

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 02-0027
)	
JOHN VELSKO)	DECISION
Appellant)	
_____)	January 29, 2003

STATEMENT OF THE CASE

John Velsko appeals an Initial Administrative Determination [IAD] by the Restricted Access Management Program [RAM], which denied his application for a groundfish license under the North Pacific Groundfish and Crab License Limitation Program [LLP].¹ Mr. Velsko can appeal the IAD because it directly and adversely affects his interests.² Mr. Velsko applied for a groundfish license with Western Gulf and Central Gulf endorsements, based on the fishing history of the F/V WAHOO, ADFG # 05193.

The IAD denied Mr. Velsko's application on two grounds. First, the F/V WAHOO did not make the harvests in the endorsement qualification period which are required for an LLP groundfish license with a Central Gulf or Western Gulf endorsement. Second, Mr. Velsko did not show that he owned the F/V WAHOO on June 17, 1995 or owned the fishing history of the F/V WAHOO that supported an LLP license, either of which is required for Mr. Velsko to be the "eligible applicant" for an LLP license based on the fishing history of the F/V WAHOO.³

Since I affirm the IAD because the F/V WAHOO did not make the harvests required for an LLP license, I do not decide whether Mr. Velsko would be the eligible applicant for an LLP license based on the fishing history of the F/V WAHOO, *if* the fishing history of the F/V WAHOO supported an LLP license.⁴

¹ IAD, July 19, 2002. The LLP is in 50 C.F.R. § 679: 50 C.F.R. § 679.1(j) (purpose and scope); 50 C.F.R. § 679.2 (definitions); 50 C.F.R. § 679.4(a)(6) (definition of harvesting privilege); 50 C.F.R. § 679.4(k)(requirements for licenses); 50 C.F.R. § 679.7 (prohibitions); 50 C.F.R. § 679.43 (appeals). The NMFS Alaska region website, <http://www.fakr.noaa.gov/regs/summary.htm>, has the LLP regulations.

² 50 C.F.R. § 679.43(b).

³ 50 C.F.R. § 679.2.

⁴ Since the fishing history of the F/V WAHOO does not support an LLP license, NMFS has issued no LLP licenses based on the F/V WAHOO, except the interim license issued to Mr. Velsko. NMFS Alaska region website, <http://www.fakr.noaa.gov/ram/llp.htm>, visited January 24, 2003. This website lists the LLP licenses issued and the ADFG number of the original qualifying vessel, i.e., the vessel whose fishing history gave rise to the LLP license.

SUMMARY

The IAD is affirmed. Mr. Velsko does not qualify for an LLP groundfish license with Western Gulf and Central Gulf endorsements, based on the fishing history of the F/V WAHOO.

According to the official LLP record, the only harvests of license limitation groundfish made by the F/V WAHOO occurred on June 1, 1988 and June 2, 1988 in the Gulf of Alaska. Mr. Velsko did not submit any argument or evidence that the official LLP record was incorrect and that the F/V WAHOO made any other groundfish harvests.

Based on the fishing history of the F/V WAHOO, Mr. Velsko meets the general qualification period requirement for harvests for an LLP license with Western and Central Gulf endorsements in 50 C.F.R. § 679.4(k)(4)(i)(B)(1). But Mr. Velsko does not satisfy the endorsement qualification period requirement for a Western Gulf endorsement in 50 C.F.R.

§ 679.4(k)(4)(ii)(G), because the F/V WAHOO did not harvest license limitation groundfish in the Western Gulf between January 1, 1992 and June 17, 1995. Similarly, Mr. Velsko does not satisfy the endorsement qualification period requirement for a Central Gulf endorsement in 50 C.F.R. § 679.4(k)(4)(ii)(K), because the F/V WAHOO did not harvest license limitation groundfish in the Central Gulf between January 1, 1992 and June 17, 1995.

Mr. Velsko asserted that the F/V WAHOO was in a serious state of disrepair when he bought it in 1997. No matter the state of disrepair of the F/V WAHOO, Mr. Velsko cannot receive credit for any harvests under the unavoidable circumstances regulation because he did not harvest groundfish in the Western Gulf or the Central Gulf area between any claimed unavoidable circumstances and June 17, 1995, as required by 50 C.F.R. § 679.4(k)(8)(iv)(E).

ISSUES

1. Does Mr. Velsko qualify for an LLP groundfish license with a Western Gulf endorsement, based on the fishing history of the F/V WAHOO?
2. Does Mr. Velsko qualify for an LLP groundfish license with a Central Gulf endorsement, based on the fishing history of the F/V WAHOO?
3. May Mr. Velsko receive credit for a harvest under the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv)?

