

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:

Bluefin Fisheries, Inc.,
Rodney J. Baker

Respondents

Docket Number:

SE1000062FM
F/V FANTA SEAS

INITIAL DECISION

Issued:

July 28, 2011

Issued By:

Hon. Michael J. Devine

Appearances:

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I. PRELIMINARY STATEMENT

The National Oceanic and Atmospheric Administrative (NOAA or Agency) initiated this proceeding for assessment of civil penalties and imposition of permit sanctions against respondents Bluefin Fisheries, Inc. (Bluefin Fisheries) and Rodney J. Baker. NOAA, on March 15, 2010 and then amended on September 29, 2010, issued a Notice of Violation and Assessments (NOVA) and a Notice of Permit Sanctions (NOPS) on Respondents. In the issued NOVA and NOPS, Respondents were charged with two (2) violations of the Magnuson-Stevens Fisheries Conservation Act (Magnuson-Stevens Act) and one (1) violation of the Endangered Species Act (ESA). The alleged violations occurred aboard the Fishing Vessel (F/V) FANTA SEA, a vessel owned by respondent Bluefin Fisheries and, at all relevant times, operated by respondent Rodney Baker. The NOVA/NOPS alleged violations of:

1. 50 C.F.R. § 622.7(o) – failure to maintain Gulf red grouper intact through offloading ashore and/or 50 C.F.R. § 622.7(j) – unlawful use of prohibited fishing methods, i.e., use of Gulf reef fish as bait.
2. 50 C.F.R. § 22.205(b)(1) – operating a boat in an area where longline fishing is prohibited and for failing to then be in compliance with 50 C.F.R. § 23.206(d)(12)(ii), which requires proper storage of all longline fishing gear.
3. 50 C.F.R. 600.725(i) – to make a false statement to an authorized officer concerning the catching, taking, harvesting, landing or possession of any fish.

The Agency seeks to impose civil penalties totaling \$34,000, jointly and severally against Respondents. Additionally, the Agency seeks sixty (60) days in permit sanctions. Respondents filed a request for hearings and these matters were transferred to the United States Coast Guard Administrative Law Judge (ALJ) Docketing Center for adjudication pursuant to the legal authority contained in 15 U.S.C. § 1541 and the interagency agreement between NOAA and the United States Coast Guard.

On September 10, 2010, this matter was assigned to the undersigned judge. Following receipt of Preliminary Positions on Issues and Procedures (PPIP) from the parties and after holding scheduling conferences, the hearing in the above referenced proceedings was held on January 13, 2011, in Tampa, Florida. At the hearing, attorney Cynthia S. Fenyk appeared on behalf of NOAA. Attorney J. Michael Shea appeared on behalf of Respondents.

At the beginning of the hearing, the parties entered into stipulations of fact. That document was entered as Court Exhibit I, with the parties stipulating to paragraphs one (1) through eighteen (18) as not being in dispute. (Transcript (Tr.) at 9-11). During the hearing, stipulation number eight (8) was determined to be inaccurate and the parties were asked to address any significance of that inaccuracy in their post hearing briefs. (Tr. at 173-174). While Respondents stipulated to certain facts contained in Court Exhibit (Ct. Ex.) I, Respondents did not stipulate to any conclusions that NOAA drew from those facts.

In support of the allegations against Respondents, NOAA introduced the testimony of five (5) witnesses and offered twenty-one (21) exhibits into evidence, twenty (20) of which were admitted into evidence. Counsel for Respondents introduced the testimony of two (2) witnesses and offered three (3) exhibits into evidence. As noted above this matter commenced with an Amended NOVA and NOPS on September 29, 2010 and Respondents submitted their PPIPs through counsel asserting ability to pay as an issue on November 11, 2010 and acknowledged the requirement to submit financial information to support their position. The Scheduling Order of November 17, 2010 reflected the agreement of the parties to a hearing date of January 13, 2011 and for the parties to complete all discovery by December 16, 2010. Respondents did not provide any documents to NOAA for evaluation of the issue of an alleged inability to pay until the day of the hearing. Respondents' proposed exhibits were intended to provide some financial

information regarding Respondent's claim of an inability to pay. NOAA submitted a motion in limine to exclude such evidence as untimely; that motion was entered as Court Exhibit II. Respondents did not present any viable explanation for failing to provide financial information to NOAA prior to the hearing. Since Respondents failed to properly support a claim of inability to pay by providing materials in support at least thirty (30) days prior to the hearing, under 15 C.F.R. 904.108(b), (c), (d), (e), (f), (g) and (h) Respondents waived the right to claim inability to pay and exhibits attesting to his financial situation were not admitted into evidence since they were not timely presented. (Tr. 152, 177); see 15 C.F.R. § 904.108(e).

On March 2, 2010, the Agency filed a post-hearing brief which included the Agency's proposed Findings of Fact and Conclusions of Law. Likewise, Respondents, through counsel, filed a post-hearing brief with Findings of Fact and Conclusions of Law March 14, 2011. The record is now closed for decision. Rulings on the parties' proposed Findings of Fact and Conclusions of Law are included in Attachment II.

After careful review of the entire record in this matter, I find NOAA established by a preponderance of reliable and credible evidence that Respondents, Bluefin Fisheries and Rodney J. Baker, committed two (2) violations of the Magnuson-Stevens Act and one (1) violation of the Endangered Species Act.

II. FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, the testimonies of witnesses, the exhibits admitted into evidence, and the entire record as a whole.

1. On or about January 11, 2010, and at all times relevant to the above-captioned matter, Respondent Bluefin Fisheries, Inc. (Bluefin Fisheries) was the owner of the F/V FANTA SEAS. (Ct. Ex. I).

2. On or about January 11, 2010, and at all times relevant to the above-captioned matter, Respondent Rodney J. Baker served as the Captain and operated the F/V FANTA SEAS. (Tr. at 125-126; Ct. Ex. I).
3. Respondent Bluefin Fisheries, through its President/CEO Huriberto Ruiz had an agreement with Respondent Rodney J. Baker where the proceeds from the fishing effort aboard the F/V FANTA SEAS were to be split between the owner and operator with 35% paid to the owner and 65% to the operator.¹ (Tr. at 173; Ct. Ex. I).
4. At all times relevant to these proceedings, all fishing aboard the F/V FANTA SEAS occurred in the Gulf Exclusive Economic Zone (EEZ). (Ct. Ex. I).
5. On or about January 11, 2010, and at all times relevant to the above-captioned matter, Respondent Bluefin Fisheries, Inc., operated the F/V FANTA SEAS in the Gulf of Mexico Reef Fish Fishery. (Ct. Ex. I).

Count #1

6. Respondent Bluefin Fisheries, or an individual under its control, and Respondent Rodney J. Baker, or an individual under his control, were using undersized reef fish as bait aboard the F/V FANTA SEAS on January 11, 2010. (Ct. Ex. I).
7. Respondent Bluefin Fisheries, or an individual under its control, and Respondent Rodney J. Baker, or an individual under his control, failed to maintain finfish in or from the Gulf EEZ intact aboard the F/V FANTA SEAS through offloading ashore. (Ct. Ex. I).

Count #2

8. On January 11, 2010, officers from the Florida Fish and Wildlife Conservation Commission and the U.S. Coast Guard were conducting federal fisheries patrols approximately forty-five (45) miles off the coast of Florida in the Gulf of Mexico aboard the patrol vessel Fin Cat. (Gov't Ex. 1, 8, 9; Tr. at 58-59).
9. At approximately 1700 on January 11, 2010, the Fin Cat intercepted the F/V FANTA SEAS, which was transiting westbound and conducted an inspection. (*Id.*).
10. Respondent's wife, Ms. Baker, served as a member of the crew aboard the F/V FANTA SEAS on January 11, 2010. (Tr. at 132; Gov't Ex 2).
11. Upon being interviewed after the January 11, 2010 trip, Ms. Baker stated the F/V FANTA SEAS had fished one longline set that day and was planning on conducting more. (Tr. at 29).

