

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 04-0001
)	
SOLSTICE, INC.,)	DECISION
Appellant)	
_____)	January 20, 2006

STATEMENT OF THE CASE

Solstice, Inc., [Solstice] appeals an Initial Administrative Determination [IAD] that the Restricted Access Management Program [RAM] issued on January 16, 2004 under the North Pacific Groundfish and Crab License Limitation Program [LLP].¹ The IAD denied Solstice's application for an LLP groundfish license with endorsements for the Bering Sea, Western Gulf and Central Gulf. Solstice named the F/V SOLSTICE (ADF&G 64277, USCG No. 983381) as the qualifying vessel. The F/V SOLSTICE has a length overall of 58 feet, which makes it a category "C" vessel.²

The IAD denied Solstice this license because the F/V SOLSTICE did not make a documented harvest of groundfish in either the Bering Sea/Aleutian Islands [BSAI] or the Gulf of Alaska in the basic general qualification period [GQP] for an LLP groundfish license, which is January 1, 1988 through June 27, 1992.³

Solstice can appeal the IAD because it directly and adversely affects its interests.⁴ The record has sufficient information for me to decide this appeal, as required by 50 C.F.R. § 679.43(g)(2). This appeal has no material facts in dispute. I therefore do not hold a hearing. I close the record and decide Solstice's appeal.

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)(requirements for licenses) and 50 C.F.R. § 679.43 (appeals). These regulations are on the NMFS Alaska Region website: <<http://fakr.noaa.gov/regs/default.htm>> (visited Jan. 19, 2006).

² A vessel is in vessel length category "C" if the length overall [LOA] of the qualifying vessel is less than 60 feet. 50 C.F.R. § 679.4(k)(3)(iii).

³ 50 C.F.R. § 679.4(k)(4)(i)(A)(1); 50 C.F.R. § 679.4(k)(4)(i)(B)(1). All harvests must be documented harvests. *See* 50 CFR § 679.2 (definition of documented harvest). When I refer to harvests, I mean documented harvests. The regulation extends the GQP for [1] vessels less than 60 feet in length that harvested groundfish with pot or jig gear and [2] vessels that harvested crab between January 1, 1988 and February 9, 1992. 50 C.F.R. § 679.4(k)(4)(i)(A)(2)&(3); 50 C.F.R. § 679.4(k)(4)(i)(B)(2)&(3). I gave Solstice the opportunity to argue that the F/V SOLSTICE made harvests with pot or jig gear, but it submitted no evidence or argument. The record has no evidence of crab harvests from this vessel.

⁴ 50 C.F.R. § 679.43(b).

ISSUES

1. Does Solstice qualify for an LLP groundfish license based on the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv)?
2. Does NMFS have the authority to issue an LLP groundfish license to Solstice based on the combined fishing history of the F/V JACKIE BELL and the F/V SOLSTICE, if Solstice returns to NMFS the LLP license that it received based on the fishing history of the F/V JACKIE BELL?
3. Does Solstice qualify for an LLP groundfish license based on its claim that, as a matter of sound policy, fairness and justice, its LLP application should be granted?
4. Does Solstice qualify for an LLP groundfish license based on its claim that the LLP is arbitrary and capricious and violates the Administrative Procedure Act?

SUMMARY

The IAD is AFFIRMED. Solstice does not qualify for an LLP license based on the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv), because it did not make a documented harvest of groundfish between January 1, 1988 and February 9, 1992, as required by the first sentence of the regulation. NMFS lacks authority to issue an LLP license to Solstice by combining the general qualification period [GQP] fishing history of the F/V JACKIE BELL with the endorsement qualification period [EQP] fishing history of the F/V SOLSTICE. To receive an LLP license, the same vessel must have made the GQP and EQP documented harvests. NMFS does not have authority to do this, even though Solstice offered to return to NMFS the LLP license based on the fishing history of the F/V JACKIE BELL.

