

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 01-0014
)
PAUL S. WARD,) DECISION ON RECONSIDERATION
Appellant)
_____) February 6, 2004

Paul S. Ward appealed two initial administrative determinations [IAD] by the Restricted Access Management Program [RAM], issued under the North Pacific Groundfish and Crab License Limitation Program [LLP].¹

First, RAM denied Mr. Ward an LLP groundfish license based on the fishing history of the F/V LADY GRACE, ADFG # 16866, because Mr. Ward was not an eligible applicant for this license, as defined by federal regulation 50 C.F.R. § 679.2. The IAD acknowledged that the F/V LADY GRACE was a qualified vessel: it made the documented harvests of groundfish necessary for an LLP groundfish license. But the IAD concluded that Mr. Ward neither owned the F/V LADY GRACE on June 17, 1995 nor the qualifying fishing history of the F/V LADY GRACE according to a contract that met the requirements of 50 C.F.R. § 679.2.²

Second, RAM concluded that, even if Mr. Ward should receive an LLP groundfish license based on the fishing history of the F/V LADY GRACE, he could not designate that license for trawl gear because he did not harvest groundfish with trawl gear between June 18, 1995 and February 7, 1998 from the F/V LADY GRACE.³ Mr. Ward did not own the F/V LADY GRACE during that time but made five groundfish harvests with trawl gear from the F/V GRUMPY J. Since the F/V GRUMPY J was not itself an LLP qualified vessel, RAM stated that Mr. Ward did not meet the requirements of federal regulation 50 C.F.R. § 679.4(k)(3)(iv) for designating his LLP license for trawl gear.

I issued a Decision which vacated both actions by RAM. First, I concluded that Mr. Ward was an eligible applicant for the LLP license based on the fishing history of the F/V LADY GRACE because he bought that fishing history with a contract that met the requirements of 50 C.F.R.

¹ The LLP is located in 50 C.F.R. § 679: 50 C.F.R. § 679.1(j) (purpose); 50 C.F.R. § 679.2 (definitions); 50 C.F.R. § 679.4(a)(6) (definition of harvesting privilege); 50 C.F.R. § 679.4(k) (requirements for licenses); 50 C.F.R. § 679.7 (prohibitions); 50 C.F.R. § 679.43 (appeals). The LLP regulations are on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/regs/summary.htm>

² IAD, July 5, 2001.

³ Letter from Philip J. Smith, RAM Program Administrator, to Paul S. Ward (Oct. 24, 2001). I treat this as an IAD because it made a determination on Mr. Ward's gear designation request.

§ 679.2.⁴ Second, I concluded that Mr. Ward had the right to designate that LLP license as trawl gear because he harvested groundfish with trawl gear while he owned the qualifying fishing history of the F/V LADY GRACE, even though he did not own the F/V LADY GRACE itself and did not harvest groundfish from the F/V LADY GRACE.⁵

RAM filed a motion for reconsideration. RAM agreed with my first conclusion. RAM stated: “From the documents submitted to the Appeals Officer by the Appellant, it is clear that Mr. Ward was the owner of the qualifying fishing history of the F/V LADY GRACE and, accordingly, is an eligible applicant under the LLP program and should be awarded an LLP license derived from the qualifying fishing history of the F/V LADY GRACE.”⁶

But RAM requested that I reconsider my second conclusion. The grounds for reconsideration are that the Decision overlooked or misunderstood a material matter of fact or law.⁷ RAM argues that, in deciding that Mr. Ward was entitled to a trawl gear designation, I overlooked or misunderstood a material question of law. RAM argues that I relied on the policies and regulations of the Vessel Moratorium Program for Groundfish and Crab (VMP), the predecessor program to the LLP, and not LLP policies and regulations.

It is true that the Decision did rely, in part, on the policies and regulations of the VMP. I reaffirm that reasoning in this Decision on Reconsideration. But RAM is correct that I should have better explained that my trawl gear conclusion was squarely based on LLP policies and regulations. I issue this Decision on Reconsideration to do that.

SUMMARY

Mr. Ward is an eligible applicant for an LLP license based on ownership of the fishing history of the F/V LADY GRACE and therefore meets the second definition of eligible applicant in 50 C.F.R. § 679.2. Mr. Ward owns the fishing history of the F/V LADY GRACE according to the express terms of a written contract that clearly and unambiguously transferred the LLP qualifying history of the F/V LADY GRACE to Mr. Ward.

Federal regulation 50 C.F.R. § 679.4(k)(3)(iv)(E) provides that “[a]n applicant may request a change of gear designation [on an LLP groundfish license] based on gear used from the vessel during the period beginning June 18, 1995 to February 7, 1998.” An applicant may change a gear designation on an LLP license based on gear used between June 18, 1995 and February 7,

⁴ Decision, *Paul S. Ward*, at 2-7 (March 3, 2003). I will cite this simply as Decision.

⁵ Decision at 7 - 10.

⁶ *Motion for Reconsideration* at 1.

⁷ Revised Policy on Motions for Reconsideration, April 26, 1999, Chief Appeals Officer Edward Hein, <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.html>, the NMFS Alaska Region website.

1998, as long as the applicant owned an LLP qualifying fishing history when the applicant used the gear. The applicant does not have to have made the harvests between June 18, 1995 and February 7, 1998 from an original LLP qualified vessel.

A contrary rule – that Mr. Ward had to make trawl gear harvests from an LLP qualified vessel – would conflict with the definition of eligible applicant in the LLP in 50 C.F.R. § 679.2. Section 679.2 grants equal status to eligible applicants by virtue of owning a qualified vessel and eligible applicants by virtue of owning the fishing history of a qualified vessel. A contrary rule would conflict with the transferability of moratorium qualifications, a basic structural feature of the Vessel Moratorium Program.

