

**UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

IN THE MATTER OF:

GREG ABRAMS and
MICHAEL THOMPSON,

Respondents.

DOCKET NUMBER:

SE0703601FM

(F/V JEAN MARIE)

INITIAL DECISION

Issued by: Walter J. Brudzinski, Administrative Law Judge

Dated Issued: November 3, 2011

Appearances:

For the National Oceanic and Atmospheric Administration

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SUMMARY

To preserve the economic viability of Gulf of Mexico red snapper, the National Oceanic and Atmospheric Administration (NOAA or Agency) instituted the Individual Fishing Quota (IFQ) program in 2007. The IFQ program contains measures to enhance its enforceability. One of those measures requires commercial fishing vessels with Gulf red snapper IFQ endorsements and with red snapper onboard to contact the National Marine Fisheries Service (NMFS) at least 3 hours, but no more than 12 hours, in advance of landing to report the time and location of landing and the name of the IFQ dealer where the red snapper are to be received. Advance notification of landing information is essential for monitoring IFQ landings and ensuring the integrity of the IFQ program because it allows law enforcement to be present when red snapper arrive in port and are subsequently offloaded.

On August 30, 2007, the F/V JEAN MARIE returned to Panama City, Florida from a fishing trip in the Gulf of Mexico with mostly grouper and 226 pounds of Gulf red snapper onboard. Because the JEAN MARIE had an IFQ endorsement for red snapper, it was subject to the advance notice of landing requirement. Respondents unlawfully violated the advance notice of landing requirements by being tied up to dock for several hours prior to their NMFS authorized landing time. Therefore, Respondents are assessed a civil monetary penalty in the amount of \$2,500 jointly and severally. Further, all federal fisheries permits and endorsements for the F/V JEAN MARIE are suspended for a period of forty (40) days.

STATEMENT OF THE CASE

The Agency brought this administrative action against Respondents Greg Abrams as owner of the F/V JEAN MARIE and Michael Allen Thompson as operator of the F/V JEAN MARIE pursuant to the Magnuson-Stevens Fisheries Conservation and Management Act (the Act) as amended and codified at 16 U.S.C. §§ 1801 et seq., the Act's regulations at 50 C.F.R. Part 622, the Administrative Procedure Act at 5 U.S.C. § 554, and the Agency's procedural regulations at 15 C.F.R. Part 904.¹

On October 16, 2007, the Agency issued a Notice of Violation and Assessment of Administrative Penalty (NOVA) alleging Respondents violated the Act and its regulations. Also on October 16, 2007, the Agency issued a Notice of Permit Sanction (NOPS) against Mr. Abrams as owner of the F/V JEAN MARIE. The NOPS contained the identical allegations as those in the NOVA. Those allegations are as follows:

"[O]n or about August 30, 2007, within the exclusive economic zone of the United States (as described in 16 U.S.C. § 1802(11)), Respondent Greg Abrams, owner of the F/V JEAN MARIE (U.S. documentation number 583374), or an individual under his control, and Respondent Michael Allen Thompson, operator of the F/V JEAN MARIE, or an individual under his control, jointly and severally, did fail to comply with any provision related to the Gulf red snapper IFQ program, as specified in §622.16(c)(3) (fail to comply with advance notice of landing requirement), in violation of 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(gg)."²

¹ The Notice of Violation and Assessment as well as the Notice of Permit Sanction reflect "Greg Abrams." The U.S. Coast Guard Certificate of Documentation for the F/V JEAN MARIE reflects "Greg Abrams" as the owner. The NOAA landing confirmation reflects Terrance Abrams, and the Federal Fisheries Permits reflect "Terrance Greg Abrams" as the owner of the F/V JEAN MARIE. Mr. Abrams spelled his first name "Terrence" on one of his Federal Fisheries Permit applications but he spelled his first name and middle name T-e-r-a-n-c-e G-r-e-g-o-r-y Abrams for the court reporter on the day of the hearing. The parties do not dispute that Respondent "Greg Abrams" has also been referred to as "Terrance, Terrence or Terance Gregory Abrams." This Initial Decision will refer to Respondent Abrams as Greg Abrams.

² Because the alleged violation occurred on August 30, 2007, the substantive regulations at Title 50 C.F.R. Part 622 (2007) apply. The current procedural regulations governing NOAA's administrative proceedings at 15 C.F.R. Part 904 (2011) also apply to these proceedings.

The NOVA contained a civil monetary penalty assessment in the amount of one thousand five hundred dollars (\$1,500.00) and the NOPS imposed a thirty (30) day permit sanction in the NOPS. Respondents rejected the assessed civil monetary penalty and permit sanction and on November 8, 2007 requested a hearing before an Administrative Law Judge. As provided in 15 U.S.C. § 1541, 15 C.F.R. § 904.201(c), and Memorandum of Agreement for Coast Guard ALJs to adjudicate NOAA cases, the Agency referred this matter to the U.S. Coast Guard ALJ Docketing Center for adjudication on January 31, 2011.

The undersigned received this case on February 8, 2011 and set May 19, 2011 as the date for the hearing to be held in Panama City, Florida. The Agency and Respondents timely submitted their *Preliminary Position on Issues and Procedures (PPIP)* in accordance with 15 C.F.R. § 904.240 and on May 19, 2011, all parties appeared for an in-person hearing at the Bay County Courthouse, 300 East 4th Street, Panama City, Florida, 32401.

