

UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF: )  
)  
)

AMY N., Inc. )  
WILLIAM C. HAUCK )  
F/V SEA KING )

Respondents )  
)

Docket No. SE0900879

INITIAL DECISION AND ORDER

Issued:

July 19, 2010

Issued By:

Hon. Michael J. Devine

Appearances:

For the National Oceanic and Atmospheric Administration

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For the Respondent

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Pro Se

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**TABLE OF CONTENTS**

**STATEMENT OF THE CASE..... 3**

**FINDINGS OF FACT ..... 6**

**DISCUSSION ..... 8**

**A. Location of the Fishing Vessel SEA KING ..... 9**

**B. Respondent’s Argument ..... 12**

**C. Liability of Respondent Amy N., Inc. .... 14**

**ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW ..... 16**

**ORDER.....20**

**ATTACHMENT I LIST OF WITNESSES AND EXHIBITS..... 21**

**ATTACHMENT II AGENCY’S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW .....25**

**ATTACHMENT III NOTICE OF APPEAL RIGHTS..... 30**

## STATEMENT OF THE CASE

The National Oceanic and Atmospheric Administration (NOAA or Agency) initiated this administrative proceeding for assessment of civil penalty under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), as amended and codified at 16 United States Code §§ 1801-1882 and its underlying regulations found in 50 Code of Federal Regulations (C.F.R.) Part 622. On March 26, 2009, NOAA issued and served a Notice of Violation and Assessment (NOVA) alleging Respondents, Amy N., Inc. and William C. Hauck (corporate principle of Amy N., Inc. and operator of the F/V SEA KING), unlawfully engaged in an activity for which a valid federal permit is required under 50 C.F.R. § 622.4 without possessing such permit, in violation of the Magnuson-Stevens Act at 16 U.S.C. §1857(1)(A) and 50 C.F.R § 622.7(a). Specifically, Respondent was fishing for and caught multiple species of snapper, mackerel and grouper, dolphin, and amberjack in the Exclusive Economic Zone of the United States (EEZ).<sup>1</sup> See Agency PPIP and NOVA. The original NOVA proposed a monetary civil penalty of thirty-thousand dollars (\$30,000) for these violations of U.S. laws, statutes and regulations involving the unlawful taking of South Atlantic coastal migratory pelagic fish, South Atlantic snapper-grouper, and Atlantic dolphin and wahoo. The NOVA was later amended to seek a sanction of three thousand dollars (\$3,000).

On April 24, 2009, Respondent requested a hearing in accordance with 15 C.F.R. § 904.102(a) and (c). NOAA forwarded this matter to the U. S. Coast Guard

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<sup>1</sup> 16 U.S.C. 1802(11); 50 CFR 600.10. The term "exclusive economic zone" means the zone established by Presidential Proclamation Numbered 5030, dated March 10, 1983. For purposes of applying this chapter, the inner boundary of that zone is a line coterminous with the seaward boundary of each of the

Administrative Law Judge (ALJ) Docketing Center for assignment of an ALJ.<sup>2</sup> On May 28, 2009, the ALJ Docketing Center forwarded this matter to the undersigned for adjudication. The Agency filed and served on Respondent their Preliminary Position on Issues and Procedures (PPIP) on June 25, 2009. Respondent submitted and served his PPIP on August 19, 2009, after requesting two extensions of time to file his PPIP.

The hearing was held on February 10 and 11, 2010, in Marathon, Florida. Attorney Karen Antrim Raine, appeared on behalf of the Agency and William C. Hauck, appeared pro se. The Agency moved to amend the sanction immediately prior to the hearing, due to the closeness in time to the hearing date, the undersigned addressed this matter at the start of the hearing. The motion to amend lowered the proposed sanction from \$3,000 to \$1,500. Respondent informed the undersigned that he did not object to the lowering of the proposed sanction. Tr. Day 1, Vol. 1 at 23. The undersigned reserved ruling on this issue at the hearing. In light of the fact that Respondent did not object to the lowering of the proposed sanction, NOAA's motion to amend the proposed sanction to \$1,500.00 was granted at the end of the hearing. TR Day 2 at 100.

At the hearing, NOAA offered the testimony of eight (8) witnesses and offered forty-eight (48) exhibits into evidence, forty-four (44) were admitted, and the undersigned reserved ruling on Agency Exhibit 28. Agency Exhibit 10 was withdrawn and never offered as evidence, so it is not attached to the record. Tr. Day 1, Vol. 1 at 40-41. Agency Exhibit 22 was found not relevant. The CD attached to Agency Exhibit 22 was not played and none of Agency Exhibit 22 or the attached CD has been considered

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<sup>2</sup> Title 15 U.S.C. § 1541 provides that the United States Coast Guard may perform all adjudicatory or judicial functions required by Chapter 5 of Title 5 of the United States Code to be performed by a U.S. Administrative Law Judge for any marine resource conservation law or regulation administered by the U.S. Secretary of Commerce acting through the National Oceanic and Atmospheric Administration.

for any purpose. Tr. at Day 2, Vol. 2 at 38. Agency Exhibits 25H, 25I and 25J were all dated after the date of the charged violations and determined to be not relevant and have not been considered for any purpose in this decision. Tr. Day 1, Vol. 2 at 290. Ruling on Agency Exhibit 28 was reserved at the time of the hearing. Agency Exhibit 28 was identified by witness Gregory Mercurio as a printout from his electronic log in January 2009. The exhibit is allowed and attached to the record since it was discussed with the witness by both Agency Counsel and on cross examination by Respondent. Tr. Day 1, Vol. 2 at 216-225. Respondent offered the testimony of one (1) witness and offered nine (9) exhibits into evidence, six (6) were admitted. Respondent Exhibit G was withdrawn and never offered as evidence so it is not attached to the record. Tr. Day 2 at 4-5. Respondent Exhibit F was tentatively offered but was later withdrawn. Tr. Day 2 at 73-74. Respondent Exhibits I and J were found not relevant. Tr. Day 2 at 64-67. The list of all witnesses and exhibits are contained in Attachment I.