¹ At the outset of the hearing, the parties stipulated the proceeds were split between the owner and captain with 65% paid to the owner and 35% to the operator. Subsequent testimony from Respondent Baker indicated the assignment of percentages stipulated to for the owner and operator were reversed. (Tr. 173).

12. On January 11, 2010, the F/V FANTA SEA was equipped with longline gear. (Tr. at 75-77, 129, 139).
13. On January 11, 2010, the longline gear on the F/V FANTA SEAS was set up for longline fishing. (Tr. at 75-79, 165-167).
14. Longline gear is not typically used to buoy fish nor would it be practical to use longline gear to buoy fish. (Tr. at 77-79).

Count #3

15. Upon boarding the F/V FANTA SEAS, boarding officers made contact with the F/V FANTA SEAS' captain, Captain Baker. (Tr. at 27-28, 61-62).
16. Captain Baker was asked if he had any illegal bait or fish on board; Captain Baker said there was not. (Tr. at 62). Upon further inspection, 133 pieces of cut up red grouper and red snapper were subsequently found in an orange tote. (Id.).
17. Captain Baker was then asked if there was any more cut bait aboard, and he answered "no." (Tr. at 63-64). Further inspection revealed there was more cut bait when longline gangions, baited with red grouper, were discovered in three (3) plastic milk crates. (Id.).
18. Captain Baker said he was aware that his wife, a crew member, had baited the gangions, but they were baited with "trim," which he said was a legal bait sold by fish houses. (Tr. at 64-65). Upon further inspection, no trim was being used as bait on the gangions, instead it was determined the gangions were baited with grouper meat. (Id.).
19. Respondent Bluefin Fisheries, or an individual under its control, and Respondent Rodney J. Baker, or an individual under his control, possessed 2,876 pounds of red grouper and 73 pounds of red snapper aboard the F/V FANTA SEAS when it was boarded and also possessed 486 gangions with each hook baited with red grouper, and 153 grouper chunks that were not on gangions. (Ct. Ex. I).

III. DISCUSSION

A. Agency's Burden of Proof

In this case, Respondents were charged with three (3) separate violations. In order to prevail on the charges instituted against Respondents, NOAA must prove the violations alleged by a preponderance of the evidence. See 5 U.S.C. § 556(d); see also In the Matter of: Cuong Vo, 2001 WL 1085351 (NOAA 2001). Preponderance of the evidence means the Agency must show

it is more likely than not Respondents committed the violation with which they are charged. See In the Matter of: John Fernandez, III, 1999 WL 1417462 (NOAA 1999). NOAA may rely on either direct or circumstantial evidence to establish the violation and satisfy the burden of proof. See In the Matter of: Cuong Vo, supra. The burden of producing evidence to rebut or discredit the Agency's evidence will only shift to Respondents after NOAA proves the allegations contained in the NOVA by a preponderance of reliable, probative, substantial, and credible evidence. (Id.)

B. Count #1 – Prohibited Gear & Failure to Maintain

The Magnuson Stevens Act sets prohibitions on specific fishing gear and methods; to include prohibiting use of any Gulf reef fish, other than sand perch and dwarf sand perch, as bait in any fishery. 50 C.F.R. § 622.7(j), 622.31(n). Likewise, the regulations require that fish, to include Gulf red snapper, be maintained with head and fins intact through offloading when operating within the EEZ. 50 C.F.R. § 622.7(o), 622.38(a). In Count #1, NOAA alleged Respondents, while operating the F/V FANTA SEAS within the exclusive economic zone (EEZ) on January 11, 2010, violated these provisions by using prohibited fishing gear and for failing to maintain Gulf red grouper intact through offloading ashore. The minimum elements necessary to prove these allegations require the Agency to prove by a preponderance of the evidence:

- (1) Regulations were in effect, at the time of the alleged violation, which prohibited the use of certain fishing gear and cutting up of fish prior to offloading while operating within the EEZ.
- (2) Respondents, while operating the F/V FANTA SEAS within the EEZ, used prohibited gear and/or methods when fishing on January 11, 2010.
- (3) Respondents, while operating the F/V FANTA SEAS within the EEZ, cut up fish (Gulf red grouper) and did maintain them intact through offloading the fish ashore on January 11, 2010.

Within the Stipulations, Respondents agreed they were subject to regulations prohibiting the use of certain fishing gear and methods. (Ct. Ex. I – Stipulations #1, 2, 3, 10). Included within these provisions was a ban on using Gulf reef fish as bait in any fishery. (Id. – Stipulation #10). Also included within the provisions was a requirement that finfish in or from the Gulf EEZ was to be maintained with head and fins intact. (Id. – Stipulations #11). Respondents stipulated they used reef fish as bait during the date alleged within the Complaint and that they failed to maintain finfish within or from the Gulf EEZ intact through offloading ashore. (Id. – Stipulations #15, 16). Respondents do not dispute “they failed to maintain red grouper intact through offloading ashore and/or used a prohibited method by using Gulf reef fish as bait.” (Resp’t PHB at 11). Based upon these stipulations, the minimum elements to prove Count #1 have been established. Respondents are found to have violated provisions 50 C.F.R. § 622.7(j) and 622.7(o) by using prohibited fishing gear and for failing to maintain Gulf red grouper intact through offloading ashore.

C. Count #2 – Improperly Stored Longline Gear

Provisions under the Endangered Species Act (ESA) make it unlawful for any person to violate regulations promulgated under that Act. 16 U.S.C. § 1538(a)(1)(G). In order to reduce incidental take and mortality of sea turtles, a provision within the ESA establishes an area within the Gulf EEZ where bottom longline fishing for Gulf reef fish is prohibited. 50 C.F.R. § 223.206(d)(12). Within the prohibited area, a vessel with bottom longline gear onboard may not possess Gulf reef fish unless the bottom longline gear is appropriately stowed. 50 C.F.R. § 223.206(d)(12)(ii). “Appropriately stowed” means the longline may be left on the drum if all gangions and hooks are disconnected and stowed below deck; hooks cannot be baited. (Id.).

In Count #2, the Agency alleged Respondents, while operating the F/V FANTA SEAS within the exclusive economic zone (EEZ) on January 11, 2010, violated this provision by having longline gear with hooked and baited gangions above deck in a restricted area. The minimum elements necessary to prove these allegations require the Agency to prove by a preponderance of the evidence:

- (1) Regulations were in effect, at the time of the alleged violation, that prohibited having hooked and baited gangions above deck in a restricted area.
- (2) Respondents, while operating the F/V FANTA SEAS on January 11, 2010, were within the restricted area where longline prohibitions were applicable.
- (3) Respondents, while operating the F/V FANTA SEAS within the prohibited area, possessed Gulf reef fish and failed to properly maintain bottom longline gear, to include failing to store gangions and hooks below deck and maintaining baited hooks.

Stipulations

Within the Stipulations, Respondents agreed regulations were in effect on January 11, 2011 which set prohibitions on longline fishing within the EEZ and set restrictions on longline fishing gear. (Ct. Ex. I – Stipulations #12). Also stipulated by Respondents, was that Respondent Rodney Baker was operating the F/V FANTA SEAS in the Gulf EEZ on January 11, 2010, in the area where prohibitions on longline fishing and its gear was applicable. (*Id.* – Stipulations 6, 7, 12, 17, 18). Finally, Respondents stipulated to the fact that while in this area, 486 gangions with hooks baited with red grouper were located aboard the F/V FANTA SEAS. (*Id.* – Stipulation 18).

Respondents' Assertions

In their Post-Hearing Brief, Respondents do not dispute the F/V FANTA SEAS “possessed Gulf reef fish while bottom longline gear was aboard the vessel and that approximately 486 gangions and hooks were baited.” (Resp’t PHB at 11). Via this stipulation, it

appears Respondents admitted their violations of 50 C.F.R. § 223.206(d)(12)(ii). However, Respondent alleged they are not in violation of the regulation because they were not going to use the longline gear for longline fishing, instead it was going to be used for buoy fishing.