Solstice does not qualify for an LLP license based on its claim that, as a matter of sound policy, fairness and justice, its application should be granted. The LLP regulations grant licenses based on an objective standard of a vessel's documented harvests, subject to the limited exception of the unavoidable circumstance regulation. The LLP regulations do not give NMFS the authority to grant an LLP license based on an administrative judge's subjective determinations of sound policy, fairness and justice.

Solstice does not qualify for an LLP license based on its claim that the LLP violates the Administrative Procedure Act [APA] because NMFS did not consider vessel safety. Solstice did replace the F/V JACKIE BELL with the F/V SOLSTICE, a vessel it considered safer, by transferring the F/V JACKIE BELL's moratorium permit and LLP license to the F/V SOLSTICE. Further, the APA incorporates the judicial review provisions of the Magnuson-Stevens Fishery Conservation and Management Act. The Magnuson-Stevens Act provides for judicial review of the LLP regulations, only if a petition is filed in federal court within 30 days after the regulations were promulgated.

ANALYSIS

1. Does Solstice qualify for an LLP groundfish license based on the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv)? No.

Solstice acknowledges that the F/V SOLSTICE did not make a documented harvest of groundfish in the general qualification period. Solstice claims that it qualifies for an LLP groundfish license based on the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv), which provides:

(iv) A qualified person⁵ who owned a vessel on June 17, 1995, that made a documented harvest of license limitation groundfish, or crab species if applicable, between January 1, 1988, and February 9, 1992, but whose vessel was unable to meet all the criteria in paragraph (k)(4) of this section for a groundfish license because of an unavoidable circumstance (i.e., the vessel was lost, damaged, or otherwise unable to participate in the license limitation groundfish fishery) may receive a license if the qualified person is able to demonstrate that:

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

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

(1) Unavoidable.

(2) Unique to the owner of that vessel, or unique to that vessel.

(3) Unforeseen and reasonably unforeseeable to the owner of the vessel.

(C) The circumstance that prevented the owner from conducting directed fishing for license limitation groundfish or crab species actually occurred.

(D) Under the circumstance, the owner of the vessel took all reasonable steps to overcome the circumstance that prevented the owner from conducting directed fishing for license limitation groundfish or crab species.

(E) Any amount of license limitation groundfish or appropriate crab species was harvested on the vessel in the specific area that corresponds to the area endorsement or area/species endorsement for which the qualified person who owned a vessel on June 17, 1995, is applying and that the license limitation groundfish or crab species was harvested after the vessel was prevented from participating by the unavoidable circumstance but before June 17, 1995. [emphasis added].

⁵ For an LLP groundfish license, a qualified person is a person who was eligible on June 17, 1995, to document a fishing vessel under Chapter 121, Title 46, U.S.C. 50 C.F.R. § 679.2. Thomas Manos, principal of Solstice, Inc., meets this definition of qualified person.

The first requirement is contained in the first sentence of the regulation. The applicant must have owned a vessel on June 17, 1995 “that made a documented harvest of license limitation groundfish, or crab species if applicable, between January 1, 1988 and February 9, 1992.”⁶ If an applicant is seeking a groundfish license, the applicant must have harvested groundfish in that time period. If the applicant is seeking a crab license, the applicant must have harvested crab in that time period.⁷

This Office has observed that the time period January 1, 1988 to February 9, 1992

is a striking time period. It is not the general qualification period: that is January 1, 1988 to June 17, 1992. Where did it come from? The time period January 1, 1988 to February 9, 1992 is the general qualifying period under the Vessel Moratorium Program. The [North Pacific Fishery Management] Council wished to grant LLP groundfish and crab licenses under the unavoidable circumstance provision only to vessels that qualified under the Vessel Moratorium Program or VMP.⁸

Thomas Manos, the principal of Solstice, Inc., did own the F/V SOLSTICE on June 17, 1995 but, according to the official LLP record, the F/V SOLSTICE did not harvest groundfish (or crab) between January 1, 1988 and February 9, 1992. Solstice does not argue that the vessel made such a harvest. Rather, Solstice argues it should receive credit under the unavoidable circumstance provision because Tom Manos began construction of the vessel in January 1991 based on an agreement that Peter Schonberg would buy it. They expected to finish construction by April 1992, but Mr. Manos ran into unanticipated construction delays and financing fell through for Mr. Schonberg. Solstice asserts that, because of these events, the F/V SOLSTICE was not finished until January 1993.⁹ I accept, for purposes of this Decision, that Solstice could prove these allegations. I accept that it was impossible for the F/V SOLSTICE to have made any harvests before January 1993 because the vessel was not completed.

