

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Appeal of)	Appeal No. 07-0003
)	
ALEUTIAN PRIBILOF ISLAND)	
COMMUNITY DEVELOPMENT)	
ASSOCIATION (APICDA),)	DECISION
Appellant)	
)	
SNOPAC PRODUCTS, INC.,)	
Respondent)	May 2, 2008
_____)	

STATEMENT OF THE CASE

This appeal takes place as part of the Bering Sea/Aleutian Islands [BSAI] Crab Rationalization Program [CRP].¹ RAM issued a decision on February 6, 2007, that Snopac Products, Inc., [Snopac] could process the Individual Processor Quota [IPQ] for Bering Sea opilio crab that it holds pursuant to its IPQ Permit No. 58417 outside of the community of St. George in 2007.

Snopac earned this IPQ by processing at St. George in the years 1997, 1998 and 1999.² By regulation, until July 1, 2007, Snopac had to process this IPQ in the community where Snopac earned it, unless Snopac met the requirements for an exemption based on an unavoidable circumstance.³ RAM determined that Snopac met those requirements because a storm that occurred in October 2004 was still blocking use of the harbor in 2007. RAM allowed Snopac to process outside of St. George in 2007.

APICDA, on behalf of St. George, asked RAM to reconsider its decision.⁴ RAM denied APICDA's request on March 8, 2007. APICDA filed a timely appeal on May 7, 2007.⁵ APICDA can appeal because RAM's decision directly and adversely affects APICDA's

¹ The CRP was adopted in federal regulation on March 2, 2005. Final Rule, 70 Fed. Reg. 10174 (March 2, 2005). The CRP regulation, including amendments to the original rule, is primarily at 50 C.F.R. § 680. It is on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/regs/680/default.htm>

² I use IPQ to refer to both Processor Quota Share or PQS, which is the original underlying award, and IPQ, which is the number of pounds that a processor can process each year and is calculated annually based on the total allowable catch. Snopac's IPQ amount for IPQ Permit 58417 for 2007 was approximately 1.5 million pounds.

³ 50 C.F.R. § 680.42(b)(4)(ii).

⁴ Letter from Joe Kyle, Chief Operating Officer, APICDA (Feb. 26, 2007).

⁵ Appeal by APICDA (May 7, 2007). APICDA had sixty days to appeal. 50 C.F.R. § 679.43(d).

interests, as required by 50 C.F.R. § 679.43(b).

Since APICDA was asking me to order something which affected Snopac and Peter Pan, I joined them as parties to the appeal.⁶ The appeal presents a factual dispute, namely whether processing outside the harbor at St. George was a reasonable step that Snopac and Peter Pan should have taken to overcome the blocked harbor.⁷ I decided that an oral hearing was the best way to resolve that question,⁸ and scheduled it to begin on December 11, 2007, which was the earliest date consistent with the parties' schedules and their desire to conduct pre-hearing discovery.⁹

Before the hearing, Peter Pan and APICDA reached a settlement and asked me to dismiss APICDA's appeal of Peter Pan's exemption for 2007.¹⁰ The settlement is confidential. It is not part of the record and I do not know the terms.

I held a hearing on December 11 - 13, 2007 and December 18- 19, 2007. Twenty witnesses testified. During the hearing, it became apparent that the APICDA and Snopac were presenting evidence on whether, as a remedy, NMFS should order Snopac to process at St. George in the future, not merely whether, as a remedy, NMFS should treat Snopac *as though* it had processed at St. George for purposes of extending the St. George's Right of First Refusal [ROFR] to purchase Snopac's IPQ shares if Snopac sold them.

Since it was not clear whether APICDA's appeal had requested that NMFS order Snopac to process at St. George in the future, I asked the parties to submit argument on that question.¹¹ I ruled that I did not have the authority to order Snopac to process at St. George after July 1, 2007, because the requirement to process in the community of origin ended, by express terms of the regulation, on July 1, 2007.¹² I ruled that I could vacate RAM's decision to grant Snopac the exemption and that, if I did that, I could order RAM [1] to treat Snopac as though it had processed at St. George in 2007 and [2] to extend the period of St. George's ROFR to purchase

⁶ *Order Joining Peter Pan and Snopac as Parties and Establishing a Deadline for Responding to APICDA's Appeal* (May 23, 2007). Peter Pan and Snopac both submitted legal argument and affidavits.

⁷ *Order for Hearing* (Sept. 21, 2007)

⁸ For the requirements for a hearing, see 50 C.F.R. § 679.43 (g)(hearings) and 50 C.F.R. § 679.43 (n)(oral hearing).

⁹ *Order After Status Conference* (Sept. 28, 2007). The parties wanted to depose witnesses.

¹⁰ Stipulation (Oct. 15, 2007); *Dismissal and Order* (Nov. 1, 2007).

¹¹ *Order on Written Remedy* (Dec. 28, 2007). The parties submitted argument. *Snopac's Briefing on Remedies* (Jan. 4, 2008); *APICDA's Closing Argument Regarding Administrative Judge's Authority to Order Proposed Remedy* (Jan. 4, 2008).

¹² *Order Establishing Potential Remedy* (Jan. 18, 2007).

Snopac's IPQ shares earned at St. George.

After this order, APICDA and Snopac engaged in settlement efforts, with the assistance of Edward Hein, Chief Administrative Judge of this Office. While the parties were doing that, they delayed submitting closing arguments. I did not participate in the discussions and know nothing about them, except that they did not succeed. I established a deadline for closing arguments and received them on March 3, 2008.

I conclude that the record has sufficient information for me to reach a decision and that all procedural requirements have been met, as required by 50 C.F.R. §679.43(k). I therefore close the record and issue this decision. Before making this decision, I listened again to the tapes of the hearing.

I have attached three appendices to this decision. Appendix 1 is a map of St. George. Appendix 2 is a schematic of the harbor. Appendix 3 is a letter from Larry Cotter, Chief Executive Officer for APICDA, to Phil Smith, RAM Program Director, dated December 12, 2005, supporting Snopac's exemption from processing at St. George for the 2006 crab season.

ISSUES

The overall issue is whether Snopac met the requirements of the unavoidable circumstance exception to the cooling off period in 50 C.F.R. § 680.42(b)(4)(ii) for 2007. I decide this by examining the specific requirements of the regulation.

1. Did Snopac have a specific intent to process at St. George for the 2007 season?
2. Was Snopac's intent thwarted by the circumstance of the damaged harbor?
3. Was this circumstance unavoidable?
4. Was this circumstance unique to the IPQ permit holder or to the processing facility used by the IPQ permit holder?
5. Was this circumstance unforeseen and reasonably unforeseeable?
6. Did this circumstance actually occur?
7. Did Snopac take all all reasonable steps to overcome the circumstance that prevented the IPQ permit holder from conducting processing in the eligible crab community?
8. Was processing inside the harbor a reasonable step that Snopac should have taken to overcome the damaged harbor?
9. Was processing outside the harbor but within the boundaries of St. George a reasonable step that Snopac should have taken to overcome the damaged harbor?

