

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 03-0004
)
WIZARD FISHERIES, INC.,) DECISION
Appellant)
) March 3, 2005
)
_____)

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on March 18, 2003, that denied Wizard Fisheries, Inc., (Wizard) a Pacific cod pot gear endorsement on its groundfish license (#LLG1480) under the North Pacific Groundfish and Crab License Limitation Program (LLP).¹ The license is based on the fishing history of the F/V WIZARD (ADFG #35265), a 156-foot catcher vessel owned by the Appellant. RAM issued the endorsement on an interim basis and made the Appellant's groundfish license and its associated LLP crab license (#LLC1481) nontransferable, pending a final agency action in this matter.²

The Appellant filed a timely appeal of the IAD on April 25, 2003. The Appellant can file an appeal because the IAD directly and adversely affects its interest. [50 C.F.R §679.43(b)] The Appellant did not request an oral hearing, and none was ordered. The information on the record is sufficient to render a decision and, therefore, the record is closed. [50 C.F.R. §679.43(m)(4)]

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?
2. Is the lack of a suitable refrigeration system on a vessel an "unavoidable circumstance" within the meaning of the Pacific cod endorsement hardship provision, 50 C.F.R. §679.4(k)(9)(v)(B)?
3. Does the Appellant qualify for a Pacific cod pot gear endorsement on its LLP groundfish license (#LLG1480)?

¹The LLP is at 50 C.F.R. Part 679, primarily 50 C.F.R. § 679.4(k), and can be found on the NMFS Alaska Region website, <http://www.fakr.noaa.gov/regs/summary.htm> .

²Under 50 C.F.R. §679.4(k)(7)(viii), a groundfish license and crab license derived from the fishing history of the same vessel can only be transferred together, and an endorsement can only be transferred with the license for which it was issued. Thus, RAM makes all associated licenses and endorsements nontransferable whenever any of them are in dispute.

SUMMARY

The Appellant made insufficient harvests to qualify for a Pacific cod pot gear endorsement on its LLP groundfish license, but claimed that it qualifies for the endorsement under the hardship provision, 50 C.F.R. §679.4(k)(9)(v)(B). The Appellant argued that it had the specific intent to harvest at least 100,000 pounds of BSAI Pacific cod with pot gear aboard the F/V WIZARD in 1998, but that this intent was thwarted by the vessel's inability to adequately chill its catches of Pacific cod with slush ice due to the vessel's unusually large holding tanks.

The Appeals Officers found that the Appellant lacked the specific intent to commercially harvest at least 100,000 pounds of BSAI Pacific cod with pot gear aboard their vessel in 1998. The Appeals Officers concluded that the Appellant does not meet the requirements of 50 C.F.R. §679.4(k)(9)(v)(B)(1), and therefore does not qualify for a Pacific cod pot gear endorsement under the hardship provision.

Although the Appeals Officers found that the Appellant lacked the requisite specific intent under the hardship provision, they nonetheless considered whether the Appellant's specific intent was thwarted by an "unavoidable circumstance" within the meaning of the Pacific cod endorsement hardship provision. The Appeals Officers concluded that the fact that the F/V WIZARD has large fish holds cannot, in itself, be an "unavoidable circumstance."

The Appeals Officers concluded that an "unavoidable circumstance" must be beyond the control of the vessel owner or license holder; must involve loss, damage, or breakdown of the vessel or its gear or equipment; and must remove or seriously impair the vessel's pre-existing capability to meet the landing requirements for the Pacific cod endorsement. The Appeals Officers concluded that the Appellant's decision to use slush ice to chill Pacific cod aboard the F/V WIZARD in 1998 did not meet any of these requirements and, therefore, did not constitute an "unavoidable circumstance" within the meaning of the Pacific cod endorsement hardship provision, 50 C.F.R. §679.4(k)(9)(v)(B). The Appeals Officers concluded that the Appellant's specific intent was not thwarted by an "unavoidable circumstance" within the meaning of the Pacific cod endorsement hardship provision and, therefore, the Appellant does not qualify for a Pacific cod pot gear endorsement on its LLP groundfish license

ANALYSIS

Under federal regulation, an LLP groundfish license must have a Pacific cod gear endorsement if the license holder conducts directed fishing for Pacific cod in the Bering Sea and Aleutian Islands management area (BSAI) with hook-and-line or pot gear.³ In April 2000, the North Pacific Fishery Management Council (Council) approved the endorsement requirement to protect those fishermen who had made significant long-term investments and had long catch histories in the hook-and-line or pot gear BSAI Pacific cod fisheries from those fishermen with little or no

³50 C.F.R. §679.4(k)(9)(i).

history in those fisheries.⁴

To qualify for a Pacific cod pot gear endorsement for a catcher vessel, an LLP groundfish licensee must demonstrate that the vessel harvested at least 100,000 pounds of Pacific cod with pot gear (or jig gear) in the BSAI in each of any two years from 1995 through 1999.⁵ It is undisputed that the Appellant's vessel, the F/V WIZARD, harvested more than 100,000 pounds of Pacific cod with pot gear in the BSAI in 1999, but that was the first year the vessel made that level of Pacific cod harvests. Before 1999, the vessel had been used almost exclusively to fish crab.⁶

