NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 03-0027
	)	
PROWLER, LLC,	)	DECISION
Appellant	)	
	)	April 19, 2006
	)	

STATEMENT OF THE CASE

PROWLER, LLC, [Prowler] appeals the Initial Administrative Determination On Reconsideration [IAD] that the Restricted Access Management Program [RAM] issued on September 22, 2003. RAM issued the IAD under the North Pacific Groundfish and Crab License Limitation Program [LLP].[1] The LLP is a program of limited access to the North Pacific groundfish and crab fisheries adopted by the Secretary of Commerce pursuant to the Magnuson-Stevens Fishery Conservation and Management Act [Magnuson-Stevens Act].[2]

In 2000, Prowler received LLP groundfish license LLG 3773 based on Prowler's ownership of the fishing history of the F/V RESPONSE.[3] LLG 3773 has a catcher/processor vessel designation and two area endorsements: Bering Sea and Aleutian Islands.

In 2002, the Secretary of Commerce adopted a regulation which required that, to conduct directed fishing for Pacific cod in the Bering Sea/Aleutian Islands [BSAI] with hook-and-line or pot gear, an LLP license holder had to have a specific Pacific cod endorsement on its LLP license.[4] The IAD determined that Prowler did not meet the requirements for a BSAI Pacific cod endorsement for hook-and-line gear on LLP license LLG 3773.

Prowler can appeal the IAD because it directly and adversely affects its interests.[5] Prowler did not request a hearing and I did not hold one because no facts are in dispute and the record contains sufficient information to decide Prowler's appeal, as required by federal regulation 50 C.F.R. § 679.43(g).

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[1] The LLP is located in 50 C.F.R. § 679, primarily 50 C.F.R. § 679.2 (definitions), 50 C.F.R. § 679.4(k)(4) (requirements for licenses), 50 C.F.R. § 679.7 (prohibitions), 50 C.F.R. § 679.43 (appeals). These regulations are on the NMFS Alaska region website: http://www.fakr.noaa.gov/regs/summary.htm

[2] The Magnuson-Stevens Act is at 16 U.S.C. §§ 1801 - 1883.

[3] LLP license LLG 3773 (Nov. 13, 2000)(Exhibit 1); Prowler's LLP Application (Exhibit 2).

[4] Final Rule, 67 Fed. Reg. 18,129 (2002) *adopting* 50 C.F.R. § 679.4(k)(9).

[5] 50 C.F.R. § 679.43(b)

SUMMARY

The IAD is affirmed. Prowler is not entitled to a Pacific cod endorsement on LLG 3773 based on the fishing history of the F/V PROWLER.

Prowler received LLP license LLG 3773 based on its ownership of the fishing history of the F/V RESPONSE. The F/V RESPONSE had a fire, and then was intentionally sunk, in May 1993. Prowler wants to receive a Pacific cod endorsement on LLG 3773, based on Pacific cod harvests from a different vessel, the F/V PROWLER. NMFS cannot do this because Prowler received a Pacific cod endorsement on another license – LLG 3676 – based on the fishing history of the F/V PROWLER.

Prowler argues that it meets the eligibility requirement for the Pacific cod endorsement in 50 C.F.R. § 679.4(k)(9)(ii)(C): at least 270 metric tons of Pacific cod harvested in the BSAI in any one of the years 1996 through 1999 with hook-and-line gear. Prowler had two moratorium permits from September 1997 through December 31, 1999. The F/V PROWLER harvested approximately 2,200 metric tons of Pacific cod in the years 1997, 1998 and 1999. Prowler wants to attribute half of the F/V PROWLER's harvest to LLG 3676 and half to LLG 3773.

Prowler cannot do that because [1] the requirement of "at least 270 metric tons" is a minimum requirement, [2] no LLP regulation authorizes NMFS to divide Pacific cod catch between LLP licenses and [3] the result would be two Pacific cod endorsements, and therefore two vessels in the Pacific cod fishery, whereas before there had only been one vessel in that fishery. This result would frustrate the purpose of the LLP and the Pacific cod endorsement, is inconsistent with the basic structure of the Vessel Moratorium Program and the LLP and violates the specific regulatory prohibition in 50 C.F.R.§ 679.4(k)(9)(F)(3).

Prowler argues that it meets the hardship provision for a Pacific cod endorsement in 50 C.F.R. § 679.4(k)(9)(v)(B). Prowler does not meet 50 C.F.R. § 679.4(k)(9)(v)(B)(4) because that provision requires that the license holder harvest Pacific cod "aboard the vessel that was used as the basis of eligibility for the license holder's groundfish license after the vessel was prevented from participating by the unavoidable circumstance but before April 16, 2000."

Prowler did not harvest Pacific cod by April 16, 2000 from the F/V RESPONSE, which was the vessel that was used as the basis of Prowler's eligibility for LLG 3676. I do not decide whether a license holder could ever satisfy (B)(4) with a Pacific harvest from a vessel other than the original qualifying vessel because Prowler clearly cannot satisfy (B)(4) with a harvest from the F/V PROWLER because Prowler has used the Pacific cod harvests from the F/V PROWLER for a Pacific cod endorsement on LLG 3676. NMFS does not have the authority to divide a vessel's fishing history between two LLP licenses under the standard eligibility provision or the hardship provision.

ANALYSIS

Does Prowler LLC qualify for a Pacific cod endorsement on LLG 3773?

Prowler received LLG license 3773 because it owned the fishing history of the F/V RESPONSE.[6] The F/V RESPONSE sank in May 1993.[7] Prowler bought the fishing history of the vessel from Jean and Richard LeMay in August 1997.[8] Prowler wants a Pacific cod endorsement on LLG 3773 based on the fishing history of a different vessel, the F/V PROWLER. Prowler has already received a Pacific cod endorsement on another LLP license – LLG 3676 – from the fishing history of the F/V PROWLER.[9]

I conclude that NMFS clearly does not have the authority to award two Pacific cod endorsements based on one vessel's fishing history. An award of two Pacific cod endorsements based on one vessel's history frustrates the purpose of the LLP and the Pacific cod endorsement, violates the "one vessel=one license" structure of the LLP and violates a specific prohibition in federal regulation 50 C.F.R. § 679.4(k)(9)(F)(3).

The Secretary of Commerce adopted all the regulations at issue here – the original LLP rule in 1998,[10] the Pacific cod gear rule in 2002[11] and the amendment to the Pacific cod gear rule in 2003[12] – pursuant to the process specified in the Magnuson-Stevens Act.[13] Since the Secretary did not change any of these rules as transmitted to him by the Council and NMFS, I have treated the intent of the Council and NMFS as the intent of the Secretary of Commerce.

In analyzing this question, it is important to keep in mind one simple fact. **From 1997 to 1999, Prowler caught Pacific cod in the BSAI from one vessel, the F/V PROWLER**. From 1997 to 1999, to harvest Pacific cod in the BSAI from a particular vessel, a vessel owner had to have a

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[6] LLP license LLG 3773 (Nov. 13, 2000)(Exhibit 1); Prowler's LLP Application (Exhibit 2).

[7] Marine Casualty Investigation Report at 1 (Oct. 29, 1993)(Exhibit J to Prowler's Appeal).

[8] Earnest Money Agreement for Purchase and Sale of Moratorium Qualification/License Limitation Permit (Accepted August 12, 1997)(Exhibit L to Prowler's Appeal).

[9] IAD at 10. The IAD incorrectly states LLG 3767. Prowler owns LLG 3676. The NMFS Alaska Region website lists LLP licenses and their owners. http://www.fakr.noaa.gov/ram/llp.htm# list *visited* April 13, 2006.

[10] Final Rule, 63 Fed. Reg. 52,642 (Oct. l, 1998).

[11] Final Rule, 67 Fed. Reg. 18,129 (April 15, 2000).

[12] Final Rule, 68 Fed. Reg. 44,666 (July 30, 2003).