SUMMARY

The IAD is affirmed. Snopac met the requirements of the unavoidable circumstance exception to the cooling off period in 50 CFR § 680.42(b)(4)(ii). The cooling off period refers to the requirement that, for the first two years of the Crab Rationalization Program, an IPQ permit holder had to process its IPQ in the community where it earned the IPQ. This requirement ended July 1, 2007. The requirement to process in the community of origin had an exception for a processor who could not process in the community of origin because of an unavoidable circumstance.

Snopac showed that it was prevented from processing at St. George by a devastating storm that occurred in October 2004. The storm deposited rocks, boulders and 12,000 to 20,000 cubic yards of sand in the harbor entrance. Snopac and APICDA jointly requested that RAM grant Snopac an exemption from processing at St. George for 2006 on the grounds that the harbor was not useable. RAM granted the exemption for 2006.

In 2007, Snopac requested an exemption from processing on the same grounds as the 2006 exemption. The harbor had not yet been dredged. Snopac showed that it would have processed at St. George, if the harbor had not been damaged. Snopac showed that the damaged harbor was a circumstance that was unavoidable, unique, unforeseen and reasonably unforeseeable.

APICDA opposes the 2007 exemption primarily on the grounds that NMFS should have required Snopac to process its IPQ within the boundaries of St. George but outside the harbor. I conclude that processing outside the harbor is not a reasonable step which Snopac should have been required to take when it could not process in the harbor. First, Snopac processed at St. George from 1992 to 2000 but only inside the harbor. Second, APICDA agreed, explicitly, that Snopac met the requirements for an exemption in 2006 because of the damage to the harbor. In 2006, APICDA did not state that processing outside the harbor was safe or reliable. Nothing had occurred in 2007 that would have made processing outside the harbor safer than it was in 2006. Third, experienced mariners testified that locations outside the harbor do not provide a safe and reliable location for processing. The only relatively protected place on St. George is the harbor. That is why it was built. Fourth, no processing has ever occurred at two of the locations suggested by APICDA (Garden Cove and North Anchorage) and processing has occurred at the third (Zapadni Bay), rarely, in emergency-type situations. I concluded that it would be unreasonable to require Snopac to process at these locations.

ANALYSIS

APICDA appeals whether Snopac met the requirements of the unavoidable circumstance exception to the requirement that, until July 1, 2007, Snopac process at St. George the IPQ that Snopac earned at St. George. This time period – from the beginning of Crab Rationalization until July 1, 2007 – covered the first two years of crab fishing and processing under the CRP.

This period was called “the cooling off period.”¹³

The cooling off period was a “community protection measure,” designed to protect the communities where processing had occurred from adverse economic consequences of Crab Rationalization. The cooling off period did this by generally requiring that processing would occur in the communities where the IPQ holders earned their IPQ shares for at least two years.¹⁴ But the requirement had an exemption. If the processor was unable to process in the community of origin during the cooling off period due to an unavoidable circumstance, the processor could move processing to another location in the same region.¹⁵

The regulation establishing the requirements for the cooling off period, and the unavoidable circumstance exception to the cooling off period, is 50 CFR § 680.42(b)(4)(ii), which states:

(4) Before July 1, 2007, IPQ for the BSS [Bering Sea snow crab fishery], BBR, PIK, SMB, and EAG crab QS fisheries¹⁶ may not be used to process crab derived from PQS based on activities in an ECC [Eligible Crab Community], except in the geographic boundaries established in paragraph (b)(4)(iv) of this section, except that, before July 1, 2007:

(ii) IPQ [Individual Processor Quota] in excess of the amounts specified in paragraph (c)(7)(i) of this section may be used outside the ECC for which that IPQ is designated if an unavoidable circumstance prevents crab processing within that ECC. For purposes of this section, an unavoidable circumstance exists if the specific intent to conduct processing for a crab QS [Quota Share] species in that ECC was thwarted by a circumstance that was:

- (A) Unavoidable;
- (B) Unique to the IPQ permit holder, or to the processing facility used by the IPQ permit holder in that ECC;
- (C) Unforeseen and reasonably unforeseeable to the IPQ permit holder;
- (D) The circumstance that prevented the IPQ permit holder from processing crab in that ECC actually occurred; and
- (E) The IPQ permit holder took all reasonable steps to overcome the circumstance that prevented the IPQ permit holder from conducting processing

¹³ Final Rule, 70 Fed. Reg. 10174, 10176 (March 2, 2005)(CRP Overview).

¹⁴ *Id.*

¹⁵ The unavoidable circumstance exception is an exception to processing in the community where the IPQ was earned but not the region where it was earned. Snopac IPQ Permit 58417 has a regional designation of North. Snopac still must process its IPQ in the Northern Region.

¹⁶ IPQ means Individual Processor Quota. BBR Bristol Bay is red king crab, PIK is Pribilof red and blue king. SMB is St. Matthew blue king. EAG is Eastern Aleutian Islands gold king crab.

for that crab QS fishery in that ECC.¹⁷

I want to clarify how I refer to crab fishing years. Technically, the 2005/2006 crab fishing year was July 1, 2005 to June 30, 2006.¹⁸ I refer to the 2005/2006 crab fishing year as 2006 or the 2006 crab season because the actual harvesting and processing of crab occurred in calendar year 2006. The 2006/2007 crab fishing year was July 1, 2006 to June 30, 2007. I refer to that as the 2007 season because the harvesting and processing of crab occurred in 2007.

The event which begins this appeal is a devastating storm that occurred in the Bering Sea in 2004. The storm damaged the harbor of St. George. It damaged the breakwaters for the harbor. It deposited boulders, rocks and 12,000 to 20,000 cubic yards of sand in the harbor. Larry Cotter, APICDA CEO, stated that the storm deposited 12,000 cubic yards of sand in the entry to the harbor.¹⁹ Max Malavansky, St. George City Administrator, said the engineer's estimate was 15,000 to 20,000 cubic yards of sand.²⁰

The first year under Crab Rationalization was the 2006 crab fishing year. Snopac, APICDA, the City of St. George and Peter Pan jointly requested that Snopac and Peter Pan be exempt from processing at St. George for 2006. The joint letter, signed by representatives for the four parties, stated: "The damage [from the storm] was significant enough that until remedied, the safe processing of crab by any processor in St. George is not possible."²¹ When RAM asked the parties for further explanation, Mr. Cotter responded for the group: "Because of the damage to the breakwater and entrance channel – and the inability of the City of St. George to certify safe passage into the harbor – it is not possible for processing vessels to enter the harbor during the 2006 opilio season." [Appendix 3] RAM granted the exemption for 2006.

In January 2007, Snopac and Peter Pan requested an exemption for the 2007 crab season.²² The

¹⁷ 50 C.F.R. § 680.42(b)(4)(ii). Subsection (i) is the other exception. An IPQ holder may process 10% of its IPQ annual amount, or 500,000 pounds, whichever is less, outside of the community of origin.