At the close of the hearing, pursuant to 15 C.F.R. § 904.261(c), the parties presented oral argument. Agency counsel also presented proposed findings of facts and conclusions of law on the record<sup>3</sup> and a schedule was set to allow the parties the opportunity to follow up the proposals stated on the record with post hearing briefs. On April 9, 2010 and April 10, 2010, the Agency and Respondent respectively filed their post hearing briefs. After careful review and analysis of the entire record considered as a whole, I find the Agency **PROVED** by a preponderance of reliable, probative, substantial and credible evidence that Respondent did violate the Magnuson-Stevens Act and supporting regulations by fishing for South Atlantic coastal migratory pelagic fish, South

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<sup>3</sup> Agency's Proposed Findings of Fact and Conclusions of Law are addressed in Attachment II.

Atlantic snapper-grouper, and/or Atlantic dolphin and wahoo in the EEZ without possessing the required permit.

### FINDINGS OF FACT

The following Findings of Fact are based on a thorough and careful analysis of the entire case record as a whole including documentary evidence and credible witness testimony.

1. Respondent Amy N., Inc. is a Florida corporation. (Agency Exhibit 19).
2. At all times relevant herein, Respondent Amy N., Inc. was the owner of the F/V SEA KING. (Agency Ex. 12, 15, 17, 19 and Tr. Day 1 Vol. 1 at 27-29).
3. At all times relevant herein, Respondent William C. Hauck was the operator in charge of the fishing vessel F/V SEA KING during the voyage of January 23-25, 2009. (Agency Ex. 12, 15, and Tr. Day 1 Vol. 1 at 26-30, 47, 150, 152.).
4. On or about January 23, 2009, Respondent Hauck departed on a fishing trip operating the F/V SEA KING as a headboat<sup>4</sup> with passengers for hire. (Tr. Day 1 Vol. 1 at 102).
5. During the fishing trip on or about January 23-25, 2009, Respondent Hauck employed Robert Morrison as the second relief captain, Kerry Price and Martin Ivey as mates on the F/V SEA KING. (Tr. Day 1 Vol. 1 at 187).
6. On or about January 25, 2009, the F/V SEA KING returned to the Fishbusterz Dock on Stock Island in Key West Florida. (Tr. Day 1 Vol. 1. at 101, 160).
7. Officers Nathaniel B. Christy and Anders W. Bergstrom from Florida Fish and Wildlife Conservation boarded the F/V SEA KING while it was docked to perform an inspection. (Tr. Day 1 Vol. 1 at 101, 150).
8. Officer Bergstrom boarded the F/V SEA KING and observed coolers with several types of fish, specifically yellowtail snapper, mangrove snapper, mutton snapper, dolphin, amberjack, king mackerel, cero mackerel, and grouper. (Tr. Day 1, Vol. 1 at 101-02; 133 Agency Ex. 15).
9. Officer Bergstrom asked Respondent Hauck if he had any federal permits. (Tr. Day 1 Vol. 1 at 101-02).

<sup>4</sup> A "headboat" is a vessel that holds a Certificate of Inspection (COI) issued by the Coast Guard to carry more than six passengers for hire. 50 CFR 622.2.

10. Respondent did not produce any valid federal permits. (Tr. Day 1 Vol. 1 at 101-02, 153).
11. Officer Bergstrom brought a 2006 version of NOAA chart 11434 with him to the boarding of the F/V SEA KING. Tr. at Day 1 Vol. 1 155.
12. NOAA<sup>5</sup> official chart 11434 (Agency Ex. 5, 5A and 7) contain lines and markings that indicate where the three mile limit and nine mile limits and indications for the territorial sea that are used for application of federal law. Tr. Day 1, Vol. 1 at 76-78. (See Note X on Chart 11434 Agency Exhibits 5, 5A, 7).
13. Officer Bergstrom asked Respondent Hauck and Robert Morrison, second captain aboard the F/V SEA KING, to mark the locations where they fished on Official NOAA Chart Number 11434. (Tr. Day 1 Vol. 1 at 103-04, 154-59).
14. Both Respondent Hauck and Robert Morrison marked and signed on the Chart where they had fished during the fishing trip on January 23-25, 2009. (Tr. Day 1 Vol. 1 at 103-04, 139, 154-59; Agency Ex. 7, Agency Ex. 15).
15. The majority of places marked on NOAA Chart Number 11434 by Respondent Hauck and Robert Morrison were located in the U.S. South Atlantic EEZ off the coast of Florida. (Tr. Day 1 Vol. 1 at 139, 158; Agency Ex. 7). Only the easternmost point marked as departing and returning to Stock Island area is inside of the 3 nautical mile line on Chart 11434 (See Note X Agency Exhibit 7).
16. Respondent admitted to both Officer Bergstrom and Officer Christy that he was fishing in federal waters. (Tr. Day 1 Vol. 1 at 139-40, 162).
17. NOAA Chart Number 11434 presented to Respondent Hauck and Robert Morrison was not the most current version of the chart, the signed chart is the 27<sup>th</sup> Edition, dated October 2006. (Tr. Day 1 Vol. 1 at 155-56, Agency Ex. 7).
18. Several updates were made to NOAA Chart Number 11434 from October 2006 to the January 23-25, 2009 fishing trip but the boundaries between state and federal waters were not changed. (Tr. Day 1 Vol. 1 at 156; Agency Ex. 8, 9A, 9B, 9C).
19. Second Captain, Robert Morrison knew that at least one of the fishing locations he marked on Agency Exhibit 7 (Cosgrove Shoal area) was located in the South Atlantic EEZ because he could see the lighthouse from where they were fishing. (Tr. Day 1 Vol. 1 at 190-91; 198-200).
20. Kerry Price, mate on the F/V SEA KING testified the F/V SEA KING was fishing at locations in federal waters through his familiarity of the locations from his experience as a fishing boat captain operator. (Tr. Day 1 Vol. 1 at 46-47; 60-68, Agency Ex. 5).

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<sup>5</sup> NOAA produces navigational charts pursuant to 33 USC 883b.