NOAA Enforcement Attorney Cynthia S. Fenyk, Esquire represented the Agency and Russell R. Stewart, Esquire of Panama City, Florida represented both Respondents. The Agency called two (2) witnesses and offered nine (9) exhibits which were admitted. Respondents testified on their own behalf but did not offer exhibits. The witness and exhibit list is found in Attachment A. In accordance with 5 U.S.C. § 557(c) and 15 C.F.R. § 904.261 the undersigned advised the parties that within 30 days or less after they receive the hearing transcript they may submit proposed findings of fact and conclusions of law. They may also submit reply briefs 15 days after they submit proposed findings.

On June 2, 2011, the undersigned received the hearing transcripts from the court reporter. Also on June 2, 2011, the undersigned received the Agency's motion to re-open the evidentiary record for admission of additional documentary evidence. To allow time and opportunity for Respondents' counsel to answer the Agency's motion within 20 days as prescribed in 15 C.F.R. § 904.206(d), the undersigned forwarded the transcripts to the parties and advised that a scheduling order for proposed findings and conclusions would be forthcoming upon ruling on the Agency's motion. Respondents did not file an Answer to the Agency's motion.

On June 28, 2011, the undersigned issued an Order granting the Agency's motion to re-open and admitting the Agency's documents offered as Exhibits 10, 11, and 12 because they were relevant on the issue of Respondents' credibility. Also on June 28, 2011, the undersigned ordered proposed findings and conclusions to be submitted by July 29, 2011 and reply briefs by August 15, 2011. The Agency submitted a post-hearing brief containing proposed findings of fact. Respondents did not submit any post-hearing briefs. Attachment B contains the Agency's proposed findings of fact and rulings thereon. This matter is now ready for decision.

PRINCIPLES OF LAW

Title 16 U.S.C. § 1857(1)(A) provides, "[i]t is unlawful for any person to violate any provision of this chapter or any regulation or permit issued pursuant to this chapter." Title 50 C.F.R. § 622.7(gg) (2007) provides, "[i]n addition to the general prohibitions in § 600.725 of this chapter, it is unlawful for any person to do any of the following . . . [f]ail to comply with any provision related to the Gulf red snapper IFQ program as specified in § 622.16." The pertinent Gulf red snapper IFQ program requirement at 50

C.F.R. § 622.16(c)(3)(i) (2007) reads as follows:

Measures to enhance IFQ program enforceability – (i) Advance notice of landing. The owner or operator of a vessel landing IFQ red snapper is responsible for calling NMFS Office of Law Enforcement at 1-866-425-7627 at least 3 hours, but no more than 12 hours, in advance of landing to report the time and location of landing and the name of the IFQ dealer where the red snapper are to be received. Failure to comply with this advance notice of landing requirement will preclude authorization to complete the landing transaction report required in paragraph (b)(5)(iii) of this section and, thus, will preclude issuance of the required transaction approval code.

50 C.F.R. § 622.16(c)(3)(i) (2007).

To “land” or “landing” means “to begin offloading fish, to offload fish, or to arrive in port or at a dock, berth, beach, seawall, or ramp.” [Emphasis added]. 50 C.F.R. § 600.10 (2007).

FINDINGS OF FACT

Jurisdiction

1. On August 30, 2007 and at all relevant times to these proceedings, Respondent Greg Abrams owned the F/V JEAN MARIE. (Exs. 5, 8, 9 and 10; Tr. at 51, 114).³
2. On August 30, 2007 and at all relevant times to these proceedings, Respondent Greg Abrams owned Greg Abrams Seafood, 224 East Beach Drive, Panama City, Florida. (Ex. 6; Tr. at 114).
3. On August 30, 2007 and at all relevant times to these proceedings, the F/V JEAN MARIE, was a U.S. Documented vessel, official number 583374. (Ex. 8).
4. On August 30, 2007 and at all relevant times to these proceedings, Respondent Greg Abrams held the following Federal Fisheries Permits or endorsements for

³ Citations referring to the hearing transcript are depicted as follows: (Tr. at ____); Citations referring to Agency exhibits are depicted as follows: (Ex. ____); Citations referring to ALJ Exhibits are depicted as follows: (ALJ Ex. ____). Respondents did not offer any exhibits into evidence.

- the F/V JEAN MARIE: Shark Directed; Spanish Mackerel; Gulf of Mexico Reef Fish Commercial; King Mackerel; and, the IFQ red snapper permit, also known as the Gulf red snapper IFQ vessel endorsement under 50 C.F.R. §§ 622.16(a)(1) and 622.16(c)(1)(i)(2007). (Ex. 5 at 10, Ex 9; Tr. at 46 and 93).
5. On August 30, 2007 and at all relevant times to these proceedings, Respondent Michael Allen Thompson was an employee of Respondent Abrams and as such, operated the F/V JEAN MARIE (U.S. Documentation number 583374). (Exs. 1, 2, and 5; Tr. at 16, 94, and 116).
 6. In 2007, the IFQ program applied only to red snapper. (50 C.F.R. § 622.16 (2007); Tr. at 39).
 7. NOAA law enforcement receives e-mail IFQ notifications of landing times for the vessels landing daily. (Tr. at 45, 47).

Facts Occurring on August 30, 2007

8. Two to three hours before daylight on August 30, 2007, the F/V JEAN MARIE, operated by Respondent Michael Allen Thompson, arrived in Panama City, Florida from a commercial fishing trip and tied up to the dock at Greg Abrams Seafood a couple of hours before daylight.⁴ (Tr. at 29, 30, 96).
9. At around 7:30 or 8:00 a.m. on August 30, 2007, Respondent Michael Allen Thompson received a landing time of 11:00 a.m. Central Time and confirmation number 3H-083007-815 from NMFS to land the F/V JEAN MARIE at Greg Abrams Seafood, 224 East Beach Drive, Panama City, Florida. (Ex. 6; Tr. at 45 – 47, 97, 102).