¹⁸ "Crab fishing year means the period from July 1 of one calendar year through June 30 of the following calendar year." 50 C.F.R. § 680.2

¹⁹ Letter from Larry Cotter, CEO, APICDA, to Phillip Smith, RAM (Dec. 12, 2005) [Appendix 3].

²⁰ Testimony of Max Malavansky, St. George City Administrator, Tape 9A.

²¹ Letter to Phil Smith from Larry Cotter, APICDA; Max Malavansky, St. George Administrator; Barry Collier, Peter Pan; Terry Stewart, Controller, Snopac (Oct. 31, 2005) [Exhibit S - 5]. Snopac's Exhibits are S - (number of exhibit). APICDA's Exhibits are A - (number of exhibit). The parties largely submitted the same documents as exhibits. I introduced some documents from NMFS's records, which are OAA - (number of exhibit).

²² Letter to Jessica Gharrett, RAM (Jan. 15, 2007) [Exhibit S - 14]

breakwater had been repaired but the harbor had not been dredged.²³ APICDA planned to support the exemption for the 2007 season because it was the same situation as the previous year and Mr. Blakey, Snopac's President, was aware of APICDA's intention.²⁴ Mr. Cotter had, in fact, drafted a letter supporting Snopac's exemption for 2007. But APICDA changed its position after Mr. Cotter talked to Jessica Gharrett, Acting Program Administrator of RAM, and learned two things: [1] Snopac could move processing from St. George after the 2007 crab season without APICDA's consent; [2] St. George's ROFR would lapse if Snopac did not process at St. George in 2007 and 2008.²⁵

Mr. Cotter had mistakenly believed that Snopac could not move its processing operations from St. George without APICDA's consent. Mr. Cotter was mistaken because, after July 1, 2007, the end of the cooling off period, Snopac could choose to process outside of St. George at another location in the Northern District. And, once Snopac processed outside of St. George for three consecutive years, St. George's ROFR to purchase Snopac's shares lapsed. Thus, APICDA changed its position and decided it would not support an exemption for Snopac for 2007.

RAM granted the exemption for 2007 because the facts before it were the same as 2006. The harbor was still blocked.²⁶ RAM granted the exemption without giving APICDA the right to object to it. After Mr. Cotter spoke with Ms. Gharrett, he learned that processing had occurred outside the harbor at St. George in 1995. APICDA asked RAM to rescind the exemption on the grounds that Snopac should have processed outside the harbor in 2007.²⁷ RAM denied reconsideration but did not evaluate APICDA's claim that Snopac should be required to process outside the harbor but within the boundaries of St. George.²⁸

Normally, the person appealing RAM's decision has the burden to prove that RAM's decision was wrong. But, in this appeal, I ruled that Snopac has the burden to prove that RAM's decision was correct because [1] APICDA did not have the opportunity to object to RAM's decision before RAM made it and [2] RAM never ruled on whether processing outside the harbor is a reasonable step. Snopac has the burden of proving it met the requirements of the exemption by a

²³ Saint George Harbor Breakwater Repairs, 2006 Close-Out Summary, Peratrovich, Nottingham and Drage [PND] (Sept. 21, 2006) [Exhibit S - 9].

²⁴ Testimony of Greg Blakey, Tape 15A.

²⁵ Testimony of Larry Cotter, Tape 17A, Tape 18A. I accept as candid and truthful Mr. Cotter's testimony on the circumstances surrounding APICDA's change in position.

²⁶ Letter from Tracy Buck, Acting RAM Program Administrator, to Greg Blakey, President, Snopac (Feb. 6, 2007) [Exhibit S - 32].

²⁷ Letter from Joe Kyle, Chief Operating Officer, APICDA (Feb. 26, 2007).

²⁸ Denial of Request for Reconsideration (March 8, 2007); Testimony of Jessica Gharrett, RAM, Tape 11A; Testimony of Tracy Buck, RAM, Tape 13A.

preponderance of evidence in the record.

1. Did Snopac have a specific intent to conduct processing at St. George in 2007?

Snopac was under a legal obligation to process at St. George in 2007, unless it obtained an unavoidable circumstance exemption. I find that, if the harbor had been dredged, Mr. Blakey would have arranged to process Snopac's IPQ within the harbor at St. George.

Mr. Blakey testified that, if the harbor had been dredged, he would have contacted Paul Duffy to work out an arrangement that Mr. Duffy's vessel, the F/V PRO SURVEYOR, would process Snopac's IPQ.²⁹ Mr. Blakey testified that he had congenial, successful dealings with Mr. Duffy in the past. At first, Mr. Blakey said that the F/V PRO SURVEYOR would do custom processing, implying that Snopac would turn the processing over to the F/V PRO SURVEYOR and get back a finished product. Then Mr. Blakey said that Snopac might supply the crew and lease the vessel through a bareboat charter. Mr. Blakey had not contacted Mr. Duffy to work out a custom processing arrangement or a bareboat charter.

I find that Mr. Blakey did not contact Mr. Duffy because Mr. Blakey knew that processing could not occur in the harbor at St. George because it was still blocked. I will not interpret the specific intent requirement to mean that an IPQ holder has to take pointless steps. I conclude that, for purposes of this regulation, Mr. Blakey had a specific intent to process at St. George in 2007.

2. Was Snopac's intent to process at St. George thwarted by the damaged harbor?

I have already concluded that, if the harbor had not been blocked, Snopac would have arranged to have its IPQ processed at St. George. I analyze below whether Snopac could have processed inside the harbor, despite the blocked entrance, and conclude that it could not.³⁰

3. Was this circumstance unavoidable?

I conclude that the storm and resulting damage to the harbor is an unavoidable circumstance. The storm and the damage from it are unavoidable. Snopac could not have done anything to prevent the storm. Snopac cannot be expected to repair the municipal boat harbor.

The paradigm case of an unavoidable circumstance is a vessel that sinks or suffers catastrophic damage from a storm. That is a situation which is beyond the vessel owner's control and which physically prevents the vessel owner from using the vessel – for harvesting or processing.

A damaged harbor caused by a storm is equivalent to a vessel damaged by a storm. Both physically prevent the vessel owner from processing.

²⁹ Testimony of Greg Blakey, Tape 15A.

³⁰ See pages 9 - 12 *infra*.

4. Was this circumstance unique to the IPQ permit holder or the processing facility?

The damaged harbor is unique to St. George. The harbor is equivalent to Snopac's processing facility and a damaged harbor is equivalent to Snopac's processing vessel suffering physical damage. Both present a physical impediment to processing.

The fact that the damaged harbor also stopped Peter Pan from processing does not mean that the blocked harbor is not unique to Snopac, for purposes of this regulation. If two vessels were involved in an accident with each other, each vessel owner could claim the physical damage was unique even though the accident affected two vessels. The purpose of the uniqueness requirement is to eliminate conditions which affect the entire, or a substantial part, of the crab fleet, such as a low price of crab or a change in sea temperature.³¹ I conclude that the damaged harbor was a unique circumstance for Snopac.