The unavoidable circumstance regulation does not excuse the applicant from all documented

⁶ 50 C.F.R. § 679.4(k)(8)(iv). When I refer to groundfish, I mean license limitation groundfish. See 50 C.F.R. § 679.2 (definitions).

⁷ *St. George Marine, Inc.*, Appeal No. 02-0024 (Feb.19, 2004). All decisions by this Office are on the NMFS Alaska Region website, Administrative Appeals section at <http://www/fakr.noaa.gov/index/appeals/decisionsbynumber.asp> (visited Jan. 19, 2006).

⁸ *Id.* at 6 (footnotes omitted). The Vessel Moratorium Program was the predecessor program to the LLP. Final Rule, 60 Fed. Reg. 40,763 (1995). It expired on December 31, 1999 when the LLP went into effect. Final Rule, 65 Fed. Reg. 45,316 (2000).

⁹ Letter to RAM from Tom Manos and Peter Schonberg (Feb. 3, 200); Memorandum In Support of Appeal at 5 (April 14, 2004).

harvests. The applicant still must have made the harvest required by the first sentence – a groundfish harvest between January 1, 1988 and February 9, 1992 – and the harvests required by the last sentence – a groundfish harvest in the areas for which the applicant is seeking an endorsement after the unavoidable circumstance and before June 17, 1995.

Solstice argues that it made the required harvests by June 17, 1995 but it has not argued or proved that it made the harvest required between January 1, 1988 and February 9, 1992. I find that Solstice did not harvest groundfish from the F/V SOLSTICE between January 1, 1988 and February 9, 1992. Therefore, I conclude that Solstice does not qualify for an LLP groundfish license based on the unavoidable circumstance regulation at 50 C.F.R. § 679.4(k)(8)(iv).

2. Does NMFS have the authority to issue an LLP groundfish license to Solstice based on the combined fishing history of the F/V JACKIE BELL and the F/V SOLSTICE, if Solstice returns to NMFS the LLP license that it received based on the fishing history of the F/V JACKIE BELL? No.

Solstice received LLP groundfish license LLG 3918 based on the fishing history of the F/V JACKIE BELL. The F/V JACKIE BELL harvested groundfish in the basic general qualification period, which is January 1, 1988 to June 27, 1992, and in the Central Gulf in the endorsement qualification period, which is January 1, 1992 through June 17, 1995.¹⁰ Based on the F/V JACKIE BELL's fishing history, Solstice received transferable LLP license LLG 3918 with a Central Gulf endorsement.

The F/V SOLSTICE did not harvest groundfish in the general qualification period but did harvest groundfish in the Bering Sea, Western Gulf and Central Gulf in the endorsement qualification period, which is January 1, 1992 through June 17, 1995.¹¹ RAM denied Solstice a transferable LLP license with these endorsements. Since Solstice appealed RAM's decision, NMFS issued Solstice a non-transferable LLP groundfish license [LLG 4835] with endorsements for the Bering Sea, the Western Gulf and the Central Gulf.¹²

Solstice asks NMFS to issue it an LLP license by combining the GQP fishing history of the F/V JACKIE BELL with the EQP fishing history of the F/V SOLSTICE. Solstice wants NMFS to combine, on a single license, the one endorsement it already has (the Central Gulf endorsement) with the two additional endorsements it wants (the Bering Sea and Western Gulf). Solstice

¹⁰ 50 C.F.R. § 679.4(k)(4)(ii)(K)(Central Gulf area endorsement for category C vessels).