ISSUES

1. Is Mr. Ward an eligible applicant for an LLP license based on ownership of the fishing history of the F/V LADY GRACE?
2. Is Mr. Ward entitled to have his LLP groundfish license designated for trawl gear?
3. Should an appeals officer hold a hearing to determine the proper interpretation of a regulation?

ANALYSIS

1. Is Mr. Ward an eligible applicant for an LLP license based on ownership of the fishing history of the F/V LADY GRACE? Yes.⁸

An LLP groundfish license may be issued only to an eligible applicant. The term, “eligible applicant,” is defined in section 679.2 of the Federal Fisheries Regulations for Alaska:

Eligible applicant means a qualified person who submitted an application during the application period announced by NMFS and:

(1) 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) 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

⁸ With minor changes, I have repeated the analysis of this issue from pages 2 - 7 of the Decision.

for a license under the LLP have been transferred or retained; . . .⁹

Mr. Ward did not own the F/V LADY GRACE on June 17, 1995. Mr. Ward therefore does not satisfy the first definition of eligible applicant in section 679.2. The question is whether Mr. Ward satisfies the second definition of eligible applicant.

To prove that he does, Mr. Ward submitted to RAM a contract entitled “Moratorium Qualification Offer/Sales Agreement,” between Mr. Ward and Mary Magnuson of L.G. Fisheries.¹⁰ I will refer to this as the parties’ contract. Mr. Ward also gave RAM a Bill of Sale, signed by Mary Magnuson. On appeal, Mr. Ward submitted a lengthy affidavit by Mary Magnuson, which described the circumstances of the parties’ contract, and his own affidavit, which corroborates Ms. Magnuson’s affidavit.¹¹

An initial word about terminology may be helpful. A vessel’s **moratorium qualification** was the “transferable prerequisite for issuance of a moratorium permit.”¹² Another way of saying that is that a vessel’s moratorium qualification was the fishing history necessary for RAM to issue a moratorium permit. Moratorium permits were issued under the Vessel Moratorium Program, the predecessor program to the LLP. The Moratorium Program was originally set to expire December 31, 1998 but was extended until December 31, 1999 because it took longer than expected to establish the LLP.¹³

If a vessel had moratorium qualification, RAM issued the vessel owner a Certificate of Moratorium Qualification. L.G. Fisheries owned Certificate of Moratorium Qualification 5179A, based on the fishing history of the F/V LADY GRACE. Therefore, a vessel’s “moratorium qualification” refers both to the fishing history of a vessel that allowed RAM to issue a moratorium permit and to the document – the actual Certificate of Moratorium Qualification – that RAM issued as tangible evidence that a person owned that fishing history.

By contrast, a vessel’s **LLP qualification** is relatively straightforward. It is the fishing history necessary for RAM to issue an LLP license. Under the LLP, there is no separate certificate of LLP Qualification.

⁹ 50 C.F.R. § 679.2. This regulation contains two additional ways a person can be an eligible applicant. One applies to the Norton Sound king crab summer fishery, the other to individuals who demonstrate eligibility pursuant to the Rehabilitation Act of 1973. Mr. Ward claims neither.

¹⁰ Ms. Magnuson signed it on December 30, 1997. Paul Ward on January 7, 1998.

¹¹ Affidavit of Paul Ward (Nov. 2, 2001); Affidavit of Mary Magnuson (Nov. 2, 2001).

¹² Final VMP Rule, 60 Fed. Reg. 40,763, 40,773 (1995), *adopting* 50 C.F.R. § 679.2.

¹³ For an explanation of the purpose and timing of the Moratorium Program, see *Fierce Packer*, Appeal No. 00-0004 at 2 - 4 (Dec. 18, 2000).

I examine two competing interpretations of the parties' contract. RAM concluded that Mr. Ward had only proved that L.G. Fisheries transferred to him Certificate of Moratorium Qualification 5179A.¹⁴ I refer to this as the moratorium interpretation of the contract. Mr. Ward's interpretation is that the contract transferred *all* the groundfish history of the F/V LADY GRACE as of the date of the contract, which was January 7, 1998. Since a vessel's LLP qualifying history covers the period January 1, 1988 to June 17, 1995, if Mr. Ward's interpretation is correct, the contract transferred to Mr. Ward the F/V LADY GRACE's LLP qualifying fishing history.

RAM's conclusion is understandable. The title of the contract is "Moratorium Qualification Offer/Sales Agreement." Paragraph 1 of the contract states it is "for the lease/sale of the Alaska Moratorium Qualification # 5179A, hereinafter referred to as PERMIT." Paragraph 2 states that Mary Magnuson agrees to "lease said PERMIT for the calendar year 1998 for \$5,000." The Bill of Sale states that Mary Magnuson does "sell and convey the Alaska Moratorium Qualification # 5179A" to Paul Ward of Dallas, Oregon."

It is unquestionably true that the contract conveyed to Mr. Ward the use of Moratorium Qualification 5179A for the year 1998 and Mr. Ward paid \$5,000 for that. But that is not the only thing the contract conveyed to Mr. Ward and that was not the only amount he agreed to pay.

I find that Mr. Ward agreed to pay an *additional* \$45,000 for *all* the groundfish history of the F/V LADY GRACE, contingent upon the L.G. Fisheries proving that the groundfish history of the F/V LADY GRACE would permit Mr. Ward to fish groundfish in Alaska *after* 1998 and *after* the Moratorium Program ended. I find that L.G. Fisheries met that condition. Therefore, I conclude that the contract conveyed *all* of the F/V LADY GRACE's groundfish history to Mr. Ward, which means the contract conveyed to Mr. Ward the vessel's LLP qualifying history.