5. Was the damaged harbor unforeseen and reasonably unforeseeable?

I conclude the damaged harbor was unforeseen and reasonably unforeseeable. The damaged harbor is the result of a natural disaster – the October 2004 storm – which was unforeseen and reasonably unforeseeable. It could be argued that the blocked harbor in 2007 was foreseeable, even if the blocked harbor in 2006 was not.

I do not accept that argument on two grounds. First, I view the storm as having a continuing effect for more than one year. Second, APICDA stated in its letter to RAM that the harbor would be repaired before the 2007 crab season: “The repair work is scheduled to begin in spring of 2006 and be complete by the end of summer. At that point the harbor will be fully usable.” [Appendix 3]. Snopac did not have an obligation to foresee that St. George could not complete repairs according to the schedule that APICDA gave. Even if Snopac foresaw that the harbor repairs would not begin until May 2008, Snopac could not have been expected to repair the harbor itself.

6. Did this circumstance actually occur? Yes. The storm and the blocked harbor occurred.

7. Did the IPQ permit holder take all reasonable steps to overcome the circumstance that prevented the IPQ permit holder from conducting processing in the eligible crab community?

APICDA argues that Snopac could have taken two steps to overcome the circumstance of the blocked or damaged harbor. First, APICDA argues that Snopac could have processed within the harbor, in spite of the damage. Second, APICDA argues that Snopac could have processed outside the harbor, but still within the boundaries of St. George. Snopac argues that those are not reasonable steps.

³¹ *Wizard Fisheries, Inc.*, Decision on Reconsideration, Appeal No. 03-0004 at 9 (April 27, 2005).

A. Is processing inside the harbor a reasonable step?

APICDA presented evidence that is relevant to this appeal only if APICDA is arguing that Snopac could have processed inside the harbor, in spite of the damage to the entrance channel: PND's bathymetric map and survey; photographs of vessels in the harbor; and RAM's grant of an exemption to another vessel in 2006. I examine that evidence to determine whether Snopac can process inside the harbor in the harbor's current condition.

(1) PND bathymetric map and survey

APICDA provided a bathymetric map and survey of the St. George harbor done in 2005 harbor by Peratrovich, Nottingham and Drage [PND] [Exhibit A - 3]. It has several notations of - 20 feet and APICDA argues that this means that vessels with a draft of - 20 feet can use the harbor. APICDA did not present any testimony from PND, or any other witness, to explain the map, answer questions about it and tell me what relevance it has to the disputed issues in this appeal.³² The map has several notations of - 20, which I believe is feet, but only near very small blue spots of water and then, to my untrained eye, large portions of the harbor entrance filled with sand or silt and the sandy portions of the map mostly have no depth measurements.

The City has hired PND to do the engineering work for dredging the harbor.³³ I certainly would not conclude, without hearing from PND, that PND would say, essentially, that the project is not needed and that this map means that, without dredging, vessels can safely navigate the St. George harbor. I therefore give the map no weight as showing that Snopac could have processed within the harbor in its current condition.

(2) Photographs and testimony about vessels in the harbor

APICDA provided evidence that some vessels have used the harbor since the storm. Alvin Mercurief, Mayor and Public Works Director for St. George, testified that he had seen vessels tying up in the St. George harbor, some of which were 100 to 125 feet, since the storm. Rodney Lekanof, a lifelong resident of St. George, long-term employee of Tanaaq Corporation and excellent photographer, provided evidence that vessels have used the harbor since the storm [Exhibit A-.4 to A - 9].³⁴ He offered pictures of the F/V AMERICAN BEAUTY, F/V SEA VENTURE, F/V FARWEST LEADER and the F/V VANGUARD that he took in February and March 2007. The CFEC website shows the lengths of these vessels. The F/V AMERICAN BEAUTY is 123 feet. The F/V ENTERPRISE is 78 feet. The F/V FARWEST LEADER is 110 feet. The F/V SEA VENTURE is 104 feet. The F/V VANGUARD is 94 feet. I accept that crab

³² Witnesses could testify by telephone and many witnesses testified that way.

³³ Saint George Harbor Breakwater Repairs, 2006 Close-Out Summary, Peratrovich, Nottingham and Drage [PND] (Sept. 21, 2006) at 2 [Exhibit S - 9].

³⁴ Mr. Lekanof's testimony is at Tape 9B, 345 to 537.

fishing vessels between 100 and 125 feet have come in and out of the harbor since the storm.

It is relatively weak evidence that processing can occur in the harbor. None of the vessels seen by Mr. Lekanof or Mr. Mercurief is as long as the 171-foot F/V PRO SURVEYOR, which is the vessel that Mr. Blakey said he would have tried to use to process crab at St. George, if the harbor had not been blocked. None is as long as the 174-foot M/V SNOBAC, which is the vessel Snobac did use to process at St. George in the past. The only testimony about a long vessel getting in and out of the harbor since the storm is Delta Western's fuel barge, which is 180 feet, which requires a tug assist and only has a 5-foot draft.³⁵ None of the vessels were laden with crab, because no crab processing has occurred in the harbor since the storm.

(3) RAM's grant of exemption to another vessel

In January 2006, Yardarm Knot asked RAM for permission to move its vessel, the C/P WESTWARD WIND, from St. Paul to St. George if the weather forecasts of icy conditions at St. Paul came true and only for as long as the ice conditions kept their vessel out of the St. Paul harbor.³⁶ RAM granted the request which included RAM stating in an email to the company that the C/P WESTWARD WIND could operate within the harbor. This evidence supports APICDA's argument that a processor vessel could use the harbor after the storm. I do not give this evidence much weight because the request was not opposed, the request was for a very limited period of time and the record suggests that RAM did not conduct any research into the request. Most important, the icy conditions at St. Paul did not materialize. The C/P WESTWARD WIND did not go to St. George and did not process inside the harbor.³⁷

(4) Overwhelming weight of evidence in the record

But, stepping back, it is hard to believe that APICDA seriously contends that processing could occur in the harbor in its current state. APICDA offered no evidence from a vessel captain, an engineer or a City official who stated that the large amount of sand and rocks in the entrance to the St. George harbor is *not* seriously impeding access to the harbor. That is an inherently incredible position and the overwhelming weight of evidence in the record, including statements and actions by APICDA and City officials, is that the storm damage prevents use of the harbor for processing. I list some of that evidence:

– After the storm occurred in October 2004, the City of St. George obtained a disaster declaration from the Federal Government and obtained funds from the Federal Emergency Management Agency (FEMA) to repair the breakwater and dredge the harbor. This process

³⁵ Testimony of Kirk Payne, Delta Western, Tape 3A, 430. .

³⁶ E-mail correspondence between RAM and Yardarm Knot Fisheries, LLC, January 2006 [OAA - 1]. I found this material in the RAM file and provided it to the parties.