Respondents' argument that longline gear aboard the F/V FANTA SEAS was to be used for buoy fishing is not credible. Instead, the evidence establishes the F/V FANTA SEAS was rigged for and was to engage in longline fishing. First, Mrs. Baker, Respondent Baker's wife and crew member on the F/V FANTA SEAS, informed a boarding officer on January 11, 2010 that the F/V FANTA SEAS had completed one longline set that day and were planning on doing more longline fishing. (Tr. at 29). Respondent attempts to discount this statement by asserting his wife was an inexperienced crewmember and misspoke. (Tr. at 131-132). Second, the longline equipment aboard the F/V FANTA SEAS is neither the type of equipment typically used to buoy fish nor would it be practical to use that equipment to buoy fish. (Tr. at 77-79). Respondent attempts to discount this fact by stating he had never buoyed fished before, but he wanted to give buoy fishing a try and this was his first time arranging equipment to buoy fish. (Tr. at 130-131). Finally, the longline equipment appeared to have been set up in a configuration for longline fishing, not buoy fishing. (Tr. at 75-79, 165-167). Respondent contended that while the equipment may have been set up for longline fishing, it must have been a mistake made by the deckhand who set up the gear. (Tr. at 165-167). Respondent Baker could not explain why a deckhand with over fifteen (15) years of experience set up the equipment "incorrectly," but stated that there is not always a "rhyme or reason behind the way they do things. Deck hands are that way." (Tr. at 167).

Violations Proved

Through the evidence from the boarding of the F/V FANTA SEAS and Respondent Baker's admissions, it is found that on January 11, 2010, the F/V FANTA SEAS possessed longline gear with baited hooks while it was located in an area of the Gulf EEZ where bottom longlining gear was required to be adequately stowed. Respondents' argued they were not in violation of any regulations because they were going to use the longline gear for buoy fishing. That argument is not credible. Respondent Rodney Baker's wife who was a crewmember stated the equipment had been and was going to be used for longline fishing. The evidence shows that it is not typical or efficient to use longline fishing gear for buoy fishing, and the gear was rigged for longline fishing, not buoy fishing. Respondent Baker also admitted he had never engaged in buoy fishing before. Respondents are found to have violated provision 50 C.F.R. § 223.206(d)(12)(ii) by failing to properly stow longline fishing gear in a prohibited area.

D. Count #3- Making False Statements Concerning

Another provision included within the Magnuson Stevens Act makes it unlawful for any person to "[m]ake any false statement, oral or written, to an authorized officer concerning the taking, catching, harvesting, landing, purchase, sale, offer of sale, [or] possession. . . of any fish, or attempts to do any of the above." 50 C.F.R. § 600.725(i). In Count #3, the Agency alleges Respondents made false statements to an authorized officer during the January 11, 2010 boarding of the F/V FANTA SEAS. The minimum elements necessary to prove this allegation requires the Agency to prove by a preponderance of the evidence:

- (1) Respondent Rodney Baker made a false statement to an authorized officer concerning the taking, catching, harvesting, landing, possession, transport or possession of any fish on January 11, 2010.
- (2) Respondents were operating the F/V FANTA SEAS when the false statement was made and are subject to the jurisdiction of the United States at the time of the alleged violation.

NOAA Evidence

On January 11, 2010, officers from the Florida Fish and Wildlife Conservation Commission and the U.S. Coast Guard were conducting federal fisheries patrols approximately forty-five (45) miles off the coast of Florida in the Gulf of Mexico aboard the patrol vessel FIN CAT. (Gov't Ex. 1, 8, 9; Tr. at 58-59). At approximately 1700 on January 11, 2010, the FIN CAT intercepted the F/V FANTA SEAS, which was transiting westbound and conducted an inspection. (*Id.*) Upon boarding the F/V FANTA SEAS, boarding officers made contact with the F/V FANTA SEAS' captain, Captain Baker. (Tr. at 27-28, 61-62). Captain Baker was asked if he had any illegal bait or fish on board; Captain Baker said there was not. (Tr. at 62). However, upon initial inspection, 133 pieces of cut up red grouper and red snapper were found in an orange tote. (*Id.*) Captain Baker was then asked if there was any more cut bait aboard, and he answered "no." (Tr. at 63-64). Further inspection revealed there was more cut bait when longline gangions, baited with red grouper, were discovered in three (3) plastic milk crates. (*Id.*) Captain Baker said he was aware that his wife, a crew member, had baited the gangions, but they were baited with "trim," which he said was a legal bait sold by fish houses. (Tr. at 64-65). Upon further inspection, no trim was revealed, instead it was determined the gangions were baited with grouper meat. (Tr. at 64).

Respondents' Rebuttal

In Respondent's Post Hearing Brief, Respondents admitted when asked about cut bait on board Captain Baker said there was none; yet, a very large amount of cut bait was subsequently located. (Resp't PHB at 11). However, Respondent Baker, the Captain of the F/V FANTA SEAS, seeks to extricate himself from any responsibility of his vessel maintaining illegal bait by blaming his crewmembers for their oversights. Respondent Baker alleged he had been sick for

several days and was not overly aware of what was happening onboard the F/V FANTA SEAS. (Resp't PHB at 11; Tr. at 134). As a result, he contends he was not aware his crewmembers had illegal bait aboard the vessel. (Id.). Based on consideration of the evidence in the record as a whole the undersigned does not find this argument credible.

The F/V FANTA SEAS is a relatively small fishing vessel, measuring in at 34-feet in length. (Gov't Ex. 16). It is not credible for an experienced fisherman to be unaware of a large amount of bait and where it came from aboard a vessel that small. Also, while Respondent testified he was sick for several days, he also testified he was well enough to navigate the vessel when it needed to be repositioned. (Tr. at 133). As a result, Captain Baker's own testimony contradicts his claim of incapacity. Furthermore, Respondents failed to produce any evidence to corroborate his story. Neither of the two crewmembers provided any testimony to support Captain Baker's assertions and there was no documentation or statements presented in evidence that support the concept that Captain Baker was ignorant of the source of illegal bait aboard the F/V FANTA SEAS. Also, Captain Baker was not observed by the boarding officers to be sick at the time of the boarding. Considering the record as a whole, the undersigned finds that reliable and probative evidence shows Respondent Baker made false and misleading statements to boarding officers during the January 11, 2010 boarding of the F/V FANTA SEAS.

E. Respondents' Additional Arguments

In addition to the previously addressed arguments raised by Respondents, several additional "issues" have been raised. These three (3) issues, first spelled out by NOAA in their Post Hearing Brief and then addressed by Respondents in their Post Hearing Brief, include:

1. Whether an owner is liable for violations an operator commits aboard the owner's vessel, or for violations committed by those under the operator's control.

2. Whether it is inappropriate to challenge in this forum promulgated regulations implemented to prohibit use of bottom longline gear in a defined closed area and, when bottom longline gear is aboard a vessel in possession of Gulf reef fish in transit through the closed area, to require the gear to be appropriately stowed.
3. Whether Respondent's ability to pay information should be barred from consideration when they failed to provide that information at least 30 days prior to the administrative hearing.

Each of these issues are addressed below.

Respondeat Superior

Respondent Bluefin Fisheries assert they authorized Respondent Rodney Baker to use the F/V FANTA SEAS to harvest fish, however they did not authorize him to violate any laws of the United States and they had no knowledge of any such alleged violations. While the two parties had agreed to split proceeds from the fishing venture that in no way indicates that Bluefin Fisheries had knowledge of any alleged violation. Even if there is a finding of strict liability, Bluefin Fisheries argues for a minimal fine, otherwise owners would be reluctant to fish in U.S. waters.