To reach this conclusion, I analyze the language of the contract and extrinsic evidence regarding the parties' expectations or intentions.¹⁵ I look first to the **language of the contract**. The contract in paragraph three obligates Mr. Ward to pay an *additional* \$45,000 upon proof of a groundfish landing between January 1, 1992 and December 31, 1995:

Should SELLER produce proof of a groundfish landing in the State of Alaska, after January 1, 1992 and prior to January 1, 1996, this contract shall convert to a sale contract. The full purchase price of the PERMIT is \$50,000, the balance of \$45,000 is payable to the Trust account of Pacific Marine Brokers Inc., within 10 days of notification of a confirmed groundfish landing between 1-1-92 and 12-31-95.

¹⁴ IAD, July 5, 2001.

¹⁵ *Laborers Health and Welfare Trust Fund for Northern California v. Kaurman & Broad of Northern California*, 707 F. 2d 412, 418 (9th Cir. 1983); *Wright v. Vickaryous*, 598 P.2d 490, 497 (Alaska 1979); A. Corbin, CORBIN ON CONTRACTS (rev. ed. J. Perillo)(1993) § 1.1, § 24.7.

The parties modified this provision to require payment of the \$45,000 upon proof of a groundfish landing between January 1, 1992 and June 17, 1995, when the parties learned that the LLP endorsement qualification period was January 1, 1992 to June 17, 1995.¹⁶ The contract in paragraph four provides:

Seller intends to transfer **all groundfish rights** associated with the F/V Lady Grace, both current and future assigns. [emphasis added]

The moratorium interpretation of the contract does not account for the language in paragraphs three and four of the contract. It does not explain the structure of the contract and why the payment was divided into \$5,000 and \$45,000. It does not explain why the contract made payment of the additional \$45,000 dependent upon proof of a groundfish landing either between January 1, 1992 and December 31, 1995 or between January 1, 1992 and June 17, 1995. Neither period corresponds to any period under the Moratorium Program, whereas January 1, 1992 to June 17, 1995 period is the endorsement qualification period for an LLP groundfish license.¹⁷ The moratorium interpretation of the contract does not reasonably explain the provision in paragraph four that L.G. Fisheries “intends to transfer all groundfish rights associated with the F/V LADY GRACE.”

Mr. Ward’s interpretation explains well the language of the contract. Paragraph three conditioned Mr. Ward’s payment of \$45,000 upon proof that the fishing history of the F/V LADY GRACE would enable Mr. Ward to participate in the successor to the Moratorium Program. The concept was simple. The parties had to make sure that L.G. Fisheries had the thing that Mr. Ward wanted to buy – the qualification for an LLP license – before Mr. Ward would pay L.G. Fisheries \$45,000. Ms. Magnuson explains:

Mr. Ward and I wanted to be sure that we transferred all the rights with the Lady Grace, and wanted to be sure that the vessel had fishing rights associated with the qualifying years. I agreed to transfer the fishing history the rights rights [sic] and moratorium to Mr. Ward and make the final transfer to Mr. Ward contingent on receiving verification from Mr. Abbott [a prior owner] that the boat had made the necessary landings during the qualifying years.¹⁸

Mr. Ward’s interpretation of the contract is completely consistent with the express terms of paragraph four, namely, that L.G. Fisheries “intends to transfer all groundfish rights associated with the F/V LADY GRACE” to Mr. Ward.

¹⁶ Affidavit of Mary Magnuson at ¶ 21 (Nov. 2, 2001). I relied on this affidavit for facts that were not in the parties’ contract, the Bill of Sale or RAM’s file. I explain at page 7 *infra* why I found this affidavit credible.

¹⁷ 50 C.F.R. § 679.4(k)(4)(ii).

¹⁸ Affidavit of Mary Magnuson at ¶ 14 (Nov. 2, 2001).

Mr. Ward's interpretation is consistent with evidence of **the parties' actions after the contract**. After Ms. Magnuson signed the contract, the parties determined that the F/V LADY GRACE had an LLP qualifying history. Ms. Magnuson executed a bill of sale that recited that the contingencies in the contract had been met. Mr. Ward paid \$45,000 to L.G. Fisheries. L.G. Fisheries did not apply for this LLP license because it had transferred the vessel's LLP qualification to Mr. Ward. Ms. Magnuson explained that the transaction "left the Lady Grace with no fishing history whatsoever."¹⁹

Finally, Mr. Ward offers **a more reasonable interpretation of the expectations and intent of the contracting parties**. Paul Ward contacted L.G. Fisheries in late 1997 because he wanted to participate in the Alaska groundfish fishery with his boat, the F/V GRUMPY J.²⁰ To fish for groundfish in 1998, a vessel needed moratorium qualification. Paul Ward agreed to pay \$5,000 for the use of the F/V LADY GRACE's moratorium qualification for the year 1998. But Paul Ward wanted to fish for groundfish in Alaska not just for one year; he wanted to fish *after* 1998 as well. The contract makes the payment of \$45,000 conditional upon the parties making sure that they could accomplish their goal, namely sale of a fishing history that would enable Mr. Ward to participate in the groundfish fishery after 1998.