¹¹ See 50 C.F.R. § 679.4(k)(4)(ii)(B) & (G) (requirements for Bering Sea and Western Gulf area endorsements for category C vessels). It appears that the F/V SOLSTICE harvested groundfish in Southeast Alaska between January 1, 1992 and June 17, 1995.

¹² 50 C.F.R. § 679.43(p). RAM issues an interim, non-transferable license with the endorsements for which the appellant applied. This license expires upon the resolution of the appeal. *Id.*

offers to give back LLP license LLG 3918, the license based on the fishing history of the F/V JACKIE BELL, which has only a Central Gulf endorsement.

NMFS does not have the authority to combine fishing histories in this manner. This Office decided this question in *John A. Karuza*.¹³ Mr. Karuza wanted to combine the GQP fishing history of one vessel with the EQP fishing history of another. We ruled that NMFS does not have authority to do that:

The LLP regulation defines an eligible applicant for an LLP license as a person who owned “a vessel on June 17, 1995, 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)” or the person to whom “the fishing history of a vessel” that made those harvests was transferred. A vessel – one vessel – must have made the harvests in the qualifying periods that are required for an LLP license. This Office stated in *Kevin Suydam*: “[T]he existence of both the GQP and EQP harvests by the same vessel is what makes that vessel a ‘qualifying vessel.’”

The LLP regulations do not allow NMFS to combine the GQP history of one vessel with the EQP history of another vessel, unless the vessel that made the GQP history is lost or destroyed. The commentary to the original LLP rule explicitly states: “[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.”¹⁴

The only difference between Solstice’s situation and Mr. Karuza’s situation is that Solstice already has a license with one endorsement – a Central Gulf endorsement – and is willing to give it back if NMFS will issue it a license with three endorsements – Central Gulf, Bering Sea and Western Gulf. This difference does not help Solstice for two reasons. First, the LLP regulations do not allow NMFS to combine the GQP fishing history of one vessel with the EQP fishing history of another vessel for any reason, unless the vessel with the GQP fishing history was lost

¹³ *John Karuza*, Appeal 02-0055 at 7 - 8 (July 21, 2005)(footnotes omitted).

¹⁴ *John Karuza*, Appeal 02-0055 at 7 - 8 (July 21, 2005)(citation and footnotes omitted). *Accord*, *Bella K of Seattle, LLC*, Appeal No. 02-0006 at 7 - 13 (March 25, 2004)(LLP crab license); *Tynes Enterprises, Inc.*, Appeal No. 00-0014 (July 11, 2004) (American Fisheries Act permit); *High Spirit*, Appeal No. 96-0049 (Nov. 24, 1999)(Moratorium permit). NMFS has, on rare occasions, allowed the same vessel’s fishing history to result in two licenses or quotas but only if, because of agency error, an innocent third party purchaser for value purchased a second license or quota share. *In re Application of Darius Baltz*, Appeal No. 95-0028 (Jan. 30, 1996)(quota share); *R.J. Fierce Packer*, Appeal No. 00-0004 (Dec. 18, 2000)(LLP license). NMFS did not make LLP license LLG 4835 transferable and Solstice is not a third party purchaser of LLP license LLG 4835.

or destroyed due to an unavoidable circumstance.¹⁵ The LLP regulations do not provide any further exceptions. A fortiori, it does not allow NMFS to combine fishing histories when [1] vessel A meets the GQP requirement, [2] vessel A meets the EQP requirement for one endorsement; [3] vessel B meets the EQP requirement for two other endorsements; [4] the licenseholder of the LLP license generated by vessel A's fishing history also owns the fishing history of vessel B; [5] that licenseholder is willing to return to NMFS the license based on vessel A's history if NMFS issues the licenseholder a new license with three endorsements. If NMFS had authority to do that, the regulations would specify that authority and the conditions under which NMFS could take back licenses and issue new ones. Instead, when a license holder does not want to keep an LLP license, the LLP regulation specifies the conditions under which NMFS approves a transfer of the LLP license to someone else.¹⁶

Second, Solstice's proposal has virtually the same effect as NMFS issuing two licenses based on the fishing history of one vessel. Solstice seeks three endorsements on one license rather than one endorsement on one license and two endorsements on another license. The result is still that an additional vessel would fish in the Bering Sea and the Western Gulf without meeting the GQP requirement for the Bering Sea and Western Gulf endorsements.