## DISCUSSION

The Agency must prove the violations alleged in the NOVA by a preponderance of the evidence. 5 U.S.C. § 556(d); *Steadman v. Securities and Exchange Commission*, 450 U.S. 91, 107 (1981); *In the Matter of Cuong Vo*, 2001 WL 1085351 (NOAA 2001). Preponderance of the evidence is proved when the agency illustrates, through evidence presented in the hearing record that it is more likely than not the respondent committed the violation alleged in the NOVA. *In the Matter of John Fernandez, III*, 1999 WL 1417462 (NOAA 1999). Direct and circumstantial evidence may be relied upon to satisfy the burden of proof. *In the Matter of Cuong Vo*, 2001 WL 1085351 (NOAA 2001). The burden of production to rebut agency evidence shifts to the respondent after NOAA proves the allegations contained in the NOVA by a preponderance of reliable, credible, probative and substantial evidence. *Id.*

Respondents are charged with a violation under the Magnuson-Stevens Act which contains a general prohibition making it illegal for a person to violate any of its applicable laws included in its statutes and regulations. 16 U.S.C. § 1857(1)(A). Through its supporting regulations, the Magnuson-Stevens Act states that it is unlawful for any person to “engage in an activity for which a valid Federal permit, license, or endorsement is required under § 622.4 without such permit, license, or endorsement.” 50 C.F.R. § 622.7(a). Specifically, a person operating a headboat must have valid permits, licenses or endorsements to “fish for or possess, in or from the EEZ, species in any of the following species groups . . . South Atlantic coastal migratory pelagic fish . . . South



Atlantic snapper – grouper . . . Atlantic dolphin and wahoo . . .” See 50 C.F.R. § 622.4(a).

The Magnuson-Stevens Act was enacted to protect, conserve, and manage the fishery resources of the United States and its adjacent waters. 16 U.S.C. § 1801(b)(1)(A). To achieve this purpose, the Secretary of the U.S. Department of Commerce may assess civil penalties and/or impose permit sanctions against any person who violates the Magnuson-Stevens Act. 16 U.S.C. § 1858; *In the Matter of Corsair Corporation, F/V CORSAIR*, 1998 WL 1277924 (NOAA 1998). The term “person” is broadly defined to include any individual, corporation, partnership, association, or other entity. 16 U.S.C. § 1802(31). Therefore, Respondent, Amy N., Inc., as owner of the F/V SEA KING, is subject to the jurisdiction of the United States and may be assessed a civil penalty as a person for any violation of the Magnuson-Stevens Act or any regulation adopted pursuant to the Act. *In the Matter of Northern Wind Seafood, Inc.*, 1998 WL 1277922 (NOAA 1998).

#### **A. Location of the Fishing Vessel SEA KING**

Under 50 C.F.R. § 600.10, “*Exclusive economic zone (EEZ)* means the zone established by U.S. Presidential Proclamation 5030, 3 CFR part 22, dated March 10, 1983, and is that area adjacent to the United States which, except where modified to accommodate international boundaries, encompasses all waters from the seaward boundary of each of the U.S. coastal states to a line on which each point is 200 nautical miles (370.40 km) from the baseline from which the territorial sea of the United States is measured.” The demarcation line between Florida state waters and the U.S. South Atlantic Exclusive Economic Zone is three (3) nautical miles from the Florida coast.

43 U.S.C. 1312; *United States v. Florida*, 425 U.S. 791 (1976); *Anderson Seafoods Inc., v. Graham*, 529 F.Supp. 512 (N.D.FL. 1982).

Officers Christy and Bergstrom boarded the F/V SEA KING at Fishbusterz Dock on Stock Island in Key West Florida to perform an inspection on January 25, 2009. (Tr. Day 1 Vol. 1. at 101, 150, 160). During the boarding Officer Bergstrom observed coolers containing yellowtail snapper, mangrove snapper, mutton snapper, dolphin, amberjack, king mackerel, cero mackerel, and grouper. (Agency Ex. 15). After observing the fish in the coolers, Officer Bergstrom asked Respondent Hauck if he had any federal permits. (Tr. Day 1 Vol. 1 at 101-02). Respondent Hauck failed to produce any valid federal permits. (Tr. Day 1 Vol. 1 at 101-02, 153).

After Respondent Hauck's failure to produce any valid federal permits, Officer Bergstrom requested that Respondent Hauck and second captain Robert Morrison mark the locations where they fished during the January 23-25, 2009 fishing trip on NOAA Chart 11434. (Tr. Day 1 Vol. 1 at 103-04, 154-59). NOAA CHART 11434 was provided to Respondent Hauck and Robert Morrison by Officer Bergstrom. (Tr. Day 1 Vol. 1 at 158; Agency Ex. 7). Respondent Hauck and Robert Morrison marked locations on the chart provided by the officers where they stopped and engaged in fishing on Agency Exhibit 7. Only one mark was inside of the 3 nautical mile line noted on the chart and the rest of these locations were located in the South Atlantic EEZ. (Agency Ex. 7). Note X<sup>6</sup> of Agency Exhibit 7 (herein after "the chart") describes the 3 nautical mile

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<sup>6</sup> Note X states: Within the 12-nautical mile Territorial Sea established by Presidential Proclamation, some Federal Laws apply. The Three Nautical Mile Line, previously identified as the outer limit of the territorial sea is retained as it continues to depict the jurisdictional limit of the other laws. The 9-nautical mile Natural Resources Boundary of the Gulf Coast of Florida, Texas and Puerto Rico, and the Three Nautical Mile Line elsewhere remain in most cases the inner limit of Federal fisheries jurisdiction and the outer limit of the jurisdiction of the states. The 24-nautical mile Contiguous Zone and the 200-nautical mile Exclusive

line, and the 9 nautical mile Natural Resource Boundary line of the Gulf coast of Florida, Texas and Puerto Rico. Other than the first mark indicating the beginning and end of the voyage the rest of the locations marked on the chart can be observed to be outside of these lines which mark the outer limit of state waters. Id.

