

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of ) Appeal No. 03-0004  
)  
WIZARD FISHERIES, INC., ) DECISION ON RECONSIDERATION  
Appellant )  
) April 27, 2005  
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STATEMENT OF THE CASE

This Office issued a Decision in this appeal on March 3, 2005. On March 14, 2005, the deadline for submitting a Motion for Reconsideration, I granted the Appellant a one-week extension to file the motion, and stayed the effective date of the decision. I granted the extension of time primarily because the Appellant had retained new legal counsel, Mr. Christopher Y. Kim of Seattle, on March 11, 2005.

We received a 40-page Motion for Reconsideration via fax on March 21, 2005, followed by the original motion in the mail on March 23, 2005. In the motion, the Appellant states that we did not have before us “a complete picture of the facts surrounding the vessel WIZARD’s (“Vessel”) failure to land the requisite amount of cod during the qualification period. The evidence originally submitted with the appeal paints Wizard as an operator venturing into a virtually unknown fishery for the first time with an untested vessel and system.”<sup>1</sup>

The standard for reviewing a Motion for Reconsideration is whether the Appeals Officers overlooked or misunderstood a material matter of fact or law. The Appellant’s motion presents one material matter of fact that was overlooked by the Appeals Officers in the Decision, namely, the Pacific cod harvest record of the F/V WIZARD in 1992. The motion also presents a new argument and evidence regarding Bering Sea ocean temperatures and their effect on the F/V WIZARD’s ability to chill Pacific cod aboard the vessel. Although this argument and evidence were not overlooked or misunderstood by the Appeals Officers, I consider them because they raise an important question concerning the interpretation of the Pacific cod hardship provision and the characteristics of an “unavoidable circumstance” that we announced for the first time in the Decision. Therefore, the Motion for Reconsideration is GRANTED. I now close the record and issue this Decision on Reconsideration.

ISSUES

1. Did the Appellant have the specific intent to commercially harvest at least 100,000 pounds of BSAI Pacific cod with pot gear aboard the F/V WIZARD in 1998?

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<sup>1</sup>Motion for Reconsideration at 1.

2. Was the Appellant's specific intent thwarted by an "unavoidable circumstance" within the meaning of the Pacific cod endorsement hardship provision, 50 C.F.R. §679.4(k)(9)(v)(B)?

## DISCUSSION

### **1. Did the Appellant have the specific intent to commercially harvest at least 100,000 pounds of BSAI Pacific cod with pot gear aboard the F/V WIZARD in 1998?**

In the Decision we found that the Appellant lacked the specific intent to commercially harvest at least 100,000 pounds of BSAI Pacific cod with pot gear aboard the F/V WIZARD in 1998. We based this finding on evidence in the administrative record that showed:

- In 1998, the F/V WIZARD did not start commercially harvesting Pacific cod until late in the year. The vessel's first and only commercial harvest that year was delivered October 30. It was a mere 400 pounds.
- Earlier in 1998, the F/V WIZARD had made two non-commercial Pacific cod harvests. Both these harvests were retained aboard the vessel and used for crab bait; they were not sold.
- The F/V WIZARD's fishing history indicates that the Appellant was not aggressively pursuing the Pacific cod fishery for the first ten months of 1998.
- Of the Pacific cod the Appellant did catch and report that in 1998, the Appellant kept 93 percent for crab bait.
- Except for the lone 400-pound delivery in October 1998, the F/V WIZARD fished exclusively for crab or crab bait all year.
- The Appellant bypassed the opportunity to commercially harvest Pacific cod in September and most of October 1998.
- The F/V WIZARD's 1997 fishing history is virtually indistinguishable from 1998. The vessel made a single 399-pound commercial harvest of Pacific cod in December 1997. The rest of that year, the vessel fished exclusively for crab or crab bait.
- In both 1995 and 1996, the F/V WIZARD fished exclusively for crab, with the exception of a single commercial harvest of 8,169 pounds of Pacific cod in February 1995.
- The Appellant's decision not to invest in new refrigeration equipment and custom pots before the fall of 1998 suggests that the Appellant was not yet fully committed to making large-scale commercial Pacific cod harvests.