I find **Ms. Magnuson's affidavit** credible. It is internally consistent. It explains convincingly why the contract payment is divided into \$5,000 and \$45,000 and why Mr. Ward only had to pay the additional \$45,000 if L.G. Fisheries showed a groundfish landing between certain dates. Ms. Magnuson's affidavit is corroborated by Mr. Ward, who states that "the information she has set forth in her affidavit comports with my memory and understanding of the facts of this transaction."²¹

It is significant that the parties agree on the terms and effect of their contract. In adopting the LLP regulations, NMFS explained that, where eligibility is based on a written contract, NMFS "will recognize written contracts to the extent practicable; however, in the event of a dispute concerning the disposition of the fishing history by written contract, NMFS will not issue a license until the dispute is resolved by the parties involved."²² These parties have resolved any dispute over the disposition of this fishing history.

Since I have found that L.G. Fisheries sold the LLP qualification of F/V LADY GRACE to Paul Ward according to the express terms of a clear and unambiguous contract, I conclude that Paul Ward is the eligible applicant for an LLP license based on the fishing history of the F/V LADY GRACE.

¹⁹ *Id.* at ¶ 19.

²⁰ *Id.* at ¶ 10.

²¹ Affidavit of Paul Ward (Nov. 2, 2001).

²² Final LLP Rule, 63 Fed. Reg. 51,642, 51,645 (1998)(supplementary information).

2. Is Mr. Ward entitled to have his LLP groundfish license designated for trawl gear?

After the initial adoption of the LLP, NMFS adopted a regulation that required a gear designation on LLP groundfish licenses: 50 C.F.R. § 679.4(k)(3)(iv).²³ That regulation provides:

(iv) Gear designations for groundfish licenses.

(A) General. A vessel may only use gear consistent with the gear designation on the LLP license authorizing the use of that vessel to fish for license limitation groundfish or crab species.

(B) Trawl/non-trawl. A license will be assigned a trawl/non-trawl designation if trawl and non-trawl gear were used to harvest LLP species from the qualifying vessel during the period beginning January 1, 1998 to June 17, 1995.

(C) Trawl. A license will be assigned a trawl gear designation if only trawl gear was used to harvest LLP species from the qualifying vessel during the period beginning January 1, 1988, through June 17, 1995.

(D) Non-trawl. A license will be assigned a non-trawl gear designation if only non-trawl gear was used to harvest LLP species from the qualifying vessel during the period beginning January 1, 1988, through June 17, 1995.

(E). Changing a gear designation.

(1) An applicant may request a change of gear designation based on gear used from the vessel during the period beginning June 18, 1995, through February 7, 1998. Such a change would be permanent and may only be used for a change from trawl to non-trawl or from non-trawl to trawl.

(2) An applicant may request a change of gear designation based on a significant financial investment in converting a vessel or purchasing fishing gear on or before February 7, 1998, and making a documented harvest with that gear on or before December 31, 1998. Such a change would be permanent and may only be used for a change from trawl to non-trawl or from non-trawl to trawl. [emphasis added]

Based on this regulation, RAM designates LLP groundfish licenses as “trawl,” or “non-trawl,” or “trawl/non-trawl,” based on the type of gear the qualified vessel used between January 1, 1988 and June 17, 1995. This time period was the qualifying periods for an LLP groundfish license: the combined general qualification period and endorsement qualification period.²⁴ If the vessel used trawl gear during this time period, NMFS gave the LLP license a trawl gear designation. If the vessel used non-trawl gear, NMFS gave the LLP license a non-trawl gear designation. If the vessel used trawl and non-trawl gear, NMFS gave the LLP license a trawl/non-trawl designation.

²³ Final rule, 66 Fed. Reg. 48,813 (Sept. 24, 2001), *codified at* 50 C.F.R. § 679.4(k)(3)(iv).

²⁴ 50 C.F.R. § 679.4(k)(4)(i)(ii).

But section (E) of the regulation allows an applicant to obtain a different gear designation, based on gear used by the applicant between June 18, 1995 and February 7, 1998. Mr. Ward's rights under section (E) are the subject of this part of the appeal.

The F/V LADY GRACE harvested groundfish only with non-trawl gear in the LLP qualifying periods of January 1, 1988 to June 17, 1995 and in the section (E) period of June 18, 1995 to February 7, 1998. If the gear designation on Mr. Ward's LLP license must be based on harvests from the F/V LADY GRACE, Mr. Ward's license must have a non-trawl gear designation.

On January 16, 1998, after Mr. Ward bought the moratorium qualification of the F/V LADY GRACE, RAM transferred Certificate of Moratorium Qualification 5179A to him and issued him a moratorium permit. Mr. Ward named the F/V GRUMPY J as the vessel on his moratorium qualification and permit and promptly made five documented harvests of groundfish from the F/V GRUMPY J between January 23, 1998 and February 7, 1998. If the gear designation on Mr. Ward's license can be based on harvests from the F/V GRUMPY J, Mr. Ward can designate his LLP license for trawl gear.

The legal question is the correct interpretation of "the vessel" in 50 C.F.R. § 679.4(k)(3)(iv)(E): "An applicant may request a change of gear designation based on gear used from **the vessel** during the period beginning June 18, 1995 to February 7, 1998." RAM argues that "the vessel" must be an original qualified vessel. Mr. Ward argues that "the vessel" can be any vessel owned by the applicant, as long as the applicant used the desired gear and owned the fishing history of the original qualified vessel while he or she used the gear.

Based on the policies and regulations of the Moratorium Program and the License Limitation Program, I conclude that Mr. Ward has the right to designate his LLP license for trawl gear, based on trawl harvests between June 18, 1995 and February 7, 1998 from the F/V GRUMPY J.

A. RAM's interpretation conflicts with the transferability of moratorium qualifications.

During the time period June 18, 1995 to February 7, 1998, no vessel had an LLP license. The LLP had not come into effect. The VMP was in effect. To harvest groundfish during this time, a vessel had to have a moratorium qualification and permit. The F/V GRUMPY J was not an original qualified vessel under the Moratorium Program but it received a moratorium qualification from the F/V LADY GRACE, which was an original qualified vessel under the Moratorium Program.