The law is well-settled on the principle that an employer may be vicariously liable for its employee's acts committed in the scope of employment while furthering the employer's business. See Greenwell v. Aztar Indian Gaming Corp., 268 F.3d 486, 489 (C.A.7 2001); Wilson v. Chicago, Milwaukee, St. Paul, and Pacific R. Co., 841 F.2d 1347, 1352 (C.A7 1998); cf. Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 543 (1994). As such, the owner of a vessel may be held liable for crewmember committed regulatory violations. In the Matters of James Chan Song Kim, Askar Ehmes, Ulheelani Corp., 2003 WL 22000639 (NOAA 2003). "The idea behind Respondeat Superior is to subject an employer to liability for whatever is done by the employee by virtue of his employment and in furtherance of its ends." Id., see also Weinberg v. Johnson,

518 A.2d 985, 988 (D.C. 1986). The doctrine of Respondeat Superior is used to “prevent vessel owners and operators from reaping the benefits of illegal fishing activities while avoiding the responsibility that goes along with such tactics.” In the Matters of James Chan Song Kim, Askar Ehmes, Ulheelani Corporation, 2003 WL 22000639 (NOAA 2003); In the Matter of Atlantic Spray Corporation, 1996 WL 1352603 (NOAA 1996); In the Matter of Corsair Corporation, F/V CORSAIR, 1998 WL 1277924 (NOAA 1998); In the Matter of Atlantic Spray Corporation, 1997 WL 1402870 (NOAA 1997). When a corporation owns a vessel, it acquires a share of the vessel's proceeds from the fishing trip and thus, the corporation benefits financially from the illegal acts of the vessel's captain during the fishing trip. Id. Therefore, the vessel owner should not be allowed to escape responsibility for the transgressions of the captain the vessel owner hires to operate its boat and has the authority to fire. Id.

Here, Respondent Bluefin Fisheries employed Respondent Rodney J. Baker as Captain of the F/V FANTA SEAS. (Ct. Ex. 1 - Stipulations 4, 8). Respondent Baker was acting in the capacity as Captain of the F/V FANTA SEAS when the vessel was boarded and violations were discovered on January 11, 2010. Further, Respondents split proceeds of all fishing trips with 35% of the proceeds going to Respondent Bluefin Fisheries and 65% to the Captain and crew. (Tr. at 173). The fact Respondent Bluefin Fisheries hired Captain Baker as Captain of the F/V FANTA SEAS, retained the authority to fire him, and shared in all proceeds from fishing trips involving Captain Baker and the F/V FANTA SEAS, illustrates that Respondent Bluefin Fisheries had the right to control Captain Baker. Therefore, Respondent Bluefin Fisheries may be held liable for the violations of the F/V FANTA SEAS Captain and crew.

Longline Gear Regulations

Respondents assert the longline gear aboard F/V FANTA SEAS was to be used for buoy fishing, not longline fishing. Since they were not going to use the longline gear for longline fishing, Respondents state they did not need to have the gear properly stored and therefore did not violate the regulations. In their Post Hearing Brief, NOAA characterizes this argument as a challenge to the validity of the regulations. Specifically, NOAA believes Respondents' assert "the requirement to have the gear appropriately stowed restricts [Respondents'] ability to set up to engage in buoy fishing where allowed and should not apply to them." (Gov't PHB at 15).

The undersigned is constrained by the applicable Agency regulations. In keeping with NOAA regulations, ALJs are not authorized to rule on challenges to the underlying regulations. 15 C.F.R. § 904.200(b). Respondents did not dispute this limitation in the regulations but argued within their Post Hearing Brief that the regulations somehow lacked clarity and therefore the Court could determine that Respondents had not violated the regulations by having gear on deck since they were supposedly preparing to jug or buoy fish. Respondents' argument is rejected. The facts show that there was gear on deck contrary to the requirements of the regulations and it was longline gear. Respondent Baker's contentions that he intended to conduct buoy fishing is not credible. Additionally, NOAA is not required to prove the vessel was actually engaged in longline fishing. Having the gear baited on deck is enough to constitute a violation. I find NOAA established by a preponderance of reliable and credible evidence that the F/V FANTA SEAS had longline fishing gear aboard, that this gear was capable of being used for longline fishing, and it was not properly stowed therefore the violation is proven.

Ability to Pay Information

When assessing civil penalties, NOAA may take into consideration a respondent's financial situation and ability to pay. 15 C.F.R. § 904.108(b). Any financial information regarding respondent's ability to pay "must be submitted to Agency counsel at least 30 days in advance of the hearing" 15 C.F.R. § 904.108(e). In this case, Respondents were made aware of the need to file such financial information within a September 2010 Notice of Transfer and Assignment of ALJ and during a November 2010 pre-hearing conference call. Respondents did not provide any financial information regarding their ability to pay prior to the day of the hearing.

On the day of the hearing, Respondent presented financial documents regarding Respondents' inability to pay. NOAA made a motion in limine (Court Exhibit II), requesting such documentation be excluded since it was not provided to NOAA at least thirty (30) days prior to the hearing as provided by 15 C.F.R. § 904.108. Because the documents were not disclosed until the last minute, and the undersigned found that Respondents had not presented a valid basis for not providing the information prior to hearing in keeping with 15 C.F.R. § 904.108, the undersigned ALJ ruled that the financial documents were not admitted as an exhibit or considered as evidence at the hearing. (Tr. at 147-148). However, in order to preserve Respondents' rights for any objection, the documents were attached to the record and Respondents were permitted to make further arguments requesting reconsideration of the preliminary ruling that the ability to pay information would not be considered and that the issue of Respondents ability to pay was waived.

In Respondents Post Hearing Brief, Respondents moved again to have the court consider the inability to pay documentation. Respondents' only justification for the late submission was,

“[t]he Respondents are fishermen and even though they have an attorney often find it difficult to comply with financial regulations. . . .” (Resp’t PHB at 14). Mere assertion of the fact that Respondents are “fishermen” does not provide sufficient good cause for the undersigned to disregard requirements set forth in the regulations. As noted in Respondent’s PPIPs, Respondents knew of the requirement to submit financial information at least thirty (30) days prior to the hearing to allow NOAA the opportunity to evaluate the materials presented. No valid basis was presented to excuse submission of such information on the morning of the hearing. In keeping with 15 C.F.R. § 904.108(b), since Respondents failed to timely submit their inability to pay information, the issue is waived. *Id.*

F. PENALTY ASSESSMENT AND PERMIT SANCTION

The Magnuson-Stevens Act authorizes the imposition of a civil penalty of up to \$140,000 for each violation involved and/or permit sanctions, both of which must be commensurate to the violation(s) involved. 16 U.S.C. § 1858(a), 1858(g). The Endangered Species Act authorizes imposition of a civil penalty up to \$32,500 for knowing violations. In assessing penalties and or permit sanctions, the undersigned must consider a number of factors. “Factors to be taken into account in assessing a penalty . . . may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior offenses, and ability to pay; and such other matters as justice may require.” 15 C.F.R. § 904.108(a). On June 23, 2010, NOAA promulgated a change in the sanction assessment portion of the regulations. See 75 FR 35631-32 (Wed. June 23, 2010). On March 16, 2011, NOAA issued new civil penalty policy guidance which expressly supersedes previous guidance. (See http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf). The new policy was announced in the Federal Register on April 14, 2011. 76 Fed. Reg. 20959 (Apr. 14, 2011). Based on that action and a Special

Master Report for NOAA regarding civil enforcement matters the undersigned issued an Order on May 26, 2011, offering the parties an opportunity to submit supplemental briefs on or before June 17, 2011 regarding the issue of the sanction in this matter in view of the new NOAA civil penalty policy guidance; or because of any matter raised by the Special Master's Report.

Agency counsel submitted a response on June 17, 2011 indicating that there was no change in the Agency position asserted in its previous briefs. No explanation or argument regarding any potential impact of NOAA's new policy was presented in the Agency submission. To date Respondent has not submitted anything in regard to the Court's Order of May 26, 2011.

