the legislative will is the all-important or controlling factor. Indeed, it is frequently stated in effect that the intention of the legislature constitutes the law. Accordingly, the primary rule of construction of statutes is to ascertain and declare the intention of the legislature, and to carry such intention into effect to the fullest degree. A construction adopted should not be such as to nullify, destroy or defeat the intention of the legislature.[35]

Admittedly, Title V of Pub. L. No. 106-562 could have been drafted more clearly. But that does not excuse NMFS from attempting to determine Congressional intent:

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[32] *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *George v. United States District Court for the Central District of California*, 219 F.3d 930, 936 (9th Cir. 2000); *Schwenk v. Hartford*, 204 F.2d 1187, 1202 n.12 (9th Cir. 2000); *Pressley v. Capital Credit & Collection Service Inc.*, 760 F.2d 922, 923 (9th Cir. 1985)(per curiam); (*Calatayud v. State of California*, 959 P.2d 360, 365 (Cal. 1998)("The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.") (internal quotation and citation omitted); *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494, 500 (Fla. 1999); *Carr v. New York State Board of Elections*, 356 N.E. 2d 713, 715 (N.Y. 1976)("In statutory interpretation, legislative intent is the great and controlling principle.")(citation omitted); 73 AM. JUR. 2D *Statutes* § 145 (1974).

[33] 2A NORMAN SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.01 AT 1 (6th ed. 2000 revision)(footnote omitted)

[34] *Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Company of Virginia*, 464 U.S. 30, 35 (1983), *quoting Chapman v. Houston Welfare Rights Org.*, 443 U.S. U.S. 600, 608 (1979).

[35] 73 AM. JUR. 2D *Statutes* § 145 at 351 (1974) .

> It is not necessary that the intention of the legislature be manifested in the most appropriate and expressive language. For example, defects in grammar, though they may entail difficulty in interpreting an enactment, do not impair its binding force once the meaning is ascertained. And the fact that an act is carelessly and awkwardly drawn, or that some of its terms are inapt or susceptible of two or more interpretations, does not excuse the courts from attempting to ascertain the legislative intent or authorize them to enlarge the plain meaning and effect of an act. An awkwardly and loosely drawn statute should be so construed as to remove its inconsistencies and obviate constitutional objections, and the courts will give to it the most reasonable solution permissible, although it may not be entirely satisfactory.[36]

Where the intent of Congress is clear, an agency, just as a court, must give effect to that intent.[37]

Sometimes, an agency or a court cannot with confidence determine Congressional intent. Some statutes are complicated and are the results of a series of legislative compromises. There may not be any legislative history which clearly states the purpose of the statute. That is not the situation here. We have a short statute with a clear purpose.

2. A remedial statute is liberally construed to accomplish its purpose.

A leading treatise on statutory construction states:

> Remedial statutes are liberally construed to suppress the evil and advance the remedy. The policy that a remedial statute should be liberally construed in order to effectuate the remedial purpose for which it was enacted is firmly established. Expressions of that rule appear over and over in judicial opinions.[38]

A liberal construction "is ordinarily one which makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction."[39]

Title V of Pub. L. No. 106-562 is the classic case of remedial legislation. It is in the nature of a private bill, as it is intended to grant relief to particular persons. Congress concluded that the AFA worked an

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[36] 58 Cal Jur. 3d *Statutes* § 119 (Thomas Capelle ed., 1980)

[37] 2 AM. JUR. 2D *Administrative Law* § 525 (1994).

[38] 3 SUTHERLAND ON STATUTORY CONSTRUCTION § 60.01 at 147 (Norman Singer, ed., 5th ed. 1992 rev.)(footnotes omitted).

[39] *Id.*

unfair result on the owners of the F/V PROVIDIAN and sought to correct that. The relief Congress intended, and the beneficiaries of that relief, are clear. Since Title V of Pub. L. No. 106-562 is remedial legislation, a more expansive interpretation of its reach is proper.