[13] 16 U.S.C. §§ 1853, 1854.

moratorium permit that named that particular vessel.[14] From 1997 to 1999, Prowler had two moratorium permits, named the F/V PROWLER on both permits,[15] and caught Pacific cod only from the F/V PROWLER. Prowler now wants the Pacific cod catch of *one vessel* to give it the legal right to put *two vessels* in the BSAI Pacific cod fishery.

A. An award of two Pacific cod endorsements based on the fishing history of one vessel violates the purpose of the LLP and the Pacific cod endorsement.

The LLP, adopted in 1998, was "the first stage in fulfilling the Council's commitment to develop a comprehensive and rational management program for the fisheries in and off Alaska."[16] The Council was concerned "that the domestic harvesting fleet had expanded beyond the size necessary to harvest efficiently the optimum yield (OY) of the fisheries within the EEZ off Alaska."[17] NMFS explained the function of the LLP:

> By limiting the number of vessels that are eligible to participate in the affected fisheries, the LLP places an upper limit on the amount of capitalization that may occur in those fisheries. This upper limit will prevent future overcapitalization in those fisheries at levels that could occur if such a constraint was not present.[18]

The Council approved Pacific cod endorsements in Amendment 67 to the Fishery Management Plan for the BSAI groundfish fishery.[19] Amendment 67 is a continuation of the LLP and is "designed to address the concern about new participants entering the Pacific cod fisheries."[20] The Pacific cod regulation limits the number of vessels that can participate in the BSAI Pacific cod fishery by excluding vessels that did not harvest specified amounts of Pacific cod in the years 1995 to 1999.[21]

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[14] Final Rule, 60 Fed. Reg. 40,763, 40773 (1995), *adopting* 50 C.F.R. § 676.3(a).

[15] Moratorium Permit 1500 (Date Issued, Feb. 9, 1996)(Exhibit 3); Moratorium Permit 8166A (Date issued, Sept. 25, 1997)(Exhibit 4).

[16] Final Rule, 63 Fed. Reg. 52,642, 52,642 (1998). It took effect on January l, 2000.

[17] *Id.* EEZ stands for the Exclusive Economic Zone.

[18] *Id.* at 52,643.

[19] Final Rule, 67 Fed. Reg. 18,129, 18,130 (2002).

[20] Proposed Rule, 66 Fed. Reg. 49,908, 49,909 (2001).

[21] 50 C.F.R. § 679.4(k)(9)(ii). There are four Pacific cod endorsements: catcher vessel for hook-and-line gear; catcher vessel for pot gear; catcher/processor for pot gear; catcher/processor for hook-and-line gear. The eligibility period for the first three endorsements is 1995 to 1999. The eligibility period for a catcher/processor to use hook-and-line, what Prowler seeks, is 1996 to 1999.

If Prowler received two LLP licenses with Pacific cod endorsements, there could be two vessels in this fishery whereas from 1996 to 1999, the qualifying period for this endorsement, there was only one. A license holder needs one Pacific cod endorsement to put one vessel in the Pacific cod fishery. If Prowler received two Pacific cod endorsements, it could put a second vessel in the fishery or sell the second LLP license to someone else who could put another vessel in this fishery. That is what Prowler plans to do.[22] This is what any license holder would likely do, since it would not need two Pacific cod endorsements to put one vessel in the Pacific cod fishery.

Two vessels in the Pacific cod fishery would be an increase in the number of vessels in the Pacific cod fishery, an increase in the capacity within this fishery and an increase in the capitalization of this fishery. These results would undercut the purpose of the LLP and the BSAI Pacific cod endorsement.

B. An award of two Pacific cod endorsements based on the fishing history of one vessel is inconsistent with the basic structure of the Vessel Moratorium Program and LLP

The Vessel Moratorium Program [VMP] was in effect from 1996 to 1999.[23] It was the predecessor to the LLP, which took effect in 2000.[24] A cornerstone of the VMP and the LLP is that the fishing history of one vessel generates one original permit or license. To receive a moratorium groundfish permit, typically an applicant needed only two groundfish harvests.[25] If a vessel owner could divide the fishing history of a vessel, a vessel owner could receive more than one moratorium permit based on the fishing history of one vessel.

But that is not how it worked. A vessel owner received one original, transferable moratorium qualification and permit if its vessel made the landings required for a permit. Once a vessel owner had a moratorium qualification and permit, the owner could transfer it to another person.[26]

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[22] John Winther, owner of Prowler, LLC, stated: "In total, Prowler paid $131,000.00 in order to acquire the LeMay's permit, licenses and fishing rights. Prowler hoped to recapture the value of its investment by either perfecting and selling the rights acquired or by eventually building a second vessel and fishing the rights from that vessel." Affidavit of John Winter at ¶ 8 (Jan. 30, 2004)(Exhibit E to Prowler's Appeal).

[23] Final Rule, 60 Fed. Reg. 40,763 (1995) *adopting* 50 C.F.R. §§ 676.1 to 676.6. The VMP was moved to 50 C.F.R. § 679. Final Rule, 61 Fed. Reg. 31,228, 31,327 - 31,239 (1996). Originally in effect from 1996 to 1998, it was extended through 1999. Final Rule, 64 Fed. Reg. 3651 (1999).

[24] Final Rule, 65 Fed. Reg. 45,316 (2000). The VMP was removed as obsolete from federal regulation after the LLP took effect. *Id.*

[25] Final Rule, 60 Fed. Reg. 40,763, 40,773 - 40,774 (1995), *adopting* 50 C.F.R. § 676.3(e).

[26] Final Rule, 60 Fed. Reg. 40,763, 40,774 (1995) *adopting* 50 C.F.R. § 676.4. A moratorium qualification was the "transferable prerequisite for a moratorium permit," which means a vessel's fishing history necessary for NMFS to issue a moratorium permit. *Id.* at 40,771 *adopting* 50 C.F.R. § 676.2.

But then, that new person, and that new person's vessel had the moratorium permit. One vessel's fishing history did not lead to two moratorium permits and two vessels on the water at the same time.

The LLP worked according to the same basic principle. One vessel's fishing history led to one LLP license. A corollary of that principle is that only one person was the eligible applicant for the LLP license based on a vessel's fishing history: the owner of the vessel on June 17, 1995 or the person who had bought the vessel's fishing history from the June 17th owner.[27] If a vessel owner could divide the history of a vessel, a vessel owner could receive more than one LLP license based on the history of one vessel.

But that was not how the LLP worked either. NMFS explained in commentary to the original LLP rule: "[O]nly one license will be issued based on the fishing history of any qualified vessel. For instance, a vessel's fishing history cannot be divided so that multiple licenses would be issued."[28] But that is exactly what Prowler wants to do: receive multiple licenses with Pacific cod endorsements by dividing the fishing history of one vessel.

Since Prowler is proposing something clearly not allowed under the original LLP, it must show that something changed with the adoption of the Pacific cod endorsement. But the opposite is true. The Council and NMFS adopted a specific Pacific cod regulation that reaffirmed the ban on dividing one vessel's fishing history between two LLP licenses.

C. An award of two Pacific cod endorsements based on the fishing history of one vessel violates the specific prohibition in federal regulation 50 C.F.R. § 679.4(k)(9)(F)(3).

This regulation, 50 C.F.R. § 679.4(k)(9)(F)(3), states**:**

> Notwithstanding the provisions of paragraph 50 C.F.R. § 679.4(k)(9)(iii)(F)(2) of

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Technically, moratorium qualifications were transferable; moratorium permits were not. *Id.* at 40,774, *adopting* 50 C.F.R. § 676.4(a). For simplicity, I will refer to moratorium permits as transferable, since if a person received a moratorium qualification by transfer, he had the right to receive a moratorium permit. RAM issued certificates of moratorium qualification so vessel owners would have tangible proof that they owned a moratorium qualification. Exhibit M to Prowler's Appeal at page 6 has such a certificate.