³⁷ Testimony of Jessica Gharrett, Tape 12B.

suggests that the storm seriously affected the navigability of the harbor.

– Mr. Cotter, in supporting Snopac’s exemption for 2006, stated:

- **The south breakwater suffered structural damage which will require approximately 12,000 cubic yards of five to ten ton rock to repair. In addition, the entrance channel filled in with approximately 12,000 cubic yards of sand, which now needs to be dredged. As a result, the City of St. George cannot certify safe passage into the harbor.**

- **The nature of the planned processing activity in St. George involves the use of a floating processing vessel(s) tied to the dock in the inner harbor. This is how all crab processing operations have operated in St. George in the past. Because of the damage to the breakwater and the entrance channel – and the inability of the City of St. George to certify safe passage into the harbor – it is not possible for processing vessels to enter the harbor during the 2006 opilio season. [Appendix 3]**

– The City of St. George sent a letter to the City of St. Paul on January 16, 2007 requesting that St. Paul rebate to St. George the taxes that St. Paul would collect on Snopac’s and Peter Pan’s processing for 2007. This is when St. George still intended to support the exemption for 2007. Mayor Mercurief’s letter explains why the City intended to support the exemption for 2007:

Both processors have since sold the floating processors MV Snopac and MV Bluewave that they originally used to process in the St. George harbor **and the existing processor Stellar Sea cannot safely navigate into the St. George harbor and processing off St. George being problematic.** [emphasis added]
[Exhibit S - 12]

– Max Malavansky, City Administrator for St. George since 1999, testified that, since the entrance channel is filled with sand, the entrance can get as low as 12 feet, which is too shallow for processor vessels and fully loaded crab vessels. He also testified that he was concerned about potential legal liability of the City if the City let those vessels use the harbor in its current state. [Tape 9A]

– Mayor Mercurief testified that, given the build up of sand and silt in the harbor, he did not think that the vessels’ insurance policy would allow them to use the harbor. [Tape 10A]

The record contains ample testimony that getting into the harbor at St. George is difficult even when the harbor does not have 12,000 to 20,000 cubic yards of sand in it. The design of the harbor is such that a vessel comes into the harbor and then has to make an immediate 90-degree turn in close quarters. Any significant surge or swell can build in the entry to the harbor and prevent a boat from getting in – even when the harbor does not have the extra blockage it has

now.³⁸

The state of the harbor, by itself, is definitely not an unavoidable circumstance that thwarts processing. Snopac and Peter Pan processed millions of pounds of opilio crab, regularly coming in and out of this harbor, in 1997, 1998 and 1999.³⁹ But this testimony supports the conclusion that this harbor – which is difficult to navigate under normal conditions – would not be safely navigable with 12,000 to 20,000 cubic yards of sand, rock and silt in it.

During this entire time – from the storm in October 2004 to the hearing in this appeal – no representative of APICDA or St. George has ever stated that processing inside the harbor is safe and feasible, if the harbor is not repaired. I find the obvious: processing inside the harbor cannot occur until the harbor is repaired. I conclude, based on the overwhelming evidence in the record, that Snopac could not have processed inside the harbor in 2007 and that processing inside the harbor is not a reasonable step that NMFS should have expected Snopac to take.

B. Is processing outside the harbor a reasonable step?

APICDA argues that Snopac should have been expected to process outside the harbor in 2007. Snopac argues processing outside the harbor is not a reasonable step that NMFS should have expected Snopac to take in 2007. I conclude that Snopac has shown, by a preponderance of the evidence in the record, that processing outside the harbor was not a reasonable step. I base this conclusion on the testimony of experienced mariners, Snopac's history of processing and the extremely limited amount of processing that has occurred outside the harbor at St. George.

(1) Testimony of mariners.

APICDA said three locations were suitable for processing: Zapadni Bay, right outside the harbor, on the southwest part of the Island; North Anchorage, on the north side of the Island near the village; and Garden Cove, on the east side of the Island.

Snopac offered a large amount of consistent, credible testimony from experienced mariners that processing outside the harbor at these locations presented serious problems stemming from the Island's physical characteristics. The Island is small, flat, oval-shaped and has a smooth coast line. Apart from the harbor, the Island does not provide vessels with adequate protection from

³⁸ Testimony of Jorn Kvinge, crab vessel captain in the Bering Sea, Tape 2A; Justin Buckley, Operations Manager, Kelly Ryan, Tape 2A; Tom Suryan, crab vessel captain in the Bering Sea, Tape 1A. Larry Cotter testified that the harbor had serious problems, even before the storm. [Tape 17 or 18].

³⁹ The total opilio crab quotas in those years were large: 117 million pounds in 1997, 243 million pounds in 1998 and 194 million pounds in 1999. This contrasts with 24 million pounds in 2005, 37 million pounds in 2006 and 32 million pounds in 2007. These figures are from the State of Alaska, Alaska Department of Fish and Game, Commercial Division website: <http://222/cf.adfg.state.ak.us/geninfo/shellfish>.

wind and swells. The Island provides inadequate opportunities for processor vessels to safely anchor, to safely and reliably receive crab from catcher vessels, and to safely and reliably offload crab onto freighter vessels.

I give great weight to the testimony of Captain Thomas Dundas.⁴⁰ Captain Dundas had a pilot's license for the Western Region of Alaska from 1988 to 2005. The Western Region is the Bering Sea, Aleutian Islands and the Pribilof Islands.⁴¹ Before getting his pilot's license, he worked on crab vessels in in the Western Region and Kodiak Island area as deckhand and skipper. He worked on the M/V SEA ALASKA, a 343-foot crab processing vessel, in 1984 as mate and quality control officer and from 1985 to 1988 as the master and superintendent. The superintendent is in charge of production on the ship. From 1988 to 2005, he acted as a marine pilot for various vessels in the Western Region. The vessels included containerships in Dutch Harbor, ranging from 710 to 905 feet, and trampers, ranging from 280 to 500 feet, that loaded frozen product from processing vessels servicing the opilio crab fleet.

Captain Dundas was the only witness who had a marine pilot's license and who was ever responsible for deciding where a large processing vessel and its crew could safely anchor and process.⁴² He offered lengthy, detailed, consistent testimony that supported his conclusion:

Snopac Attorney Bruce Weyhrauch: In your opinion, would processing at North Anchorage, Garden Cove and Zapadni Bay, would that entail a safety risk to the processing crew?

Thomas Dundas: Potentially

Weyhrauch: Potentially? For all the reasons you've already discussed.

Dundas: That I've already discussed. Winds, swells, broken lines, vessels coming together. And part of its the rate of which the wind can sheer. It can change sometimes quickly as a front goes by you. It can shift direction quite a bit.

Weyhrauch: Now what, you said it poses a safety risk to process any of those alternate locations, to what degree of certainty do you have about that position?

Dundas: Well, just from my experience there with seeking a lee and a _____

⁴⁰ Testimony of Thomas Dundas, Tapes 3B (near end), 4A, 4B, 5A, 5B, 18A. Mr. Dundas's resume is Exhibit S - 45, which he testified accurately states his experience and qualifications.