⁴ The undersigned takes official notice that on August 30, 2007 sunrise occurred at approximately 5:18 a.m. Central Standard Time in Panama City, Florida. *Astronomical Applications Dept., U.S. Naval Observatory*: http://aa.usno.navy.mil/data/docs/RS_OneYear.php. A printout of this document is attached as ALJ Ex. 1.

10. Prior to going on patrol on the morning of August 30, 2007, Officer George Nicholas Price of the Florida Fish and Wildlife Commission, who was authorized to enforce NOAA regulations, received notification that the F/V JEAN MARIE was to land at 11:00 a.m. at the Greg Abrams Seafood Dock. (Tr. at 12 -14).
11. Officer Price went to his boat to get on patrol. (Tr. at 14).
12. While on patrol Officer Price observed the F/V JEAN MARIE tied up to the dock at Greg Abrams Seafood at 9:40 a.m. offloading grouper fish. (Tr. at 12 – 17, 30, 38, 97-98; Exs. 1 and 2).
13. Officer Price verified the 9:40 a.m. time with his atomic clock controlled watch. (Tr. at 15).
14. Officer Price then called the dispatch center and reconfirmed the 11:00 a.m. landing time for the F/V JEAN MARIE. (Tr. at 15).
15. Officer Price then tied up his boat and went up to the dock to investigate further. (Tr. at 16).
16. Officer Price observed grouper being offloaded from the F/V JEAN MARIE. (Tr. at 17).
17. Officer Price also observed two totes of red snapper, out of the fish hold and on the F/V JEAN MARIE's deck, without ice. (Ex. 3; Tr. at Tr. at 17, 24, 97 – 98).
18. Officer Price asked Respondent Thompson why he was there offloading fish and Thompson replied that he did not know any better. (Ex. 1; Tr. at 18).
19. On August 30, 2007, Officer Price seized the two totes containing 226 pounds of red snapper from the F/V JEAN MARIE and subsequently had them sold for \$904.00. (Ex. 1 and Ex. 5 at 2, 3 and 5; Tr. at 24, 25).

Facts Relating to Respondent Thompson's Interview of September 21, 2007

20. On September 21, 2007, NOAA Fisheries Special Agent (S/A) Gregg Randall Houghaboom interviewed Respondent Thompson about the events occurring on August 30, 2007. (Ex. 5 at 8; Ex. 7 at 3-6; Tr. at 49).⁵
21. Respondent Thompson told S/A Houghaboom that he (Thompson) was "in the wrong" and "made a judgment call" to offload early because otherwise he would have had to go to the back of the boat line which would have backed up his day by several hours and that he would not have time to get to the bank to pay his bills and his crew. (Ex. 5 at 8; Ex. 7; Tr. at 49, 50).
22. Respondent Thompson told S/A Houghaboom that this was his first fisheries violation and that it would never happen again. (Ex. 7 at 6; Tr. at 81).
23. Respondent Thompson told S/A Houghaboom that he (Thompson) made the call for his advance notice of landing after he had landed and two hours and 15 minutes before unloading on August 30, 2007. (Ex. 7 at 5; Tr. at 81, 82).

Facts Relating to Credibility

The IFQ call 8-9 hours early

24. On September 21, 2007, Respondent Thompson told S/A Houghaboom that he placed his IFQ call "8-9 hours early this time" to avoid any IFQ landing problems. (Ex. 7 at 6; Tr. at 77, 78, 80, 81).
25. At the hearing, Respondent Thompson testified his statement to S/A Houghaboom on September 21, 2007 that he "called in 8 – 9 hours early this time" was in reference to the August 30, 2007 fishing trip, not the September 21, 2007 trip

⁵ On May 19, 2011, Gregg Randall Houghaboom was Assistant Special Agent-in-Charge of District 3, the Southeast Region for NOAA Fisheries. In 2007, he was a Field Agent. (Tr. at 41, 42). For brevity, this witness will be referred to as S/A Houghaboom.

because Mr. Abrams fired him on August 30, 2007. (Ex 7 at 6; Tr. at 100, 103, 112).

26. S/A Hougaboom testified that Respondent Thompson's statement to him on September 21, 2007 concerning the IFQ call "8-9 hours early this time" was in reference to Respondent Thompson's fishing trip returning to Panama City on September 21, 2007, not his August 30, 2007 fishing trip. (Ex. 5 at 10; Ex. 7 at 6; Tr. at 74 – 80).

The September 21, 2007 Fishing Trip

27. At the hearing Respondent Thompson denied he was on a fishing trip September 21, 2007. (Tr. at 100).
29. However, Respondent Thompson operated the F/V JEAN MARIE from September 17-21, 2007. (Exs. 10, 11).
30. Respondent Thompson received a 9:00 a.m. IFQ landing time for September 21, 2007 to dock at Greg Abrams Seafood in Panama City, Florida. (Ex. 12).