[27] 50 C.F.R. § 679.2 (definition of eligible applicant for LLP). *Accord, John A. Karuza,* Appeal No. 02-0055 at 8 (July 21, 2005). All decisions of the Office of Administrative Appeals are on the NMFS Alaska region website: http://www.fakr.noaa.gov/appeals/default.htm.

[28] Final Rule, 63 Fed. Reg. 52,642, 52,646 (1998). NMFS has, on rare occasions, allowed the same vessel's fishing history to result in two licenses or quotas when, because of agency action, an innocent third party purchaser for value purchased the second license or quota share. *In re Application of Darius Baltz,* Appeal No. 95-0028 at 1 (Jan. 30, 1996)(quota share): *R.J. Fierce Packer,* Appeal No. 00-0004 at 15, 20 - 21 (Dec. 18, 2000)(LLP license). NMFS did not, by mistake, make LLG 3773 transferable with a Pacific cod endorsement and Prowler is not a third party purchaser of LLG 3773.

> this section, the LLP groundfish license qualifying history or the Pacific cod qualifying history of any one vessel may not be used to satisfy the requirements for issuance of more than one LLP groundfish license endorsed for the BSAI Pacific cod hook-and-line or pot gear fisheries.

This regulation squarely prohibits NMFS from doing what Prowler wants to do. It states that "the Pacific cod qualifying history of any one vessel may not be used to satisfy the requirements for issuance of more than one LLP groundfish license endorsed for the BSAI Pacific cod hook-and-line or pot gear fisheries."

D. Prowler shows no authority that allows NMFS to divide the fishing history of one vessel and award two LLP licenses with Pacific cod endorsements based on the fishing history of one vessel.

In the face of the specific prohibition in 50 C.F.R. § 679.4(k)(9)(F)(3), I examine Prowler's ten arguments for NMFS's authority to issue two Pacific cod endorsements based on one vessel's fishing history. I conclude that Prowler shows no regulation or legal principle that authorizes NMFS to issue two Pacific cod endorsements based on one vessel's fishing history.

1. The eligibility requirement for the Pacific cod endorsement in 50 C.F.R. § 679.4(k)(9)(ii).

Prowler argues that it meets the eligibility requirement for a Pacific cod endorsement in 50 C.F.R. § 679.4(k)(9)(ii)(C): it harvested with hook-and-line gear "at least 270 mt [metric tons] of Pacific cod in the BSAI in any one of the years 1996, 1997, 1998 or 1999." The F/V PROWLER harvested 5 million pounds, or approximately 2,200 metric tons of Pacific cod, in 1997, 1998 and 1999.[29] From September 1997 through December 1999, Prowler had two moratorium permits and argues it should be able to attribute half of the F/V PROWLER's harvest in that time period to LLG 3676 and half to LLG 3773.

The heart of Prowler's argument is a distinction it tries to draw between awarding two Pacific cod endorsements based on the "same fish" caught by one vessel and "dividing" the fish caught by one vessel. Prowler acknowledges that NMFS cannot do the first but states it must do the second:

> [I]t is clear that allowing the same exact landings to create the qualifying history for two separate endorsements on two separate licenses would plainly contradict the Council's intent and the Fishery Management Plan currently in place. **In a fishery where limitation is a critical component, it follows logically that the same fish should not be used to create similar rights on two separate licenses.**

[29] Affidavit of John Winter ¶ 12 (Jan. 30, 2004) (Exhibit E to Prowler's Appeal); NMFS printout of F/V PROWLER catch data from1997 to 2000 (without totals) (Exhibit D to Prowler's Appeal). I assume that Prowler's assertion of total catch is correct.

> And, perhaps, that is what NMFS intended to accomplish by enactment of 50 C.F.R. § 679.4(k)(9)(iii)(F)(3). Unfortunately, 50 C.F.R. § 679.4(k)(9)(iii)(F)(3), goes much further.
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> In this instance, Prowler never intended to use the same fish in order to create two separate qualifying histories. Instead, Prowler simply intended to apportion roughly 50% of its annual harvest to each of the two licenses, permits and fishing histories that it was fishing on the F/V PROWLER from 1997-2000. *Affidavit of John Winther* ¶ 12. As noted, during that period, Prowler annually harvested an average of 5 million pounds of Pacific cod. *Id.* Accordingly, Prowler seeks to have each LLP license credited with approximately half the Pacific cod landed during the period. *Id.* **Prowler is not seeking to count the same fish twice, but instead, simply desires to have those landings apportioned to each of the two licenses it was fishing**. *Id.* Nevertheless, 50 C.F.R. § 679.4(k)(9)(iii)(F)(3) purports to prevent this due to the fact that the regulation associates qualifying histories with "vessels" as opposed to "licenses" as the regulatory scheme now mandates.[30]

The same fish/different fish distinction is completely untenable. First, this distinction is simply another way of asking NMFS to divide the fishing history of a vessel. That is antithetical to a fundamental principle of the LLP: "[O]nly one license will be issued based on the fishing history of any qualified vessel. For instance, a vessel's fishing history cannot be divided so that multiple licenses would be issued."[31]

Second, the requirement of 270 metric tons in a qualifying year is a *minimum* requirement. To receive a Pacific cod endorsement for hook-and-line gear, the Pacific cod regulation states that "the license holder must demonstrate that he or she harvested *at least* 270 metric tons of Pacific cod in the BSAI in any one of the years 1997, 1997, 1998 or 1999."[32] It is not that Prowler has "extra" fish, over and above the 270 metric tons of Pacific cod, that it can allocate to other LLP licenses.

Prowler's misconception is evident in its analogy to the IFQ program.[33] Under the IFQ regulation, the more halibut or sablefish a vessel owner caught in the past, the more quota share the vessel owner received and the more halibut or sablefish the vessel owner could catch in the

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[30] Prowler Appeal at 23 - 24 (emphasis added).

[31] Final Rule, 63 Fed. Reg. 52,642, 52,646 (Oct. l, 1998)

[32] 50 C.F.R. § 679.4(k)(9)(ii)(C)(emphasis added).

[33] Prowler's Appeal at 25 - 26. The IFQ, or Individual Fishing Quota Program, limits access to to the Pacific halibut and sablefish fisheries. 50 C.F.R. § 679.40.

future.[34] The LLP is not like that. It is not a quota share program. The LLP is a yes/no affair.[35] The LLP lets the license holder into the Pacific cod fishery if the license holder caught a minimum number of Pacific cod in the past and lets the license holder catch as many Pacific cod as he is capable of catching.[36] Therefore, the concept that Prowler has "extra" pounds from one vessel that it can allocate between two licenses does not make sense in the context of the LLP.

Third, if the Council wanted NMFS to divide Pacific cod caught by one vessel between two licenses, it would explicitly state that in a rule and tell NMFS how to do it. If different owners owned the vessel during the qualifying period, could both owners divide the fishing history? If not, would it be the owner as of a certain date? If so, what date?[37] What if a vessel harvested over 270 metric tons in 1996, 1997, 1998 and 1999? Could the vessel owner divide the history in each year? Prowler obtained its second moratorium permit in September 1997. What if 1997 were the only year a vessel owner harvested over 270 metric tons? To receive two Pacific cod endorsements, would the owner have to harvest 540 metric tons in the remaining four months of 1997? These questions are not impossible to answer but they would have been asked, and answered, if NMFS was supposed to divide the Pacific cod fishing history of one vessel between two or more LLP licenses.

Fourth, by adopting 50 C.F.R. § 679.4(k)(9)(iii)(F)(3), the Council and NMFS made crystal clear that the same rule that governed original LLP licenses governs Pacific cod endorsements: one vessel's fishing history = one Pacific cod endorsement. To repeat 50 C.F.R. § 679.4(k)(9)(iii)(F)(3):

> Notwithstanding the provisions of paragraph 50 C.F.R. § 679.4(k)(9)(iii)(F)(2) of this section, the LLP groundfish license qualifying history or the Pacific cod qualifying history of any one vessel may not be used to satisfy the requirements for issuance of more than one LLP groundfish license endorsed for the BSAI Pacific cod hook-and-line or pot gear fisheries.