⁴¹ Tape 3B. In 2005, Mr. Dundas become certified for Southeast Alaska where he now works.

⁴² Wayne Bouch testified that he had piloted vessels for Coastal Transportation, but I do not know if they were equivalent to large processing vessels.

[indecipherable] distance and so on. The shape of the island just doesn't offer much of a lee, I mean just to find a spot to, maybe if you can find a place to anchor but a place that's calm enough, particularly for any amount of time that's calm enough to have a vessel to vessel contact, is unlikely.

Weyhrauch: So what degree of certainty do you have on that opinion? Like 90%? 10%?

Dundas: Of certainty of my opinion? I am quite certain of it. Yea, quite certain.

Weyhrauch: Is it reasonable to risk that kind of a processing action outside of the harbor at one of those locations, North Anchorage, Garden Cove, Zapadni Bay?

Dundas: No, not in my opinion. As the skipper of a ship, I wouldn't want to do it. [Tape 4B, 220]

Captain Dundas testified that, as master and superintendent of the F/V SEA ALASKA, he planned where the vessel would process and selected areas where he thought the vessel could safely and reliably process. He never planned to process outside the harbor at St. George and never did, because of the inherent difficulties of processing there.

Weyhrauch: The North Anchorage here which is near the village of St. George. What would it be like to try and process crab at St. George in the North Anchorage there?

Dundas: Again, unreliable. Particularly for any long term situation.

Weyhrauch: Is there any place in that area that's better than others for an anchorage, or is the whole area that's just fine?

Dundas: Well, it's not again something to be counted on. And, again, when you're trying and you have vessels along side and you've got your processing going and people on deck and exposed situation, and loose cargo, and equipments, forklifts in the freezer. Again, you're. When the wind changes, you go from being in the lee to being at sea. Suddenly the wind changes and you're at sea. The tail of your ship is pointed to the beach. All the weather is coming in on you, so you could be a couple of miles out there or you could be right where you were. Suddenly you're at sea. So everything is coming at you. And that's the fear, is that when things change, you are totally exposed. [Tape 4B, 126]

Other witnesses agreed with Captain Dundas's concerns. Jorn Kvinge, captain of the F/V ARCTIC SEA, has operated in the Bering Sea for 30 years:

Weyhrauch: What would it be like to do that during opilio season outside the

harbor of St. George?

Kvinge: Well, I think it would be difficult, unless conditions were perfect,. You know, it's anytime you tie up to a big ship that is rolling at a different rate. It may look nice but once you get next them you say, whew, they're moving around and I'm moving around and it gets tricky, hard on the boats, and you're breaking lines, that's the standard thing, you know they give you big hawsers, and you tie up the best you can, but you're snapping lines all the time and it doesn't take a lot to do it these boats are 480 ton and it rolls and things have to give so either breaks lines or rip cleats off.

Weyhrauch: What does rip cleats off mean?

Kvinge: Well, it's like something has to give. If the boats roll apart during rolling sequence and something has to give and if the line doesn't break, the cleat will rip out of the deck. That's the bad thing that could happen and then you open holes on the boat, then things fly, but I've snapped a lot of lines in my career tied up to processors.

Weyhrauch: And what is the areas around St. George does that present that kind of risk?

Kvinge: I think it would, because there is no protected, real protection in there, no harbor that will stop swells coming in. It's like around St. George, there's always swell that reaches around the island whether you are in the leeward side or not. You are in the middle of the Bering sea. You're next to a little rock in the middle of the Bering Sea and there's always, you know, swells coming from all different there direction and will reach around the island no matter what side you are on. [Tape 1B, 550 - Tape 2B, 40]

Wayne Bouck is Sales and Vessel Logistics Manager for Coastal Transportation in Seattle, which is a freight company that brings supplies to Western Alaska and brings frozen fish back. Mr. Bouck also has a mate's license and a captain's license. He has taken Coastal Transportation ships to Alaska on 33 trips as a mate and 50 trips as a captain but stopped sailing in 1997. He said that he valued very much his working relationship with both APICDA and Snopac, which suggested his testimony would be reliable.⁴³ [Tape 3A]

Mr. Bouck testified that "the last time we tried to do an offload with a longliner on the north side of St. George was February of 2007, we were unable to work. We got alongside but broke away due to conditions." [Tape 3A,] Mr. Bouck testified that his company had the same problem in 1995:

⁴³ Mr. Bouck's testimony is at Tape 3A, 40 - 360.

Weyhrauch: What was your, the experience up there in '95 with vessels trying to offload?

Bouck: We had the same problem, there was a, the reason we tried to do it was because, it was pretty crowded up at St. P. There wasn't any good anchorage left to work, so with the wind, we tried to go down and work it and we couldn't do it at St. G.

Weyhrauch: Did you have any problems with the vessels? Did they?

Weyhrauch: It was swell. The problem is that you get swells from multiple directions there, so say if you have a south wind you can still have an easterly or westerly swell. You are constantly, you are fighting two things, the wind and the swell itself. It's pretty exposed. [Tape 3A]

Snopac's attorney asked Mr. Bouck about Garden Cove:

Weyhrauch: All right, have you ever tried to anchor off, say, Garden Cove by St. George Island?

Bouck: You know, I haven't. What scared me on that is that, you know, you don't have a whole lot of sandy ground there. It's mostly rocky. When we did lose our anchor one, after we hold in St. George, that was the problem, we drug into a rocky area and the rocks just hooked up on the anchor and we just couldn't get it back out and that's how we broke our anchor chain. So I try to avoid anchoring in areas were its predominantly, uh, rocky for that reason. [Tape 3A]

Tom Suryan has worked in the Bering Sea since 1974 and is captain of his own crab vessel. He has been into the St. George harbor many times and has anchored off the North Village and Zapadni Bay but never off Garden Cove.⁴⁴ He was asked about the anchorage at Zapadni Bay:

Weyhrauch: Have you ever, what's the anchorage like at Zapadni Bay?

Suryan: The anchorage itself is ok, if you're close into the beach. But again you get a lot of surge around the island, if there's much swell activity or wave activity and stuff, it can wrap around the point so if there's much weather at all you have to get right up on the beach to try to get out of it.

Weyhrauch: Could you tie up to a processor in that situation to offload your catch and process it?

⁴⁴ Mr. Suryan's testimony is at Tape 2B, 316 - 577.

Suryan: Uh, if it was extremely calm you could. But if there was much weather at all, it would be it wouldn't be a good situation. [Tape 2B,]

Lance Farr, captain of the F/V KEVLEEN K, a crab vessel, delivered to Snopac in the harbor in the past. He has never offloaded outside the harbor at St. George. He testified that he has never tried to off load there and wouldn't want to. He thinks there would be a safety problem and someone could get hurt. He also stated that you could get started offloading and have to stop in the middle, which is bad because it causes deadloss.