Solstice notes that NMFS approved a transfer from Jackie Bell, Inc, to Solstice, Inc., of the vessel moratorium qualification and permit that Jackie Bell, Inc., received under the Vessel Moratorium Program.¹⁷ The Moratorium Program was the predecessor to the LLP.¹⁸ NMFS transferred the moratorium permit based on the F/V JACKIE BELL's fishing history. Solstice then used that moratorium permit on the F/V SOLSTICE. Solstice could have used the moratorium permit on any vessel that fell within the maximum length limitation on the moratorium permit.¹⁹ The F/V SOLSTICE's fishing history had nothing to do with why Solstice was able to use the F/V JACKIE BELL's moratorium permit on the F/V SOLSTICE. Solstice is confusing "the transferability of a moratorium permit with the combining of one vessel's fishing history with another vessel's fishing history."²⁰ Under the Moratorium Program, NMFS

¹⁵ 50 C.F.R. § 679.4(k)(8)(iv), as interpreted in *Mark Donovick*, Appeal No. 02-0008A at 7 (Sept. 27, 2000). The applicant still must meet all the requirements of the unavoidable circumstance regulation.

¹⁶ 50 C.F.R. § 679.4(k)(7).

¹⁷ Memorandum in Support of Appeal at 3. See Application for Transfer of Moratorium Qualification 4812 from Jackie Bell, Inc., to Solstice, Inc., (Dec. 18, 1995)(Exhibit 1); Certificate of Moratorium Qualification 4812 issued to Solstice, Inc. (April 11, 1996) (Exhibit 2).

¹⁸ Final Rule, 60 Fed. Reg. 40,763 (1995). It expired on December 31, 1999 when the LLP went into effect. Final Rule, 65 Fed. Reg. 45,316 (2000).

¹⁹ Moratorium Qualification 4812 had a maximum length limitation of 67 feet. (Exhibit 2).

²⁰ *Tynes Enterprises, Inc.*, Appeal 00-0014 at 13 (July 11, 2002)(emphasis omitted).

transferred moratorium permits. It did not combine moratorium permits or moratorium fishing histories.

Solstice points out that although the moratorium permit based on the F/V JACKIE BELL's fishing history allowed harvest of groundfish with trawl gear, the LLP license based on the F/V JACKIE BELL's fishing history (LLP license LLG 3918) does not allow the harvest of groundfish with trawl gear.²¹ Solstice's point goes to the proper gear designation on LLP license LLG 3918.²² That issue is not before me and is not relevant to this appeal.

I conclude that NMFS does not have the authority to issue Solstice an LLP license with endorsements for the Bering Sea, Western Gulf and Central Gulf, even though Solstice offers to return the LLP groundfish license with a Central Gulf endorsement that Solstice received based on the fishing history of the F/V JACKIE BELL.

3. Does Solstice qualify for an LLP groundfish license based on its claim that its LLP application should be granted, as a matter of sound policy, fairness and justice, its LLP application should be granted? No.

Solstice argues that Tom Manos, the principal of Solstice, Inc.,

sold a qualifying vessel, the F/V EQUINOX, to Mr. [Peter] Schonberg in 1991 in order to secure financing to complete the construction of the F/V SOLSTICE. Prior to the sale, Mr. Manos had made the necessary documented groundfish harvest during the GQP with the F/V EQUINOX. But for the sale of the F/V EQUINOX to Mr. Schonberg in 1991 which was precipitated by the difficulties encountered by Mr. Schonberg in financing the construction of the F/V SOLSTICE, Mr. Manos would have continued to participate in the qualifying groundfish fisheries with the F/V EQUINOX, instead of the F/V SOLSTICE during the EQP, and an LLP license would have been issued to Mr. Manos for the F/V EQUINOX.