Oddly, in spite of the specific reference to 50 C.F.R. § 679.4(k)(9)(iii)(F)(2), it is that regulation

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[34] 50 C.F.R. § 679.40(a)(4)

[35] As a paper cited by Prowler states, "Licence [sic] and vessel moratoria and limitations are designed to cap or reduce the number of participants and, or, vessels in a fishery by establishing criteria for their continued inclusion, such as historical participation at some threshold level." G.H. Darcy and G.C. Matlock, *Development and Implementation of Access Limitation Programmes in Marine Fisheries of the United States* at 3.3, Proceedings of the FishRights 99 Conference, November 11 - 19, 1999, Freemantle, Western Australia, available at http://www.fao.org/DOCREP/003/X8985E/X8985e05.HTM, *visited* Feb. 21, 2006. Prowler cites this paper at pages 25 - 26 of its Appeal.

[36] 50 C.F.R. § 679.4(k)(9)(ii).

[37] For example, for original LLP licenses, NMFS decided eligibility by ownership of a vessel as of June 17, 1995. 50 C.F.R. § 679.2 (definition of eligible applicant).

on which Prowler principally relies to show that the Council intended to grant NMFS the authority divide the fishing history of the F/V PROWLER between LLG 3676 and LLG 3773.

2. Council intent and federal regulation 50 C.F.R. § 679.4(k)(9)(F)(2)

To analyze Prowler's argument, it is helpful to see 50 C.F.R. § 679.4(k)(9)(iii)(F) in its entirety:

> (F) Harvests within the BSAI would count toward eligibility amounts in the table at paragraph (k)(9)(ii) of this section if:
>
> (1) Those harvests were made from the vessel that was used as the basis of eligibility for the license holder's LLP groundfish license, or
>
> (2) Those harvests were made from a vessel that was not the vessel used as the basis of eligibility for the license holder's LLP groundfish license, provided that, at the time the endorsement-qualifying Pacific cod harvests were made, the person who owned such Pacific cod endorsement-qualifying fishing history also owned the fishing history of a vessel that satisfied the requirements for the LLP groundfish license.
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> (3) Notwithstanding the provisions of paragraph 50 C.F.R. § 679.4(k)(9)(iii)(F)(2) of this section, the LLP groundfish license qualifying history or the Pacific cod qualifying history of any one vessel may not be used to satisfy the requirements for issuance of more than one LLP groundfish license endorsed for the BSAI Pacific cod hook-and-line or pot gear fisheries.

How does Prowler argue that it can meet the eligibility requirement for a Pacific cod endorsement on LLG 3773 by Pacific cod harvests from the F/V PROWLER? Prowler does not meet (F)(1). The F/V PROWLER was not "the vessel that was used as the basis of eligibility for [LLG 3773]." That vessel was the F/V RESPONSE.

Prowler argues it meets (F)(2), namely [1] the F/V PROWLER "was not the vessel used as the basis of eligibility for [LLG 3773]," [2] from 1997 to 1999, "at the time the endorsement-qualifying Pacific cod harvests were made," Prowler owned the F/V PROWLER and its fishing history, and [3] from 1997 to 1999, Prowler owned the fishing history of the F/V RESPONSE, the "vessel that satisfied the requirements for [LLG 3773]."

Prowler's argument fails because Prowler has to ignore the clear language of 50 C.F.R. § 679.4(k)(9)(iii)(F)(3). At the very same time that the Council approved 50 C.F.R. § 679.4(k)(9)(iii)(F)(2), it approved 50 C.F.R. § 679.4(k)(9)(iii)(F)(3).[38] Paragraph (F)(3) states unequivocally that paragraph (F)(2) cannot be read the way Prowler wants.

[38] Final Rule, 68 Fed. Reg. 44,666 (2003), *adopting* 50 C.F.R. § 679.4(k)(9)(iii)(F).

Paragraph (F)(3) states "[n]otwithstanding the provisions of paragraph 50 C.F.R. § 679.4(k)(9)(iii)(F)(2)." This means that paragraph (F)(3) prohibits something that might otherwise be allowed under (F)(2). And what does (F)(3) prohibit? Using the "Pacific cod qualifying history of any one vessel . . . [to satisfy] the requirements for issuance of more than one LLP groundfish license endorsed for the BSAI Pacific cod hook-and-line or pot gear fisheries." The language of 50 C.F.R. § 679.4(k)(9)(iii)(F)(3) could not be clearer or more specific in rejecting what Prowler wants to do.

Prowler's argument also fails because it is completely inconsistent with the Council's intent in adopting 50 C.F.R. § 679.4(k)(9)(iii)(F)(2) and the purpose and history of that provision. As originally adopted, 50 C.F.R. § 679.4(k)(9)(iii)(F) had no subsections. It had only what is now (F)(1):

> (F) Harvests within the BSAI will count toward eligibility amounts in the table at paragraph (k)(9)(ii) of this section **only if those harvests were made from the vessel that was used as the basis of eligibility for the license holder's LLP groundfish license.**[39] [emphasis added]

This provision caused a problem that vessel owners brought to the Council's attention in October 2002.[40] Although not apparent at first, this provision could mean that license holders who harvested Pacific cod while they held a moratorium permit *obtained by transfer* could not get a Pacific cod endorsement. The problem resulted because the qualifying periods for an original LLP license were 1988 to 1995,[41] and the qualifying periods for a Pacific cod endorsement were 1995 to 1999.[42] Assume one vessel made the harvests for an original LLP license in 1988 to 1995. Assume that vessel's owner then transferred the vessel's moratorium permit to another vessel owner. Assume the new vessel owner, and the new vessel, harvested the amount of Pacific cod necessary for a Pacific cod endorsement in 1995 to1999. The new vessel owner could not use the Pacific cod it caught in 1995 to 1999 to get a Pacific cod endorsement because the new vessel owner did not harvest the Pacific cod "from the vessel that was used as the basis of eligibility for the license holder's LLP groundfish license."

The owners of the F/V BRISTOL LEADER and the F/V GALAXY brought this problem to the

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[39] Final Rule, 67 Fed. Reg. 18,129, 18,138 (2002) *adopting* 50 C.F.R. § 679.4(k)(9)(iii)(F).

[40] Exhibit I to Prowler's Appeal is a transcript of the Council's consideration of this issue at its meeting on October 8, 2002. It is extremely helpful in understanding the Council's actions on 50 C.F.R. § 679.4(k)(9)(iii)(F). I will refer to it simply as Exhibit I.

[41] 50 C.F.R. § 679.4(k)(4)(i) & (ii).

[42] 50 C.F.R. § 679.4(k)(9)(ii).

Council's attention.[43] The Council's staffperson, Fisheries Analyst Nicole Kimball, stated:

> So the issue at hand is then to clarify the council's intent and decide whether to amend that rule – that's what will be brought to you in public testimony – to include those vessels that met the qualifying criteria for a cod endorsement but had received an LLP license or fishing history prior to that from another vessel.
>
> So these were vessels that bought fishing history from someone else that eventually gave rise to their LLP license, and then went on to fish for P. cod and qualified for a P. cod endorsement.[44]

The attorney for the vessel owners explained:

> Bristol Leader and Galaxy purchased LLP-qualified fishing rights for groundfish catcher/processors in '97 or so. Bristol Leader built a new vessel. Galaxy acquired and converted a processing vessel that had not earned an LLP. In accordance with the moratorium and LLP rules, they transferred the fishing rights to their respective vessels, and operating under those fishing rights, they met the Amendment 67 landing requirements for freezer longlingers in both 1998 and 1999 – both vessels did.
>
> This summer, Bristol Leader and Galaxy received notice that their LLP licenses were not eligible for a catcher/processor fixed-gear Pacific cod endorsement. The basis for the denial, we have been told by NMFS, is a provision in the Amendment 67 final rule that harvest [sic] count toward Amendment 67 landings requirements only if they were made by the same vessel that met the original LLP landing requirements.[45]

The owners of the F/V BRISTOL LEADER and the F/V GALAXY were *not* in Prowler's situation. These vessels were being excluded from the Pacific cod fishery because these vessels were not the vessels that made the harvests that met the original LLP requirements. These vessel owners did *not* have one LLP license with a Pacific cod endorsement and wanted a second one. These vessel owners did *not* want two Pacific cod endorsements from the fishing history of one vessel. These vessel owners wanted *one* LLP license with a Pacific cod endorsement based on the Pacific cod fishing history of *one* vessel.