The marks on the chart (Agency Ex. 7) made by Respondent during the boarding to show locations where the F/V SEA KING was fishing during the voyage are an admission of the locations where he was fishing. (In the Matter of Felix Aguiar, 5 O.R.W. 30 (NOAA 1987).

In addition to the fishing locations marked on the chart (Agency Exhibit 7), by Respondent Hauck, witnesses Robert Morrison and Kerry Price independently verified that the F/V SEA KING was fishing in federal waters by indicating locations of the F/V SEA KING when fishing was conducted that was outside of state waters. Robert Morrison testified that he knew the F/V SEA KING was fishing in federal waters because he could see the lighthouse near the Cosgrove Shoal area from where they were fishing and he knew that area was located in the EEZ. (Tr. Day 1 Vol. 1 at 190-91). Kerry Price, mate aboard the F/V SEA KING knew some of the fishing locations were in the EEZ because of his familiarization with the area due to his experience as a fishing boat operator in that area. (Tr. Day 1 Vol. 1 at 60-67, Agency Ex. 5). Witness Kerry Price testified that he has extensive fishing experience in this area of Florida waters and recognized the areas where they fished. During his testimony Kerry Price marked on Agency Exhibit 5 four approximate positions where they fished and identified them as follows: Marked as #1 the Tail End Buoy. The point marked near this buoy on the chart

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Economic Zone were established by Presidential Proclamation. Unless fixed by treaty or the U.S. Supreme Court, these maritime limits are subject to modification.

(Agency Exhibit 5) is outside of United States territorial waters (See Note X) and is in the EEZ. Mark #2 near Rebecca Shoals, is outside of the natural resource boundary as shown by the gray line that is beyond 3 miles from land on the Atlantic side and beyond 9 miles on the Gulf side (See Note X). Mark #3 on the south side of Dry Tortugas area is outside of the natural resource boundary as shown by the gray line that is beyond 3 nautical miles from land on the Atlantic side and beyond 9 nautical miles on the Gulf side (See Note X). Mark #4 in the Marquesas area is beyond the gray line, and therefore is beyond 3 nautical miles from land on the Atlantic side (See Note X). See Tr. Day one Vol. One 60, 64-67. Each of the approximate locations marked on Agency Ex. 5 is in the EEZ.

Finally, Officers Christy and Bergstrom testified that Respondent Hauck admitted during the boarding that he was fishing in the EEZ during the January 23-25, 2009 fishing trip. (Tr. Day 1 Vol. 1 at 139-40, 162). Based on the record as a whole including Respondent's admissions in marking the fishing locations on NOAA Chart 11434, and the corroborating testimony regarding some of the fishing locations in the EEZ by witnesses Kerry Price and Robert Morrison, I find that NOAA proved by a preponderance of the evidence that the F/V SEA KING with Respondent Hauck as captain was fishing or possessed multiple species of snapper, mackerel and grouper, dolphin, and amberjack in the South Atlantic EEZ without valid permits that were required to be on board the vessel.

#### **B. Respondent's Argument**

Although Respondent Hauck chose not testify at the hearing,<sup>7</sup> he made numerous assertions and arguments throughout the hearing. Respondent Hauck repeatedly emphasized the point that neither he nor Robert Morrison was given “proper plotting tools” to plot the points marked on NOAA Chart Number 11434, Agency Exhibit 7. Under the circumstances of this case this argument is not persuasive.

Plotting tools are not required to make a proper identification on a chart of where Respondent was fishing. Simply pointing to a general area on a chart has been found sufficient to establish vessel location. See In the Matter of Felix Aguiar, Jr., 5 O.R.W. 30 (NOAA 1987). Precision navigation is not an issue in this matter. Most of the marks on the chart made by both Respondent Hauck and Robert Morrison were well within the South Atlantic EEZ. Officers Christy and Bergstrom observed Respondent Hauck and Robert Morrison state that they could mark the points where they were fishing on the Chart provided to them. (Tr. Day 1 Vol. 1 at 139-40, 154-59). Neither Respondent Hauck nor Robert Morrison requested “proper plotting tools” prior to marking their fishing locations on the Chart. Id. Respondent Hauck also cross-examined the Agency witnesses regarding their knowledge of the difference between a nautical mile<sup>8</sup> and a statute mile. However, the points indicated on the chart by Respondent Hauck and witness Kerry Price are not on the edge of the EEZ but instead are clearly beyond the boundary line and clearly seen on the chart as beyond the 3 nautical mile limit on the Atlantic side or beyond 9 miles on the Gulf side precise navigation is not an issue.

(Agency Ex. 5, 7; also see Note X on the Chart)

<sup>7</sup> Respondent Hauck was advised that his arguments were not evidence and he was given an opportunity to testify or present other evidence on his own behalf at the conclusion of the Agency case in chief but Respondent Hauck declined to offer anything more in evidence at that point. Tr. Day 2 at 62, 76-77.

<sup>8</sup> Although the nautical mile based on a minute of latitude exceeds 6,000 feet as noted in Howditch, The American Practical Navigator ([www.irbs.com/howditch](http://www.irbs.com/howditch)) and a statute mile is 5,280 feet the difference is not in issue here where the markings on the chart are well within the EEZ.

Furthermore, case law is well established that there are many different means to establish a vessel's location, such as verbal admissions, see In the Matter of David C. Picciandra, Michael A. Picciandra, 4 O.R.W. 456 (NOAA 1985), vessel logbook positions, see In the Matter of Gerald Dale Dube, Everett W. Figg, 7 O.R.W. 44 (NOAA 1993), and personal observations. Accordingly, I find Respondent Hauck's argument that proper plotting tools were required for both Respondent Hauck and Robert Morrison to accurately mark the F/V SEA KING's fishing locations for the January 23-25, 2009 fishing trip unpersuasive.

Respondent Hauck also cross-examined Agency witnesses regarding the processing (or asserted lack of timely processing) of his application for a fishing permit. Whether the Agency could have processed his application sooner or not, it does not provide Respondents with a defense to the failure to have a valid permit on board the F/V SEA KING as required by 50 CFR 600.4 in order to lawfully fish in federal waters (EEZ) during the January 2009 fishing voyage. Additionally, the ongoing dispute between Respondents and NOAA over nonpayment for a prior violation was the apparent reason the Respondent's permits were not approved until October 2009. Agency Ex. 23A-23H.