In the NOVA the Agency proposed a civil penalty of \$18,000 for Count 1, \$8,500 for Count 2, and \$7,500 for count 3. The Agency also proposed a 60 day permit sanction against Respondent Bluefin Fisheries Inc., based on two counts. The Court reviewed the new NOAA Policy for Assessment of Penalties and Permit Sanctions.² The Guidance for the Magnuson Stevens Act Schedule indicates Level II for violating area specific gear requirements. Providing false statements to an authorized officer is also considered a Level II offense. The Civil Penalty Matrix for the Magnuson-Stevens Act shows the following penalty range for Level II violations unintentional = \$2,000-5,000; Negligent = \$4,000-6,000; Reckless \$6,000-10,000; and intentional = \$10,000-20,000. Since hooks/gangions were baited intentionally with Gulf reef fish the evidence indicates that the violations were either reckless in disregarding the restrictions in the regulations or intentional.

The Penalty Matrix for the Endangered Species Act indicates a penalty range of \$6,000 to \$11,500 for a level II intentional violation. Entering or transiting the closed area with gear not properly stowed under the facts in the record in this case fits within level II. With respect to the nature, circumstances, extent, and gravity of these offenses, I find that they are intentional.

² See NOAA internet site. http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf

The next issue to look at is history of violations. The Agency did not present anything on any prior violations by Respondents.

Although the specific issue of ability to pay was not properly asserted prior to the hearing as required by the regulations, all of the facts and circumstances of the violations in issue is a matter to be considered by the ALJ within the process provided and in the interests of justice. In consideration of the above mentioned factors, I find the Agency's proposed civil penalty with respect to Counts 2 (\$8,500) and 3 (\$7,500) are appropriate and within the limits of the new NOAA policy guidance. However, in this case in keeping with the authority to determine a penalty *de novo* (15 C.F.R. § 904.204), I find that the proposed penalty for Count 1 should be reduced to \$15,000, which is the midpoint of the schedule guidance for that violation. While Bluefin Fisheries Inc., may not have prior violations, the circumstances of using Gulf reef fish as bait supports assessment above the minimum of \$10,000 for a level II violation.

For Respondent Bluefin Fisheries, Inc., under the limited specific facts and circumstances of this particular matter, a civil penalty of \$31,000 is considered appropriate. There is no evidence of prior offenses or a pattern of violations by the owner of the vessel and the undersigned does not find Bluefin Fisheries Inc., to have directed the false statements made by Respondent Baker but the company is liable under the doctrine of *Respondeat Superior*.

For Respondent Rodney Baker under the limited specific facts and circumstances of this particular matter, a civil penalty of \$31,000 is considered appropriate. Both Respondents are jointly and severally liable for the \$31,000 penalty assessed for the violations.

The above noted civil penalty assessment has been made in consideration of all the aggravating and mitigating factors as permitted by 15 C.F.R. § 904.108, in view of the facts and circumstances presented in this matter in the record, and considering the post hearings briefs

submitted by the parties. In addition to proposing a civil penalty of \$34,000, NOAA also proposed a permit sanction of 60 days with regard to Respondent Bluefin Fisheries, Inc. However, the new NOAA Policy for Assessment of Penalties and Permit Sanctions does not indicate a permit sanction for level II violations. The new penalty matrix indicates a permit sanction of 5-20 days may be appropriate for a level III Magnuson-Stevens Act violation. Since the level of assessment is Level II and Respondent Bluefin Fisheries, Inc. was not demonstrated to have aggravating factors sufficient to warrant a permit sanction, the undersigned has determined not to assess any permit sanction for this matter.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Ultimate Findings of Fact and Conclusions of Law are based on a thorough and careful analysis of the documentary evidence, the testimonies of witnesses, the exhibits admitted into evidence and the entire record as a whole.

1. Respondents Rodney Baker and Bluefin Fisheries, Inc., are “persons” within the meaning of the Magnuson-Stevens Act, 16 U.S.C. § 1802 (31) and subject to the jurisdiction of the United States.
2. The Magnuson-Stevens Act is a strict liability statute, which makes it unlawful for any person to violate “any regulation or permit issued pursuant to [the] Act.” 16 U.S.C. § 1857(1)(A),
3. NOAA has proved by a preponderance of reliable, probative, substantial and credible evidence that:
 - (a.) On or about January 11, 2010 Respondents while operating F/V FANTA SEAS within the EEZ used gulf reef fish as bait contrary to the prohibition in 50 C.F.R. §§ 622.7(j); 622.31 (n) and also failed to maintain gulf red grouper with head and fins intact through offloading as required by 50 C.F.R. § 622.7(o) and § 622.38(a).
 - (b.) On or about January 11, 2010 Respondents used prohibited gear or methods of fishing in the EEZ in violation of the Endangered Species Act 16 U.S.C § 1538(a)(1)(G) 50 C.F.R. § 2.205(b)(1) and § 223.206(d)(12)(ii).

(c.) On or about January 11, 2010 Respondent Baker made false statements concerning the taking, catching or harvesting of fish in violation of the Magnuson-Stevens Fishery Conservation and Management Act and 50 C.F.R. § 600.725(i).

4. Under the theory of *Respondeat Superior*, Respondents Bluefin Fisheries Inc., and Rodney Baker are jointly and severally liable for violation of the Magnuson-Stevens Act and violation of the Endangered Species Act. See 15 C.F.R. § 904.107; See Also In the Matter of Bruce Stiller, et al, 1998 WL 1277931 (Aug. 10, 1998).
5. After consideration of all of the evidence of record and the factors contained in 15 C.F.R. § 904.108 an appropriate sanction for the violations in this matter is \$31,000. Both Respondents are jointly and severally liable for the assessed penalty.

V. CONCLUSION

Based on the record developed in this proceeding, NOAA has established by a preponderance of the reliable and credible evidence that Respondents Bluefin Fisheries Inc., and Rodney Baker violated 50 C.F.R. § 622.7(o); 50 C.F.R. § 22.205(b)(1) – operating a fishing boat with gear not stowed in an area where longline fishing is prohibited and for failing to then be in compliance with 50 C.F.R. § 23.206(d)(12)(ii).

Likewise, NOAA has established that Respondent Rodney Baker violated 50 C.F.R. § 600.725(i) by unlawfully making a false statements to authorized officers during the boarding of the F/V FANTA SEAS on January 11, 2010 in connection with possession of cut up grouper and using grouper for bait.

Having taken into consideration the nature and circumstances surrounding the events presented in this case, and the factors in 15 C.F.R. § 904.108 I have determined the following sanctions to be appropriate.

WHEREFORE,

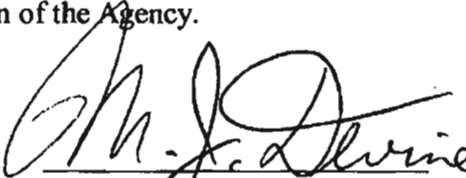
VI. ORDER

IT IS HEREBY ORDERED that for the Notice of Violation and Assessment of Administrative Penalty regarding Respondents, Rodney Baker and Bluefin Fisheries Inc. violation of 50 C.F.R. § 600.725(i); 50 C.F.R. § 622.7(o); 50 C.F.R. 622.7(j); and 50 C.F.R. § 22.205(b)(1) and 50 C.F.R. § 23.206(d)(12)(ii) a civil penalty in the amount of **\$31,000 DOLLARS** is assessed against Respondents Rodney Baker and Bluefin Fisheries, Inc.

IT IS FURTHER ORDERED that with regard to the Notice of Permit Sanction against Respondent Bluefin Fisheries, Inc. for violation of 50 C.F.R. § 622.7(o) and 50 C.F.R. § 600.725(i) no permit sanction is assessed.

Please be advised that any party may petition for administrative review of this decision. The petition for review must be filed with the Administrator of the National Oceanic and Atmospheric Administration within thirty (30) days from the day of this initial decision as provided in 15 C.F.R. § 904.273. Copies of the petition should also be sent to the ALJ Docketing Center, NOAA counsel, and the presiding judge. A copy of 15 C.F.R. § 904.273 is attached to this order.