Under RAM's interpretation, if Mr. Ward used trawl gear from the F/V LADY GRACE, he could designate his LLP license for trawl gear. But since he used trawl gear from the F/V GRUMPY J, he cannot designate his LLP license for trawl gear. The result of RAM's interpretation is that a vessel owner that had a moratorium qualification because he owned an original qualified vessel under the Moratorium Program can change the gear designation on his LLP license but the vessel owner that had a moratorium qualification by transfer from an original qualified vessel cannot make such a change.

This result conflicts with the basic structure of the Moratorium Program. The essence of a moratorium qualification was that it was transferable. A moratorium qualification was defined, in federal regulation, as “the transferable prerequisite for issuance of a moratorium permit.”²⁵ An owner of a moratorium qualification, such as L.G. Fisheries, had the right to transfer it, if the owner submitted specified information.²⁶ A rule that an applicant, such as Mr. Ward, who obtained a moratorium qualification *by transfer* cannot use his trawl harvests to obtain a trawl gear designation conflicts with the free transferability of moratorium qualifications.

It conflicts with the VMP regulations in another way. The VMP regulations stated that a vessel had moratorium qualification in one of two ways. The vessel was an original qualified vessel or the vessel received a moratorium qualification by transfer from an original qualified vessel.²⁷ The VMP regulations do not state or imply that a moratorium qualification obtained by transfer is any less than, or entitles its owner to any less than, a moratorium qualification obtained by virtue of owning an original qualified vessel.

Although RAM did not deny Mr. Ward’s gear change request *because* he obtained a moratorium qualification by transfer, that is the *effect* of RAM’s interpretation. I agree with RAM that an interpretation of an LLP regulation has to be based primarily on the language of the LLP regulation construed in light of its purpose and regulatory history. But I also believe that, if an interpretation of an LLP regulation conflicts with a basic structural feature of the Moratorium Program, that is a reason to question, but not necessarily reject, the interpretation of an LLP regulation. The VMP and the VMP regulations governed groundfish fishing in BSAI and the Gulf of Alaska between June 18, 1995 and December 31, 1998, the time period when applicants were making harvests and investing money that can now meet the requirements of the LLP gear change regulation.

On the one hand, I presume that the government acts harmoniously in successive programs of regulation of the same fishery. On the other hand, I realize that, when the government adopts a new program, it has the right, and responsibility, to respond to new conditions and issue regulations for a new program that improve upon the old. The question is whether there should be a difference between the Moratorium Program and LLP because of a intentional policy choice made in the LLP.

B. RAM’s interpretation conflicts with the policies and regulations of the LLP.

RAM argues that the characteristics of the original qualified vessel always govern the

²⁵ Final VMP Rule, 60 Fed. Reg. 40,763, 40,773 (1995), *adopting* 50 C.F.R. § 679.2.

²⁶ Final VMP Rule, 60 Fed. Reg. 40,763, 40,774 (1995), *formerly* 50 C.F.R. § 676.3(c)(8).

²⁷ Final VMP Rule, 60 Fed. Reg. 40,763, 40,773, *adopting* 50 C.F.R. § 676.3©); *Fierce Packer*, Appeal No. 00-0004 at 2 (Dec. 18, 2000). Technically, the moratorium qualification was transferable, not the permit. But the owner of a moratorium qualification could obtain a moratorium permit.

characteristics of the LLP license based on activities of the original vessel: the length overall of the original qualified vessel dictates forever the maximum length overall (MLOA) on LLP license, the fishing history of the original qualified vessel dictates the area endorsements on the license. Therefore, RAM argues that since the F/V LADY GRACE did not make any groundfish harvests with trawl gear, the LLP license derived from the fishing history of the F/V LADY GRACE cannot have a trawl gear designation.

I agree that generally, under the LLP, the characteristics of the original qualified vessel dictate the characteristics on the LLP license. RAM determines the MLOA on an LLP license based on the vessel's length overall as of June 27, 1992 or, in some circumstances, June 17, 1995.²⁸ RAM determines area endorsements based on a vessel's groundfish fishing between January 1, 1988 to June 17, 1995, which is the combined general and endorsement qualification period for groundfish licenses.²⁹ And the general rule for gear designation – in 50 C.F.R. § 679.4(k)(3)(iv)(B) to (D) – is that RAM determines the gear designation based on what gear the qualified vessel used between January 1, 1988 to June 17, 1995.

But section (E) is different. Section (E) directs RAM to change the gear designation on the LLP license based on actions that an applicant took *after* June 17, 1995, if the applicant requests the change. Those actions are that an applicant either actually used a new type of gear between June 17, 1995 and February 7, 1998 or spent \$100,000 toward vessel conversion and used the new gear by December 31, 1998.³⁰

I analyze the language of the regulation in light of its purpose and regulatory history. The language of Section (E) is not that helpful on this question. Section (E) does *not* state that the applicant had to use gear “from the qualifying vessel” but only that the applicant used gear “from the vessel” during the period June 18, 1995 to February 7, 1998.³¹ Since the regulation is silent on the question before me, I determine Council and NMFS intent based on what the Council and NMFS did adopt by regulation and did state in the LLP regulatory history.

Every interpretation of a regulation has a purpose implicit in the interpretation. RAM's interpretation means that the Council only intended to benefit applicants who were owners of

²⁸ 50 C.F.R. § 679.2 (definition of maximum length overall for the LLP).

²⁹ 50 C.F.R. § 679.4(k)(4)(i)&(ii).