Respondent Thompson's Termination of Employment

31. Respondent Thompson testified he did not work for Respondent Abrams or run any boat, including the F/V JEAN MARIE after August 30, 2007. (Tr. at 94, 100, 103, 110, 111-112).
32. Respondent Abrams testified he fired Respondent Thompson on August 30, 2007 and that Mr. Thompson did not work for him after that. (Tr. at 116, 117).
33. Respondent Thompson operated the F/V JEAN MARIE on fishing trips for Greg Abrams from September 17th through the 21st, 2007; September 28th through October 6th, 2007; and, October 12th through the 22nd, 2007. (Exs. 10, 11).

Spotty Cell Phone Service

34. Respondent Thompson testified at the hearing that on or about August 30, 2007 he had spotty cell phone service when he tried to reach NMFS but when he finally did reach them, he left a recording of his name, number, and where he was landing, prior to calling NMFS again and receiving a confirmation number. (Tr. at 96, 97).
35. Respondent Thompson did not advise S/A Houghaboom during his interview on September 21, 2007 that on or about August 30, 2007 he had spotty cell phone service and received only a recording when he called NMFS or that he had any difficulty getting a confirmation number. (Exs. 5 and 7; Tr. at 82, 91).
36. Respondent Thompson provided no other defense or explanation to S/A Houghaboom on September 21, 2007 for the violation aboard the F/V JEAN MARIE on August 30, 2007. (Exs. 5 and 7; Tr. at 82, 91).
37. Respondents' Preliminary Position on Issues and Procedures did not raise this alleged defense of difficulty reaching NMFS as required by 15 CFR 904.240(a)(1). (Respondents' PPIPs).

Facts Relating to Sanction

38. Respondents have no prior violations. (The Administrative Record).
39. Neither Respondent Abrams nor Respondent Thompson presented any financial information regarding inability to pay the penalty. (The Administrative Record).

BURDEN OF PROOF

The Agency has the burden to prove the allegation by a preponderance of reliable, probative, and credible evidence. 5 U.S.C. § 556; In the Matter of Horacio Gonzalez,

2003 WL 549342 (N.O.A.A. 2003), January 27, 2003; In the Matter of Cung Vo, 2001 WL 1085351 (N.O.A.A. 2001), August 17, 2001. To satisfy this burden, the Agency must show that it is more likely than not that the Respondents committed the alleged violation. In the Matter of John Fernandez, III, 1999 WL 1417462 (N.O.A.A. 1999), August 23, 1999. NOAA may rely on either direct and/or circumstantial evidence to establish the burden of proof. In the Matter of Cung Vo, 2001 WL 1085351 (N.O.A.A. 2001), August 17, 2001.

AGENCY'S CLAIM

The Agency claims Respondents violated the Act when they arrived at the dock prior to the NMFS prescribed 11:00 a.m. landing time.

RESPONDENTS' DEFENSES

First, Respondents contend that the regulations, and specifically the term "landing," were unclear in 2007 and that the Agency amended the regulations in 2008 to define and clarify the term "landing." Respondents also contend the term "to land" meant to catch or to offload fish, and that "landing time" is "offloading time.

Second, Respondents contend Michael Allen Thompson attempted to call for a landing time 8 ~ 9 hours prior to arriving at the dock. Instead of an answer, he received a recording.

Third, Respondents claim they did not violate the IFQ because it applied only to red snapper and they did not offload any red snapper prior to the 11:00 a.m. landing time.

Finally, Respondents claim Mr. Abrams should not be held liable for any violation because he was not at the dock or onboard the F/V JEAN MARIE at any relevant time.

ANALYSIS OF RESPONDENTS' DEFENSES

In general, "offenses under the Magnuson Act are strict liability offenses."

Northern Wind, Inc. v. Daley, 200 F.3d 13, 19 (1st Cir. 1999)(internal quotations and brackets omitted). "As a general matter, *scienter* is not required to impose civil penalties for regulatory violations when the regulation is silent as to state of mind." *Id.* (citing, Tart v. Massachusetts, 949 F.2d 490, 502 (1st Cir. 1991)). Regulators "need not prove intentional or knowing violation." Roche v. Evans, 249 F. Supp. 2d 47, 59 (D. Mass. 2003). Therefore, to prove a violation, the Agency does not need to show intent or knowledge on the part of Respondents.

"Individuals are properly charged with the responsibility to be aware of the pertinent content of the laws and regulations that are applicable to their fishing activities." In the Matter of Giuseppe Taormina, 6 O.R.W. 249, 251 (N.O.A.A. App. 1990). As participants in a highly regulated industry, Respondents were obligated to keep abreast of the regulations that govern their business. See, e.g., In re Cuong Vo, 2001 WL 1085351 (N.O.A.A.) (noting that "when one participates in the highly regulated commercial fishing industry, that person is presumed to possess knowledge of the rules and regulations governing that industry and is subject to the rules and regulations governing that business, regardless of whether the individual has actual knowledge of such rules or regulations.")

The 2007 regulations require the owner or operator of a vessel landing IFQ red snapper to notify NMFS at least three hours prior to landing. It is undisputed that NMFS provided the F/V JEAN MARIE with an 11:00 a.m. landing time on August 30, 2007. It is also undisputed that the F/V JEAN MARIE was at the dock prior to 11:00 a.m.

Respondent Thompson testified that he actually arrived at the dock on August 30, 2007 “two to three hours before daylight” and “eight hours before the actual unloading began.” (Tr. at 96 – 97). Respondent Thompson additionally testified that he did not receive the landing confirmation until after the F/V JEAN MARIE was tied up at the dock and after he went ashore. (Tr. at 96 – 97).

Argument 1: The term “land” was not clear in 2007.