If neither party seeks administrative review within 30 days after issuance of this order, this initial decision will become the final decision of the Agency.


Michael J. Devine
Administrative Law Judge
United States Coast Guard

Done and dated this 28th day of July 2011
Baltimore, Maryland

ATTACHMENT I

LIST OF WITNESSES AND EXHIBITS

AGENCY'S WITNESS LIST

1. Kelly Moran-Kalamas
2. William Widener
3. Randall Hart
4. Jason Curtin
5. Brodie MacDonald

AGENCY'S EXHIBITS

(All of NOAA's Exhibits were admitted into evidence, except Exhibit #19 which was not admitted into evidence.)

1. Incident Summary Report
2. Voluntary Statement of Rodney Baker
3. Excerpt of NOAA chart 11420, 27th Ed. Mar./03 marked by Rodney Baker
- 3a. NOAA chart 11420, 27th Ed. Mar./03 marked by Rodney Baker
4. Excerpt of NOAA chart 110006, 33rd Ed. Mar./09
- 4a. NOAA chart 110006, 33rd Ed. Mar./09
5. GPS Verification Form
6. Photograph log and 8 color photographs (-001 to -005; -036 to -038)
- 6a. CD of photographs
7. Property Receipt
8. Incident Summary Report Supplement
9. Incident Summary Report
10. Statement

11. Investigative Report
12. Madeira Beach Seafood Trip Ticket
13. VMS data
14. Southeast Fishery Bulletin FB09-054 and associated Federal Register notice
15. Pertinent provision of the Code of Federal Register
16. Certificate of Documentation and Abstract of Title for F/V FANTA SEAS
17. Federal Fisheries Permit and associated application for F/V FANTA SEAS
18. Southeast Region Magnuson-Stevens Act Penalty Schedule and Endangered Species Act Penalty Schedule
19. Document detailing earlier trips made by the F/V FANTA SEAS (*NOT ADMITTED*)

RESPONDENTS' WITNESS LIST

1. Rodney J. Baker
2. Huriberto Ruiz

RESPONDENTS' EXHIBITS

(Respondents' exhibits contained financial information which was not submitted in a timely fashion; all of Respondents' exhibited were not admitted)

- A. Bank of America Statement (*NOT ADMITTED*)
- B. Handwritten documentation (*NOT ADMITTED*)
- C. Bluefin financial documentation (*NOT ADMITTED*)

COURT EXHIBIT

- I. Stipulations of fact
- II. Motion in Limine

ATTACHMENT II

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. AGENCY'S PROPOSED FINDINGS OF FACT

1. The Magnuson Stevens Fishery Conservation and Management Act (M-S Act), as amended through January 12, 2007, at 16 USC 1857(1)(A) states: "It is unlawful – for any person (A) to violate any provision of this Act or any regulation or permit issued pursuant to this Act." **ACCEPTED**, as provided in the Decision and Order.
2. "Person" is defined under the M-S Act to mean "any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government." 16 USC 1802(36). "Person" is very similarly defined, at 16 USC 1532(13), in the Endangered Species Act. **ACCEPTED**, as provided in the Decision and Order.
3. Respondent Bluefin Fisheries, Inc. and Respondent Rodney J. Baker are persons within the meaning of the M-S Act and the Endangered Species Act. **ACCEPTED**, as provided in the Decision and Order.
4. On or about January 11, 2010, and at all times relevant to the above-captioned matter, Respondent Bluefin Fisheries, Inc. was the owner of the F/V FANTA SEAS (U.S. documentation number 695222). **ACCEPTED**, as provided in the Decision and Order.
5. Federal fisheries permit, Gulf of Mexico Reef Fish Commercial, number RR-672 was issued to the F/V FANTA SEAS (U.S. documentation number 695222) and in effect at all times relevant to the above-captioned matter. **ACCEPTED**, as provided in the Decision and Order.
6. All fishing aboard the F/V FANTA SEAS occurred in the Gulf Exclusive Economic Zone (EEZ). **ACCEPTED**, as provided in the Decision and Order.
7. On or about January 11, 2010, and at all times relevant to the above-captioned matter, Respondent Bluefin Fisheries, Inc., through its President/CEO Huriberto Ruiz authorized Respondent Rodney J. Baker to operate the F/V FANTA SEAS in the Gulf of Mexico Reef Fish Fishery pursuant to the privileges conferred by the Gulf of Mexico Reef Fish Commercial Permit number RR-672. **ACCEPTED**, as provided in the Decision and Order.
8. Respondent Bluefin Fisheries, Inc., through its President/CEO Huriberto Ruiz had an agreement with Respondent Rodney J. Baker where the proceeds from the fishing effort aboard

the F/V FANTA SEAS was to be split between the owner and operator with 35-40% paid to the owner and 60-65% to the operator.³ **ACCEPTED**, as provided in the Decision and Order.

9. Regulations promulgated at 50 CFR part 622 implement provisions of the M-S Act. **ACCEPTED, IN PART**, as provided in the Decision and Order.

10. At all times relevant to this proceeding, 50 CFR 622.31(n) identified prohibited gear and methods as follows: Gulf reef fish other than sand perch or dwarf sand perch may not be used as bait in any fishery, except that, when purchased from a fish processor, the filleted carcasses and offal of Gulf reef fish may be used as bait in trap fisheries for blue crab, stone crab, deep-water crab, and spiny lobster. The corresponding prohibition at 50 CFR 622.7(j) makes it unlawful for any person to use prohibited methods. **ACCEPTED, IN PART**, as provided in the Decision and Order.

11. At all times relevant to this proceeding, 50 CFR 622.38(a) required finfish in or from the Gulf EEZ to be maintained with head and fins intact. The corresponding prohibition at 50 CFR 622.7(o) makes it unlawful to fail to maintain a fish intact through offloading ashore, as specified in 622.38. **ACCEPTED, IN PART**, as provided in the Decision and Order.

12. At all times relevant to this proceeding, 50 CFR 223(d)(12) set forth an area in the Gulf EEZ east of 85° 30' W. long. that is shoreward of specified rhumb lines where bottom longlining for Gulf reef fish is prohibited. Within this prohibited area, a vessel with bottom longline gear on board may not possess Gulf reef fish unless the bottom longline gear is appropriately stowed, which means that a longline may be left on the drum if all gangions and hooks are disconnected and stowed below deck; hooks cannot be baited; and all buoys must be disconnected from the gear. The corresponding prohibition at 50 CFR 223.205(b)(1) makes it unlawful to knowingly own, operate, or be on board a vessel, except if that vessel is in compliance with all applicable provisions of 223.206(d)(12). **ACCEPTED, IN PART**, as provided in the Decision and Order, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

13. At all times relevant to this proceeding, 50 CFR 600.725(I) makes it unlawful to make any false statement, oral or written, to an authorized officer concerning the taking, catching, harvesting, landing, purchase, sale, offer of sale, possession, transport, import, export, or transfer of any fish or attempts to do any of the above. **ACCEPTED**, as provided in the Decision and Order.

14. Pursuant to Table 3 of Appendix A to Part 622, red grouper and red snapper are considered a reef fish species. **ACCEPTED**, as provided in the Decision and Order.

³ At the outset of the hearing, the parties stipulated that the proceeds were split between the owner and captain with 65% paid to the owner and 35% to the operator. Subsequently, testimony from Respondent Baker indicated the assignment of percentages stipulated to for the owner and operator were reversed. (TR 173).

15. Respondent Bluefin Fisheries, Inc., or an individual under its control, and Respondent Rodney J. Baker, or an individual under his control, were using undersized reef fish as bait on January 11, 2010. **ACCEPTED**, as provided in the Decision and Order.