The Appellant acknowledges that the F/V WIZARD made insufficient harvests to qualify for the Pacific cod pot gear endorsement, but asserts that it nonetheless should qualify for the endorsement under the hardship provision.⁷ That provision allows an LLP groundfish license holder to qualify for the endorsement if it can show that it held a "specific intent" to "conduct directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements," but the specific intent was "thwarted" by a circumstance that was unavoidable, unique to the license holder, and both unforeseen and reasonably unforeseeable by the license holder. The license holder also must show that the alleged circumstance actually occurred, that the license holder took all reasonable steps to overcome it, and that the license holder harvested any amount of BSAI Pacific cod aboard its vessel after the unavoidable circumstance occurred but before April 16, 2000.⁸

⁴Final Rule, 67 Fed. Reg. 18,129, 18,130 (April 15, 2002). The Final Rule was published two years after the Council adopted Amendment 67 to the Bering Sea/Aleutian Islands Groundfish Fishery Management Plan. The Final Rule took effect January 1, 2003.

⁵50 C.F.R. §679.4(k)(9)(ii)(B).

⁶The F/V WIZARD made only five Pacific cod harvests, totaling about 14,000 pounds, during the period 1995-1998: one harvest of 8,169 pounds (1995); one harvest of 400 pounds (1997); and three harvests totaling 5,300 pounds (1998). All the vessel's other harvests during that four-year period were crab harvests. *NMFS official LLP record, fishing history of F/V WIZARD, 1995-1999.*

⁷50 C.F.R. §679.4(k)(9)(v)(B).

⁸50 C.F.R. §679.4(k)(9)(v)(B) reads:

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

(1) The license holder at the time of the unavoidable circumstance held a specific intent to conduct directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in the table at paragraph (k)(9)(ii) of this section but that this intent was thwarted by a circumstance that was:

(continued...)

The Appellant asserts that it meets all the requirements of the hardship provision. The Appellant says it had the specific intent to harvest at least 100,000 pounds of BSAI Pacific cod with pot gear aboard the F/V WIZARD in 1998, but that this intent was thwarted by the vessel's inability to adequately chill its catches of Pacific cod with slush ice due to the vessel's unusually large holding tanks.⁹ On October 30, 1998, the F/V WIZARD delivered 400 pounds of Pacific cod to its contracted buyer, Trident Seafoods, Inc. (Trident), at a shore-based processing facility at Akutan, Alaska.¹⁰ A Trident manager in Seattle states that the company informed the Appellant at that time that the fish were too warm and that, for quality reasons, it would not accept any more Pacific cod deliveries from the F/V WIZARD unless the Appellant installed a refrigerated seawater (RSW) system on the vessel.¹¹ The Appellant did not harvest Pacific cod again during the remaining five and one-half weeks of the 1998 season, which ended December 9, 1998. The Appellant ultimately did install an RSW system the following year.

The Appellant asserts that, until the October 30, 1998 delivery, it did not know and had no reason to suspect that using slush ice with the vessel's circulating seawater refrigeration system would be inadequate to keep its Pacific cod sufficiently chilled. John Jorgensen, Wizard Fisheries president and the principal owner of the F/V WIZARD, states that "to some extent, we

⁸(...continued)

(i) Unavoidable;

(ii) Unique to the license holder, or unique to the vessel that was used as the basis of eligibility for the license holder's groundfish license; and

(iii) Unforeseen and reasonably unforeseeable to the license holder.

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

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

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

⁹The F/V WIZARD's four holds have a total storage capacity of 16,000 cu. ft. The Appellant compares that to two other crab catcher vessels that entered the Pacific cod fishery: the 118-foot F/V ALEUTIAN SPRAY, with two holds totaling 5,500 cu. ft., and the 124-foot F/V SEA VENTURE, with three holds totaling 6,500 cu. ft. Appeal Brief at 28; J. Douglas Dixon affidavit, ¶9 (July 2003). *See also* RAM's list of LLP groundfish licenses, on the NMFS Alaska Region website at http://www.fakr.noaa.gov/ram/daily/llp_gf.pdf (viewed Feb. 12, 2005).

¹⁰NMFS official LLP record, fishing history of F/V WIZARD, 1995-1999.

¹¹Paul Padgett affidavit (Aug. 2, 2002); first John Jorgensen affidavit, ¶3 (Aug. 5, 2002); Keith Colburn affidavit, ¶3 (Aug. 2, 2002).

did analyze the vessel's suitability for slush ice prior to fall 1998."¹² The Appellant obtained a bid for an RSW system from Bowman Refrigeration, Inc., in Seattle in late 1997 or early 1998.¹³ Mr. Jorgensen asserts that using slush ice to chill Pacific cod "was common and well accepted in the industry" and that he and his skipper were unaware of any vessels on which slush ice had not worked.¹⁴ Thus, the Appellant asserts that the ineffectiveness of the slush ice was unforeseen, unavoidable, and unique to the F/V WIZARD.¹⁵

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?