Respondents contend that the definition of “landing” was unclear in 2007. In support of their argument, they rely on subsequent amendments to the regulations that clarified the term “landing” within the regulation.⁶ Respondents refer to the 11:00 a.m. landing time as their “unloading time” implying they believed the term to mean they could not unload the IFQ red snapper until the NMFS prescribed time.

The ALJ has no authority to rule on constitutional issues or challenges to the validity of regulations promulgated by the Agency or statutes that it administers. See, 15 C.F.R. § 904.200(b). Regardless, it is not necessary to rule on Respondents’ challenge to the regulation because a plain reading of the 2007 definition of “land” shows the term means “to arrive in port or at a dock, berth, beach, seawall, or ramp” as well as “to begin offloading fish, to offload fish.” See, 50 C.F.R. § 600.10 (2007).

Here, the regulation required advance notice of landing prior to arriving at the dock, not prior to offloading fish. Any other construction would frustrate the purpose of the IFQ program. For example, if the “landing time” were construed as the “offloading fish time” then an unscrupulous fishing vessel operator could legally arrive at the dock

⁶ The current version of 50 C.F.R. § 622.16(c)(3)(i), effective in 2008, reads in pertinent part as follows: For the purpose of this paragraph, landing means to arrive at a dock, berth, beach, seawall, or ramp. The owner or operator of a vessel landing IFQ red snapper is responsible for ensuring that NMFS is contacted at least 3 hours, but no more than 12 hours, in advance of landing to report the time and location of landing, estimated red snapper landings in pounds gutted weight, vessel identification number...and the name and address of the IFQ dealer where the red snapper are to be received.

without law enforcement present and offload red snapper prior to the designated time.

Further, the regulations specifically prohibit "at-sea or dockside transfer of IFQ red snapper from one vessel to another vessel." See 50 C.F.R. § 622.16(c)(3)(iii)(2007). Therefore, the only place for IFQ red snapper to be legally offloaded is "at a dock, berth, beach, seawall, or ramp." It is clear that one must arrive at a dock before fish can be offloaded. Thus, the activity for which NMFS must be notified is arriving at a dock, not offloading fish.

Argument 2: Respondent attempted to call the number in advance of arriving at the dock.

Respondents next contend Mr. Thompson attempted to call the prescribed number prior to arriving at the dock but only reached a recording and was therefore unable to obtain a landing confirmation number until after he arrived at the dock. In support of this claim, they rely on Respondent Thompson's testimony that he tried to call in about 8 – 9 hours before arriving at the dock (Tr. at 104) and that his statement to S/A Houghaboom on September 21st that he called in "8-9 hours early this time" was in reference to fishing trip returning to Panama City on August 30, 2007 not September 21, 2007. (Tr. at 103, 112). As shown in the credibility findings of fact 24 – 30, Respondent Thompson was actually referring to the fishing trip that ended on September 21, 2007, not the fishing trip that ended on August 30, 2007.

Respondents submitted no evidence to corroborate Mr. Thompson's testimony that on or about August 30, 2007 he tried to call the prescribed number but got only a recording. Even if the undersigned accepts Respondent's testimony on this issue as true, it is not a defense to the alleged violation. If Respondent Thompson's testimony were true, his actions indicate he was aware of the regulation's requirements by calling NMFS

to get the landing confirmation prior to arriving at the dock instead of calling NMFS after arriving at the dock.

Argument 3: No IFQ red snapper were offloaded.

Respondents contend that because no IFQ Red Snapper were offloaded from the vessel, there was no violation. Respondents are not charged with illegally offloading red snapper. They are charged with violating the advance notice of landing requirement that the Agency established to enhance IFQ program enforceability for Gulf red snapper.

Argument 4: Respondent Abrams is not liable for a violation because he was not present.

The owner of a vessel is liable for MSFCMA violations the operator commits. In re Kepez, 6 O.R.W. 556, 562, 1991 WL 432069, (N.O.A.A.), October 23, 1991.

Violations of the Act are generally strict liability offenses irrespective of the owner's presence. Respondent Abrams owns the F/V JEAN MARIE and employed Respondent Thompson who operated that vessel on August 30, 2007. Respondent Abrams is therefore liable for any violations of the Act that Respondent Thompson commits.

CREDIBILITY DETERMINATIONS

Based on findings of fact 24 to 37, the undersigned makes the following credibility determinations:

1. Respondent Thompson is not fully credible.
2. Respondent Abrams is not fully credible.
3. S/A Houghaboom of NOAA Fisheries is fully credible.
4. Officer Price of the Florida Fish and Wildlife Commission is fully credible.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on findings of fact 1 to 23, law, regulations, and other evidence in the record, the undersigned makes the following, ultimate findings of fact and conclusions of law:

1. Respondents Abrams and Thompson are “persons” within the meaning of 16 U.S.C. § 1802(31).
2. Respondents Abrams and Thompson are subject to the jurisdiction of the United States. (Stipulation – Tr. at 52).
3. Possessing Gulf red snapper and having a Gulf red snapper IFQ vessel endorsement subjected the F/V JEAN MARIE to the Gulf red snapper IFQ program requirements of 50 C.F.R. § 622.16 (2007).
4. A vessel subject to the Gulf red snapper IFQ program requirements with red snapper onboard may not land prior to its IFQ program confirmed landing time.
5. Respondent Thompson’s statement to S/A Houghaboom on September 21, 2007 concerning the IFQ call “8-9 hours early this time” was in reference to Respondent Thompson’s fishing trip returning to Panama City on September 21, 2007, not his fishing trip returning to Panama City on August 30, 2007.
6. The Agency PROVED by the preponderance of reliable, probative, and credible evidence that on or about August 30, 2007, Respondents Abrams and Thompson did fail to comply with the advance notice of landing requirement for the Gulf red snapper IFQ program by landing at the Greg Abrams Seafood dock prior to the 11:00 a.m. NMFS confirmed landing time, in violation of 50 C.F.R. § 622.16(c)(3)(i)(2007), 50 C.F.R. § 622.7(gg) (2007), and 16 U.S.C. § 1857(1)(A).