### **C. Liability of Respondent Amy N., Inc.**

The owner or operator of the vessel may be held liable for the actions of a crewmember that violates the Magnuson-Stevens Act or its underlying regulations under the legal doctrine of *respondeat superior*. *In the Matters of James Chan Song Kim, Askar Ehmes, Ulheclani Corporation*, 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 and crew 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 and pays to operate its boat and has the authority to fire. *Id.*

At the time of the January 23 – 25, 2009 fishing trip Respondent Hauck was an officer of Amy N., Inc. and Respondent Hauck was the captain of the F/V SEA KING. (Tr. Day 1 Vol. 1 at 29). Respondent made various assertions in argument about the status of that company and its ownership and its ability to pay but produced no evidence or documentation in support of his assertions. Evidence of the Amy N. incorporation as an entity in Florida is contained in Agency Exhibit 19. That documentation shows Respondent as the corporate principle of Amy N., Inc., as the owner of the F/V SEA KING the doctrine of *respondeat superior* applies to the Amy N. Corporation. Respondent made various assertions about the vessel being under control of the second captain Robert Morrison during the voyage in January 23-25, 2009. However, the vessel

operation was managed by William Hauck including hiring and directing the crew.

Therefore, Respondent Amy N., Inc., is liable for the violations of laws of the F/V SEA KING captain and crew as owner of the F/V SEA KING.

#### ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent, Amy N., Inc., is a "person" within the meaning of the Magnuson-Stevens Act and is therefore subject to the laws and jurisdiction of the United States. 16 U.S.C. § 1802(31).
2. The F/V SEA KING was in the U.S. South Atlantic Exclusive Economic Zone in possession of yellowtail snapper, mangrove snapper, mutton snapper, dolphin, amberjack, king mackerel, cero mackerel, and grouper without a valid permit on January 25, 2009 and thus, violated the Magnuson-Stevens Fishery Conservation and Management Act, as amended, at 16 U.S.C. § 1857(1)(A) and 50 C.F.R. § 622.7(a), specifically by possessing South Atlantic coastal migratory pelagic fish, South Atlantic snapper-grouper, Atlantic dolphin and wahoo from the South Atlantic EEZ without such permit.
3. Respondent William C. Hauck, an owner of the corporation, Amy N., Inc. and captain (operator) of F/V SEA KING, engaged in fishing and possessed fish for which a valid federal permit was required (South Atlantic coastal migratory pelagic fish, South Atlantic snapper-grouper, Atlantic dolphin and wahoo) in the South Atlantic EEZ in January 2009 without having a valid permit.
4. All updates made to NOAA Chart Number 11434 during the time period between its 37<sup>th</sup> Edition October 2006 printing and January 25, 2009, have no effect as to whether the fishing locations indicated on the chart by Respondent Hauck and Robert Morrison were in the EEZ because the boundaries between state and Federal waters have not changed.
5. Respondent Amy N., Inc., is liable under the doctrine of *respondeat superior* for the fishing permit violations by F/V SEA KING's captain (operator) and crew which occurred on and about January 23-25, 2009, and at all times relevant to this case.
6. The \$1,500 civil penalty assessed by the Agency is within the guidelines set forth in the Southeast Region Magnuson-Stevens Act Penalty Schedule and is appropriate.



## PENALTY ASSESSMENT

The Magnuson-Stevens Act authorizes the imposition of a civil penalty of up to \$100,000 and permit sanctions commensurate to the violation(s) involved.<sup>9</sup> 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). In keeping with 15 CFR 904.204(m) as amended in 2010, any presumption in favor of the agency proposed sanction has been eliminated. See 75 Fed.Reg. 35631-32 (June 23, 2010). The ALJ may assess a civil penalty or impose a permit sanction, taking into account all of the factors required by applicable law. This rule change is effective immediately and applies to this case. Id.

The Agency proposed an initial civil penalty of \$30,000, and subsequently through discussions with Respondent and in consideration of other factors, reduced the proposed civil penalty first to \$3,000 and then shortly before the hearing moved to amend the proposed sanction to \$1,500. The Southeast Region Magnuson–Stevens Act Penalty Schedule in effect at the time of the violations shows a penalty range under “act without permit” for first time violators from \$1,500 to \$30,000; for second time violators the penalty range is \$3,000 to \$75,000; and, for third time violators the penalty range is from \$5,000 to statutory maximum. (Agency Ex. 24).

Requiring headboats to have proper federal permits is a required component of the snapper-grouper fishery management and is “designed to prevent this overfishing, rebuild

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<sup>9</sup> Civil monetary penalties are subject to the Federal Civil Penalties Inflation Adjustment Act of 1990 and are adjusted regularly for inflation. The current adjustment established the statutory maximum at \$130,000. See 15 C.F.R. § 6.4.

the overfished species, and manage the fishery in a more orderly manner. (Agency Ex. 25B). Permits are also required for dolphin and wahoo fisheries for similar purposes. See 68 Fed. Reg. 62267 (Nov. 3, 2003). Therefore, fishing for these species without the proper permits can cause irreparable harm to the fishery stocks. Respondent Hauck knew that federal permits were required, as evidenced by the fact that he and Amy N., Inc., had previously obtained permits and the fact that he filled out an application for the permits prior to the January 23-25, 2003 fishing trip. (Agency Ex. 18).

The Southeast Region Magnuson-Stevens Act Penalty Schedule prescribes that “the Agency’s procedure for determining applicability of a prior violation to a penalty or permit sanction, is to look back from the date of the current violation and take into account prior violations that have been reduced to final administrative decisions during the previous five years . . . a violation is considered to be a prior violation if it has been reduced to either a court decision (civil or criminal) or it has become a final administrative decision of the Agency as defined in 15 C.F.R. § 904 *et seq.*” In the past five (5) years, Respondents Amy N., Inc. and William C Hauck have had one (1) previous violation. On November 1, 2004, the Agency issued an Order Denying Discretionary Review constituting final agency action and assessing Respondents \$10,000.00. (Agency Ex. 23C). Settlement of the matter did not eliminate it from consideration as a prior violation under the regulations.