³⁰ The \$100,000 criterion for significant financial investment is in 50 C.F.R. §679.4(k)(3)(iv)(F).

³¹ If subsection (E) had said “qualified vessel,” and nothing else in any LLP regulations or regulatory history were different, I believe that subsection (E) would still be ambiguous as to whether a vessel owner who was fishing based on the purchase of the fishing history of a qualifying vessel history would stand in the shoes of the owner of the qualified vessel. But the absence of the term “qualified vessel” in subsection E, when subsection (B) to (D) specify harvests “from a qualified vessel,” makes subsection (E) even more ambiguous on whether those harvests must be from a qualified vessel.

original LLP-qualifying vessels and used the new gear, or spent money toward a new gear type, *on the original qualifying vessel*. RAM's interpretation means that the Council did not intend to benefit applicants who bought the LLP qualifying fishing history from an owner of an LLP qualified vessel and used a new type of gear, or spent money toward a new gear, on a different vessel. RAM's interpretation gives the eligible applicant-by-virtue-of-vessel-ownership the right to change the gear designation on his or her LLP license and denies that right to the eligible applicant-by-virtue-of-ownership-of-a-fishing-history.

For four reasons, I conclude that Mr. Ward offers a superior interpretation of the regulation authorizing an applicant to change the gear designation on his or her LLP groundfish license.

First, Mr. Ward's interpretation is more consistent with the definition of eligible applicant. "Eligible applicant" is a key term in the LLP. Section 679.2 defines eligible applicant as the owner of a qualified vessel as of June 17, 1995 or *the person to whom the owner transferred the LLP-qualifying history*.³² Section 679.2 gives equal status to these avenues of becoming an eligible applicant for an LLP license. The LLP regulations provide that a groundfish license "will be issued to an eligible applicant that meets the criteria [for an LLP license]."³³ The regulations do not differentiate between an applicant who is an eligible applicant by virtue of owning a vessel on June 17, 1995 or an applicant who bought an LLP qualifying fishing history from an owner of a qualified vessel.

Section 679.2 imposes stringent requirements for someone to prove he or she is an eligible applicant based on purchase of a fishing history. The contract must be written. It must have express terms that clearly and unambiguously provide for the transfer of the qualifications for an LLP license. Having met that high standard, I conclude that the eligible applicant, by that route, has the same rights and privileges as an eligible applicant, by the vessel ownership route.

Second, Mr. Ward's interpretation is more consistent with the definition of license recipient. RAM quotes the Fishery Management Plan for BSAI groundfish fisheries on the gear designation regulation:

For vessels which used only one gear type (trawl/non-trawl) in the original qualifying period, and then used the other gear type between June 18, 1995 and February 17, 1998, *the license recipient* may choose one or the other gear designation, but will not receive both. For vessels which used only one gear type (trawl/non-trawl) in the original qualification period, but made a significant financial investment toward conversion to the other gear type or deployment of such gear on or before February 7, 1998, and made landings on that vessel with the new gear type by December 31, 1998, *the license*

³² I quote the definition of eligible applicant in section 679.2 in full on page 3 - 4 *supra*.

³³ 50 C.F.R. § 679.4(k)(4).

recipient may choose which gear designation to receive, but not both.³⁴

RAM quotes the Council's explanation of the gear designation regulation in its October 1998 newsletter:

There are two ways to change a gear designation based on landings which occurred after June 17, 1995. First, if a vessel made a landing with the new gear type (fixed/rawl) between June 18, 1995 and February 7, 1998 **then the license recipient can choose either the fixed or trawl gear designation, but not both.** The second way to change the license's gear designation is for the vessel owner to have made a "significant" financial investment toward the conversion of a vessel or the deployment of fishing gear on or before February 7, 1998 and making a landing on that vessel with the new gear type by December 31, 1998. **This will allow the license recipient to choose which of the two gear endorsements (trawl or fixed, but not all) they will receive.** A significant financial commitment is defined as a minimum purchase of \$100,000 worth of equipment specific to trawling or having acquired groundline, hooks or pots, and hauling equipment for the purpose of prosecuting the fixed gear fisheries on or by February 7, 1998.³⁵

The Fishery Management Plan defines "license recipients" as follows:

License recipients. Licenses will be issued to owners (as of June 17, 1995) of qualified vessels. The owners as of this date must be "persons eligible to document a fishing vessel" under Chapter 121, Title 46, U.S.C. In cases where the vessel was sold on or before June 17, 1995, and the disposition of the vessel's fishing history for license qualification was not mentioned in the contract, the license qualification history would go with the vessel. If the transfer occurred after June 17, 1995, the license qualification history would stay with the seller of the vessel unless the contract specified otherwise.³⁶

License recipients are the owners of the vessel as of June 17, 1995 or the owners of the vessel's fishing history, if the vessel owner sold the fishing history by contract. The Plan does not differentiate between license recipients, based on owning a vessel, and license recipients, based

³⁴ *Motion for Reconsideration* at 5 - 6, quoting page 310 of the Fishery Management Plan for BSAI Groundfish, available on the Council website at <http://www.fakr.noaa.gov/npfmc/FMP/FMP.htm>. <<visited December 16, 2003>>. The Council website notes that the FMP for groundfish in the Gulf of Alaska essentially mirrors the BSAI plan.

³⁵ *Motion for Reconsideration* at 5, quoting the Council's October 1998 newsletter (emphasis added by appeals officer). The Council archives past newsletters on its website at <http://www.fakr.noaa.gov/npfmc/newsletters/newsletters.htm>.