7. The purpose of the waiting period of at least three hours is to give law enforcement personnel time to be available to observe to landing and unloading of fish. (Tr. at 83).
8. Respondents Abrams and Thompson thereby unlawfully violated the Magnuson-Stevens Fishery Conservation and Management Act, as amended, at 16 U.S.C. § 1857(1)(A).
9. Respondents Abrams and Thompson are jointly and severally liable to the United States for a civil penalty in accordance with 16 U.S.C. § 1858(a).
10. The F/V JEAN MARIE was used in the commission of an act prohibited under 16 U.S.C. § 1857.
11. The Federal Fisheries Permits and endorsements issued to Respondent Abrams for the F/V JEAN MARIE are subject to sanctions as per 16 U.S.C. § 1857(g) and 15 C.F.R. § 904.301(a)(1).

SANCTION

The maximum civil monetary penalty for a Magnuson-Stevens Fisheries Conservation and Management Act violation occurring in 2007 was \$130,000. See, 16 U.S.C. § 1858(a); 15 C.F.R. 6.4(f)(14) (2006) (inflation adjustment of civil penalties). In assessing a civil penalty and a permit sanction, the following factors are considered: (1) the nature of the prohibited acts committed; (2) the circumstances of the prohibited acts committed; (3) the extent and gravity of the prohibited acts; (4) the degree of culpability; (5) any history of prior offenses; and (6) other matters as justice may require. 16 U.S.C. §§ 1858(a) and (g); 15 C.F.R. § 904.108(a) (2007). Respondents have not submitted any evidence showing an inability to pay as required under 15 C.F.R. §

904.108(e); therefore, ability to pay will not be taken into consideration.

Here, one violation of the Magnuson-Stevens Act is proved. In arriving at an appropriate civil monetary penalty and permit sanction, the undersigned is mindful that in 2010, the Agency eliminated the presumption in favor of assessed civil penalties and permit sanctions contained in the NOVA and NOPS. See, 75 Fed. Reg. 13050 (Mar. 18, 2010) (Proposed Rule); and 75 Fed. Reg. 250523 (Jun. 23, 2010) (Final Rule) (now codified at 15 C.F.R. § 904.204(m)). Additionally, the Administrative Law Judge is no longer required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document. Id. Now, the Administrative Law Judge assesses a civil penalty and imposes a permit sanction “taking into account all of the factors required by applicable law.” Id. This regulatory change is procedural and not substantive in nature. Therefore, it applies to the instant proceedings even though the Agency issued its NOVA and NOPS in 2007.

Nature and circumstances of the prohibited acts committed.

NOAA initiated the Gulf red snapper IFQ program to help conserve a finite natural resource. The advance notification requirement ensures Agency enforcement personnel are available when fishing vessels land and begin to offload. It enables Agency enforcement personnel to monitor all red snapper brought ashore, thereby enhancing Gulf red snapper IFQ enforcement. Without advanced notice of landings, Gulf red snapper IFQ program is completely undermined. Therefore, noncompliance with the advanced notice regulation is not a *de minimus* or technical violation.

Here, NMFS authorized the F/V JEAN MARIE to land at the Greg Abrams Seafood dock at 11:00 a.m. However, Officer Price observed the F/V JEAN MARIE at

that dock at 9:40 a.m. Respondent Thompson admitted that he actually arrived at the dock much earlier, two to three hours before daylight. This is not a situation in which a fishing vessel simply arrives at the dock a few minutes short of its authorized landing time. The F/V JEAN MARIE was moored to the dock for several hours before any law enforcement officer knew it was there. While there is no evidence that any red snapper were removed prior to Officer Price's presence, landing prior to the authorized time creates an opportunity to do so, thereby undermining and frustrating the purpose of the regulation.

There are other circumstances to consider as well. For example, Respondent Thompson testified he attempted to call NMFS prior to arriving at the dock. While this testimony is inconsistent with his statements to S/A Houghaboom, it shows he was aware of the regulation's requirements. Further, Officer Price observed the red snapper out of the fish hold and on the deck of the F/V JEAN MARIE, without ice, at 9:40 a.m. in Florida, in August, at least full one hour and twenty minutes prior to their 11:00 a.m. prescribed landing time. (Tr. at 17).

Extent and gravity of the prohibited acts.

Having red snapper out on the deck for at least one hour and twenty minutes prior to the prescribed landing time and without ice makes little sense in the absence of intent to offload it as soon as possible. Further, docking the F/V JEAN MARIE several hours prior to the authorized landing time without law enforcement personnel present to check the red snapper is exactly the conduct that IFQ enhanced enforcement was designed to prevent absent extenuating or emergent circumstances not present here. Respondent Thompson's actions show he knew of the regulation's requirements, yet he chose to

arrive at the dock several hours before his landing time.

Degree of culpability.