To qualify for an endorsement under the hardship provision, the Appellant has the burden of proving, by a preponderance of the evidence, that "at the time of the unavoidable circumstance [it] held a specific intent to conduct directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in the table at paragraph (k)(9)(ii) of this section"¹⁶ For a Pacific cod pot gear endorsement, the Appellant must prove that it had the specific intent to *commercially* harvest at least 100,000 pounds of Pacific cod in 1998.¹⁷

A commercial harvest is one "in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter or trade."¹⁸ This office has ruled in a number of decisions that harvests of Pacific cod that were retained aboard the vessel for use as crab bait, and were not sold, bartered, or traded, or intended to be any of these, are not commercial harvests and cannot be credited toward an LLP groundfish license or endorsement.¹⁹

The Appellant asserts that it had the requisite specific intent. Mr. Jorgensen states: "In late 1997 and early 1998, the vessel owners decided to have the F/V WIZARD engage in the directed Bering Sea Pacific cod pot fishery in the fall of 1998. . . . But for the uniquely large fish holds in the F/V WIZARD, we would have harvested in excess of 100,000 pounds of Pacific cod in the

¹²Second John Jorgensen affidavit, ¶8 (July 15, 2003).

¹³*Id.*

¹⁴Second John Jorgensen affidavit, ¶4 (July 15, 2003).

¹⁵Appeal brief at 1.

¹⁶50 C.F.R. §679.4(k)(9)(v)(B)(1).

¹⁷50 C.F.R. §679.4(k)(9)(ii)(B).

¹⁸16 U.S.C. §1802 (definition of "commercial fishing").

¹⁹*See, e.g., Williard S. Ferris*, Appeal No. 01-0004 (Jan.18, 2002); *Paula J. Brogdon*, Appeal No. 00-0011 (Feb. 26, 2002); *Ronald J. Tennison*, Appeal No. 00-0012 (April 5, 2002); *Darjen, Inc.*, Appeal No. 00-0015 (Dec. 31, 2002); and *Stephen L. Lovejoy*, Appeal No. 02-0023 (Feb. 26, 2003).

fall of 1998.”²⁰ The Appellant asserts that sometime early in 1998 it made an arrangement with its crab buyer, Trident Seafoods, Inc., to deliver Pacific cod to Trident’s Akutan facility in the fall, but the Appellant does not specify how much was to be delivered.²¹ A manager for Trident in Seattle states that the Appellant wanted to continue delivering Pacific cod in the fall of 1998, but that after the October 30, 1998 delivery, Trident would not accept any more deliveries until the Appellant installed an RSW system on the vessel.²²

We must weigh these assertions in the affidavits against the evidence of the Appellant’s actual conduct in 1998 and, to some extent, the other four years of the Pacific cod endorsement qualifying period. 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.²³ Earlier in the year, the F/V WIZARD had made two non-commercial Pacific cod harvests: a 2,400-pound harvest on January 12 and a 2,500-pound harvest on September 12.²⁴ Both these harvests were retained aboard the vessel and used for crab bait; they were not sold.²⁵

The 1998 BSAI Pacific cod pot gear fishery was open from January 1 to December 9. 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 the year. Of the Pacific cod the Appellant did catch and report that year, 93 percent were kept for crab bait. Except for the lone 400-pound delivery in October, 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.

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. Likewise, 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, delivered to Trident’s Akutan facility in February 1995.

In 1998, the Appellant appears to have done nothing different than it had done in the previous

²⁰First John Jorgensen affidavit, ¶¶2, 7 (Aug. 5, 2002). *See also* Keith Colburn affidavit, ¶¶2, 5 (Aug. 2, 2002).

²¹Keith Colburn affidavit, ¶3 (Aug. 2, 2002); Paul Padgett affidavit (Aug. 2, 2002); first John Jorgensen affidavit, ¶2 (Aug. 5, 2002).

²²Paul Padgett affidavit (Aug. 2, 2002).

²³NMFS official LLP record, fishing history of F/V WIZARD, 1995-1999.

²⁴*Id.*

²⁵*Id.* The fish tickets for both harvests show an ADFG delivery code “92” (“whole fish retained for bait – not sold”). Each of the harvests was made just before the F/V WIZARD made crab harvests.

four years. Its fishing history was very similar in all four years. There is no evidence in the record that any changes were made to the F/V WIZARD's refrigeration system during those four years. Although the Appellant considered installing an RSW system on the vessel in the summer of 1998, and obtained a bid, the Appellant chose not to purchase and install the system until the following year. In addition, by summer 1998 the Appellant had determined that the gear used on the F/V WIZARD in previous years was improper for harvesting Pacific cod. Mr. Jorgensen says that, by then, he and the skipper, Keith Colburn, recognized the importance of cod pot design.²⁶ Mr. Colburn says the vessel owners told him in the spring or summer of 1998 to arrange to have 100 custom-designed pots fabricated.²⁷ Yet, the Appellant did not order the pots until December 1998, and they were not completed until April 1999.²⁸

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.

The Appellant has demonstrated that, in the fall of 1998, it intended to commercially harvest *some* Pacific cod with the F/V WIZARD, and it did make one such harvest. The Appellant has failed to demonstrate, however, that it held a specific intent at that time to commercially harvest at least 100,000 pounds of Pacific cod. We find by a preponderance of the evidence in the record 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 conclude that the Appellant does not meet the requirements of 50 C.F.R. §679.4(k)(9)(v)(B)(1), and therefore does not qualify for a Pacific cod pot gear endorsement under the hardship provision.

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)?

Even if the Appellant *had* demonstrated that it actually held the requisite specific intent required by the hardship provision, the Appellant would still have to demonstrate that an "unavoidable circumstance" thwarted that specific intent.

The Appellant states that the "unavoidable circumstance" was "the inability to use slush ice to

²⁶Second John Jorgensen affidavit, ¶2 (July 15, 2003).

²⁷Keith Colburn affidavit, ¶2 (Aug. 2, 2002).