16. Although the possession of undersized red grouper was not charged as a stand alone violation, such possession of undersized reef fish, in violation of 50 CFR 622.7(n), serves as a matter in aggravation to the failure to maintain finfish intact through offloading ashore and/or unlawfully use of reef fish as bait. **NEITHER ACCEPTED NOR REJECTED**, the sanction assessed was based on the record as a whole as provided in the Decision and Order.

17. Respondent Bluefin Fisheries, Inc., or an individual under its control, and Respondent Rodney J. Baker, or an individual under his control, failed to maintain finfish in or from the Gulf EEZ intact through offloading ashore. **ACCEPTED**, as provided in the Decision and Order.

18. On January 11, 2010, Respondent Rodney J. Baker was operating the F/V FANTA SEAS in position 27_12.549N and 83_12.859. This position is within the area where a vessel with bottom longline gear is aboard cannot possess Gulf reef fish unless the longline gear is appropriately stowed which means, among other things, hooks cannot be baited. **ACCEPTED**, as provided in the Decision and Order.

19. Respondent Bluefin Fisheries, Inc., or an individual under its control, and Respondent Rodney J. Baker, or an individual under his control, possessed 2,876 pounds of red grouper and 73 pounds of red snapper aboard the F/V FANTA SEAS when it was boarded at position 27_12.549N and 83_12.859, and also possessed 486 gangions with each hook baited with red grouper, and 153 grouper chunks that were not on gangions. **ACCEPTED**, as provided in the Decision and Order.

20. Respondent Bluefin Fisheries, Inc., or an individual under its control, and Respondent Rodney J. Baker, or an individual under his control, owned or operated a vessel with bottom longline gear onboard that was not in compliance with the requirement to have gear appropriately stowed. **ACCEPTED**, as provided in the Decision and Order.

21. On January 11, 2010, at position 27_12.549N and 83_12.859, Respondent Rodney J. Baker showed an authorized officer, William Widener, an orange basket containing more than 100 pieces of red grouper cut into chunks. **ACCEPTED, IN PART**, as provided in the Decision and Order.

22. Mr. Widener asked Respondent Baker if there was any other cut bait he should know about and Respondent Baker assured Mr. Widener that there was no more cut bait aboard the FANTA SEAS. **ACCEPTED, IN PART**, as provided in the Decision and Order.

23. On January 11, 2010, Mr. Widener located three milk crates on the deck of the F/V FANTA SEAS containing gangions with pieces of red grouper chunks attached to each of the 486 gangions' hooks. **ACCEPTED**, as provided in the Decision and Order.

24. Respondent Baker's assertion to Officer Widener that there was not any more cut bait aboard the F/V FANTA SEAS was a false statement. **ACCEPTED**, as provided in the Decision and Order.

25. Circumstantial evidence establishes by a preponderance that Respondent Baker used bottom longline gear during the fishing trip at issue to harvest reef fish in an area where bottom longlining was prohibited. **NEITHER ACCEPTED NOR REJECTED**. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

26. Circumstantial evidence establishes by a preponderance that Respondent Baker made false statements to an authorized officer regarding the fishing gear used to harvest the reef fish located aboard the F/V FANTA SEAS on January 11, 2010. **NEITHER ACCEPTED NOR REJECTED**. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

27. The circumstantial evidence of bottom longlining in a prohibited area and making false statements to an authorized officer concerning the fishing gear used during the fishing trip at issue serve as matters in aggravation justifying the ALJ to exercise his authority to assess de novo penalties in excess of that charged by the Agency. **NEITHER ACCEPTED NOR REJECTED**. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

28. In the absence of the ALJ choosing to aggravate the penalties assessed by the Agency, the penalties as assessed by the Agency are appropriate. **REJECTED**. As noted in the Decision and Order NOAA changed its regulations and enforcement policy. There is no presumption in favor of the Agency's proposed penalties any sanction is determined de novo based on the record as a whole in keeping with the current regulations.

29. Respondent Bluefin Fisheries, Inc. and Respondent Rodney J. Baker failed to comply with the requirement to provide their ability to pay information to the Agency 30 days prior to the administrative hearing which precludes consideration of any financial information proffered or testified to at the hearing. **ACCEPTED**, as provided in the Decision and Order.

30. Respondent Bluefin Fisheries, Inc.'s and Respondent Rodney J. Baker's failure to timely submit financial information to the Agency means that they are presumed to have the ability to pay the civil penalty. **ACCEPTED**, as provided in the Decision and Order.

B. RESPONDENT'S PROPOSED FINDINGS OF FACT

1. The Magnuson Stevens Fishery Conservation and Management Act (M-S Act), as amended through January 12, 2007, at 16 use 1857(1) (A) states: "It is unlawful - for any person (A) to violate any provision of this Act or any regulation or permit issued pursuant to this Act." **ACCEPTED**, as provided in the Decision and Order.

2. "Person" is defined under the M-S Act to mean any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government." 16 USC 1802(36). "Person" is very similarly defined, at 16 USC 1532 (13), in the Endangered Species Act. **ACCEPTED**, as provided in the Decision and Order.

3. Respondent Bluefin Fisheries, Inc. and Respondent Rodney J. Baker are persons within the meaning of the M-S Act and the Endangered Species Act. **ACCEPTED**, as provided in the Decision and Order.

4. On or about January 11, 2010, and at all times relevant to the above-captioned matter, Respondent Bluefin Fisheries, Inc. was the owner of the F/V FANTA SEAS (U.S. documentation number 695222). **ACCEPTED**, as provided in the Decision and Order.

5. Federal fisheries permit, Gulf of Mexico Reef Fish Commercial, number RR-672 was issued to the F/V FANTA SEAS (U.S. documentation number 695222) and in effect at all times relevant to the above-captioned matter. **ACCEPTED**, as provided in the Decision and Order.

6. All fishing aboard the F/V FANTA SEAS occurred in the Gulf Exclusive Economic Zone (EEZ). **ACCEPTED**, as provided in the Decision and Order.

7. On or about January 11, 2010, and at all times relevant to the above-captioned matter, Respondent Bluefin Fisheries, Inc., through its President/CEO Huriberto Ruiz authorized Respondent Rodney J. Baker to operate the F/V FANTA SEAS in the Gulf of Mexico Reef Fish Fishery pursuant to the privileges conferred by the Gulf of Mexico Reef Fish Commercial Permit number RR-672. **ACCEPTED**, as provided in the Decision and Order.

8. Respondent Bluefin Fisheries, Inc., through its President/CEO Huriberto Ruiz had an agreement with Respondent Rodney J. Baker where the proceeds from the fishing effort aboard the F/V FANTA SEAS was to be split between the owner and operator with 35-40% paid to the owner and 60-65% to the operator.⁴ **ACCEPTED**, as provided in the Decision and Order.

9. Regulations promulgated at 50 CFR part 622 implement provisions of the M-S Act. **ACCEPTED IN PART**, as provided in the Decision and Order.

10. At all times relevant to this proceeding, 50 CFR 622.31(n) identified prohibited gear and methods as follows: Gulf reef fish other than sand perch or dwarf sand perch may not be used as bait in any fishery, except that, when purchased from a fish processor, the filleted carcasses and offal of Gulf reef fish may be used as bait in trap fisheries for blue crab, stone crab, deep-water crab, and spiny lobster. The corresponding prohibition at 50 CFR 622.7(j) makes it unlawful for

⁴ At the outset of the hearing, the parties stipulated that the proceeds were split between the 0 and captain with 65% paid to the owner and 35% to the operator. Subsequently, testimony from Respondent Baker indicated the assignment of percentages stipulated to for the owner and operator were reversed. (IR 173).

any person to use prohibited methods. **ACCEPTED IN PART**, as provided in the Decision and Order.

11. At all times relevant to this proceeding, 50 CFR 622.38(a) required finfish in or from the Gulf EEZ to be maintained with head and fins intact. The corresponding prohibition at 50 CFR 622.7(o) makes it unlawful to fail to maintain a fish intact through offloading ashore, as specified in 622.38. **ACCEPTED**, as provided in the Decision and Order.