That is the problem the Council wanted to fix, and did fix, by unanimously approving a motion

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[43] Council Transcript, Exhibit I at 3.

[44] Council Transcript, Exhibit I at 6.

[45] Testimony of Joseph Sullivan, Council Transcript, Exhibit I at 18 - 19. Prowler did not testify at the Council meeting through its owner, John Winther, or any other representative.

by Council Member John Bundy: "Further, I move that the council specifically request that NMFS count toward Amendment 67 landings requirements BSAI Pacific cod harvests made by a vessel that was operating under LLP-qualified fishing rights when it made such harvests, whether the vessel generated those fishing rights itself or was operating under them by transfer."[46]

The Council explained its actions in its October 2002 newsletter:

> The Council clarified that the rule should be implemented such that BSAI Pacific cod harvests made by a vessel that was operating under fishing rights which gave rise to an appropriate LLP license should count toward the Pacific cod endorsement landings requirements, ***whether or not the vessel earned those fishing rights itself or received them through transfer***.[47] [emphasis added]

I conclude that the Council intended to put on an equal footing two categories of Pacific cod harvests: [1] Pacific cod harvests made while a license holder had a moratorium permit obtained by transfer and [2] Pacific cod harvests made while a license holder had a moratorium permit obtained as an original recipient of the permit.

The Council and NMFS achieved the Council's goal of parity by adding 50 C.F.R. § 679.4(k)(9)(iii)(F)(2), which tells NMFS that it can count Pacific cod harvests toward a Pacific cod endorsement, even if the license holder did not harvest the Pacific cod from the same vessel that generated the original LLP license. This achieves parity because if the license holder did not harvest Pacific cod from the vessel that generated the original LLP license, it harvested Pacific cod from a vessel that was operating under fishing rights obtained by transfer.

But since the Council did not intend to abrogate the longstanding rule that one vessel's activities cannot give rise to more than one LLP license, the Council and NMFS approved 50 C.F.R. § 679.4(k)(9)(iii)(F)(3), and explained: "This final rule simply clarifies, consistent with Council intent, that the fishing activities of one vessel may not give rise to Pacific cod endorsements on more than one LLP license."[48]

The reason is the obvious one. The Council did not intend to increase the number of vessels allowed to participate in the Pacific cod fishery above the number of vessels that participated from1996 to 1999 and met the requirements for a Pacific cod endorsement. NMFS explained in the proposed and final rule adopting 50 C.F.R. § 679.4(k)(9)(iii)(F)(3):

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[46] Exhibit I at 24 - 25. The motion passed without objection. Exhibit I at 32.

[47] North Pacific Fishery Management Council News and Notes at 8 (Oct. 2002) *available at* NPFMC website, http://www.fakr.noaa.gov/npfmc/newsletters/1002news.pdf. *visited* April 18, 2006.

[48] Final Rule, 68 Fed. Reg. 44,666, 44,667 (July 30, 2003).

> **To prevent an increase in the number of LLP groundfish licenses**, the regulations also are amended to restrict the LLP qualifying history and the Pacific cod qualifying history of any one vessel to no more than one LLP groundfish license endorsed for Pacific cod hook-and-line and/or pot gear fisheries. **This amendment limits the number of vessels allowed to participate in the Pacific cod hook-and-line and/or pot gear fisheries as intended by the Council in developing the LLP.**[49]

I conclude that both new provisions – 50 C.F.R. § 679.4(k)(9)(iii)(F)(2) and (F)(3) – faithfully implement the intent of the Council. Read together, they strongly reaffirm the basic principle that NMFS cannot divide one vessel's fishing history to issue two licenses or permits.

3. Transferability of moratorium permits.

Prowler argues that 50 C.F.R. § 679.4(k)(9)(iii)(F)(3) undermines the transferability of moratorium permits.[50] I agree with Prowler that the transferability of moratorium qualifying fishing histories was an important part of the VMP. But NMFS's action has nothing to do with the fact that Prowler obtained a moratorium permit by transfer.

NMFS did not deny Prowler a Pacific cod endorsement on LLG 3773 because Prowler obtained a moratorium permit by transfer from Jean and Richard LeMay. NMFS denied Prowler a Pacific cod endorsement on LLG 3773 because it is the *second* LLP license with a Pacific cod endorsement that Prowler wants to receive based on the fishing history of the F/V PROWLER. The result would be the same if Prowler obtained two moratorium permits as an original recipient. If Prowler were the original recipient of two moratorium permits, but had fished Pacific cod only from one vessel, it could not get Pacific cod endorsements on two LLP licenses. NMFS's action is completely consistent with the transferability of moratorium permits.

4. Treat 50 C.F.R. § 679.4(k)(9)(iii)(F)(3) as if it said "license" rather than "vessel."

Prowler argues that 50 C.F.R. § 679.4(k)(9)(iii)(F)(3) should be read as if it said:

> Notwithstanding the provisions of paragraph 50 C.F.R. § 679.4(k)(9)(iii)(F)(2) of this section, the LLP groundfish license qualifying history or the Pacific cod endorsement-qualifying fishing history *of any one license* [rather than *of any one vessel*] may not be used to satisfy the requirements for issuance of more than one LLP groundfish license endorsed for the BSAI Pacific cod hook-and-line or pot

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[49] Final Rule, 68 Fed. Reg. 44,666, 44,44,666 (July 30, 2003)(emphasis added). The proposed rule has essentially the same statement. Proposed Rule, 68 Fed. Reg. 20,360, 20,361 (April 25, 2003).

[50] Prowler's Appeal at 25 - 27

gear fisheries.[51]

The word "license" and "vessel" are different. I have no authority to rewrite a regulation. And, based on the reasons I have already given, I see no convincing evidence that I can *interpret* 50 C.F.R. § 679.4(k)(9)(iii)(F)(3) in the way Prowler suggests. Granting Prowler two LLP licenses with Pacific cod endorsements from one vessel's Pacific cod fishing history violates the purpose of the LLP, the structure of the LLP, the clear language of 50 C.F.R. § 679.4(k)(9)(iii)(F)(3) and the Council's intent in adopting 50 C.F.R. § 679.4(k)(9)(iii)(F)(2).

Prowler's suggestion has an additional problem. The LLP license did not exist until January l, 2000. Therefore, from 1997 to 1999, there could not have been a Pacific cod endorsement-qualifying history "of an LLP license." There were no LLP licenses.

From 1997 to 1999, there were moratorium permits. The federal catch reports filed by catcher/processor vessels, such as the F/V PROWLER, are weekly production reports.[52] WPRs did not tie or document particular harvests to particular moratorium permits.[53] It is not clear how there could be a history "of"a moratorium permit or how Prowler could be said to have harvested some Pacific cod "on" one moratorium permit and other Pacific cod "on" another moratorium permit.

Prowler argues that, when it harvested the Pacific cod, it intended to apportion roughly 50% of the PROWLER's annual harvest between its two moratorium permits.[54] To count toward an LLP license, an applicant must prove documented harvests.[55] Prowler is asserting that the Council intended NMFS to divide documented harvests between moratorium permits, based not on official catch reports, but on a vessel owner's intent *then* as reported by the vessel owner *now*. If the Council wanted NMFS to do that, it is likely the Council would have adopted a regulation specifying that new concept and approach.