3. A statute should not be construed as a nullity.

Before Congress enacted Title V of Pub. L. No. 106-562, the F/V PROVIDIAN did not have a catch history which generated the right to harvest any Bering Sea pollock. The IAD interprets Title V of Pub. L. No. 106-562 so that the F/V PROVIDIAN still does not have a right to harvest any Bering Sea pollock. The IAD adds nothing to what the F/V PROVIDIAN had before Congress passed Title V of Pub. L. No. 106-562. This violates the "familiar rule of statutory interpretation which requires construction so that no provision is rendered inoperative or superfluous, void or insignificant."[40] Or as one court put it: "Absent clear congressional intent to the contrary, we will assume the legislature did not intend to pass vain or meaningless legislation."[41]

E. Additional points raised in the IAD

1. "Subject to the same requirements and limitations"

The IAD notes that Title V of Pub. L. No. 106-562 states that the catcher vessel permit received by the F/V PROVIDIAN pursuant shall be "subject to the same requirements and limitations on that harvesting as apply to catcher vessels eligible to harvest that directed fishing allowance under section 208(a) of [the AFA]." The IAD interprets this language as requiring that NMFS continue to use the formula in section 210. As discussed, this interpretation would frustrate completely Congressional intent, is incompatible with the remedial purpose of Title V of Pub. L. No. 106-562, renders the statute a nullity and should therefore not be adopted.

It is a fair question whether the allocation to a co-op under the section 210 formula is more in the nature of a benefit rather than a "requirement and limitation on harvesting." Although section 210 does limit the co-op to what its members harvested in 1995, 1996 and 1997, it is probably more in the nature of a benefit since it gives the cooperatives an extremely valuable benefit: the right to control a suballocation of the harvest. Be that as it may, the legislative history of Title V of Pub. L. No. 106-562 in no way

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[40] *C.F. Communications Corp. v. F.C.C.*, 128 F.2d 735, 739 (D.C. Cir. 1997)(citation omitted)

[41] *Coyne & Delany v. Blue Cross & Blue Shield of Virginia*, 102 F.3d 7215, 715 (4th Cir. 1966);. *Hughey v. JMS Development Corp.*, 78 F. 3d 1523, 1529 (11th Cir. 1996), *cert. den.* 519 U.S. 99 (1996)("Our jurisprudence has eschewed the rigid application of a law where doing so produces impossible, absurd or unjust results. [I]f a literal construction of a statute would lead to an absurd, unjust or unintended result, the statute must be construed so as to avoid that result.")(internal quotations and citations omitted)

suggests that this phrase represented a policy choice by Congress to permit the F/V PROVIDIAN to be a member of a catcher vessel cooperative but without the most valuable part of co-op membership: the value of the vessel's catch history contribution to a cooperative.

This phrase can and should be given meaning. A fair reading of this phrase is that, apart from any changes that are required to implement Pub. L. No. 106-562, all other requirements apply, such as sideboard harvest restrictions and reporting requirements. Congress was underlining that, except for the changes necessary because of the F/V PROVIDIAN's special circumstances, this vessel would receive no special treatment and would be subject to all other requirements.

2. The Council

The IAD states that only the Council may recommend changes in the AFA cooperative allocation formula. The Council does have the authority to recommend changes in the formula for co-op allocations and has made recommendations under section 213(c) of the AFA.[42] First, the record contains a letter by Mr. Raber to the North Pacific Fishery Management Council, dated May 31, 1999 describing his situation.[43] The letter states that he had contacted the Council and "had received the reply the council was unable to change or add any vessels to the [AFA] 1221 list" and received a recommendation that he "take it up on the Federal level." I do not make a finding as to this but I do note that the record suggests that he did contact the Council.

Second, the change sought by Ocean Spray probably is not the type of change that the Council could enact through regulation. Mr. Raber was not seeking a generic change in the formula, similar to the four changes that the Council has approved. Mr. Raber simply wanted his vessel included in the AFA.

Third, Mr. Raber believed that Congress was not aware of his special circumstances when it passed the AFA. He sought assistance from Congress, as was his perfect right to do. Whether or not the Council could also have addressed Mr. Raber's problem, Congress has the right to do so.[44] If Congress wishes to enact a statute that substitutes the catch history of the F/V OCEAN SPRAY in 1992 - 1994 for the

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[42] The Council has recommended four changes in the formula: a change in the definition of "qualified catcher vessel" to allow a retired or inactive vessel to maintain membership in an inshore cooperative; a revision to the open access formula to decrease the open access allocation; determining co-op allocations by the highest landings in two out of the three years 1995, 1996, 1997; and allowing certain inshore catcher vessels to receive credit in their catch history for offshore landings. These recommendations have become regulations. Emergency Interim Rule, 66 Fed. Reg. 4327 (Jan. 22, 2001)

[43] Exhibit 7

[44] Congress may alter or modify the application of congressional enactments in the case of particular federal administrative agencies. *Stone v. INS*, 514 U.S. 386, 393 (1995)

catch history of the F/V PROVIDIAN in 1995 - 1997 in AFA allocations, Congress has the authority to do that. The question is not whether this is a good or bad idea. The question is whether this is what Congress did.