Ultimately, Respondent William C. Hauck was on notice that fishing for South Atlantic coastal migratory pelagic fish, South Atlantic snapper-grouper, Atlantic dolphin and wahoo U.S. South Atlantic EEZ without possessing a federal permit is prohibited by U.S. law. Respondents did not offer evidence of an inability to pay the proposed fine,

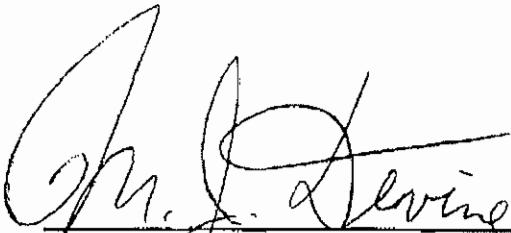
although Respondents apparently provided some financial information to the Agency. Since Respondents did not follow the requirements of 15 C.F.R. § 904.108 and did not raise this issue at hearing, Respondents are deemed to have the ability to pay. Thus, applying the factors contained in 15 C.F.R. § 904.108(a) and considering the record as a whole including the Southeast Region Magnuson-Stevens Act Penalty Schedule in effect at the time of the violations, a \$1,500 civil penalty is found appropriate.

**WHEREFORE,**

**ORDER**

**IT IS HEREBY ORDERED** that the Notice of Violation and Assessment of Administrative Penalty against Respondent, Amy N., Inc. and William C. Hauck is **PROVED** and a civil penalty in the amount of **one thousand five hundred dollars (\$1,500)** is **ASSESSED**.

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 after the date this initial decision is served as provided in 15 C.F.R. § 904.273. A copy of 15 C.F.R. § 904.273 is attached to this order. See Attachment III. If neither party seeks administrative review within thirty (30) days after service or receipt of this initial decision, it will become the final decision of the Agency.

  
HON MICHAEL J. DEVINE  
Administrative Law Judge  
United States Coast Guard

Done and dated July 19, 2010  
Baltimore, Maryland

**ATTACHMENT I**

**LIST OF WITNESSES AND EXHIBITS**

**AGENCY WITNESS LIST**

1. Kerry Price
2. Anders Bergstrom
3. Nathaniel Brian Christy
4. Robert William Morrison
5. Martin Christopher Ivey
6. Gregory Mercio
7. Cheryl Ann Franzen
8. Carolyn Sramek

**AGENCY EXHIBITS**

1. Exhibit Index (3pages)
2. Notice of Violations and Assessment issued in case SE0900879FM (dated March 26, 2009) (1 page)
3. Notice of Violations and Assessment issued in case SE0900879FM (dated October 8, 2009) (1 page)
4. Statement by Kerry Price (dated January 25, 2009) (1 page)
5. Current Chart 11434 – 28<sup>th</sup> Ed., Jun./08 11434
6. Statement by Robert W. Morrison (dated January 25, 2009) (1 page)

7. Chart 11434 signed by William C. Hauck and Robert W. Morrison
8. United States Coast Pilot 5 2009 (37<sup>th</sup> Edition, pages I (the cover page), II, and III, and pages 224, 225, 232-235

Notice to Mariners from <http://ocsddata.ncd.noaa.gov> ... for Chart 11434 as follows:

- 9A. Listing of corrections to Chart 11434 since 10/01/06, the Print Date of Edition 27
  - 9B. Listing of corrections to Chart 11434 since 6/1/08, the Print Date of Edition 28
  - 9C. Listing of corrections to Chart 11434 since 7/4/98, the Print Date of Edition 23
  10. Statement by Joseph Dawson (withdrawn and never offered)
  11. Handwritten notes/table – Martin Ivey
  12. FFWCC Officer Nathaniel B. Christy's Narrative Statement
  13. FFWCC Officer Anders Bergstrom's Citation number 145084C
  14. FFWCC Officer Anders Bergstrom's Incident/Summary Report
  15. FFWCC Officer Anders Bergstrom's Narrative Statement
  16. Photographs
  17. Certificate of Documentation/General Index or Abstract of Title for the F/V SEA KING
  18. Records within the National Marine Fisheries Service Constituent Services Branch regarding a permit application for vessels number 581340 (SEA KING)
  19. Affidavit by Cheryl Franzen with attachments regarding permit application and permits previously issued to vessel number 581340
  20. Copy of Federal Fisheries Permit Records showing issuance of four permits on October 5, 2009, and documentation of why permits were not issued in three fisheries
  21. Record of a previously issued HMS permit
  22. Affidavit by Carolyn Sramek with CD attachment
- Exhibits 23A through 23G are documents relating to a prior violation, SE015439MS
- 23A. Notice of Violation and Assessment dated May 17, 2002

- 23B. Initial Decision dated September 11, 2003
- 23C. Order Denying Discretionary Review dated November 1, 2004
- 23D. Notice of Intent to Deny Permit dated July 6, 2005
- 23E. Return Receipt for Notice of Intent to Deny Permit
- 23F. Settlement Agreement dated August 24, 2006, with Harold Dett only
- 23G. Letters to William Hauck from NOAA Finance and Administration dated June 20, 2007, November 14, 2007 and October 10, 2007
- 23H. Settlement Agreement with William Hauck and Amy N, Inc.
- 24. Penalty Schedule, including the Preface
- 25. For the Snapper-Grouper Fishery of the South Atlantic:
  - A. 56 Fed. Reg. 56016 (Oct. 31, 1991)
  - B. 59 Fed. Reg. 47833 (Sept. 19, 1994)
  - C. 56 Fed. Reg. 57302 (Nov. 8, 1991)
  - D. 57 Fed. Reg. 7886 (March 5, 1992)
  - E. 59 Fed. Reg. 66270 (Dec. 23, 1994)
  - F. 73 Fed. Reg. 40824 (July 16, 2008)
  - G. 74 Fed. Reg. 1621 (Jan. 13, 2009)
  - H. 74 Fed. Reg. 6257 (Feb. 6, 2009)
  - I. 74 Fed. Reg. 30964 (June 29, 2009)
  - J. 74 Fed. Reg. 31225 (June 30, 2009)
- 26. For the Coastal Migratory Pelagic Resources of the Gulf of Mexico and the South Atlantic:
  - A. 52 Fed. Reg. 15519 (April 29, 1987)
  - B. 52 Fed. Reg. 23836 (June 25, 1987)
  - C. Page 180 from 50 C.F.R. Part 642 (10-1-87 edition)
- 27. For the Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Dolphin and Wahoo Fishery off the Atlantic States:
  - A. 68 Fed. Reg. 62267 (Nov. 3, 2003)
  - B. 69 Fed. Reg. 30235 (May 27, 2004)