APICDA provided no testimony from a vessel operator or captain that processing outside the harbor at Zapadni Bay, North Anchorage or Garden Cove was, according to fishing industry practice, safe and reliable. In an industry where participants are used to taking risks, this testimony supports the conclusion that the reason processing has largely not occurred at these locations is that these locations are not reasonably safe and reliable for processing.

(2) Snopac's actions: Snopac has processed only inside the harbor.

I find that Snopac has never processed opilio crab outside the harbor. Snopac processed at St. George from 1992 to 2000.⁴⁵ Greg Blakey, President of Snopac, testified that Snopac did all its processing at St. George "to the last pound" from its floating processor, the M/V SNO PAC, inside the harbor at St. George.⁴⁶ The three years that count for calculating Processor Quota Share for Being Sea snow or opilio crab under Crab Rationalization are 1997, 1998 and 1999.⁴⁷ RAM records show that Mr. Blakey processed approximately 28.5 million pounds of crab at St. George in those three years. [OAA - 7] Snopac earned all its IPQ inside the harbor at St. George.

Mr. Blakey testified that he believes processing outside the harbor entails unacceptable safety and business risks. [Tape 14A, 14B, 15A, 15B]. He has never taken any actions which are inconsistent with that belief.

(3) Outside the St. George harbor, processing has occurred only at Zapadni Bay.

Both APICDA's and Snopac's witnesses testified that vessels had to move from St. Paul to St. George in February 1995 to avoid damage from the ice pack. APICDA produced observation reports from the St. George harbormaster that he saw vessels off shore and produced city sales tax returns for some of those vessels. The record also contains an affidavit from the captain of

⁴⁵ Testimony of Greg Blakey, Tape 14A, 150.

⁴⁶ Tape 14A, 291.

⁴⁷ Table 9 to Part 680. It is actually the opilio crab seasons in those years: January 15, 1997 to March 21, 1997; January 15, 1998 through March 21, 1998; and January 15, 1999 through March 22, 1999.

the M/V STELLAR SEA, Ivan Reitan, about that vessel's very limited processing in Zapadni Bay during the eight-day season in 2000.⁴⁸

By contrast, the record contains no documentary evidence or definite testimony that processing has occurred at North Anchorage or Garden Cove. Tom Suryan testified that he thought processing vessels had been off North Anchorage in the late 1990s but he did not deliver to them and did not remember any specifics. [Tape 2B] Al Chaffee, President of Yardarm Knot, testified that the F/V YARDARM KNOT processed numerous times and at different locations around the Island. Although Mr. Chaffey was cooperative, testifying over a cell phone on his walk around a park in Seattle, Mr. Chaffey gave no specifics about these instances and did not testify he was on board the F/V YARDARM KNOT when this processing supposedly happened. Kerry McClellan, purser for the F/V YARDARM KNOT from 1988 to 1999, testified that the F/V YARDARM KNOT processed at St. George once in 1995 in Zapadni Bay. Mr. McClellan was on the vessel when that happened. His testimony is more credible than Mr. Chaffee's.

Given the large number of witnesses who testified, the importance of this issue to APICDA's position, and the existence of clear evidence when processing actually did occur outside the harbor at St. George, I believe that, if processing occurred at St. George outside the harbor at any place besides Zapadni Bay, the record would likely contain evidence of it. Based on this record, I find that processing outside the harbor at St. George has occurred only at Zapadni Bay.

(4) Processing at Garden Cove and North Anchorage is not a reasonable step.

Snopac has provided convincing evidence from mariners that processing at Garden Cove and North Anchorage falls below working industry standards for a reasonably safe and reliable place to process. Snopac has shown that processing has not occurred at either of these locations.

APICDA has provided neither testimony from vessel operators that these locations are adequately safe and reliable for processing nor convincing evidence that processing has occurred at either location. APICDA introduced printouts from a weather buoy located in the Bering Sea that had lists of wave heights and from a weather tower at the St. George airport showing wind speeds [A - 30, A - 31, A - 32, A - 33]. I gave this data no weight in showing that the weather around St. George was suitable for processing. I did not know how to interpret it. For example, a number of the vessel captains testified said that swells are a critical determinant in whether a location is suitable for processing. I do not know how the weather buoy data measures swells, if at all. APICDA provided no evidence that mariners use this data in choosing processing locations. Choosing a location requires a vessel operator to look at how factors such as wind, swell, waves relate to each other and how likely they are to change. It's a judgment call. The fact that those choices and those judgments have resulted in a rejection of these sites for processing outweighs any implication that this data shows these sites are suitable for processing.

⁴⁸ Affidavit of Ivar Reitan (June 22, 2007), submitted by Peter Pan.

I find, based on the clear weight of evidence in the record, that processing at Garden Cove and North Anchorage would not be reasonably safe and reliable. I conclude that processing at Garden Cove or North Anchorage is not a reasonable step which Snopac should have been expected to take to overcome the blocked harbor.

(5) Processing at Zapadni Bay is not a reasonable step.

As for Zapadni Bay, the situation with the testimony of mariners is the same. Snopac has provided testimony from mariners that Zapadni Bay is not a reasonable place to expect someone to process. And APICDA has not provided similar testimony that expresses the opposite view. But, unlike Garden Cove and North Anchorage, APICDA has shown that some processing has occurred at Zapadni Bay. I therefore must determine the weight to give to the fact of processing at Zapadni Bay.

Kerry McClellan, the purser on the F/V YARDARM KNOT, was present on the F/V YARDARM KNOT when the vessel processed at Zapadni Bay in February 1995. He testified that it stayed “four days to a week at Zapadni Bay . . . four days maybe less, maybe more,” and that the vessel left “after a few days – not a very long time.”⁴⁹ I therefore find that the vessels were at St. George for four days total, which includes the time the crew needs to set up the processing equipment, when the vessel arrives, and secure the equipment, when the vessel leaves.

Mr. McClellan testified that, although he did not remember how many pounds the vessel processed, he remembered nothing unusual and thought the vessel processed at its usual rate of production. Mr. McClellan testified that he thought a vessel, comparable to the M/V SNOPAC, could process 1.5 million pounds of crab in nine days. Overall, I found Mr. McClellan a credible witness, who was not prone to overstatement and willing to admit when he did not know or remember something. Mr. McClellan’s testimony about the F/V YARDARM KNOT’s experience in 1995 is the strongest evidence in favor of APICDA’s argument that it would be reasonable to require Snopac to process its IPQ outside the harbor at St. George.