- It was only in May 1999, immediately after installing an RSW system and adding 100 custom-designed pots and other cod gear, that the Appellant clearly demonstrated the intent and the ability to commercially harvest at least 100,000 pounds of Pacific cod annually.<sup>2</sup>

On reconsideration, the Appellant points out that the F/V WIZARD landed over 124,000 pounds of BSAI Pacific cod with pot gear during the period May 11-21, 1992.<sup>3</sup> Keith Colburn, the 1998 and current skipper of the F/V WIZARD, and an employee of the Appellant since 1988, states that the cod landed in May 1992 was preserved with ice until delivered. He also states that, “Essentially the same methods, equipment, and set up were used to fish and preserve the cod in 1998 and 1992.”<sup>4</sup>

The Appellant argues that this evidence, which was overlooked by the Appeals Officers, shows that the F/V WIZARD had the ability to harvest and land over 100,000 pounds of Pacific cod annually prior to the 1998 season.<sup>5</sup> The Appellant states:

Given the Vessel’s proven ability to catch, preserve, and land large amounts of cod and the statement of intent given by the corporation’s principals, the fact that those principals waited to upgrade their equipment should not lead to the conclusion that Wizard did not intend to commercially harvest cod in 1998. In fact, this evidence supports the exact opposite determination, that Wizard considered upgrading equipment and a system that had already been proven to be successful.<sup>6</sup>

This evidence of the May 1992 harvests and landings does show that the F/V WIZARD had the ability to harvest more than 100,000 pounds of BSAI Pacific cod with pot gear in approximately two weeks. This evidence negates our determination in the Decision that “It was only in May 1999 . . . that the Appellant clearly demonstrated . . . the ability to commercially harvest at least 100,000 pounds of Pacific cod annually.” Also, in light of this evidence, it can no longer be fairly said that the Appellant’s decision not to invest in new refrigeration equipment and custom pots before the fall of 1998 *necessarily* suggests that the Appellant was not yet fully committed to making large-scale commercial Pacific cod harvests.

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<sup>2</sup>Decision at 5-7.

<sup>3</sup>The landings were made on May 11, 15, 18, and 21, 1992. The Appellant states in its brief that it believes the F/V WIZARD made other significant landings of cod in 1991, but NMFS’s records show only crab landings in 1991. *NMFS official LLP record, fishing history of F/V WIZARD, 1991-1999.*

<sup>4</sup>Keith Colburn affidavit at 1 (March 17, 2005).

<sup>5</sup>Motion for Reconsideration at 3.

<sup>6</sup>*Id.*

It is now clear that in 1998 the Appellant knew it was possible for the F/V WIZARD to harvest over 100,000 pounds of Pacific cod in less than two weeks. The record contains no evidence that the F/V WIZARD had failed to adequately chill its Pacific cod catches with slush ice prior to October 1998. Therefore, it appears that the Appellant could have reasonably assumed in the summer of 1998 that the vessel would have been able to successfully harvest, chill, and land over 100,000 pounds of Pacific cod between October 31, 1998, and the end of the season in mid-December 1998. Thus, it is possible that the Appellant held the requisite specific intent for an unavoidable circumstance claim.

The question remains, however, whether the Appellant actually did hold such a specific intent. A person's intent is ordinarily derived not only from a person's statements, both current and contemporaneous with the events in question, but also by inferences drawn from a person's actions. The Appellant's patterns of cod fishing during the endorsement qualifying period, 1995-1999, show an enterprise devoted almost entirely to crab fishing for the first four years of the qualifying period. The vast majority of the Appellant's cod fishing during 1995-1998 were non-commercial bait harvests in service of their crab fishing.

The May 1992 harvests were the last commercial Pacific cod harvests the Appellant made with the F/V WIZARD until February 1995, when it made a single commercial harvest of 8,169 pounds. The Appellant's next commercial cod harvests were in December 1997 for 399 pounds, and October 1998 for 400 pounds. Only in May 1999 did the Appellant again begin making commercial cod harvests of more than 100,000 pounds per year. Thus, it appears from the harvest records that for seven years, including most of the endorsement qualifying period, the Appellant had substantially abandoned the commercial BSAI Pacific cod fishery.<sup>7</sup>

Other than the affidavits of Mr. Colburn and Wizard Fisheries President John Jorgensen, there is little in the record to show that in the fall of 1998 the Appellant actually intended to harvest and land 100,000 pounds of Pacific cod. Nonetheless, the fact that the F/V WIZARD in 1992 had the demonstrated ability to harvest and land over 100,000 pounds of Pacific cod makes me less confident of our previous finding that the Appellant lacked the requisite specific intent to qualify for the endorsement under an unavoidable circumstance claim. As a result, I withdraw that finding in the Decision.