³⁶ Fishery Management Plan for BSAI Groundfish, page 309, available at the Council website at <http://www.fakr.noaa.gov/npfmc/FMC/FMP.htm> <<visited December 16, 2003>>.

on owning a vessel's fishing history. The Plan does not grant the right to choose a gear designation to license recipients who own a qualified vessel and deny the right to persons who are license recipients who own a qualified vessel's fishing history.

When NMFS drafted regulations to implement the Council's recommendations for the LLP, it used the term eligible applicant instead of license recipients. The text of the gear change regulation, the language in the FMP and the Council explanation of the gear change regulation show that the Council and NMFS intended to give all *license recipients* or *eligible applicants* the right to continue to use a gear type they used between June 18, 1995 to February 7, 1998. I have no basis to conclude that the Council and NMFS only intended to give that right to one set of license recipients or eligible applicants, namely those who owned a vessel on June 17, 1995.

Third, RAM's interpretation undermines private contracts to transfer fishing histories. The LLP regulations expressly provide that a person may become an eligible applicant through the purchase of an LLP-qualifying fishing history. The commentary to the final LLP regulations provides: "NMFS will recognize written contracts to the extent practicable."³⁷ The LLP regulations adopt and reinforce the policy from the Moratorium Program of giving effect to private contractual transfers of fishing histories.

The parties to this contract intended that Mr. Ward take all the rights that L.G. Fisheries had. The parties wished Mr. Ward to stand in the place of L.G. Fisheries. But, under RAM's interpretation, the transfer of an LLP qualifying fishing history would, as a matter of law, entail a loss. Under RAM's interpretation, L.G. Fisheries could not transfer to Paul Ward all that L.G. Fisheries had. L.G. Fisheries had the right to change the gear designation on its LLP license but Mr. Ward cannot have that right. This is inconsistent with the Council and NMFS's intention to give effect to private contracts that transfer fishing history.

At the same time NMFS proposed the gear designation regulation, it published a Clarification of a Complete Fishing History Necessary for License Eligibility. NMFS stated:

The LLP is designed to place an upper limit on the amount of capitalization that can occur in the groundfish and crab fisheries. In doing so, **the LLP also identifies the field of participants** and provides stability during the development of a more comprehensive solution for conservation and management of the affected fisheries. **One of the design features that assists in providing stability is the provision that allows the fishing history of a vessel to be transferred prior to license issuance. This provision protects the investment-backed expectations of a person who purchased a fishing history to meet the eligibility requirements for a license under the LLP.** Although the LLP provides for these transfers, eligibility for a license under the LLP cannot currently occur by "piecing together" the fishing histories from two or more

³⁷ Final Rule, 63 Fed. Reg. 52,642, 52,645 (1998)(supplementary information).

vessels, except under a specific provision of the LLP explained here.³⁸

If Mr. Ward's request is viewed as improper combining of fishing histories, it should be denied. But I do *not* view Mr. Ward's request as piecing together fishing histories to meet the eligibility requirements for an LLP license. The fishing history for Mr. Ward's LLP license came from one vessel: the F/V LADY GRACE. Based on the purchase of this fishing history, Mr. Ward *is* an eligible applicant for an LLP license. He is a member of the field of LLP participants and took the place of the prior owner of the F/V LADY GRACE.

I view this decision as protecting the legitimate investment-backed expectation of a bona fide purchaser of an LLP qualifying fishing history. I have concluded Mr. Ward's expectations are legally legitimate because the LLP regulations define the purchaser of an LLP qualifying fishing history as an eligible applicant and, therefore, entitled to all the rights of an eligible applicant or license recipient. The right to change the gear designation, based on harvests between June 18, 1995 to December 31, 1998, is a right of an eligible applicant or license recipient.

Fourth, Mr. Ward's interpretation is consistent with two recent actions by the Council and NMFS that give equal status to owners of qualified vessels and owners of fishing histories of qualified vessels.

The first involves LLP crab licenses. After the original LLP regulations, the Council and NMFS added a recent participation period [RPP] requirement for LLP crab licenses. The basic requirement was for a harvest between January 1, 1996 to February 9, 1998.³⁹ The regulation was unclear as to whether the RPP harvest had to be from an original qualifying vessel. NMFS clarified the regulation to reflect Council intent and to put an owner of an LLP-qualifying fishing history on an equal par with an owner of an LLP-qualifying vessel.⁴⁰ Under the new regulation, the person who made the RPP harvest did not have to make it from an original qualifying vessel, as long as the person who made the RPP harvest owned the fishing history of an original qualifying vessel when he or she made the RPP harvest.

The second action involves groundfish licenses. NMFS adopted a regulation that added a BSAI Pacific cod gear/species endorsement on groundfish licenses.⁴¹ To receive the endorsement, a license holder must have harvested specific amounts of BSAI Pacific cod with hook-and-line or

³⁸ Proposed Rule, 66 Fed. Reg. 17,397, 17,399 (2001)(emphasis added).

³⁹ Final Rule, 66 Fed. Reg. 48,813 (2001), *adopting* 50 C.F.R. § 679.4(k)(5)(iii).

⁴⁰ Final Rule, 68 Fed. Reg. 46,117 - 46,118 (2003), *adopting* 50 C.F.R. § 679.4(k)(5)(iii)(A).

⁴¹ Final Rule, 67 Fed. Reg. 18,129 (2002), *codified at* 50 C.F.R. § 679.4(k)(9). It embodied Amendment 67 to the Fishery Management Plan for the BSAI Groundfish Fishery.

pot gear between 1995 and 1999.⁴² Under the original regulation, an applicant could count Pacific cod harvests toward this endorsement only if the harvests were made from an original qualified vessel.⁴³ NMFS changed the Pacific cod regulation to state clearly that an applicant receives the Pacific cod endorsement if the applicant made the required Pacific cod harvests from *any* vessel, as long as the applicant owned the fishing history of the original qualified vessel when the applicant made the required Pacific cod harvests.⁴⁴

These actions show that the Council and NMFS wish to protect applicants who purchase fishing histories and meet new LLP requirements with vessels other than original qualified vessels. These actions also show that the Council and NMFS do not view equal treatment of owners of qualifying fishing histories and owners of qualified vessels the same as improper combining of fishing histories.