## RESPONDENT'S WITNESS LIST

1. Elizabeth Riesz

### RESPONDENT'S EXHIBITS

- (A) Definition of Marquesas Keys - Wikipedia, the free encyclopedia (1 page)
- (B) Definition of Dry Tortugas - Wikipedia, the free encyclopedia (1 page)
- (C) Federal Permit Application for Vessels Fishing in the Exclusive Economic Zone (EEZ) received Jan. 26, 2009 (6 pages)
- (D) Permit Information Vessel number 581340, Application ID 42212 (dated Feb. 5, 2009 (1 page)
- (E) NOAA letter of written warning dated June 12, 2003 (1 page)
- (F) NOAA printout of Frequently Requested Records last updated May 1, 2009 (Withdrawn by Respondent after initial offer)
- (G) (Withdrawn and never offered)
- (H) NOAA letter for receipt of appeal dated May 4, 2004 (1 page)
- (I) NOAA letter advising Mr. Hauck that he was not selected to serve on the Advisory Council dated Aug. 14, 2003 (1 page)
- (J) Copy of letters from Robert D. Loeffler, M.D. summarizing medical care dated June 6, 2008 and Apr. 9, 2004 (3 pages)



## ATTACHMENT II

### AGENCY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following proposed findings of fact and conclusions of law were presented by the Agency at the hearing, they have been copied directly from the transcript. The Agency in their Post hearing brief included corrections made to the proposed findings of fact and conclusions of law. Those corrections have been made and appear below.

1. Respondents, Amy N., Inc. and William C. Hauck are persons within the meaning of the Magnuson-Stevens Conservation and Management Act (MF), 16 USC 1801 et seq.

#### **ACCEPTED AND INCORPORATED.**

2. During a period of time ending on or about January 25th, 2009 and at all times relevant to the above-caption matter, Respondent, Amy N., Inc. was the owner of the fishing vessel, Sea King, U.S. Documentation Number 581340, a headboat vessel.

#### **ACCEPTED AND INCORPORATED.**

3. During a period of time ending on or about January 25th, 2009 and at all times relevant to the above-captioned matter, Respondent, William C. Hauck, was the officer, director, shareholder, that is the corporate principal of Amy N., Inc.

**ACCEPTED IN PART.** Respondent did not present any evidence of the ownership of Amy N., Inc. but asserted that he was a part owner at the time of the incidents in January 2009 but became the sole officer, director, shareholder, corporate principle of Amy N., Inc. after the death of his daughter.

4. During a period of time ending on or about January 25th, 2009 and at all times relevant to the above-captioned matter, Respondent, William C. Hauck, was an operator of the fishing vessel, Sea King.

#### **ACCEPTED AND INCORPORATED.**

5. On January 23rd, 2009, the fishing vessel, Sea King, departed from Stock Island, Florida on a for-hire headboat fishing trip with crew and at least 17 paying customers on board. The fishing vessel, Sea King, traveled to the Dry Tortugas area and the vessel returned from the fishing trip on January 25th, 2009.

**ACCEPTED AND INCORPORATED.**

6. While at sea, during the January 23 to 25, 2009 fishing trip, people on board the fishing vessel, Sea King, were cutting bait, baiting hooks, putting fishing lines in the water, catching fish, putting harvested fish in the coolers, and engaging in other activities in support of or in preparation for catching, taking or harvesting of fish, or attempting to do so. They were also fishing. These activities took place in federal waters in the Exclusive Economic Zone of the United States.

**ACCEPTED AND INCORPORATED IN PART.** As noted in the Decision and Order the evidence shows that some of the activity took place in state waters and some in federal waters.

7. The following species of fish were caught and possessed during the January 23 to 25, 2009 fishing trip by the fishing vessel, Sea King, Yellowtail Snapper, Mangrove Snapper, Mutton Snapper, Dolphin, Amberjack, King Mackerel, Cero Mackerel, Red Grouper, and Strawberry Grouper. The fishing vessel, Sea King, was in the Exclusive Economic Zone fishing for and possessing these fish on board.

**ACCEPTED AND INCORPORATED IN PART.** Testimony at the hearing indicated that there was no such fish as "Strawberry Grouper" and that it was apparently a slang term.

8. On January 25th, 2009 during a boarding at port, at Stock Island, Florida, by Florida Fish and Wildlife Conservation Personnel, Respondent, William C. Hauck, signed his name to locations for the fishing vessel, Sea King, that he marked with some explanations for the fishing trip ending on January 25th, 2009, on NOAA Chart 11434, 27th Edition, October '06 that was provided to him by Florida Fish and Wildlife Conservation, which I'll be referring to as FFWC personnel. Except for the location marked in the vicinity of the Stock Island channel, the positions marked and signed by Respondent, William C. Hauck, are beyond the three-nautical-mile line on the chart within the South Atlantic Exclusive Economic Zone off the coast of Florida. 50 CFR Section 600.105 (B) and (C), 50 CFR Section 622.2.