II. Must NMFS recalculate the allocations it made under § 210(b) of the American Fisheries Act for the year 2001?

A. The IAD

The IAD states:

> We note that the inshore sector pollock TAC is fully allocated under the formula set out in the AFA. There is no quota held in "reserve" that could be allocated to the Peter Pan Fleet Cooperative to account for the 1992 to 1994 catch history of the OCEAN SPRAY. Consequently, incorporating this catch history would result in the reduction of the allocations to each of the other six inshore cooperatives. Under the procedures of the AFA and the Magnuson-Stevens Act, any regulatory changes of this nature must be implemented through proposed and final rule-making to provide all affected parties opportunity to review and comment on the proposed change. NMFS may not unilaterally reduce the allocations to all other cooperatives to provide additional quota to the Peter Pan Fleet Cooperative.[45]

The fact that the 2001 pollock TAC has been fully allocated is a reason why the allocation to the F/V PROVIDIAN's cooperation should not be increased for the current fishing season. It is not a reason why the allocation to the Peter Pan Fleet Cooperative for the 2002 season (and subsequent years) could not be determined by adding the F/V PROVIDIAN's catch history, refigured on the basis of the F/V OCEAN SPRAY's 1992 - 1994 catch history. RAM is legitimately reluctant to disturb the allocations it has already made to the six other inshore cooperatives.

There will always be a tension between two valid goals in administering quota-type programs. On the one hand, NMFS needs to annually determine how much fish a fisherman or a vessel or, as in the AFA, a group of vessels, can harvest. With a guaranteed number, permit holders can assess their needs, hire crew, purchase new equipment, arrange financing, etc. On the other hand, if appellants are awarded fishing rights on appeal, NMFS needs to have a procedure for letting them in. In the IFQ program, RAM establishes a reserve.[46] The AFA regulations instead requires that final agency action on appeals of cooperative allocations occur by December 15 if the cooperative allocations are to be changed for

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[45] IAD at 5.

[46] 50 C.F.R. § 679.40(a)(9).

the upcoming year.[47]

I assume *arguendo* that Congress could enact a statute that required an immediate increase in the allocation to one cooperative and a corresponding decrease in the allocation to the other cooperatives even if an appeal were to be decided after December 15. The question, as always, is to determine whether Congress intended to do that when it enacted Title V of Pub. L. No. 106-562. I will first examine 50 C.F.R. § 679.4 *l*(8)(v) and then whether Title V of Pub. L. No. 106-562 overrides its application to this appeal.

B. Federal regulation 50 C.F.R. § 679.4 *l*(8)(v)

Federal regulation 50 C.F.R. § 679.4 *l*(8)(v) provides:

> (v) *Effect of cooperative allocation appeals.* An AFA inshore cooperative may appeal the pollock quota share issued to the cooperative under § 679.61; however, final agency action on the appeal must occur prior to December 15 for the results of the appeal to take effect during the subsequent fishing year.

Ocean Spray is clearly appealing the allocation to the Peter Pan Fleet Cooperative. The threshold question is whether this regulation prevents Ocean Spray from bringing this appeal. By saying that "[a]n AFA inshore cooperative may appeal the pollock quota share issued to the cooperative," does the regulation mean that an individual vessel owner may not appeal? I decline to decide this issue because no one has raised it. Further, the IAD addressed the issue. Ocean Spray has brought this question to this Office and fully briefed it. Everyone will benefit from resolving it.

The reasons for requiring final agency action on a cooperative allocation appeal by December 15, if the decision is to go into effect in the next fishing season, apply with equal force to a co-op allocation appeal by an individual vessel owner and by the co-op itself. The other co-op permit holders are entitled to rely on the allocation RAM has made to them and would be equally disturbed by a reshuffling of allocation whether it resulted from an appeal by an individual or a cooperative.