²⁸Dorian Metal Fabricating, Inc., sales order, dated Dec. 1, 1998. The order notes: "Terms: 50% deposit down, balance upon completion. Due 4-1-99." Appellant's Exhibit A, attached to first John Jorgensen affidavit (Aug. 5, 2002).

chill Pacific cod due to the F/V WIZARD's uniquely large and deep fish holds extending to the outer skin of the hull."²⁹ The Appellant asserts that "[b]ut for the Vessel's uniquely large and deep fish holds extending to the skin of the hull that caused improper chilling of Pacific cod with slush ice, the Appellant would have harvested at least 100,000 pounds of pot-caught Pacific cod from the Bering Sea in the fall of 1998."³⁰

It is unclear to us whether the Appellant is saying that the "unavoidable circumstance" was the "uniquely large and deep fish holds," or whether it was "the inability to use slush ice to chill Pacific cod," or some combination of the two. The Appellant *does* clearly state that the "unavoidable circumstance" was *not* Trident's refusal to accept further deliveries of Pacific cod until an RSW was installed on the F/V WIZARD. The Appellant says Trident's refusal was the *result* of the "unavoidable circumstance." The Appellant says its problem was with the vessel, not with the market.³⁰

The Appellant focuses on the meaning of the word "circumstance" in the hardship provision, and points out that the word is not defined in regulation. The Appellant says that the word "circumstance" is unambiguous and therefore must be given its "plain meaning." Turning to two dictionaries, the Appellant says the plain meaning of the word "circumstance" is "one of the conditions or facts attending an event and having some bearing upon it, a determining or modifying factor" or "a condition, fact, or event accompanying, conditioning, or determining another."³¹ Based on these dictionary definitions, the Appellant argues that a "circumstance" need not be an "event," but can be a "fact or condition attending an event," and can include "pre-existing or latent conditions" of the vessel.

The Appellant states that "*the Vessel's inability to use slush ice to chill Pacific cod* due to its uniquely large and deep fish holds extending to the outer skin of the hull was a 'fact' or 'condition' that 'attended the event' of *the WIZARD's inability to use slush ice to chill Pacific cod*."³² This is a circular statement. Perhaps the Appellant meant to say that the existence of the vessel's unusually large and deep fish holds was a "fact" or "condition" that "attended the event" of the WIZARD's inability to use slush ice to chill Pacific cod.

Regardless of which sentence was intended, we do not believe that "the WIZARD's inability to use slush ice to chill Pacific cod" is an event. Our dictionary defines the word "inability" as "the

²⁹Appeal brief at 1.

³⁰*Id.* at 9.

³⁰Appeal brief at 24-25.

³¹*Id.* at 12-13, citing, respectively, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE and WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1967).

³²*Id.*

quality or state of being unable, a lack of ability.” It defines the word “event” as “something that happens, an occurrence.”³³ Thus, we are not persuaded by the Appellant’s linguistic argument that the F/V WIZARD’s inability to use slush ice constitutes a “circumstance” within the meaning of the hardship provision.

We disagree with the Appellant’s premise that the word “circumstance” is unambiguous. We conclude that the meaning of the word “circumstance” and the term “unavoidable circumstance,” as used in the hardship provision, cannot be properly understood by seeking the so-called “plain meaning” found in a dictionary. We conclude below that the term “unavoidable circumstance” has a specific meaning derived from the text and regulatory history of the hardship provision and related “unavoidable circumstance” provisions in the LLP regulations.³⁴

We will consider now whether either the existence of the fish holds on the F/V WIZARD or the vessel’s inability to use slush ice was an “unavoidable circumstance” within the meaning of the Pacific cod endorsement hardship provision.

Are the F/V WIZARD’s fish holds an “unavoidable circumstance”?

If the Appellant is asserting that the existence of the large holds on the vessel was the “unavoidable circumstance,” then the Appellant is saying, in effect, “If only we had had smaller holds on our vessel, everything would have been fine. We would have been able to chill our Pacific cod with slush ice and we would have delivered at least 100,000 lbs. in 1998.”

As a factual matter, this is a questionable assertion. In 1995, the F/V WIZARD, using the same “large and deep” holds, was able to deliver over 8,000 pounds of Pacific cod to Trident’s Akutan facility with no apparent problem, and evidently without using slush ice.³⁵ In 1997, again with the same fish holds, the F/V WIZARD delivered 399 pounds of Pacific cod to the Unisea facility in Dutch Harbor with no apparent problem.³⁶ The large fish holds certainly did not keep the F/V WIZARD from harvesting, delivering, and selling considerably more than 100,000 pounds annually from 1999 - 2004. There is no evidence in the record that the fish holds *per se* have ever prevented the F/V WIZARD from commercially harvesting and landing Pacific cod. If

³³WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED. (Merriam-Webster 1986).

³⁴See the discussion at 10-13, *infra*.

³⁵Appellant’s Exhibit “B,” attached to Keith Colburn affidavit, shows a delivery of 8,169 pounds of Pacific cod to processor F0939 on Feb. 23, 1995. Alaska Dept. of Fish and Game’s 2005 *Preliminary Processors & Buyers (Intent to Operate) Listing* lists F0939 as Trident Seafoods Corporation’s Akutan facility. The listing can be viewed at <http://www.cf.adfg.state.ak.us/geninfo/pubs/pubshome.php#operlist>. We read Mr. Jorgensen’s statements as indicating that the F/V WIZARD had not used slush ice to chill Pacific cod before the fall of 1998. See Second John Jorgensen affidavit, ¶4 (July 15, 2003).