**ACCEPTED AND INCORPORATED.**

9. On January 25th, 2009, during a boarding at port, at Stock Island, Florida by FFWC personnel, Robert Morrison, the second captain on board the Sea King, signed his name to a location he marked for the fishing trip ending on January 25th, 2009, on NOAA Chart 11434, 27th Edition, October '06, that was provided to him by FFWC personnel. This location was beyond the three-nautical-mile line on the chart within the South Atlantic Exclusive Economic Zone off the coast of Florida.

**ACCEPTED AND INCORPORATED.**

10. Fishing locations during the January 23rd to 25th, 2009 fishing trip by the fishing vessel, Sea King, included the Tail-end Buoy, Marquesas Rock, Cosgrove Light, and Rebecca Shoal.

**ACCEPTED.**

11. Federal Fishery Permit for South Atlantic Snapper/Grouper Charter headboat, South Atlantic Charter headboat for Coastal Migratory Pelagic Fish, Coastal Migratory Pelagic Charter headboat Gulf of Mexico and Gulf of Mexico Reef Charter Headboat were issued to the fishing vessel, Sea King, on June 16th, 2003. All had expired by January 31st, 2004. The next time any Federal Fishery Permits were issued to fishing vessel, Sea King, was on October 5th, 2009 when Federal Fishery Permit for Atlantic Dolphin, Wahoo, Charter Headboat, Atlantic Dolphin/Wahoo Commercial, South Atlantic Charter Headboat For Coastal Migratory Pelagic, and South Atlantic Charter Headboat For Snapper/Grouper were issued to the fishing vessel, Sea King.

**ACCEPTED.**

12. The fishing vessel, Sea King, did not have valid Federal Fishery Charter Headboat Permits For South Atlantic Coastal Migratory Pelagic Fish, South Atlantic Snapper/Grouper, Atlantic Dolphin/Wahoo or any other fishery for which a Federal Fishing Permit during the period of time ending on or about January 25th, 2009, or at any time relevant to the above-captioned matter.

**ACCEPTED AND INCORPORATED.**

13. It is unlawful to engage in activity for which a valid Federal Permit or endorsement is required under 622.4 without such permit, license or endorsement, 50 CFR Section 622.7(A).

**ACCEPTED.**

14. "For a person aboard a vessel that is operating as a charter vessel or headboat to fish for or possess in or from the E.E.Z. species in any of the following species group, a valid charter vessel, headboat permit for that species group must have been issued to the vessel, and must be on board, South Atlantic Coastal Migratory Pelagic Fish, South Atlantic Snapper/Grouper, Atlantic Dolphin and Wahoo." 50 CFR 622.4(A)(1).

**ACCEPTED AND INCORPORATED.**

15. Cero and King Mackerel are included in the list of Coastal Migratory Pelagic Fish, 50 CFR Section 622.2.

**ACCEPTED.**

16. Greater Amberjack -- Lesser Amberjack, Yellowtail Snapper, Mutton Snapper and Red Grouper are included in the list of South Atlantic Snapper/Grouper, 50 CFR Section 622.2.

**ACCEPTED AND INCORPORATED.**

17. Dolphin are included in the list of Dolphin, 50 CFR Section 622.2.

**ACCEPTED AND INCORPORATED.**

18. "The term fishing means: A, the catching, taking or harvesting of fish. B, the attempted catching, taking, or harvesting of fish. C, any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish or; D, any operations at sea in support of or in preparation for any activity described in Subparagraph A through C." 16 USC 1802 16.

**ACCEPTED.** [However it is noted that the cite has a typographical error. The correct cite is 16 USC 1802 (15)]

19. The Southeast Region Penalty Schedule in effect at the time of the violation provide a monetary penalty range for first-time violators of fifteen-hundred dollars to thirty-thousand dollars, and three-thousand dollars to seventy-five thousand dollars for second violators. The civil penalty assessment sought by the Agency, fifteen-hundred dollars, is at the lowest end of the penalty range for first violators and below the range for second violators. Although there are also provisions for permit sanctions, a proposed permit sanction was not issued.

**ACCEPTED.**

20. Respondents engaged in activities for which valid federal fishery permits were required without such permits.

**ACCEPTED AND INCORPORATED.**

21. Permit systems are part of management measures adopted to properly manage fisheries stocks and as such were adopted for snapper-grouper charter/headboat, South Atlantic charter/headboat for Coastal Migratory Fish and Atlantic Dolphin/Wahoo.

**ACCEPTED.**

22. Respondents are presumed able to pay the proposed penalty. The Respondents did not offer financial information into evidence.

**ACCEPTED.**

23. NOAA issued a ten-thousand dollar NOVA administrative penalty in Case Number SE0154399MS, as in Mary, "F," to William Hauck and Harold Dett, which was amended to include Amy N., Inc., for a violation of the Marine Protection Research and Sanctuaries Act, 16 USC Section 1431 et sec, on December 15, 2001. After an administrative hearing, an Administrative Law Judge, Parlen L. McKenna, issued an initial decision upholding the NOVA as amended to include Amy N., Inc. and its penalty, on September 11, 2003. On November 1, 2004, the Undersecretary of Commerce issued an order denying discretionary review, which became the Agency's final administrative decision.

**ACCEPTED.**

24. On July 6th, 2005, the Agency issued a Notice of Intent to Deny Permit that advised that the Agency intended to deny any request for Federal Fisheries Permits for the fishing vessel, Sea King, for nonpayment of the penalty, SC0154399MF. Other collection efforts were also undertaken. When the outstanding-penalty issue was resolved with a settlement agreement, effective date, October 5, 2009, with Respondent, William C. Hauck and Amy N., Inc.

**ACCEPTED.**

25. NOAA has proved by a preponderance of reliable, probative, substantial, and credible evidence that: A. For the dates in question, Respondent failed -- that are relevant to this case, Respondents failed to have permits required by the regulations in violation of 50 CFR Section 622.4 and 622.7 (A) and 16 USC Section 1857(1)(A). B. Consideration of all the evidence of record and the factors contained in 15 CFR Section 904.108 support the determination that the proposed penalty of fifteen-hundred dollars is appropriate.

**ACCEPTED.**

**ATTACHMENT III**

**NOTICE OF APPEAL RIGHTS**  
**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.