5. The hardship provision in the Pacific cod regulation, 50 C.F.R. § 679.4(k)(9)(v)(B).

Prowler argues that it meets the hardship provision, 50 C.F.R. § 679.4(k)(9)(v)(B), which states:

(B) *Hardship provision*. A license holder may be eligible for a Pacific cod

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[51] Prowler's Appeal at 27.

[52] 50 C.F.R. § 679.4(k)(4).

[53] Weekly Production Reports of the F/V PROWLER 1997 to 1999 (Exhibits 2, 3 and 4 to Prowler's Response to Order and Amendment to Order (March 6, 2006)

[54] Affidavit of John Winther ¶ 12 (Jan. 30, 2004) (Exhibit E to Prowler's Appeal).

[55] 50 C.F.R. § 679.4(k)(4); 50 C.F.R. § 679.2 (a documented harvest is "a lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting.")

endorsement because of unavoidable circumstances if he or she meets the requirements in paragraphs (k)(9)(v)(B)(1) - (4) of this section. For purposes of this hardship provision, the term license holder includes the person who [sic] landings were used to meet the eligibility requirements for the license holder's groundfish license, if not the same person.

(1) The license holder at the time of the unavoidable circumstance held a specific intent to conduct directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in the table at paragraph (k)(9)(ii) of this section but that this intent was thwarted by a circumstance that was:
(i) Unavoidable.
(ii) Unique to the license holder, or unique to the vessel that was used as the basis of eligibility for the license holder's groundfish license; and
(iii) Unforeseen and reasonably unforeseeable to the license holder.

(2) The circumstance that prevented the license holder from conducting directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in paragraph (k)(9)(ii) actually occurred;

(3) The license holder took all reasonable steps to overcome the circumstance that prevented the license holder from conducting directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in paragraph (k)(9)(ii) of this section; and

(4) **Any amount of Pacific cod was harvested in the BSAI aboard the vessel that was used as the basis of eligibility for the license holder's groundfish license after the vessel was prevented from participating by the unavoidable circumstance but before April 16, 2000.** [emphasis added]

I do not analyze whether Prowler meets sections (1), (2) and (3) because I conclude Prowler does not meet section (4) and therefore cannot receive a Pacific cod endorsement under the hardship provision. Prowler did not harvest any amount of Pacific cod "aboard the vessel that was used as the basis of eligibility for the license holder's groundfish license [LLG 3773] after the vessel was prevented from participating by the unavoidable circumstance but before April 16, 2000." The vessel that was the basis of eligibility for LLG 3773 was the F/V RESPONSE. The F/V RESPONSE did not harvest any Pacific cod after May 1993.

I do not decide whether a license holder could ever satisfy section (4) with a harvest from a vessel other than the original qualifying vessel because it is clear that a license holder can never satisfy section (4) with a harvest from a vessel whose fishing history has already generated a

Pacific cod endorsement.[56] Put another way, it is clear that Prowler could never use a harvest that the F/V PROWLER made before April 16, 2000 to receive a Pacific cod endorsement on LLG 3773 because Prowler has already used the F/V PROWLER's Pacific cod history to receive a Pacific cod endorsement on LLG 3676.

All the problems that I have discussed with dividing a vessel's fishing history to issue two or more LLP licenses apply here. An award of two LLP licenses with Pacific cod endorsements from one vessel's Pacific cod history would violate the purpose of the LLP, the structure of the LLP and the specific regulatory prohibition in 50 C.F.R. § 679.4(k)(9)(iii)(F)(3). It does not matter whether the applicant wants to divide a vessel's fishing history to meet the standard eligibility criteria for a Pacific cod endorsement or to meet the hardship provision. The result is still two vessels in the Pacific cod fishery whereas before there was one. I conclude that NMFS has no authority to divide a vessel's fishing history between two LLP licenses, whether to meet the standard eligibility requirements for a Pacific cod endorsement or the hardship provision.

6. The unavoidable circumstance provision in the original LLP rule, 50 C.F.R. § 679.4(k)(8)(iv).

Prowler refers to the Council discussion in 1995 when it approved the unavoidable circumstance provision in the original LLP rule.[57] I agree that the Council, in the original LLP rule, wished to provide a remedy to the owner of a vessel that suffered catastrophic damage and that the F/V RESPONSE suffered catastrophic damage: it had a fire and then was intentionally sunk.[58] This does not help Prowler. An essential part of the remedy in the original LLP rule was that, after the damage, the vessel owner get back into the fishery by a specific date and that date was June

[56] I also do not decide whether a license holder seeking a Pacific cod endorsement by combining the harvests of one vessel with another vessel must satisfy the "combination of landings provision," which does state: "No other combination of landings will satisfy the eligibility amounts in the table at paragraph (k)(9)(ii) of this section." 50 C.F.R. § 679.4(k)(9)(v)(A). Prowler does not meet this provision. First, the F/V RESPONSE did not sink after January l, 1995, as required by 50 C.F.R. § 679.4(k)(9)(v)(A)(2). The reason for this date is that January l, 1995 is the first date of the eligibility period for any Pacific cod endorsement. A vessel would have to have sunk after January l, 1995 for the sunken vessel to have any harvests that could combine with another vessel to add up to the eligibility amounts for an endorsement. Second, assuming *arguendo* that the LeMays' sale of the fishing history of the F/V RESPONSE to Prowler can count as obtaining a replacement vessel, the replacement vessel must be obtained "by December 31 of the year 2 years after the sunken vessel sank." 50 C.F.R. § 679.4(k)(9)(v)(A)(3). The F/V RESPONSE sank in May 1993. To meet this section, the LeMays had to sell the fishing history of the F/V RESPONSE by December 31, 1995. They sold it in August 1997.

[57] Prowler Appeal at 15; Exhibit K to Prowler's Appeal, Informal Transcript of Council Meeting, June 15 - 17, 1995. The discussion of this provision is at pages 69 - 71 and 150 - 151.

[58] Marine Casualty Investigation Report at 1 (Oct. 29, 1993)(Exhibit J to Prowler's Appeal).

17, 1995.[59] In adopting the Pacific cod rule, the Council retained the requirement that the license holder had to get back into the fishery by a specific date, in this case by April 16, 2000.

The LeMays did not get back into the Pacific cod fishery with the F/V RESPONSE by April 16, 2000. The LeMays did not get back in the fishery with a replacement vessel by April 16, 2000. Prowler did not get back into the Pacific cod fishery with the F/V RESPONSE by April 16, 2000. Prowler did not get back into the Pacific cod fishery with a replacement vessel by April 16, 2000. Prowler was already in the fishery with the F/V PROWLER. The F/V PROWLER was not a replacement vessel for the F/V RESPONSE. Further, Prowler received a Pacific cod endorsement from the F/V PROWLER's participation in the Pacific cod fishery. Prowler offers no evidence that the Council, in providing a remedy to vessel owners who suffered catastrophic damage, deviated from the basic structure of the LLP, namely that the fishing history of a vessel leads to one LLP license.