²¹ Memorandum in Support of Appeal at 3.

²² LLP license LLG 3918 received a non-trawl gear designation. The LLP regulation allows a license holder one permanent change of gear designation, from non-trawl to trawl, when the original qualifying vessel, or a licenseholder owning the fishing history of an original qualifying vessel, harvested groundfish with trawl gear between June 18, 1995 and February 7, 1998. 50 C.F.R. § 679.4(k)(3)(iv); *Paul S. Ward*, Appeal No. 00-0014, Decision at 7 - 10 (March 3, 2003), Decision on Reconsideration at 8 - 16 (Feb. 6, 2004). Solstice harvested groundfish with the F/V SOLSTICE between June 18, 1995 and February 7, 1998 using the moratorium qualification and permit it obtained by transfer from the F/V JACKIE BELL. If Solstice wishes a change of gear designation on LLG 3918, it should submit its request to RAM. See e-mail correspondence between Tracy Buck, RAM, and Mary Alice McKeen (Jan. 6 and 9, 2006)(copy served on Solstice with this Decision).

When Mr. Manos agreed to sell the F/V EQUINOX to Mr. Schonberg in 1991, Mr. Manos could not have contemplated the possibility that the Council four years later, would adopt regulations that would prevent him from qualifying for an LLP groundfish license based on the history of the F/V EQUINOX or F/V SOLSTICE. As a matter of sound policy and in the interest of fairness and justice, Solstice's application should be granted.²³

Solstice argues that Mr. Manos sold the F/V EQUINOX in 1991 but might not have done that if he had known that four years later, the Council would approve the LLP regulations that it did. Solstice does not dispute that NMFS issued the LLP license based on the fishing history of the F/V EQUINOX – LLP license LLG 3124 – to the applicant who met the requirements of the LLP regulation.²⁴ That applicant was Equinox Fishing Venture Partnership, which was a 50/50 partnership between Tom Manos's company, Manos Boats, and Peter Schonberg's company, Schonbergsen, Inc.²⁵

Tom Manos is the principal of Solstice, Inc. Tom Manos/Solstice must be arguing either that NMFS should have issued the LLP license based on the fishing history of the F/V EQUINOX to Solstice *instead of* a partnership of which Tom Manos was 50% owner, *or* that NMFS should have issued two licenses based on the fishing history of the F/V EQUINOX. The first alternative is untenable. NMFS has to grant an LLP license to whichever applicant meets the requirements of the LLP regulations. If an applicant owned an LLP-qualified vessel on June 17, 1995, or owns the qualifying fishing history apart from the vessel, that person has a clear right to receive an LLP license.²⁶ The second alternative is untenable. NMFS awards one LLP license based on one vessel's fishing history.²⁷

Solstice's argument has a more fundamental problem. As this appeal suggests, there are countless reasons people buy and sell their interests in boats: construction delays; financial problems; a desire to upgrade to a safer, bigger, better vessel; health problems; marital problems; labor problems; a desire to leave commercial fishing or a desire to enter it for the first time. The LLP regulations do not award LLP licenses based on why an applicant did or did not own a

²³ Memorandum in Support of Appeal at 6 - 7.

²⁴ RAM issued LLP license LLG 3124 to Equinox Fishing Venture Partnership, which is still the license holder. E-mail from Phil Smith, RAM, to Mary Alice McKeen (Dec. 22, 2005); NMFS Alaska Region website, <http://www.fakr.noaa.gov/ram/daily/llp_gf.pdf> (visited Jan. 19, 2006).

²⁵ Letter to RAM from Tom Manos and Peter Schonberg at 2 (Feb. 3, 2000).

²⁶ 50 C.F.R. § 679.2(definition of eligible applicant); 50 C.F.R. § 679.4(k)(iv)(groundfish licenses); 50 C.F.R. § 679.4(k)(v)(crab licenses).