3. Should an appeals officer hold a hearing on the proper interpretation of the gear change regulation?

RAM suggests that I hold a hearing and question Council members, Council staff and regulation writers from NMFS to determine Council intent on this question. I will not do that for two reasons. First, the question of Council intent is a legal question that I must decide on publicly available documents. It is not like determining the intent of parties to a private contract.⁴⁵ Second, the proper interpretation of a regulation is a question of law. I do not have the authority to hold a hearing on issues of law.⁴⁶

FINDINGS OF FACT

1. According to the official LLP record, L.G. Fisheries, Inc., was the owner of record of the F/V LADY GRACE on June 17, 1995 and was eligible to apply for an LLP license that resulted from the fishing history of the F/V LADY GRACE.

⁴² 50 C.F.R. § 679.4(k)(9)(ii).

⁴³ Final Rule, 67 Fed. Reg. 18,129, 18,138 (2002), *adopting* 50 C.F.R. § 679.4(k)(iii)(F)(the harvest had to be made “from the vessel that was used as the basis of eligibility for the license holder’s LLP groundfish license.”)

⁴⁴ Final Rule, 68 Fed. Reg. 44,666 (2003) *adopting* 50 C.F.R. § 679.4(k)(9)(iii)(F)(2)(3). It would be anomalous if the very same Pacific cod harvests that can now count toward a Pacific cod endorsement for hook-and-line or pot gear could not count toward a endorsement for non-trawl gear since hook-and-line and pot gear endorsements are subsets of a non-trawl gear endorsement.

⁴⁵ *Ocean Spray Partnership*, Decision on Reconsideration at 20 - 21 (June 15, 2001)(statutory interpretation).

⁴⁶ 50 C.F.R. § 679.43(g)(3)(i).

2. L.G. Fisheries, Inc., through Mary Magnuson, President of L.G. Fisheries, Inc., and Paul Ward entered into a contract entitled, Moratorium Qualification Offer/Sales Agreement which Mary Magnuson signed on December 30, 1997 and Paul Ward signed on January 7, 1998.
3. Under the express terms of the contract, Paul Ward agreed to pay \$5,000 for the use of the F/V LADY GRACE's fishing history that would enable him to receive a moratorium permit for the year 1998.
4. Under the express terms of the contract, Mr. Ward agreed to pay an additional \$45,000, contingent upon the parties' determining that the fishing history of the F/V LADY GRACE would enable Mr. Ward to participate in the program that would replace the Moratorium Program.
5. The parties determined that the fishing history of the F/V LADY GRACE supported issuance of an LLP groundfish license.
6. Mr. Ward paid L.G. Fisheries \$45,000 to obtain the qualifications, or fishing history, for an LLP license.
7. L.G. Fisheries transferred to Mr. Ward all the groundfish history of the F/V LADY GRACE.
8. L.G. Fisheries transferred to Mr. Ward the qualifications for an LLP license, which means the fishing history of the F/V LADY GRACE which supports issuance of an LLP license.
9. The express terms of the contract clearly and unambiguously transfer the qualifications for an LLP license based on the fishing history of the F/V LADY GRACE from L.G. Fisheries to Paul Ward.
10. RAM transferred Certificate of Moratorium Qualification 5179A, based on the fishing history of the F/V LADY GRACE, to Paul Ward on January 16, 1998 and issued Mr. Ward a moratorium permit.
11. At Mr. Ward's request, RAM named the F/V GRUMPY J as the vessel on Certificate of Moratorium Qualification 5179A and the moratorium permit based on that certificate.
12. Mr. Ward made five documented harvests of license limitation groundfish from the F/V GRUMPY J between January 23, 1998 and February 7, 1998 with trawl gear.

CONCLUSIONS OF LAW

1. Paul Ward owns the LLP qualifying history of the F/V LADY GRACE according to a

contract that meets the second definition of eligible applicant in 50 C.F.R. § 679.2.

2. Paul Ward is the eligible applicant for an LLP license based on ownership of the fishing history of the F/V LADY GRACE.
3. Under 50 C.F.R. § 679.4(k)(3)(iv)(E)(1), NMFS must grant an applicant's request for a change of gear designation on an LLP license from non-trawl to trawl gear if the applicant harvested groundfish with trawl gear between June 18, 1995 to February 7, 1998 and the applicant owned an LLP-qualifying fishing history at the time the applicant harvested groundfish with trawl gear.
4. Paul Ward is entitled to have his LLP groundfish license designated for trawl gear.
5. An appeals officer may not hold a hearing to determine the proper interpretation of a regulation.

DISPOSITION

The IAD denying Mr. Ward's application for an LLP groundfish license, based on the fishing history of the F/V LADY GRACE, is VACATED. The Restricted Access Management Program is ORDERED to grant Paul Ward the LLP license that is based on the fishing history of the F/V LADY GRACE.

The IAD denying Mr. Ward's request to designate his LLP groundfish license for trawl gear is VACATED. The Restricted Access Management Program is ORDERED to allow Mr. Ward to designate his LLP license for trawl gear.

This Decision on Reconsideration takes effect on March 8, 2004, unless by that date the Regional Administrator orders review of this Decision.

Mary Alice McKeen
Appeals Officer