On balance, however, I find the evidence is stronger that Zapadni Bay is not a reasonable place to order an IPQ holder to conduct processing operations. Mr. McClellan did not present himself as giving a general opinion that Zapadni Bay was a reliable place to process. He relied on the vessel captain to decide whether to process there. I have before me persuasive testimony from vessel captains – Thomas Dundas, Jorn Kvinge, Lance Farr – that they do not consider it a suitable place to process. APICDA presented no evidence from vessel operators – the persons who would have to carry out a requirement to process outside the harbor – that Zapadni Bay has the characteristics expected by the industry for an adequately safe and reliable location for processing. And, in fact, St. George expressed a view consistent with Snopac’s witnesses when it wrote to St. Paul that it intended to support Snopac’s exemption for 2007 because processing

⁴⁹ Tape 7A, 25.

off St. George was problematic.⁵⁰

Mr. McClellan stated: “I don’t remember [processing] as being problematic. From what I recollect, we were getting a steady northerly and so we were in good shape there in the south side, the southwest side of the Island.” [Tape 6B, 440] Captain Dundas stated that weather systems in that area of the Bering Sea often go counterclockwise, from southwest to northeast, [Tape 4A, 260] Zapadni Bay would be exposed to winds with a westerly component. Winds change speed and direction unpredictably and, as Captain Dundas testified, you can suddenly go from being in the lee to being at sea. I am not convinced that the conditions which allowed the F/V YARDARM KNOT to process once at Zapadni Bay in 1995 are common and predictable enough so a processor could rely on having those conditions.

It is very relevant to me that these vessel captains processed outside the harbor at St. George because they were forced to leave St. Paul so the ice pack would not destroy or damage their vessels. When they got to St. George, these vessel captains had no choice between inside the harbor and outside the harbor because Snopac was in the harbor. These vessel captains left St. George – and stopped processing outside the harbor – as soon as the emergency was over.

I accept Mr. Cotter’s testimony that Clyde Sterling, of Peter Pan, said that if Peter Pan was legally required to process outside the harbor, Peter Pan would try to do that with the M/V BLUE WAVE.⁵¹ But this testimony provides little support for the assertion that it would be reasonable to make Peter Pan, or Snopac, try to do that. In this appeal, Peter Pan vigorously opposed a requirement that it process outside the harbor and presented detailed affidavits that that such a requirement would be unreasonable.

Fairly stated, the record shows that vessel captains and vessel owners do not voluntarily choose to process outside the harbor at St. George. Snopac has shown, by a preponderance of evidence in the record, that prudent vessel operators, except in emergency conditions and situations where they have no choice, will not choose to process outside the harbor at St. George. Based on careful review and consideration of all the evidence in the record, I conclude that it would be unreasonable to require Snopac to process at St. George when the harbor is not useable. I therefore conclude that processing outside the harbor at St. George is not a reasonable step and that there were no reasonable steps Snopac could take to overcome the damaged harbor.

I conclude that Snopac has met all the requirements for the unavoidable circumstance exemption to the cooling off period in 50 C.F.R. § 680.42(b)(4)(ii). I conclude that the damaged harbor is an unavoidable circumstance that prevented Snopac from processing in the harbor in 2007.

⁵⁰ Letter from Mayor Alvin Merculief to Linda Snow, City Manager, St. Paul (Jan. 16, 2007) [Exhibit S - 11].

⁵¹ Testimony of Larry Cotter. The conversation between Mr. Cotter and Mr. Sterling is the subject of earlier affidavits in the record: Affidavit of Larry Cotter (April 27, 2007); Affidavit of Clyde Sterling (June 20, 2007).

CONCLUSION

APICDA offered convincing, credible and moving testimony about how important processing is to the future of St. George and to its economic viability as a community. City Administrator Max Malavansky stated that the community's concern over future processing "cuts to the heart of the matter. If in fact this crab leaves the community, this community is essentially toast. Because this is our lifeblood right now." [Tape 9A, 480]. Mayor Mercurief stated that the future of St. George, without crab processing, is "extremely grim. It's tough. It's going to be terrible. It's going to be horrible. I can't imagine not processing product here." [Tape 9B, 255].

The damage to the harbor prevented Snopac from processing at St. George in the first two years of the Crab Rationalization Program. Hopefully, the harbor will be repaired in 2008 and processing can occur again on St. George Island.

FINDINGS OF FACT

Based on a preponderance of evidence in the record, I make the following findings of fact.

1. Snopac processed opilio crab at St. George from 1992 to 2000.
2. Snopac processed all its opilio crab inside the harbor of St. George and did not process any opilio crab outside the harbor.
3. Snopac earned all its IPQ shares from processing inside the harbor at St. George.
4. A devastating storm in October 2004 deposited rocks, boulders and 12,000 to 20,000 cubic yards of sand in the harbor entrance and caused significant damage to the harbor.
5. APICDA and the City of St. George did not ask Snopac to process outside the harbor in 2006.
6. APICDA, the City of St. George and Snopac jointly requested that Snopac receive an exemption from processing at St. George for the 2006 season.
7. APICDA and the City of St. George did not ask Snopac to process outside the harbor until after NMFS had issued IPQ permits for the 2007 season.
8. APICDA and the City of St. George planned to support Snopac's exemption from processing at St. George for the 2007 season.
9. APICDA and the City of St. George mistakenly believed that they could prevent Snopac from removing processing operations from St. George in the future.
10. APICDA and the City of St. George changed their position in January 2007 because they

learned that Snopac, under current regulations, could permanently stop processing at St. George after the 2007 season.

11. APICDA and the City of St. George changed their position because they learned that, if Snopac did not process at St. George in 2006, 2007 and 2008, the City's Right of First Refusal would lapse.
12. Snopac cannot use the harbor at St. George to process opilio crab until the harbor is dredged.
13. Snopac would have arranged to process its IPQ at St. George in 2007 if the harbor had been dredged.
14. Snopac could not have done anything to prevent the storm or the storm damage.
15. Snopac did not foresee, and could not be reasonably expected to have foreseen, the storm or the storm damage.
16. Outside the harbor at St. George, processing has occurred only at Zapadni Bay.
17. Processing has not occurred at North Anchorage or Garden Cove.
18. In Zapadni Bay, crab was processed for four days in 1995 by a group of vessels forced to move from St. Paul to avoid damage from the ice pack.

CONCLUSIONS OF LAW

Within the meaning of 50 CFR § 680.43(b)(4)(ii), I reach the following conclusions of law.

1. Snopac had a specific intent to process at St. George in 2007.
2. Snopac's intent to process was thwarted by the damaged harbor.
3. The circumstance of the damaged harbor was unavoidable.
4. The circumstance of the damaged harbor was unique to Snopac or to the processing facility used by Snopac.
5. The circumstance of the damaged harbor actually occurred.
6. Processing inside the harbor was not a reasonable step to overcome the damaged harbor.
7. Processing at St. George outside the harbor was not a reasonable step to overcome the damaged harbor.

8. There were no reasonable steps that Snopac could take to overcome the circumstance that prevented it from processing at St. George.
9. An unavoidable circumstance prevented Snopac from crab processing within St. George in 2007.
10. Snopac met the requirements of the unavoidable circumstance exception to the cooling off period in 50 C.F.R. § 680.42(b)(4)(ii).

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on June 2, 2008, unless by that date the Regional Administrator orders review of the Decision.

APICDA or Snopac Products, Inc., may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on May 12, 2008, the tenth day after this Decision. 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