It serves no apparent purpose to permit an appeal by an individual vessel owner of a cooperative allocation to go into effect more quickly than an appeal of a cooperative allocation by the cooperative itself. Such a result is particularly questionable when the regulations do not even expressly grant an individual the right to appeal the cooperative allocation. If the individual owner had more immediate appeal rights than the cooperative, it would encourage the cooperative to enlist an individual owner to prosecute an appeal thereby circumventing the valid purpose of 50 C.F.R. § 679.4 *l*(8)(v). Therefore, unless Congress has modified the application of 50 C.F.R. § 679.4 *l*(8)(v) to this appeal, any relief

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[47] 50 C.F.R. § 679.4 *l*(8)(v).

provided Ocean Spray by Title V of Pub. L. No. 106-562 will go into effect next season.

C. Title V of Pub. L. No. 106-562 did not modify 50 C.F.R. § 679.4 *l*(8)(v).

The language of Title V of Pub. L. No. 106-562 does not explicitly require a departure from 50 C.F.R. § 679.4 *l*(8)(v). The legislative history of the bill does not mention anything about the need to abrogate the usual timetable that exists for an orderly administration of the co-op allocation process. Since the 2001 co-op allocations have already occurred, requiring a recalculation now would be in the nature of a retroactive application of this statute. Retroactive application of a statute is not favored because it tends to interfere with settled expectations.[48]

The legislative history clearly indicates that Congress recognized that Ocean Spray had a problem because neither of its vessels fished for pollock from 1995 to 1997 and that Congress sought to solve that problem. But the legislative history contains no indication that Congress wanted to solve the Ocean Spray's problem in a way that required revocation of allocations already made to the other cooperatives. NMFS made these allocations in accordance with its usual timetable and this timetable serves important goals. I conclude that Title V of Pub. L. No. 106-562 does not modify 50 C.F.R. § 679.4 *l*(8)(v) for this appeal.

Since final agency action on Ocean Spray's appeal did not occur by December 15, 2000, I conclude that the allocation to the Peter Pan Fleet Cooperative shall not be increased for 2001.

CONCLUSIONS OF LAW

1. Title V of Pub. L. No. 106-562 is ambiguous as to whether NMFS is required to substitute the catch history of the F/V OCEAN SPRAY in the years 1992 - 1994 for the catch history of the F/V PROVIDIAN in the years 1995 - 1997.

2. The purpose of Title V of Pub. L. No. 106-562 was to solve the problem caused the confluence of these events: [1] Congress enacted the AFA; [2] the F/V OCEAN SPRAY sank in 1994; [3] the F/V PROVIDIAN was not built until late 1998.

3. Title V of Pub. L. No. 106-562 requires that NMFS issue the F/V PROVIDIAN an inshore catcher vessel permit under section 208 of the AFA.

4. Title V of Pub. L. No. 106-562 requires that NMFS substitute the catch history of the F/V OCEAN SPRAY in 1992 -1994 for the catch history ofthe F/V PROVIDIAN in 1995 - 1997

[48] *E.g., RAM v. I.N.S.*, 243 F.3d 510 (9th Cir. 2001): "The presumption against retroactive application arises from concerns about altering settled expectations, interfering with repose, and providing fair notice to those affected by a statute."(citation omitted)

when making allocations to cooperatives under section 210(b) of the AFA.

5. Title V of Pub. L. No. 106-562 does not require that NMFS recalculate the AFA allocations to inshore vessel cooperatives that it has already made for the year 2001.

DISPOSITION AND ORDER

The IAD that is the subject of this appeal is AFFIRMED in part and VACATED in part. Determinations No. 1, 2 and 3 at page 5 of the IAD are AFFIRMED. Determination No. 4 is VACATED. RAM is ORDERED to allocate Bering Sea pollock to the Appellant's cooperative under section 201(b) of the AFA based on the 1992-1994 catch history of the F/V OCEAN SPRAY, beginning in 2002. The Decision in this case, dated April 13, 2001, takes effect on May 13, 2001, 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 at this Office not later than 4:30 p.m. Alaska Time, on the tenth day after the date of this Decision, April 23, 2001. A Motion for Reconsideration must be in writing, must allege one or more specific, material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.

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Mary Alice McKeen
Appeals Officer