I decline, however, to find that the Appellant did have the requisite specific intent without holding an oral hearing on this issue. I am not ordering such a hearing, however, because (as discussed below) I conclude as a matter of law that even if the Appellant held the requisite specific intent, that intent was not thwarted by an "unavoidable circumstance" within the

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<sup>7</sup>Wizard Fisheries President John Jorgensen states, "The WIZARD . . . had attempted fishing Pacific cod with pots in 1995 and 1997. We discontinued those efforts for business reasons (improper gear, inexperienced skipper, low price, unwilling crew)." Second Jorgensen affidavit, ¶2 (July 15, 2003).

meaning of the Pacific cod endorsement hardship provision, 50 C.F.R. §679.4(k)(9)(v)(B).<sup>8</sup>

**2. Was the Appellant's specific intent thwarted by an "unavoidable circumstance" within the meaning of the Pacific cod endorsement hardship provision, 50 C.F.R. §679.4(k)(9)(v)(B)?**

On reconsideration, the Appellant asserts that the F/V WIZARD's design did not make the effective use of slush ice impossible, contrary to what we stated in the Decision, and contrary to what the Appellant argued in its appeal brief.<sup>9</sup> The Appellant points out that the vessel had successfully harvested and landed over 124,000 pounds of Pacific cod, which was chilled with slush ice, in May 1992. The Appellant also asserts that over 300,000 pounds of Pacific cod that the F/V WIZARD landed from February 14, 2000, to March 4, 2000, were chilled with slush ice.<sup>10</sup>

The Appellant asserts that this evidence shows that the F/V WIZARD had the proven ability to adequately chill Pacific cod with slush ice, and without an RSW system, both before and after the fall of 1998. Thus, the Appellant argues that its decision to use slush ice to chill Pacific cod aboard the F/V WIZARD in the fall of 1998, and to delay installation of an RSW system, was not the circumstance that thwarted its specific intent to harvest and land at least 100,000 pounds of Pacific cod that year. Rather, the Appellant reasons, some other factor must have kept the vessel from being able to chill Pacific cod with slush ice in the fall of 1998.

The Appellant on reconsideration introduces for the first time scientific evidence that purportedly shows that the temperatures in the Bering Sea in 1998 were substantially warmer than in other years, such as 1997.<sup>11</sup> The Appellant asserts that the warmer ocean temperature was the real cause of the F/V WIZARD's inability to chill Pacific cod with slush ice in the fall of 1998. The Appellant argues that the warmer ocean temperature was an "unavoidable

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<sup>8</sup>"A hearing will not be ordered on factual issues that are not determinative with respect to the action requested." 50 C.F.R. 679.43(g)(3)(iv).

<sup>9</sup>"The inability to use slush ice is a limitation of the vessel, and a direct consequence of the vessel's design and configuration." Decision at 10. "[I]n hindsight, the lack of the wing fuel tanks in the WIZARD would have been a determining factor, if not the determining factor, why the WIZARD was unable to successfully use slush ice to chill Pacific cod." Appeal brief at 28.

<sup>10</sup>Keith Colburn states that the generator that powered the vessel's RSW system failed on February 14, 2000, and that the vessel had to use ice to preserve the cod catch until after March 4, 2000. Keith Colburn affidavit at 2 (Mar. 17, 2005). NMFS records show that the F/V WIZARD landed over 500,000 pounds of Pacific cod during that period. *NMFS official LLP record, groundfish fishing history of F/V WIZARD, 2000.*

<sup>11</sup>"Is the Climate of the Bering Sea Warming and Affecting the Ecosystem?" Overland, J.E. and Stabeno, P.J., 85 EOS (Transactions, American Geophysical Union) No. 33 at 309-316 (Aug. 17, 2004); Rodionov, S.; Stabino, P., Overland, J., Bond, N., and Salo, S., "Eastern Bering Sea - 2003" (Source not identified). Exhibit 2, attached to Appellant's Motion for Reconsideration.

circumstance” because it was beyond the Appellant’s control, caused the failure of the slush ice, and seriously impaired the vessel’s pre-existing capability to meet the landing requirements for the Pacific cod pot gear endorsement.<sup>12</sup> The Appellant also notes that the increase in ocean temperature was unforeseen.<sup>13</sup> Therefore, the Appellant concludes, the F/V WIZARD was prevented from making the required landings by an “unavoidable circumstance” and the Appellant qualifies for a Pacific cod pot gear endorsement on its LLP groundfish license.