²⁷ The commentary to the original LLP rule states: "Furthermore, only one license will be issued based on the fishing history of any qualified vessel." Final Rule, 63 Fed. Reg. 52,642, 52,646 (1998).

vessel on June 17, 1995 or why an applicant does or does not own a qualifying fishing history apart from the vessel. As this Office stated in *Jonathan Schumacher*: “NMFS does not examine why any applicant did not own a vessel on June 17, 1995 and does not award an LLP license based on *any* reason why an applicant did *not* own a vessel on June 17, 1995.”²⁸

The LLP awards licenses to persons who owned a vessel on June 17, 1995 with a qualifying fishing history or who owns a qualifying fishing history apart from the vessel. The qualifying fishing history means that the vessel met an objective standard of past participation, subject to a limited exception in the unavoidable circumstance regulation and even that still requires two documented harvests.

The LLP regulations embody the Council’s and NMFS’s determination of the reasons for awarding an LLP license that are sound, fair and just. The LLP regulations do not authorize NMFS to grant an LLP license to an applicant that does *not* meet the objective standards for an LLP license, based on an administrative judge’s subjective determination of what is sound, fair and just.

I have the duty to interpret the LLP regulations, *as proposed by the Council and adopted by the Secretary of Commerce*, and to apply them to appeals before me.²⁹ I do not have the authority to make exceptions to the LLP regulation or add provisions to it.

I conclude that Solstice does not qualify for an LLP groundfish license based on its claim that its LLP application should be granted, as a matter of sound policy, fairness and justice.

4. Does Solstice qualify for an LLP groundfish license based on its claim that the LLP is arbitrary and capricious and violate the Administrative Procedure Act? No.

Solstice argues:

As stated above, Mr. Schonberg sought to replace an unsafe vessel with a new vessel.^[30] To the extent the LLP regulations promulgated by NMFS unfairly penalize a vessel owner who replaced a similar class vessel with a safer, more reliable vessel, as in then [sic] present case, the regulations are “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.” *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A). When NMFS enacted

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

²⁹ *George Ramos*, Appeal 94-0008, March 21, 1995, Regional Director’s Decision on Review at 4, April 21, 1995.

³⁰ I accept that Mr. Manos can make arguments based on what is fair to Mr. Schonberg.

the LLP regulations, it failed to consider a relevant factor, vessel safety.³¹

I accept, as true, that Mr. Schonberg wished to substitute the F/V SOLSTICE for the F/V JACKIE BELL and that the F/V SOLSTICE is a safer vessel than the F/V JACKIE BELL. The Moratorium Program and the LLP have essentially allowed Solstice, Inc., to do this because moratorium permits and LLP licenses are freely transferable.³² Solstice used the moratorium permit resulting from the fishing history of the F/V JACKIE BELL on the F/V SOLSTICE.³³ And Solstice is using LLP license 3918, resulting from the fishing history of the F/V JACKIE BELL, on the F/V SOLSTICE.³⁴ The LLP allows the F/V SOLSTICE to replace the F/V JACKIE BELL in the Central Gulf fishery, where the F/V JACKIE BELL participated. The LLP prevents the F/V SOLSTICE from *expanding* into the Bering Sea and Western Gulf fisheries, where the F/V JACKIE BELL did not participate.

The F/V SOLSTICE did not participate in any fishery until January 1993. This means that the F/V SOLSTICE does not qualify for an LLP license either under the standard requirements for documented harvests or the unavoidable circumstance requirements. The Secretary of Commerce did not adopt a regulation that exempted a vessel from meeting the standard requirements *and* the unavoidable circumstance requirements for any reason, including that the new vessel was safer vessel than the prior vessel and the entry of the new vessel into the fishery was delayed by financial difficulties. I cannot *interpret* the LLP regulations to achieve the result Solstice wishes.

At base, Solstice argues that the LLP itself is unwise because it does not consider vessel safety in the manner that Solstice thinks the Council and NMFS should have considered vessel safety.³⁵

³¹ Memorandum in Support of Appeal at 7.