12. At all times relevant to this proceeding, 50 CFR 223(d) (12) set forth an area in the Gulf EEZ east of 85° 30' W. long. that is shoreward of specified rhumb lines where bottom longlining for Gulf reef fish is prohibited. Within this prohibited area, a vessel with bottom longline gear on board may not possess Gulf reef fish unless the bottom longline gear is appropriately stowed, which means that a longline may be left on the drum if all gangions and hooks are disconnected and stowed below deck; hooks cannot be baited; and all buoys must be disconnected from the gear. There is no credible evidence in the record that the vessel violated this provision. And there is no credible evidence which demonstrates the vessel or its crew were guilty of the corresponding prohibition at 50 CFR 223.205(b)(1) makes it unlawful to knowingly own, operate, or be on board a vessel, except if that vessel is in compliance with all applicable provisions of 223.206(d)(12). **ACCEPTED IN PART**, as provided in the Decision and Order. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

13. At all times relevant to this proceeding, 50 CFR 600.725(1) makes it unlawful to make any false statement, oral or written, to an authorized officer concerning the taking, catching, harvesting, landing, purchase, sale, offer of sale, possession, transport, import, export, or transfer of any fish or attempts to do any of the above. There is no credible evidence that Capt. Rodney Baker knowingly made any false statement to a federal officer. **ACCEPTED IN PART AND REJECTED IN PART**, as provided in the Decision and Order. Respondent was determined to have made false statements in violation of 50 CFR 600.725(i).

14. Pursuant to Table 3 of Appendix A to Part 622, red grouper and red snapper are considered a reef fish species. **ACCEPTED**, as provided in the Decision and Order.

15. Respondent Bluefin Fisheries, inc., or an individual under its control, and Respondent Rodney J. Baker, or an individual under his control, were using undersized reef fish as bait on January 11, 2010. **ACCEPTED**, as provided in the Decision and Order.

(NOTE: There is no proposed finding of fact or conclusion of law #16. on the Respondent's Proposed Findings of Fact and Conclusions of Law document)

17. As the government chose not to charge the respondents with possession of undersized red grouper a violation, of 50 CFR 622.7(n), the court will not address such issue. **NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

18. Respondent Bluefin Fisheries, Inc., or an individual under its control, and Respondent Rodney J. Baker, or an individual under his control, failed to maintain finfish in or from the Gulf EEZ intact through offloading ashore. **ACCEPTED**, as provided in the Decision and Order.

19. On January 11, 2010, Respondent Rodney J. Baker was operating the F/V FANTA SEAS in position 27°12.549N and 83°12.859. This position is within the area where a vessel with bottom longline gear is aboard cannot possess Gulf reef fish unless the longline gear is appropriately stowed. There is no credible evidence that the respondent Rodney baker violated this provision. **ACCEPTED IN PART AND REJECTED IN PART**, as provided in the Decision and Order. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted some of it may be rejected and some may be immaterial.

20. Respondent Bluefin Fisheries, Inc., or an individual under its control, and Respondent Rodney J. Baker, or an individual under his control, possessed 2,876 pounds of red grouper and 73 pounds of red snapper aboard the F/V FANTA SEAS when it was boarded at position 27°12.549N and 83°12.859, and also possessed 486 gangions with each hook baited with red grouper, and 153 grouper chunks that were not on gangions. **ACCEPTED**, as provided in the Decision and Order.

21. Respondent Bluefin Fisheries, Inc., or an individual under its control, and Respondent Rodney J. Baker, or an individual under his control, owned or operated a vessel with bottom longline gear onboard however there is no evidence that the longline gear was in operation and therefore not in compliance with the requirement to have gear appropriately stowed. **REJECTED**, as provided in the decision and order.

22. On January 11, 2010, at position 27°12.549N and 83°12.859, Respondent Rodney J. Baker showed an authorized officer, William Widener, an orange basket containing more than 100 pieces of red grouper cut into chunks. (#22 is used two times on the Respondent's Proposed Findings of Fact and Conclusions of Law document). **ACCEPTED**, as provided in the Decision and Order.

22. Mr. Widener asked Respondent Baker if there was any other cut bait he should know about and Respondent Baker assured Mr. Widener that there was no more cut bait aboard the FANTA SEAS. **ACCEPTED IN PART**, as provided in the Decision and Order.

23. On January 11, 2010, Mr. Widener located three milk crates on the deck of the F/V FANTA SEAS containing gangions with pieces of red grouper chunks attached to each of the 486 gangions hooks. **ACCEPTED**, as provided in the Decision and Order.

24. Respondent Baker's assertion to Officer Widener that there was not any more cut bait aboard the F/V FANTA SEAS was a false statement and there is no credible evidence to show that Capt. Baker did not believe this statement to be true at the time based upon his testimony that he had been sick for several days. **ACCEPTED IN PART AND REJECTED IN PART**, as provided in the Decision and Order. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be

accepted, some may be rejected and some may be considered immaterial.

25. Circumstantial evidence establishes by preponderance that Respondent Baker used bottom longline gear during the fishing trip at issue to harvest reef fish in an area where bottom longlining was prohibited. **NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted some may be rejected and some may be immaterial.

26. There is no credible evidence to establish by a preponderance of the evidence that Respondent Baker made false statements to an authorized officer regarding the fishing gear used to harvest the reef fish located aboard the F/V FANTA SEAS on January 11, 2011. **NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

27. While there is some evidence as to the use of bottom longline gear which is primarily from the boarding officers there is conflict in the in the evidence as to its use primarily from the crew. There is no evidence that the longline gear being used by the crew at the time of the boarding and there is no creditable evidence that false statements were made to officers concerning the fishing gear used during the fishing trip. Therefore there is no aggravation evidence justifying the ALJ to assess de novo penalties in excess of that charged by the Agency. **NEITHER ACCEPTED NOR REJECTED**, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

28. In the absence of the all choosing to aggravate the penalties assessed by the Agency, the penalties as assessed by the Agency are appropriate. **REJECTED**, as provided in the Decision and Order NOAA changed its regulations. There is no presumption that penalties proposed by the Agency are appropriate. In keeping with the regulations if any sanction is assessed the court determines a sanction de novo.

29. Respondent Bluefin Fisheries, Inc. and respondent Rodney J. Baker failed to comply with the requirement to provide their ability to pay information to the Agency 30 days prior to the administrative hearing however the court exercises its right of discretion and considers the oral financial information proffered or testified to at the hearing by the respondents and will take it into consideration in its deliberations. **ACCEPTED**, as provided in the Decision and Order.

ATTACHMENT III

PROCEDURES GOVERNING ADMINISTRATIVE REVIEW

15 C.F.R. § 904.273

§ 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse, modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

(c) Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for discretionary review, or review is timely undertaken on the Administrator's own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

(d) A petition for review must comply with the following requirements regarding format and content:

- (1) The petition must include a concise statement of the case, which must contain a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;
- (2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;
- (3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations, and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;
- (4) A copy of the Judge's initial decision must be attached to the petition;
- (5) Copies of all cited portions of the record must be attached to the petition;
- (6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and
- (7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.

(f) No oral argument on petitions for discretionary review will be allowed.

(g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.

(h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.

(i) If the Administrator issues an order denying discretionary review, the order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.

(j) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be briefed and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

(l) An initial decision shall not be subject to judicial review unless:

(1) The party seeking judicial review has exhausted its opportunity for administrative review by filing a petition for review with the Administrator in compliance with this section, and

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section

(m) For purposes of any subsequent judicial review of the agency decision, any issues that are not identified in any petition for review, in any answer in support or opposition, by the Administrator, or in any modifications to the initial decision are waived.

(n) If an action is filed for judicial review of a final agency decision, and the decision is vacated or remanded by a court, the Administrator shall issue an order addressing further administrative proceedings in the matter. Such order may include a remand to the Chief Administrative Law Judge for further proceedings consistent with the judicial decision, or further briefing before the Administrator on any issues the Administrator deems appropriate.