The Appellant’s claim for relief stands on three legs: the factual assertion that the ocean temperature in the Bering Sea in the fall of 1998 was as much as 2° Celsius (3.6° Fahrenheit) warmer than in 1997;<sup>14</sup> the factual assertion that such an increase in water temperature was sufficient to prevent the adequate chilling of Pacific cod with slush ice and, thus, thwarted the Appellant’s specific intent; and the legal assertion that an increase in the ocean temperature can and did constitute an “unavoidable circumstance” within the meaning of the Pacific cod endorsement hardship provision, 50 C.F.R. §679.4(k)(9)(v)(B).

### **Ocean temperatures in the Bering Sea**

The two scientific articles the Appellant submitted on reconsideration are not, by themselves, sufficient evidence on which to base a finding that the temperature in the Bering Sea was significantly warmer in October 1998 than it was in May 1992, February 1995, December 1997, or February and March 2000 (the periods when the F/V WIZARD successfully chilled Pacific cod with slush ice and made landings).

The EOS article describes an overall warming trend in the Bering Sea since 1976, but the specific data shown in the article do not appear to support the Appellant’s claim that the F/V WIZARD was affected by unusually warmer temperatures in October 1998.<sup>15</sup> For example, Figure 2 in the EOS article indicates that air temperatures measured at St. Paul Island were significantly warmer in February and March 2000 than in October 1998. The figure also shows that temperatures in October 1998 were the same as in May 1992 and February 1995. The figure shows that although December 1997 was cooler than the other three periods when the F/V WIZARD successfully used slush ice, October 1998 was cooler than the previous three Octobers.

The EOS article states that depth-averaged water temperatures at oceanographic mooring site M2 (56.8°N, 164°W) for the two-month period July 15 to September 15 are warmer by 2° Celsius “for the mean of 2001-2003 compared with the mean of 1995-1997.” Figure 1 in the article

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<sup>12</sup>Motion for Reconsideration at 4.

<sup>13</sup>Appellant’s notation in pencil on “Eastern Bering Sea - 2003” at 1.

<sup>14</sup>Dixon Marine Surveys memorandum (Mar. 18, 2005); Appellant’s notation in pencil on EOS article at 1 (Exhibit 2).

<sup>15</sup>Citation to EOS article is at footnote 11, *supra*.

shows depth-averaged water temperatures for July 15, 1998, to September 15, 1998, ranged between 5° and 6° Celsius, whereas temperatures for the same period in 1997 were between 3.5° and 4.5° Celsius; for the same period in 2000 temperatures were between 3.5° and 5.5° Celsius. Figure 1 covers only April - September, 1995 - 2003; it contains no data for any of the five periods when the F/V WIZARD successfully used slush ice.

The second article, "Eastern Bering Sea - 2003," states that the surface air temperature in the Eastern Bering Sea increased substantially and the ice cover retreated in February or March of 1998, 2000, and 2002, due to unusual cyclonic (storm) activity.<sup>16</sup> Figure 1 of the article shows that mean winter (December - March) surface air temperatures at St. Paul Island in 1998 were the same as in 1992, 1° Celsius warmer than in 1995, and approximately 0.5° Celsius warmer than in 2000, but were 1.5° cooler than in 1997. Surface air temperatures measured at oceanographic mooring site M2, for the months January - April, show that 1998 was actually cooler than 1995, 1997, and 2000, but more than 2° Celsius warmer than 1992.

In summary, I find the evidence in these two scientific articles to be inconclusive, contradictory, or irrelevant regarding the ocean temperature in October 1998 and, more particularly, the water and air temperatures in the areas of the Bering Sea in which the F/V WIZARD fished for Pacific cod and through which the vessel transported its catch in October 1998. Without more evidence on this issue, and probably an oral hearing, I cannot make a finding that the temperature in the Bering Sea was significantly warmer in October 1998. Therefore, I do not make such a finding. For the sake of this discussion, however, I will assume that in October 1998 the water and air temperatures in the Bering Sea were as much as 2° Celsius warmer than in the other four periods when the F/V WIZARD successfully used slush ice to chill its Pacific cod catches.

### **Effect of warmer temperatures on the effectiveness of slush ice aboard the F/V WIZARD**

Assuming that the temperatures in the Bering Sea were, in fact, as much as 2° Celsius warmer in October 1998 than at other relevant times, the question remains whether such an increase in temperature was sufficient to prevent the F/V WIZARD from effectively using slush ice to chill its Pacific cod catch, and thereby thwart the Appellant's asserted specific intent to commercially harvest and land at least 100,000 pounds of BSAI Pacific cod in 1998.