³⁶*Id.* The delivery was made on Dec. 30, 1997, to processor F1180.

anything, the large holds helped enable the F/V WIZARD to deliver large amounts of Pacific cod every year since 1999. Thus, it cannot be said that the fish holds themselves thwarted the Appellant's specific intent to land at least 100,000 pounds of Pacific cod in 1998.

The hardship provision specifies that an "unavoidable circumstance" is a circumstance that was unavoidable, unique to the license holder or the vessel, and both unforeseen and reasonably unforeseeable by the license holder.³⁷ The "uniquely large and deep" fish holds are a design feature of the vessel. The design of the F/V WIZARD may be unique, but it is hard to see how the existence of these fish holds on the vessel was unavoidable, unforeseen by the Appellant, or reasonably unforeseeable by the Appellant. Mr. Jorgensen has been the principal owner of the F/V WIZARD since it was built in 1978.³⁸ Presumably he was not surprised or unaware that the vessel came with "unusually large and deep" fish holds. Thus, the fact that the F/V WIZARD has large fish holds cannot, in itself, be an "unavoidable circumstance."

Was the Appellant's decision to use slush ice to chill Pacific cod aboard the F/V WIZARD an "unavoidable circumstance"?

The Appellant asserts that the F/V WIZARD's inability to chill Pacific cod effectively with slush ice was an "unavoidable circumstance." The inability to use slush ice is a limitation of the vessel, and a direct consequence of the vessel's design and configuration.³⁹ The design of the F/V WIZARD did not force the Appellant to use slush ice. To the contrary, the vessel's design made the effective use of slush ice impossible.

Nor is the use of slush ice to chill Pacific cod required in order to meet the landing requirements for a Pacific cod endorsement. As far as chilling the Pacific cod is concerned, all that is required is the ability to maintain the fish aboard the vessel in a salable condition until it can be delivered to the buyer. How that is done is a matter of choice. Slush ice is only one method of chilling fish. So the real question here is whether the Appellant's decision to use slush ice constitutes an "unavoidable circumstance" within the meaning of the Pacific cod hardship provision.

The Appellant rightly points out that the word "circumstance" in the hardship provision is not defined. Neither is the word "unavoidable." However, the term "unavoidable circumstance," while not explicitly defined in NMFS regulations, does have a specific meaning within the License Limitation Program.

The term is found in three parallel provisions in the LLP regulations: the unavoidable

³⁷50 C.F.R. §679.4(k)(9)(v)(B)(1).

³⁸Second John Jorgensen affidavit, ¶1 (July 15, 2003).

³⁹The F/V WIZARD was built for the North Pacific crab pot fishery. It was configured differently from other crab vessels that successfully used slush ice in the Pacific cod fishery. J. Douglas Dixon affidavit, ¶¶5, 8-11 (July 2003).

circumstance provision for the groundfish and crab endorsement qualification period (EQP),⁴⁰ the unavoidable circumstance provision for the crab recent participation period (RPP),⁴¹ and the hardship provision for the Pacific cod endorsement. Although these provisions were adopted at different times, the first one – the EQP unavoidable circumstance provision – served as the model for the other two.⁴² These three provisions are related. Each sheds light on the meaning of the term “unavoidable circumstance.” We find no evidence in the regulatory history to suggest that the Council or NMFS intended the term to have a different meaning from one provision to the next.

From the text and the regulatory history of these provisions, we derive the characteristics that an “unavoidable circumstance” must possess. First, as all three provisions specify, an “unavoidable circumstance” must be (1) unavoidable; (2) unique to the vessel owner (license holder) or the vessel; and (3) both unforeseen and reasonably unforeseeable by the vessel owner (license holder).⁴³

Second, to be “unavoidable,” the circumstance must be beyond the control of the vessel owner or license holder. This is evident throughout the Council’s discussion of the EQP unavoidable circumstance provision, as well as NMFS’s commentary on the Pacific cod endorsement hardship provision in the Federal Register.⁴⁴ Lightning, storms, or other severe and unanticipated weather conditions would be examples of circumstances that are beyond a person’s control and, therefore, unavoidable. Likewise, a heart attack, stroke, or sudden debilitating illness or injury to the owner, skipper, or crew members could be considered unavoidable. So,

⁴⁰50 C.F.R. §679.4(k)(8)(iv).

⁴¹50 C.F.R. §679.4(k)(5)(v).

⁴²“Adding an unavoidable circumstance provision to the RPP is consistent with the original provisions of the LLP (i.e., the EQP has an unavoidable circumstances provision).” Final Rule, 66 Fed. Reg. 48,813, 48,816 (Sep. 24, 2001). “Another [Pacific cod endorsement] provision recommended by the Council concerns unavoidable circumstances. This hardship provision is similar to one provided for general LLP eligibility” Proposed Rule, 66 Fed. Reg. 49,908, 49,910 (Oct. 1, 2001). See also the North Pacific Fishery Management Council’s *EA/RIR/IRFA for proposed Amendment 67 to the BSAI Groundfish FMP* at 114-115, ¶5.1.5.2 (July 2001). This document is available on the NMFS Alaska Region’s website at <http://www.fakr.noaa.gov/analyses/amd67/amd67ea.pdf>

⁴³50 C.F.R. §679.4(k)(5)(v)(B), §679.4(k)(8)(iv)(A), and §679.4(k)(9)(v)(B)(1).