³² Final Rule, 60 Fed. Reg. 40,763, 31,238, *adopting* 50 C.F.R. § 679.4(c)(9)(Moratorium Program); 50 C.F.R. § 679.4(k)(7)(LLP).

³³ Exhibit 1; Exhibit 2.

³⁴ NMFS Alaska Region website, <http://www.fakr.noaa.gov/ram/daily/llp_gf.pdf> (visited Jan. 19, 2006).

³⁵ The commentary to the LLP rule addresses safety in Comment 20:

Comment 20: The LLP does not solve the race for fish. The race for fish contributes to safety hazards of fishing; therefore, the LLP does not meet the requirements of national standard 10.

Response: National standard 10 requires conservation and management measures, to the extent practicable, to promote the safety of human life at sea. The U.S. Coast Guard reviewed the LLP and determined that all safety concerns had been adequately addressed. No management program can totally eliminate the inherent risks of fishing. Fishing vessel operators, as they have been throughout history, will be faced with the many inherent risks of earning a living at sea. The LLP

Solstice is challenging the LLP itself. I have the duty to interpret and apply the LLP regulations. I do not have the authority to change them.

Solstice notes that section 706(2)(A) of the Administrative Procedure Act (APA) provides that a reviewing court shall set aside an agency regulation found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” But the APA recognizes that Congress adopts statutes on specific subjects with specific provisions for judicial review and provides that those specific statutes take precedence over the general APA provisions.³⁶

The Secretary of Commerce adopted the LLP regulations according to the detailed process for public, Council and NMFS participation in the Magnuson-Stevens Fishery Conservation and Management Act.³⁷ The Magnuson-Stevens Act provides for judicial review of regulations adopted under it, if a petition for review is filed [1] in federal court [3] within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register.³⁸ This proceeding is not before a federal court and was not filed within 30 days after the LLP regulations were promulgated.

I conclude that Solstice does not qualify for an LLP groundfish license based on its claim that the LLP is arbitrary and capricious and violates the Administrative Procedure Act.

FINDING OF FACT

Solstice did not make a documented harvest of license limitation groundfish from the F/V SOLSTICE between January 1, 1988 and February 9, 1992.

CONCLUSIONS OF LAW

will not increase that peril.

Final Rule, 63 Fed. Reg. 52,642, 52,651 (1998).

³⁶ 5 U.S.C. § 702 (“Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought); 5 U.S.C. § 703 (“The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute . . .”).

³⁷ 16 U.S.C. §§ 1801 - 1883. *See* Proposed Rule, 62 Fed. Reg. 43,866 (1997); Final Rule, 63 Fed. Reg. 52,642 (1998)(substantive requirement for LLP licenses); Proposed Rule, 64 Fed. Reg. 19,113 (application and transfer); Final Rule, 64 Fed. Reg.. 42,826 (1999)(application and transfer).

³⁸ 16 U.S.C. § 1855(f)(1).

1. Solstice does not qualify for an LLP license with endorsements for the Bering Sea, Western Gulf of Alaska, and Central Gulf of Alaska areas based on the unavoidable circumstance regulation.
2. NMFS does not have authority to issue Solstice an LLP groundfish license based on the combined fishing history of the F/V JACKIE BELL and the F/V SOLSTICE, even though Solstice has offered to return to NMFS the LLP license it received based on the fishing history of the F/V JACKIE BELL.
3. Solstice does not qualify for an LLP groundfish license based on its claim that its LLP application should be granted, as a matter of sound policy, fairness and justice.
4. Solstice does not qualify for an LLP groundfish license based on its claim that the LLP is arbitrary and capricious and violates the Administrative Procedure Act.

DISPOSITION

The IAD that is the subject of this Appeal is AFFIRMED. This Decision takes effect February 19, 2006, unless by that date the Regional Administrator takes further action under 50 C.F.R. § 679.43(o).

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

Mary Alice McKeen
Administrative Judge