The Appellant has submitted no evidence on this factual question. Although I could take judicial notice of the fact that water freezes at 0° Celsius (32° Fahrenheit), the Appellant has not shown at what air or ocean temperature slush ice becomes incapable of adequately chilling Pacific cod on a vessel at sea, and in particular, aboard the F/V WIZARD. Figure 1 in the EOS article shows depth-averaged ocean temperature high points of approximately 6° Celsius (42.8° Fahrenheit) in August and September 1998 at site M2. The Appellant asserts that, whatever the Bering Sea temperatures were in October 1998, they were warm enough to prevent the slush ice aboard the vessel from adequately chilling the Pacific cod. The Appellant argues by deduction that because

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<sup>16</sup>Reference to "Eastern Bering Sea" article is at footnote 11, *supra*.

the F/V WIZARD was able to chill its Pacific cod catches with slush ice when temperatures were cooler, then the increase in temperature must have been the cause of the vessel's inability to do so in October 1998.

While it is reasonable to assume that ocean temperatures above freezing would reduce the effectiveness of slush ice, it is not clear from the evidence in the record whether the difference in temperature in October 1998 was enough to account for the F/V WIZARD's inability to chill the catch. It may be that other factors were in play, such as differences in the amount of ice used, the amount of fish to be chilled, or the length of time the fish were under ice, that could account for the difference in performance in October 1998 versus the other time periods in question. Without more evidence, I am not prepared to make a factual finding that warmer ocean temperatures in October 1998 prevented the F/V WIZARD from chilling the fish with slush ice.

Nonetheless, I will assume for the sake of this discussion that temperatures in the Bering Sea in October 1998 were sufficiently warm to have been a factor in reducing the F/V WIZARD's ability to chill its Pacific cod catch with slush ice.

**“Unavoidable circumstance” under 50 C.F.R. §679.4(k)(9)(v)(B)**

Even if it is true that Bering Sea temperatures in October 1998 were significantly warmer than at other relevant times, and that the warmer temperatures prevented the F/V WIZARD from being able to chill its Pacific cod catch with slush ice, the legal question remains: whether warmer ocean temperatures can and did constitute an “unavoidable circumstance” within the meaning of the Pacific cod endorsement hardship provision, 50 C.F.R. §679.4(k)(9)(v)(B).

For at least two reasons, I conclude that warmer ocean temperatures cannot and did not constitute an “unavoidable circumstance” under 50 C.F.R. §679.4(k)(9)(v)(B). The first reason is that the increase in ocean temperature did not involve or result in loss, damage, or breakdown of the vessel or its gear or equipment. As we explained in the Decision, this is one of the characteristics that a vessel-related “unavoidable circumstance” must possess.<sup>17</sup> We said that “the [North Pacific Fishery Management] Council conceived of unavoidable circumstances as involving substantial and sudden damage or loss, such as a vessel sinking or grounding, a catastrophic fire, a catastrophic engine failure, or similar disastrous events or acts of God.”<sup>18</sup>

The Appellant states that the warming of the Bering Sea in 1998 caused the F/V WIZARD's refrigeration system to completely fail.<sup>19</sup> That is an incorrect application of this “unavoidable circumstance” characteristic. The F/V WIZARD in 1998 used a circulating seawater system,

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<sup>17</sup>Decision at 12.

<sup>18</sup>*Id.*

<sup>19</sup>Motion for Reconsideration and Memorandum in Support thereof at 4.



supplemented with slush ice.<sup>20</sup> This system contrasts with a refrigerated seawater system (RSW), which mechanically maintains cool temperatures in the vessel's fish holds, and which was not installed on the F/V WIZARD until 1999. The circulating seawater system relies on cold ocean temperatures combined with the chilling effect of slush ice. The F/V WIZARD is a steel-hulled vessel configured with uninsulated fish holds that extend to the skin of the hull. The vessel has no wing fuel tanks, void, or airspace to form an insulating barrier between the fish holds and the hull. Thus, by design, the vessel is sensitive to the ocean temperature. Warm sea temperatures will naturally counteract the chilling effect of slush ice.<sup>21</sup> The purpose of using slush ice, obviously, is to keep fish cold when the circulating seawater alone is insufficient to do the job.