ANALYSIS

To count toward an LLP license, a harvest must be a documented harvest.⁵ When I refer to a harvest in this Decision, I mean a documented harvest. To count toward an LLP license, a harvest must generally be of “license limitation groundfish,” which are

⁵ A documented harvest means “a lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting.” 50 C.F.R. § 679.2.

target species and the “other species” category, specified annually pursuant to [50 C.F.R.] § 679.20(a)(2), except that demersal shelf rockfish east of 140° W. longitude and sablefish managed under the IFQ program are not considered license limitation groundfish. [50 C.F.R. § 679.2]

NMFS sets the Total Allowable Catch [TAC] for groundfish harvested in the Gulf of Alaska and the Bering Sea and Aleutian Islands [BSAI] through the annual specification process in 50 C.F.R. § 679.20(a)(2).⁶ When I refer to groundfish in this Decision, I mean license limitation groundfish.

To implement the LLP, NMFS was charged with constructing an official LLP record, which is a database containing information on vessel ownership, vessel characteristics and harvests by vessels during the qualification periods for licenses.⁷ NMFS constructed the official LLP record using information from weekly production reports, observer reports, fish tickets, processor annual reports and vessel registration information.⁸ The official LLP record is presumed to be correct. The applicant who claims the official LLP record is incorrect has the burden of proving that his or her claims, rather than the official LLP record, are correct.⁹

1. Does Mr. Velsko qualify for an LLP groundfish license with a Western Gulf endorsement, based on the fishing history of the F/V WAHOO?

To receive an LLP groundfish license with a Western Gulf endorsement based on the fishing history of the F/V WAHOO, Mr. Velsko must meet the requirements for groundfish harvests in a general qualification period and an endorsement qualification period.¹⁰

Mr. Velsko can meet the general qualification period requirement in one of three ways, as provided in 50 C.F.R. § 679.4(k)(4)(i)(B). Mr. Velsko satisfies the first way: the F/V WAHOO harvested groundfish between January 1, 1988 and June 27, 1992 in the Gulf of Alaska.¹¹

⁶ The TAC for groundfish in the Gulf of Alaska for 2003 is on the NMFS website at <<<http://www.fakr.noaa.gov/sustainablefisheries/2003hrvstspecs.htm>>>, *visited* January 24, 2003.

⁷ 50 C.F.R. § 679.2.

⁸ Final rule, 64 Fed. Reg. 42,826, 42,826 (1999)(supplementary information).

⁹ 50 C.F.R. § 679.2 (definition of official LLP record); 50 C.F.R. § 679.4(k)(6)(v).

¹⁰ 50 C.F.R. § 679.4(k)(4)(i)(ii)

¹¹ 50 C.F.R. § 679.4(k)(4)(i)(B)(1). The other two ways to satisfy the general qualification period are more specialized. One applies to groundfish harvests with pot or jig gear by vessels less than sixty feet. 50 C.F.R. § 679.4(k)(4)(i)(B)(2). The other applies to applicants whose vessel “crossed-over” to crab during the Moratorium Program, as shown by a crab harvest between January 1, 1988 and February 9, 1992 in GOA and a groundfish harvest between February 10, 1992 and December 11, 1994 in the GOA

According to the official LLP record, the F/V WAHOO harvested groundfish in the Gulf of Alaska [GOA] on June 1, 1988 and June 2, 1988.¹²

The problem is that these 1988 harvests are the only groundfish harvests by the F/V WAHOO in the official LLP record. The F/V WAHOO is a category C vessel – a vessel less than sixty feet – seeking an LLP license with a catcher vessel designation and a Western Gulf endorsement. To receive that license, the F/V WAHOO must have made one groundfish harvest between January 1, 1992 and June 17, 1995 in the Western Gulf regulatory area.¹³ The official LLP record shows no such harvest. Mr. Velsko has not produced any argument or evidence that the official LLP record is incorrect.

Mr. Velsko requested that this Office contact Bill Abbott, who is the Homer Harbormaster and Port Commissioner and who owned the F/V WAHOO from 1992 to April or May 1994.¹⁴ I contacted Mr. Abbott, who stated that he did no commercial fishing from the F/V WAHOO. Mr. Abbott stated that he sold the vessel to Cloyd Moser in April or May 1994 and that he thought Mr. Moser used the vessel for diving for sea urchins.¹⁵ Sea urchins are not a license limitation groundfish.¹⁶ Therefore, even if sea urchins were caught from the F/V WAHOO in 1994 and 1995, that does not support Mr. Velsko's claim to an LLP groundfish license.

2. Does Mr. Velsko qualify for an LLP groundfish license with a Central Gulf endorsement, based on the fishing history of the F/V WAHOO?

Mr. Velsko is seeking an LLP license for a category C vessel with a catcher vessel designation and a Central Gulf endorsement. The F/V WAHOO's 1988 groundfish harvest in the Gulf of Alaska meets the general qualification period requirement for this endorsement.¹⁷ But, here too, the fishing history of the F/V WAHOO does not satisfy the endorsement qualification period requirement. To receive a Central Gulf endorsement, the F/V WAHOO must have made one groundfish harvest in the Central GOA regulatory area between January 1, 1995 and June 17,

or BSAI with trawl or longline gear but not sablefish using fixed gear. 50 C.F.R. § 679.4(k)(4)(i)(B)(3); Final rule, 63 Fed. Reg. 52,642, 52,643 (1998)(supplementary information).