⁴⁴Final Rule, 67 Fed. Reg. 18,129, 18,137 (Apr. 15, 2002) (“The Council also recommended a hardship provision that was designed to assist applicants to achieve eligibility if they were prevented from meeting all the eligibility requirements by circumstances beyond their control.”). See also, the transcript of NPFMC meeting at 69-71, 151-152 (June 15-18, 1995). It is available on the Administrative Appeals section of the NMFS Alaska Region website under “Other Documents,” <http://www.fakr.noaa.gov/appeals/default.htm>

too, would many, if not all, accidents be deemed beyond a person's control and unavoidable.⁴⁵

Third, a vessel-related "unavoidable circumstance" involves loss, damage, or breakdown of the vessel or its gear or equipment.⁴⁶ As this office explained in *Alaska Trojan Partnership*, the 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.⁴⁷ This understanding of the concept of "unavoidable circumstance" is reflected in the text of the EQP and RPP unavoidable circumstance provisions. In both provisions, the term "unavoidable circumstance" is followed immediately by the clause "(i.e., the vessel was lost, damaged, or otherwise unable to participate in the license limitation ground fish or crab fisheries). . . ."⁴⁸ The same clause also appears in the Council's explanation of the hardship provision that was submitted to the Secretary of Commerce during the rulemaking process for the Pacific cod endorsement.⁴⁹

The final characteristic of an "unavoidable circumstance" is that it must remove or seriously impair the vessel's pre-existing capability to (in this case) meet the landing requirements for the Pacific cod endorsement. Necessarily, the vessel must have had such a capability before the unavoidable circumstance occurred. Otherwise it could not be said that the unavoidable circumstance thwarted the person's specific intent.

NMFS states this explicitly in its explanation of the hardship provision in the Federal Register:

⁴⁵"As long as damage to the vessel is an accident and is not the result of substance abuse by the boat operator or some other condition that generally impairs the operator's ability to command a vessel, an accident should generally be considered unavoidable." *Pequod, Inc*, Appeal No. 00-0013 at 22 (Apr. 12, 2002).

⁴⁶*See, e.g., Pequod, Inc., supra*, at 11 (vessel suffered major structural damage). An "unavoidable circumstance" can also pertain to an impairment of the vessel owner, skipper, or crew. This is suggested by the requirement that the unavoidable circumstance be unique to the vessel or unique to the license holder. *See* 50 C.F.R. §679.4(k)(9)(B)(1)(ii).

⁴⁷Appeal No. 01-0001 at 32-33 (Oct. 20, 2003). *See also* Transcript of NPFMC meeting at 69-71, 151-152 (June 16-17, 1995).

⁴⁸We interpret "otherwise unable" to mean unable to participate in the fishery or in directed fishing because of a physical disability or mechanical breakdown of the vessel, gear, or equipment. *See, Alaska Trojan Partnership*, Appeal No. 01-0001 at 31 (Oct. 20, 2003).

⁴⁹*EA/RIR/IRFA for proposed Amendment 67 to the BSAI Groundfish FMP* at 115, ¶5.1.5.2 (July 2001). Although this "i.e." clause does not appear in the regulatory text of the hardship provision, we think that the drafter of the rule simply omitted the clause for stylistic reasons, because including it would have made the provision unwieldy. This document is available on the NMFS Alaska Region's website at <http://www.fakr.noaa.gov/analyses/amd67/amd67ea.pdf>

To qualify for a Pacific cod endorsement under the unavoidable circumstances [hardship] provision a license holder must demonstrate that:

1. *But for the unavoidable circumstances, he or she could have made sufficient landings* to meet the requirements for a particular Pacific cod endorsement . . . [and]

2. He or she had the specific intent to use that vessel to conduct directed fishing for Pacific cod in the BSAI during the relevant time period *and that the vessel had the capability to have made harvests sufficient to meet the eligibility requirements; . . .* [emphasis supplied]⁵⁰

We now analyze whether the Appellant's decision to use slush ice to chill Pacific cod aboard the F/V WIZARD was beyond the Appellant's control; whether it resulted in loss, damage, or breakdown of the vessel, gear or equipment; and whether it removed or seriously impaired the vessel's pre-existing capability to meet the landing requirements for the Pacific cod endorsement.

a. Was the Appellant's decision to use slush ice beyond the Appellant's control?

The Appellant says the fact that slush ice didn't work on the F/V WIZARD was unforeseen and reasonably unforeseeable, and therefore was unavoidable. The Appellant asserts that it thoroughly and prudently analyzed the use of slush ice to chill Pacific cod during the spring and summer of 1998. The Appellant argues that it did not know there would be a problem with using slush ice aboard the F/V WIZARD, and that even a refrigeration expert likely would not have discovered the problem. The Appellant asks how it could have prevented or fixed a problem it did not know existed. Thus, the Appellant argues, the inability to use slush ice successfully was unavoidable.