7. This Office's decision in *Bella K. of Seattle, LLC.*[60]

Prowler cites *Bella K of Seattle, LLC,* in support of its claim.[61] *Bella K* involved the recent participation period [RPP] requirement that the Council and NMFS adopted as a condition for a license holder retaining an LLP crab license. *Bella K* concluded that the RPP requirement was a status requirement and that, if a person made one harvest of crab in the RPP, the person attained the status of a recent participant and could retain all the LLP crab licenses the person had at the time of the RPP harvest.[62] The administrative judge relied on the language of the RPP regulation that "a person must have made at least one documented harvest of any amount of LLP crab species during the RPP."[63]

The key difference between *Bella K* and this appeal is that, in *Bella K*, the administrative judge did not have a specific provision that said "One RPP harvest cannot be used to prevent the revocation of more than one LLP crab license." The administrative judge in *Bella K* had to carefully parse the language and history of the RPP regulation to determine what the Council

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[59] 50 C.F.R. § 679.4(k)(8)(iv)(E); *Mark Donovick*, Appeal No. 02-0008 at 7 (Sept. 27, 2002) (interpreting this section as allowing a replacement vessel to make the June 17, 1995 harvest). In moving the unavoidable circumstance provision, Council Member Dave Benton included the requirement that the vessel "made a landing in a fishery any time between the time the vessel left the fishery and the date of final Council action on the license program," which was June 17, 1995. Exhibit K at 69.

[60] Appeal No. 02-0006 at 2 - 7 (March 25, 2004).

[61] Prowler's Notice of Supplemental Authority (June 2, 2005).

[62] Appeal No. 02-0006 at 5 (March 25, 2004).

[63] Appeal No. 02-0006 at 5 (March 25, 2004) *citing* 50 C.F.R. § 679.4(k)(5)(iii)(A).

meant.[64] Here, the Council, NMFS and the Secretary of Commerce specifically and unequivocally said what they meant. Further, *Bella K* involved a license holder keeping LLP endorsements it had already received. This appeal involves granting a new endorsement. And *Bella K* noted the short seasons for different species of LLP crab and the fact the same crab vessel would participate in different crab fisheries.[65] Here, there is only one fishery – the BSAI Pacific cod fishery – and two endorsements for this fishery will mean two vessels.

But the key difference, as I noted, is that a specific regulation, 50 C.F.R. § 679.4(k)(9)(iii)(F)(3), clearly answers the question whether NMFS can use the Pacific cod history of one vessel to issue more than one Pacific cod endorsement.

8. Administrative Procedure Act [APA].

Prowler argues that 50 C.F.R. § 679.4(k)(9)(iii)(F)(3) is arbitrary and capricious within the meaning of section 706 of the APA because the regulation is repugnant to the intent of the Council and the regulatory framework.[66] I have concluded that the regulation faithfully implements Council intent and is completely consistent with the regulatory framework. The regulation is therefore not arbitrary and capricious for those reasons.

Prowler argues that the regulation, 50 C.F.R. § 679.4(k)(9)(iii)(F)(3), is arbitrary and capricious, and therefore violates section 706 of the APA, because it is not consistent with national standards in the Magnuson-Stevens Act.[67] The APA recognizes that Congress adopts statutes on specific subjects with specific provisions for judicial review. The APA provides that those specific provisions take precedence over the general APA provisions.[68]

The Magnuson-Stevens Act provides for judicial review of regulations adopted under it if a petition for review is filed [1] in federal court [2] within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register.[69] In the cases cited by Prowler, applicants filed suit in federal court within thirty days after the Secretary

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[64] *Id.* at 5 - 7.

[65] *Id.* at 6 & n. 11.

[66] Prowler Appeal at 29. The specific APA section argued by Prowler is 5 U.S.C. § 706(2)(a).

[67] Prowler Appeal at 29 - 36. The national standards are at 16 U.S.C. § 1851(a).

[68] 5 U.S.C. § 702, 5 U.S.C. § 703 *quoted in Solstice, Inc.,* Appeal No. 04-0001 at 12 n. 36 (Jan. 20, 2006)

[69] 16 U.S.C. § 1855(f)(1). *See Norbird Fisheries, Inc., v. NMFS,* 112 F. 3d 414 (9th Cir. 1997) (court did not rule on challenge to regulation filed more than 30 days after regulation was promulgated).

promulgated the regulation[70] or within thirty days after the Secretary assessed a civil penalty in an enforcement action.[71] This proceeding is not before a federal court and was not filed within 30 days after this regulation was promulgated. This proceeding is not an enforcement action. I do not have authority to decide whether this regulation is consistent with Magnuson Act standards.[72]

9. Retroactive regulation.

Prowler argues that NMFS's reliance on 50 C.F.R. § 679.4(k)(9)(iii)(F)(3) constitutes an illegal retroactive application of a rule.[73]

The regulation at issue here, 50 C.F.R. § 679.4(k)(9)(iii)(F)(3), is different in kind and character from the types of government action that courts have found impermissibly retroactive. Prowler relies on *Bowen v. Georgetown University Hospital.*[74] The U.S. Supreme Court interpreted the federal Medicaid statute as not allowing the government to adopt a new rule that took back money that the hospitals had received based on a prior rule. Prowler relies on a concurring opinion by Justice Scalia that, under the APA, a rule can only have a future effect and that a rule was impermissibly retroactive if it altered "the *past* legal consequences of past actions."[75]

The record gives me no reason to doubt that Prowler's fishing on its moratorium permits was completely legal when it occurred. Prowler's situation would be like *Bowen* only if NMFS was altering the legal consequences of Prowler's past fishing based on a regulation the Secretary adopted after the fishing took place: if NMFS was making Prowler pay back money it earned from that fishing, if NMFS was fining Prowler for that fishing, if NMFS was subjecting Prowler to liability in a civil suit for that fishing, or if NMFS was subjecting Prowler to criminal liability for that fishing.

Prowler argues that the Secretary is changing the legal consequences of Prowler's past fishing.

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[70] *Massachusetts ex rel. Div. of Marine Fisheries v. Daley*, 170 F. 3d 23, 27 (1st Cir. 1999); *Alaska Factory Trawler Association v. Baldridge*, 831 F. 2d. 1456, 1463 (9th Cir. 1987). *See Alliance Against IFQs v. Brown*, 84 F. 3d 343, 345 (9th Cir. 1996) (court does not state filing date but cites 16 U.S.C. § 1855(f)(1) as basis for judicial review); *Yakutat, Inc., v. Evans*, No. C02-1052R, 2003 WL 1906336 at 3 (W.D. Wash. Apr. 10, 2003)(same). *Hall v. Evans*, 165 F. Supp. 2d 114, 127 (D. Rhode Island 2001) (same).

[71] *The Fishing Company of Alaska v. US*, 195 F. Supp. 1239, 1246 - 1247 (W.D. Wash. 2002).

[72] *Solstice, Inc.*, Appeal No. 04-0001 at 11 - 12 (Jan. 20, 2006).

[73] Prowler's Appeal at 36 - 40.

[74] 488 U.S. 204 (1988).

[75] *Id.* at 219 (emphasis in original).

This argument proves too much. Prowler wants NMFS to change the legal consequences of fishing it did on its moratorium permits. It wants to receive, and has received, a Pacific cod endorsement on LLG 3676 based on the F/V PROWLER's past Pacific cod harvests. It just wants the same endorsement on LLG 3773.

Through *all* the LLP rules, the Council is saying that some past fishing entitles a person to receive an LLP license, or an endorsement on that license, and some fishing does not – because the fishing is too distant in time, because it is not enough, because it is not the right species, because it is not in the right place, because it is not by the right boat, e.g., a boat the person owned. But that is not the "retroactivity" that the courts have warned against. If so, every government regulation that grants a license or permit based in whole or in part on past activity by an applicant would be retroactive. This Office stated in *Hansen Enterprises, Inc.*:

> A statute or regulation is not made retroactive merely because it draws upon antecedent facts for its operation. Even a cursory examination of valid government actions bears out this statement because almost every government regulation or statute draws upon prior facts for its operation.[76]

Through this regulation – 50 C.F.R. § 679.4(k)(9)(iii)(F)(3) – the Council is doing what both the majority in *Bowen*, and the concurrence in *Bowen*, said the government could do: adopt a rule which operates in the future. To conduct directed fishing for BSAI Pacific cod in the future on an LLP license, the license holder cannot rely on fishing from a vessel whose fishing history has already given rise to a Pacific cod endorsement on another LLP license.