¹² Memorandum from Mukhya Khalsa to Mary Alice McKeen, January 16, 2003.

¹³ 50 C.F.R. § 679.4(k)(4)(ii)(G). *See* 50 C.F.R. § 679.2 (definition of Western GOA Regulatory Area). When I refer to Western Gulf, I will mean the Western GOA Regulatory Area.

¹⁴ Letter from John Velsko to NMFS, September 15, 2002.

¹⁵ Memorandum to File from Mary Alice McKeen, January 24, 2003.

¹⁶ NMFS does not specify the total allowable catch for sea urchin and, therefore, sea urchin are not license limitation groundfish. *See* pages 2 - 3 *supra*.

¹⁷ 50 C.F.R. § 679.4(k)(4)(i)(B).

1995.¹⁸ The official LLP record shows no such harvest. And Mr. Velsko has submitted no argument or evidence that the F/V WAHOO made such a harvest.

3. May Mr. Velsko receive credit for harvests under the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv)?

Mr. Velsko stated that the F/V WAHOO was in serious disrepair when he bought it in 1997 and questioned whether this could be the basis for award of an LLP license.¹⁹ The LLP contains an unavoidable circumstances regulation, which gives an applicant credit for harvests in some circumstances when a vessel is incapacitated and unable to participate in a fishery.²⁰

But the unavoidable circumstances regulation does not excuse the lack of all harvests. For Mr. Velsko to receive credit under the unavoidable circumstances regulation, he would have to prove that the F/V WAHOO harvested groundfish in the Western Gulf, for a Western Gulf endorsement, and groundfish in the Central Gulf, for a Central Gulf endorsement, after the claimed unavoidable circumstances but before June 17, 1995.²¹ Since the F/V WAHOO did not harvest groundfish at any time between June 2, 1988 – the date of its last harvest – but before June 17, 1995, Mr. Velsko cannot possibly receive credit for harvests under the unavoidable circumstances provision, no matter the state of disrepair of the F/V WAHOO.

FINDINGS OF FACT

1. The F/V WAHOO harvested license limitation groundfish on June 1, 1988 and June 2, 1988.
2. The F/V WAHOO did not harvest license limitation groundfish after June 2, 1988 but before June 17, 1995.

CONCLUSIONS OF LAW

1. Mr. Velsko does not qualify for an LLP groundfish license with a Western Gulf endorsement based on the fishing history of the F/V WAHOO because the F/V WAHOO did not harvest

¹⁸ 50 C.F.R. § 679.4(k)(4)(ii)(K). *See* 50 C.F.R. § 679.2 (definition of Central GOA Regulatory Area). When I refer to Central Gulf, I mean the Central GOA Regulatory Area.

¹⁹ Memorandum to File from Mary Alice McKeen, January 24, 2003.

²⁰ 50 C.F.R. § 679.4(k)(8)(iv).

²¹ 50 C.F.R. § 679.4(k)(8)(iv)(E). *See* Mark Donovanick, Appeal 02-0008A at pages 7 - 9 (September 27, 1999) for a discussion of this requirement. The effect of this requirement is that, for all LLP groundfish endorsements that require only one harvest in the endorsement qualification period, such as a Western Gulf and Central Gulf for a category C vessel, an applicant can never receive credit under the unavoidable circumstances regulation because all the groundfish endorsement qualification periods end June 17, 1995. If an applicant had a harvest by June 17, 1995, the applicant would not need to claim unavoidable circumstances.

groundfish in the endorsement qualification period in the Western Gulf, as required by 50 C.F.R. § 679.4(k)(4)(ii)(G).

2. Mr. Velsko does not qualify for an LLP groundfish license with a Central Gulf endorsement based on the fishing history of the F/V WAHOO because the F/V WAHOO did not harvest groundfish in the endorsement qualification period in the Central Gulf, as required by 50 C.F.R. § 679.4(k)(4)(ii)(K).

3. Under the unavoidable circumstances regulation, Mr. Velsko cannot receive credit for a harvest toward an LLP groundfish license with a Western Gulf endorsement, because the F/V WAHOO did not harvest groundfish in the Western Gulf after any claimed unavoidable circumstances but before June 17, 1995, as required by 50 C.F.R. § 679.4(k)(8)(iv)(E).

4. Under the unavoidable circumstances regulation, Mr. Velsko cannot receive credit for a harvest toward an LLP groundfish license with a Central Gulf endorsement, because the F/V WAHOO did not harvest groundfish in the Central Gulf after any claimed unavoidable circumstances but before June 17, 1995, as required by 50 C.F.R. § 679.4(k)(8)(iv)(E).

DISPOSITION

The IAD is AFFIRMED. This Decision takes effect March 3, 2003, unless by that date the Regional Administrator orders review of the Decision.

The Appellant or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, February 10, 2003. 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 Appeals Officer, and must be accompanied by a written statement of points and authorities in support of the motion.

Mary Alice McKeen
Appeals Officer