To be "unavoidable," a circumstance must be a matter beyond the Appellant's control. Vessel owners and skippers are responsible for knowing their own vessel – its design, its performance capabilities, and its limitations. They are responsible for knowing any idiosyncracies and unusual features of the vessel, and to adapt as needed for each fishery they enter. It is a vessel owner's and skipper's responsibility to properly equip and gear their own vessel. They routinely make a multitude of decisions in preparing their vessel for participation in a particular fishery. No one, including the government, can specify how much preparation or research is sufficient to ensure success in a fishery. This is for the owners and skippers to judge and decide to their own satisfaction. This is an area of commercial fishing that is entirely within their own control.

In this case, the Appellant considered installing an RSW system on the F/V WIZARD in the spring and summer of 1998. After getting an estimate of the cost of installing the system, and after discussing the use of slush ice with other vessel owners, the Appellant made a reasoned decision to forego retrofitting the vessel with the RSW system before fishing for Pacific cod in

⁵⁰Final Rule, 67 Fed. Reg. 18,129, 18,131 (Apr. 15, 2002).

the fall of 1998. This was a financial and business decision. As Mr. Jorgensen stated, “we were entirely justified to decide to use slush ice to deliver Pacific cod chilled with slush ice in fall 1998. It was commonly used by other steel-hulled vessels with uninsulated fish holds. Moreover, at the time, the circumstance with the Vessel was unforeseen and reasonably unforeseeable. On the other hand, the alternative refrigerated seawater (“RSW”) involved significant expense. . . . No prudent vessel owner would spend such a substantial sum [\$172,596.00] to overcome a circumstance it didn’t know existed.”⁵¹

Commercial fishing is inherently a risky business. To a great extent, it is also a trial-and-error business. In 1998, the Appellant was still a relative newcomer to the Pacific cod fishery, having made only two commercial harvests of Pacific cod in the previous three years. The Appellant did not understand or realize the F/V WIZARD’s limitations in using slush ice until late in the 1998 season. The Appellant was trying something new and it didn’t work. Despite consulting with others to make an informed decision about using slush ice, the particular problem of using it on the F/V WIZARD was only detected through trying it out under actual at-sea conditions. The Appellant apparently did not test the system to see if it actually worked until the end of October, when there was no time left to correct the problem.

The Appellant took a calculated risk in choosing to use slush ice for the first time. The Appellant no doubt reasonably believed slush ice would work on the F/V WIZARD, but the Appellant was wrong. It simply miscalculated. The fact that the Appellant did not foresee the problem with the slush ice does not mean it was unavoidable. Once the Appellant became aware of the problem, the Appellant was able to fix it and avoid it thereafter. This is not a problem which, in its nature, was beyond the Appellant’s control.

In our judgment, the lack of knowledge and the inability to accurately predict a vessel’s performance that stem from a lack of experience in a specific fishery with a specific vessel is not an “unavoidable circumstance” within the meaning of the Pacific cod endorsement hardship provision. If it were, then every new or inexperienced Pacific cod fisherman who failed the first time out would qualify for an endorsement under the hardship provision. The Council created the hardship provision for those who were victimized by circumstances beyond their control. Choosing the wrong refrigeration method or equipment for a particular vessel and a particular fishery is not beyond the vessel owner’s control and is not an “unavoidable circumstance.”

b. Did the Appellant’s decision to use slush ice result in loss, damage, or breakdown of the vessel, gear or equipment?

The central idea here is that the “unavoidable circumstance” must somehow damage the vessel, or its gear or equipment, or cause any of these to fail. The Appellant’s decision to use slush ice did no harm to the F/V WIZARD, its gear or equipment. There was no loss, damage, mechanical failure or breakdown. The slush ice did not adequately chill the Pacific cod aboard the vessel,

⁵¹Second John Jorgensen affidavit, ¶7 (July 15, 2003).

but neither the ice nor the vessel failed. The Appellant simply expected them to perform beyond their actual limits. From the Appellant's perspective at the time, the decision to use slush ice on the F/V WIZARD may have seemed reasonable, prudent, and justified, as the Appellant has said. In retrospect, however, it is clear that the Appellant's performance expectations for the vessel were unrealistic.

The Appellant was not a victim of a catastrophe; the Appellant made a miscalculation resulting from a lack of experience with the F/V WIZARD in the Pacific cod pot gear fishery. Those fishermen with limited history in the fishery were precisely the ones the Council sought to exclude by imposing the Pacific cod gear endorsement requirement. The hardship provision was intended to help those who were kept from meeting the endorsement landing requirements by catastrophic damage sufficient to have stopped even the most experienced Pacific cod fishermen, but not to help those whose handicap was their own inexperience in the fishery.

c. Did the Appellant's decision to use slush ice remove or seriously impair the vessel's pre-existing capability to meet the landing requirements for the Pacific cod endorsement.

The Appellant's decision to use slush ice to chill Pacific cod on the F/V WIZARD was also a decision *not* to retrofit the vessel with an RSW system. The installation of an RSW system would have given (and ultimately did give) the F/V WIZARD the capability to keep Pacific cod aboard the vessel sufficiently chilled to deliver a salable product to the contracted buyer. Whether installing an RSW in 1998 would have given the vessel the capability to meet the landing requirements for the Pacific cod endorsement has not been determined.