10. Prowler's investment-backed expectations.

In 1997, Prowler spent $131,000 to purchase the fishing history and moratorium permit generated by the F/V RESPONSE.[77] After Prowler did that, it had two moratorium permits, it named the F/V PROWLER on both moratorium permits but only harvested Pacific cod from the F/V PROWLER. I read Prowler's argument as asserting that, when it bought the fishing history of the F/V RESPONSE in 1997 and when it harvested Pacific cod from 1997 to 1999, it expected to receive two LLP licenses with Pacific cod endorsements based on the Pacific cod caught from one vessel.[78] This argument fails for three separate reasons.

First, Prowler's assumption or expectation is unreasonable as a matter of law. As a matter of law, it is unreasonable for an investor who purchased the fishing history of a vessel which sank in*1993* to expect to receive an endorsement which requires fishing in the years *1996 to 1999.*

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[76] Appeal No. 02-0025 at 19 (Dec. 24, 2004)(internal quotations marks and footnote omitted).

[77] Affidavit of John Winther ¶ 8 (Jan. 30, 2004) (Exhibit E to Prowler's Appeal).

[78] Prowler's Appeal at 36 - 40.

It is also unreasonable for an investor who caught Pacific cod from one vessel in 1997 to 1999 to expect two Pacific cod endorsements based on that one vessel's fishing. From 1996 to 1999, the VMP was in effect. Under the VMP, NMFS issued only one original moratorium permit based on the fishing history of one vessel. It would have been unreasonable for an investor to assume that the Council, NMFS or the Secretary would depart from this fundamental principle. And they did not. The LLP rule and the Pacific cod continued, and reaffirmed, the "one vessel = one license" principle. The VMP rule, the LLP rule and the Pacific cod rule *never* authorized NMFS to issue two original permits or licenses based on one vessel's fishing history.[79]

Second, Prowler cites no LLP regulation that authorizes NMFS to award a license, or an endorsement on a license, based on the number of moratorium permits a license holder had, a license holder's investment or investment-backed expectations. When the Council wants to award something based on a license holder's investment, it will do that specifically and will tell NMFS how much an applicant had to invest, when it had to invest and for what.[80] The Council specifically rejected a hardship provision in the Pacific cod rule based on investment:

> Although the Council and NMFS are sensitive to investment-backed expectations, the Council is not under an obligation to provide for eligibility based on economic decisions. The Council reviewed the various proposals and decided to recommend exemptions that required a connection to the eligibility criteria.[81]

A vessel owner's participation in a fishery will usually reflect the vessel owner's investment in the fishery. But the Secretary adopted participation in the Pacific cod fishery, not the number of permits or investment, as the basic criterion for a Pacific cod endorsement. I cannot order RAM to award an LLP license based on criteria – number of permits, investment, expectations from an investment – that were not approved by the Secretary under the Magnuson-Stevens Act.

Third, NMFS has fully recognized Prowler's legitimate investment-backed expectations by applying the eligibility criteria approved by the Secretary. NMFS awarded Prowler a moratorium permit based on its purchase of the fishing history of the F/V RESPONSE. Prowler had the right to sell that moratorium permit or put another vessel in the groundfish fishery, options it did not exercise. If Prowler had put another vessel in the Pacific cod fishery and that vessel harvested the eligibility amounts, Prowler would have received a Pacific cod endorsement based on that vessel's activity.

NMFS awarded Prowler LLP license LLG 3773 based on its purchase of the fishing history of

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[79] *See* pages 4 - 14 *supra.*

[80] *E.g.*, C.F.R. 679.4(k)(3)(iv)(E) & (F) (applicant may change trawl gear designation on LLP license if applicant spent at least $100,000 on gear and other specified items by February 7, 1998).

[81] Final Rule, 67 Fed. Reg. 18,129, 18,137 (2002).

the F/V RESPONSE. If this decision becomes final agency action, Prowler will still own LLG 3773. LLG 3773 will not have a BSAI Pacific cod endorsement but it will still have Bering Sea and Aleutian Islands area endorsements. Subject to other legal requirements, Prowler, or its successor, can use LLG 3773 to harvest and process other groundfish, besides Pacific cod, in BSAI.

Most importantly, NMFS awarded Prowler a fully transferable Pacific cod endorsement on LLP license LLG 3676. NMFS awarded Prowler one Pacific cod endorsement because it participated with one vessel in the Pacific cod fishery from 1996 to 1999. This respects Prowler's legitimate investment-backed expectations.

It was the Council's desire to protect legitimate investment-backed expectations that led the Council to adopt 50 C.F.R. § 679.4(k)(9)(iii)(F)(2). Through that provision, the Council protected the investment of a vessel owner who purchased a moratorium fishing history and met the requirements for a Pacific cod endorsement. But the Council did not recognize as legitimate the desire of a vessel owner to receive two LLP licenses for the Pacific cod fishery when it only participated in that fishery with one vessel. The Council chose to preserve the overall policies of the LLP by adopting 50 C.F.R. § 679.4(k)(iii)(F)(3), which made sure that two vessels would not replace one vessel in the Pacific cod fishery.

CONCLUSION

Under the Magnuson-Stevens Act, the North Pacific Fishery Management Council recommends criteria to the Secretary of Commerce for limited access programs. The Council could have chosen the method urged by Prowler, namely that one vessel could generate more two Pacific endorsements, but it did not. The Council remained with the structure of the Moratorium Program and the LLP, namely that one vessel's fishing history cannot generate more than one LLP license with a Pacific cod endorsement. This structure furthers the overall goal of the LLP and the Pacific cod endorsement, which is to limit the number of vessels in the LLP fisheries.

FINDINGS OF FACT

1. The F/V RESPONSE did not harvest Pacific cod after May 1993.

2. Richard and Jean LeMay did not harvest any Pacific cod in the BSAI with any vessel after the fire/sinking of the F/V RESPONSE in May 1993 and before April 16, 2000.

3. Prowler, LLC did not harvest any Pacific cod in the BSAI with any vessel other than the F/V PROWLER after the fire/sinking of the F/V RESPONSE in May 1993 and before April 16, 2000.

CONCLUSIONS OF LAW

1. Prowler does not qualify for a Pacific cod hook-and-line endorsement on LLG 3773.

2. NMFS does not have the authority to divide the Pacific cod fishing history of one vessel to issue two LLP licenses with Pacific cod endorsements to meet the standard eligibility requirements in 50 C.F.R. § 679.4(k)(9)(ii) or the hardship provision in 50 C.F.R. § 679.4(k)(9)(v)(B)(4).

3. Federal regulation 50 C.F.R. § 679.4(k)(9)(iii)(F)(2) and (F)(3) faithfully implement the intent of the North Pacific Fishery Management Council.

4. The requirement in 50 C.F.R. § 679.4(k)(9)(ii)(C) of "at least 270 mt [metric tons] of Pacific cod [harvested] in the BSAI in any one of the years 1996, 1997, 1998 or 1999" is a minimum requirement.

5. Prowler does not satisfy section (4) of the hardship provision, 50 C.F.R. § 679.4(k)(9)(v)(B).

6. The F/V PROWLER was not a replacement vessel for the F/V RESPONSE.

7. I do not have authority to decide whether federal regulation 50 C.F.R. § 679.4(k)(9)(iii)(F)(3) is inconsistent with the standards in the Magnuson-Stevens Act.

8. NMFS's reliance on 50 C.F.R. § 679.4(k)(9)(iii)(F)(3) does not subject Prowler to an impermissible application of a retroactive rule.

9. NMFS's reliance on 50 C.F.R. § 679.4(k)(9)(iii)(F)(3) does not undermine Prowler's legitimate investment-backed expectation.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect May 19, 2006, unless by that date the Regional Administrator orders review of the Decision.

Prowler or RAM may submit a motion for reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, April 30, 2006. A motion for reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Administrative Judge, and must be accompanied by a written statement in support of the motion.

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Mary Alice McKeen
Administrative Judge