The refrigeration capacity of a circulating seawater/slush ice system apparently is limited by the ocean temperature and the natural cooling properties of slush ice. As mentioned before, the amount of ice used, the size of the catch to be chilled, and the length of time the catch must be chilled are also factors which logically would affect the system's refrigeration capacity. At some point, as the Appellant argues, the ocean temperature could be so warm that slush ice simply won't work. That is not a failure resulting from a catastrophic event, as envisioned by the Council. That is not a damaged refrigeration system. That is simply a condition that exceeds the design capacity of the system. This inherent limitation of a circulating seawater/slush ice system is presumably one reason that some vessel owners, including perhaps the Appellant, have installed an RSW system on their vessels. They apparently decided that the added capacity and reliability of mechanical refrigeration is worth the added cost.

The second reason I conclude that warmer ocean temperatures do not constitute an "unavoidable circumstance" is that the temperature of the ocean is an element of the environment in which all fishing vessels must operate. It is a circumstance that is not "unique to the license holder, or unique to the vessel," as required by 50 C.F.R. §679.4(k)(9)(v)(B)(1)(ii). To meet the uniqueness requirement of this regulation, the Appellant would have to show that the F/V WIZARD was the only vessel (or perhaps one of only a few vessels) that was subjected to unusually warm ocean temperatures. Clearly, that was not the case. The warmer ocean temperature in the Bering Sea in 1998 did not act upon the F/V WIZARD alone. All the vessels in the fishery at that time were subject to the same ocean temperatures.

Even if the F/V WIZARD was the only vessel in the Bering Sea that was unable to chill its Pacific cod with slush ice in 1998, that would not mean that the circumstance of warm ocean temperature was unique to the Appellant or its vessel.<sup>22</sup> If other vessels succeeded in chilling

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<sup>20</sup>Affidavit of J. Douglas Dixon at 2 (July 2003).

<sup>21</sup>Affidavit of Scott Yale at 2 (July 11, 2003).

<sup>22</sup>As the Appellant itself argued in the original appeal, the uniqueness requirement of 50 C.F.R. §679.4(k)(9)(v)(B)(1)(ii) "focuses on the causal fact or condition that thwarts the required landings, not the effect of that causal fact or condition." Appeal brief at 25.

their Pacific cod catches with slush ice, then the ocean temperature *per se* was not the culprit in this case.<sup>23</sup> Either the F/V WIZARD could not operate successfully in warm ocean temperatures because of its unusual design and configuration, or the Appellant did not adequately compensate for the vessel's design limitations. The success of other vessels shows that, with proper vessel design or adjustments, unusually warm ocean temperatures can be overcome, and need not render ineffective a vessel's capacity to chill Pacific cod with slush ice. Thus, if anything was unique to the F/V WIZARD or the Appellant, it was the vessel's design or the Appellant's failure to deal effectively with changed ocean conditions.

The temperature of the ocean is not a circumstance unique to the Appellant, nor is it even a catastrophic event. It is but one of many variables of nature with which all fishermen must constantly contend.

#### FINDINGS OF FACT

1. The increase in ocean temperature did not involve or result in loss, damage, or breakdown of the F/V WIZARD or its gear or equipment.
2. The temperature of the ocean is an element of the environment in which all fishing vessels must operate.

#### CONCLUSIONS OF LAW

1. The temperature of the ocean is not a circumstance "unique to the license holder, or unique to the vessel," as required by 50 C.F.R. §679.4(k)(9)(v)(B)(1)(ii).
2. Warmer ocean temperatures in the Bering Sea in 1998 cannot and did not constitute an "unavoidable circumstance" under 50 C.F.R. §679.4(k)(9)(v)(B).
3. The Appellant's specific intent was not thwarted by an "unavoidable circumstance" within the meaning of the Pacific cod endorsement hardship provision, 50 C.F.R. §679.4(k)(9)(v)(B).
4. The Appellant does not qualify for a Pacific cod pot gear endorsement on its LLP groundfish license (#LLG1480).

#### DISPOSITION

Finding of Fact Number 1 of our Decision in this appeal is WITHDRAWN. In all other respects,

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<sup>23</sup>In its original appeal brief, the Appellant asserted, but did not prove, that "the WIZARD proved to be uniquely unfit to use slush ice to chill Pacific cod." Appeal brief at 24. The Appellant also asserted, but did not prove, that "the WIZARD's fish holds are uniquely large and deep and uniquely configured in comparison to other crab pot vessels . . . that successfully used slush ice to chill Pacific cod during the time in question." Appeal brief at 27.

the Decision is incorporated by reference and made a part of this Decision on Reconsideration. The IAD that is the subject of this appeal is AFFIRMED. This Decision on Reconsideration takes effect on May 27, 2005, unless by that date the Regional Administrator orders review of the Decision.

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Edward H. Hein  
Chief Appeals Officer