It is clear, however, that the inability of the slush ice to adequately chill Pacific cod on the F/V WIZARD was sufficient to prevent the Appellant from meeting the endorsement landing requirements. But that fact does not make the Appellant's decision to use slush ice an "unavoidable circumstance," because using slush ice did not remove or impair a pre-existing capability of the vessel to meet the landing requirements. With or without slush ice, the F/V WIZARD was not capable of meeting the Pacific cod endorsement landing requirements at any time in 1998 because it did not have the necessary refrigeration system until 1999. Having this pre-existing capability is a prerequisite for making a successful unavoidable circumstances claim. The Appellant's pre-existing *inability* to meet the Pacific cod endorsement landing requirements in 1998 is the death knell of its claim under the hardship provision.

We conclude as a matter of law that the existence of "uniquely large and deep" fish holds on the F/V WIZARD did not constitute an "unavoidable circumstance" within the meaning of the Pacific cod endorsement hardship provision, 50 C.F.R. §679.4(k)(9)(v)(B). We also conclude that the Appellant's decision to use slush ice to chill Pacific cod aboard the F/V WIZARD in 1998 did not constitute an "unavoidable circumstance" within the meaning of the Pacific cod endorsement hardship provision, 50 C.F.R. §679.4(k)(9)(v)(B). Therefore, we conclude that the Appellant does not qualify for a Pacific cod pot gear endorsement on its LLP groundfish license (#LLG1480).

We conclude as a matter of law that the Appellant's decision to use slush ice to chill Pacific cod aboard the F/V WIZARD in 1998 (1) was not beyond the Appellant's control, and therefore was not "unavoidable"; (2) did not result in loss, damage, or breakdown of the vessel, gear or equipment; and (3) did not remove or seriously impair any pre-existing capability of the vessel to meet the landing requirements for the Pacific cod endorsement. We therefore need not decide whether the Appellant's decision to use slush ice was unique, unforeseen by the Appellant, or reasonably unforeseeable by the Appellant. We conclude as a matter of law that 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).

Appellant's equitable arguments

In addition to its claims under the hardship provision, the Appellant seeks equitable relief on four grounds: (1) The Appellant has participated full-time in the Pacific cod fishery since installing an RSW on the F/V WIZARD in 1999; (2) The Appellant has become increasingly dependent on the Pacific cod fishery and has been one of the top-producing Pacific cod pot catcher vessels since 1999; (3) The Appellant has made a significant financial investment in equipment and gear on the vessel specifically for the Pacific cod pot gear fishery; and (4) Denial of a Pacific cod pot gear endorsement for the F/V WIZARD would preclude the Appellant from continuing to participate in the Pacific cod pot gear fishery because the Appellant believes there are no other LLP groundfish licenses that could be purchased that have a Pacific cod pot gear endorsement for a vessel the size of the F/V WIZARD.

We do not decide whether any of the Appellant's equitable arguments have merit because we do not have authority to grant equitable relief. The LLP regulations do not provide for a financial hardship exception to the documented harvest requirements for a BSAI Pacific cod catcher vessel pot gear endorsement. Therefore, we do not have the authority to exempt Appellant from the documented harvest requirements for a BSAI Pacific cod catcher vessel pot gear endorsement.

FINDINGS OF FACT

By a preponderance of the evidence in the administrative record, we make the following findings of fact:

1. 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.
2. The F/V WIZARD was not capable of meeting the Pacific cod endorsement landing requirements at any time in 1998 because it did not have the necessary refrigeration system until 1999.

CONCLUSIONS OF LAW

1. For a Pacific cod pot gear endorsement, the Appellant must prove that it had the specific intent to *commercially* harvest at least 100,000 pounds of Pacific cod in 1998.
2. Harvests of Pacific cod that were retained aboard the vessel for use as crab bait, and were not sold, bartered, or traded, or intended to be any of these, are not commercial harvests and cannot be credited toward an LLP groundfish license or endorsement.
3. The Appellant does not meet the requirements of 50 C.F.R. §679.4(k)(9)(v)(B)(1).
4. The existence of “uniquely large and deep” fish holds on the F/V WIZARD did not constitute an “unavoidable circumstance” within the meaning of the Pacific cod endorsement hardship provision, 50 C.F.R. §679.4(k)(9)(v)(B).
5. To be “unavoidable,” a circumstance must be beyond the control of the vessel owner or license holder.
6. A vessel-related “unavoidable circumstance” must involve loss, damage, or breakdown of the vessel or its gear or equipment.
7. An “unavoidable circumstance” must remove or seriously impair the vessel’s pre-existing capability to meet the landing requirements for the Pacific cod endorsement.
8. The lack of knowledge and the inability to accurately predict a vessel’s performance that stem from a lack of experience in a specific fishery with a specific vessel is not an “unavoidable circumstance” within the meaning of the Pacific cod endorsement hardship provision.
9. Choosing the wrong refrigeration method or equipment for a particular vessel and a particular fishery is not beyond the vessel owner’s control and is not an “unavoidable circumstance.”
10. The Appellant’s decision to use slush ice to chill Pacific cod aboard the F/V WIZARD in 1998 did not constitute an “unavoidable circumstance” within the meaning of the Pacific cod endorsement hardship provision, 50 C.F.R. §679.4(k)(9)(v)(B).
11. The Appellant does not qualify for a Pacific cod pot gear endorsement on its LLP groundfish license (#LLG1480).

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on April 4, 2005, unless by that date the Regional Administrator orders review of the Decision.

The Appellant or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on March 14, 2005, 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 were overlooked or misunderstood by the Appeals Officers, and must be accompanied by a written statement in support of the motion.

Edward H. Hein
Chief Appeals Officer

Randall J. Moen
Appeals Officer