Because liability for violating the Act is strict in nature, Respondents' state of mind is irrelevant when deciding if they committed a violation. However, Respondents are required to be aware of their industry's applicable laws and regulations. Professing ignorance of the law's requirements in contravention of its common sense meaning and application is insufficient to justify a *de minimus* sanction in a highly regulated industry. That Respondent Thompson knew what was required under the regulation and yet did not get the landing confirmation number and time until after he had already landed makes him more culpable. Likewise, Respondent Abrams, as the owner of the vessel, is responsible for any violations committed by the operator, his employee.

History of prior offenses.

There is no evidence of prior violations by either Respondent Thompson or Respondent Abrams.

Other matters as justice may require.

The Act declares that "[f]ishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis." 16 U.S.C. §1801(a)(5). The relevant purposes of the Act are: (1) "to take immediate action conserve and manage the fishery resources found off the coasts of the United States . . ." (3) "to promote domestic commercial and recreational fishing under sound conservation management principles . . ." and, (4) "to provide for the preparation and implementation, in accordance with national standards, of fishery management plans

which will achieve and maintain, on a continuing basis, the optimum yield from each fishery." See 16 U.S.C. §§ 1801(b)(1), (3) and (4). Under this framework, NOAA created the Gulf red snapper IFQ program.

Administrative penalties and sanctions are remedial, not penal, in nature. They are intended to deter conduct that does not comport with the purposes of the Act. Respondents' conduct violates the regulations and creates a situation in which the purposes of the IFQ program are frustrated.

Respondent Thompson's statements to S/A Houghaboom show he understood the nature of his violation. In fact, his statements show he accepted responsibility and was contrite. It was these circumstances upon which agency counsel based her assessed civil monetary penalty and permit. However, Respondents testimony at the hearing was not credible. Instead of accepting responsibility and providing the trier of fact with good reasons to impose lesser sanctions, findings of fact 24-37 show Respondents attempted to obfuscate and fabricate. Their false testimony not only shows their unwillingness to conform their conduct to the requirements of the law, it removes any mitigating reasons to assess a civil penalty and permit sanction less than or equal to those reflected in the NOVA and NOPS. As such, a civil monetary penalty in the amount of \$2,500 and a permit sanction of forty (40) days are appropriate under the circumstances.

ORDER

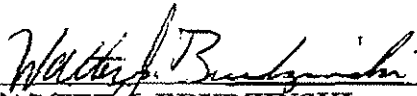
IT IS HEREBY ORDERED that a civil monetary penalty in the amount of two thousand five hundred dollars (\$2,500.00) is assessed jointly and severally against Respondent Michael Allen Thompson and Greg Abrams. That is, both Respondents jointly and each of them individually, are liable for the total assessed penalty.

IT IS FURTHER ORDERED that any and all federal fisheries permits and endorsements issued to the F/V JEAN MARIE are suspended for a period of forty (40) days.

PLEASE BE ADVISED that a failure to pay the penalty within thirty (30) days from the date on which this decision becomes final agency action will result in interest being charged at the rate specified by the United States Treasury regulations and an assessment of charges to cover the cost of processing and handling the delinquent penalty. Further, in the event the penalty or any portion thereof becomes more than ninety (90) days past due, an additional penalty charge not to exceed six (6) percent per annum may be assessed.

ANY PARTY may petition the Administrator of the National Oceanic and Atmospheric Administration for administrative review of this decision. The petition must be filed within thirty (30) days from the date of this Initial Decision as provided in 15 C.F.R. § 904.273 (**Attachment C**). Copies of the petition shall also be sent to the undersigned judge, the Coast Guard Docketing Center, and NOAA counsel. If no party seeks administrative review within 30 days after issuance of this Order, the Initial Decision will become the final decision of the Agency.

Done and dated November 3, 2011
New York, New York



WALTER J. BRUDZINSKI
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD

ATTACHMENT A

Agency's Witnesses
Officer Nick Price
S/A Gregg Houghaboom

Respondents' Witnesses
Michael Allen Thompson
Greg Abrams

ALJ Exhibits

1. Table of sunrises and sunsets in 2007 for Panama City, Florida (one page).

Agency Exhibits

1. Incident Summary Report completed by Officer Nick Price on September 4, 2007 (one page).

2. Citation issued by Officer Nick Price to Respondent Michael Thompson on August 30, 2007 (one page).

3. Two (2) color photographs of red snapper in "totes" (one page).

4. Sale invoice of Red Snapper seized from the F/V Jean Marie on August 30, 2007 (one page).

5. Offense Investigation Report prepared by Special Agent Houghaboom, dated September 19, 2007 and executed on September 21, 2007 (twelve pages).

6. Copy of email received by Gregg Houghaboom on August 30, 2007 at 8:34 a.m. regarding the IFQ landing of the F/V JEAN MARIE at 11:00 a.m. – email was forwarded to Officer Nick Price at 9:44 a.m. (one page).

7. Investigative Telephone Log containing handwritten notes of Agent Gregg Houghaboom, written contemporaneously with telephone calls made in the course of investigation (six pages).

8. Certificate of Documentation for the JEAN MARIE, owner Greg Abrams and General Index or Abstract of Title for JEAN MARIE (seven pages).

9. Federal Fisheries Permits for JEAN MARIE (fourteen pages).

10. 2007 Logbook Trip Report Forms for the F/V JEAN MARIE (three pages).

11. 2007 Logbook Trip Report Forms for the F/V JEAN MARIE (three pages).

12. Copy of email received by Gregg Houghaboom on September 20, 2007 at 11:15 p.m. regarding the IFQ landing of the F/V JEAN MARIE at 9:00 a.m. on September 21, 2007 (one page).

ATTACHMENT B**NOAA PROPOSED FINDINGS OF FACT**

1. On August 30, 2007, when Florida Fish and Wildlife Conservation Commission (FFWCC) Officer Nick Price went on duty for water patrol, he received a message from his dispatch that an IFQ red snapper advance notice of landing for that day at 11 AM had been provided for the F/V JEAN MARIE. **ACCEPTED AND INCORPORATED.**
2. At all times relevant to this proceeding, the F/V Jean Marie (United States documentation number 583374) was owned by Respondent Greg Abrams. **ACCEPTED AND INCORPORATED.**
3. At all times relevant to this proceeding, the F/V JEAN MARIE (United States documentation number 583374) held a Gulf of Mexico Reef Fish Commercial permit and was an IFQ red snapper endorsed vessel. **ACCEPTED AND INCORPORATED.**
4. At all times relevant to this proceeding, Respondent Michael Thompson was the operator of the F/V JEAN MARIE (United States documentation number 583374). **ACCEPTED AND INCORPORATED.**
5. On August 30, 2007, the F/V JEAN MARIE was secured to the dock at Greg Abrams Seafood and unloading fish at 9:40 AM. **ACCEPTED AND INCORPORATED.**
6. On August 30, 2007 at 9:40 AM, grouper were in totes on the dock and red snapper were out of the fish hold of the F/V JEAN MARIE and on the deck without any ice covering them. **ACCEPTED AND INCORPORATED**
7. On August 30, 2007, the F/V JEAN MARIE, owned by Respondent Abrams and operated by Respondent Thompson was at the dock and unloading fish one hour and twenty minutes before its reported landing time. **ACCEPTED AND INCORPORATED.**
8. When Officer Price asked Respondent Thompson why he was offloading so soon, Respondent Thompson said that he didn't know any better. **ACCEPTED AND INCORPORATED.**
9. On September 21, 2007, when Agent Houghaboom interviewed Respondent Thompson about the early landing on August 30, 2007, Respondent Thompson advised that he was "in the wrong" and "made a judgment call" to offload early because otherwise he would have had to go to the back of the boat line which would have meant that he wouldn't have time to get to the bank to pay his bills and pay his crew. **ACCEPTED AND INCORPORATED.**

10. No other defense or explanation for the violation aboard the F/V JEAN MARIE on August 30, 2007 was provided by Respondent Thompson to Agent Houghaboom. **ACCEPTED AND INCORPORATED.**
11. Respondent Thompson never advised Agent Houghaboom that on or about August 30, 2007 he received only a recording when he called the IFQ line or that he had any difficulty getting a confirmation number. **ACCEPTED AND INCORPORATED.**
12. Respondents did not raise this alleged defense of difficulty reaching the IFQ call in telephone number in their Preliminary Position on Issues and Procedures as required by 15 CFR 904.240(a)(1). **ACCEPTED AND INCORPORATED.**
13. Respondent Thompson told Agent Houghaboom during his interview on September 21, 2007 that he was "in the wrong" for starting to unload early on August 30, 2007 and that he made the required call in about two hours and 15 minutes before unloading. **ACCEPTED AND INCORPORATED.**
14. Respondent Thompson told Agent Houghaboom during the September 21, 2007 interview that the violation at issue in this matter would never happen again, and to make sure of that he "called in 8 – 9 hours early this time" which Agent Houghaboom understood was for the trip that unloaded on September 21, 2007. **ACCEPTED AND INCORPORATED.**
15. Respondent Thompson's testimony that his reference to the 8 – 9 hour early call in was for the trip ending on August 30, 2007 is credibly contradicted by the Agency's evidence. **ACCEPTED AND INCORPORATED.**
16. Respondent Thompson's testimony that he did not make another reef fish trip aboard the F/V JEAN MARIE after August 30, 2007 is credibly contradicted by Agency's exhibits 10 and 11. **ACCEPTED AND INCORPORATED.**
17. Respondent Thompson's and Respondent Abrams' testimony that Respondent Abrams fired Respondent after the trip ending on August 30, 2007 is credibly contradicted by Agency's exhibits 10 and 11. **ACCEPTED AND INCORPORATED.**
18. Agency's exhibits 10, 11, and 12 are relevant to the issue of Respondents' credibility. **ACCEPTED AND INCORPORATED.**
19. Respondent Thompson worked as the operator of the F/V JEAN MARIE, owned by Respondent Abrams, for three trips harvesting reef fish, including red snapper, subsequent to August 30, 2007. **ACCEPTED AND INCORPORATED.**

20. On or about September 17, 2007 through September 21, 2007, Respondent Thompson was the operator of the F/V JEAN MARIE, engaged in a reef fish trip, harvesting grouper and red snapper. **ACCEPTED AND INCORPORATED.**
21. An advance notification of landing on September 21, 2007 at 9 AM at Greg Abrams Seafood by the F/V JEAN MARIE was sent to Agent Houghaboom at 11:15 PM on September 20, 2007. **ACCEPTED AND INCORPORATED.**
22. The September 20, 2007 transmission at 11:15 PM of advance notice of landing on September 21, 2007 at 9 AM for the F/V JEAN MARIE with a confirmation number provided contradicts Respondents' claim that the IFQ red snapper call-in line is manned 8-hours only and not at night. **ACCEPTED.**
23. The September 20, 2007 transmission at 11:15 PM of advance notice of landing on September 21, 2007 at 9 AM for the F/V JEAN MARIE, an approximate ten hour early notification, corroborates Agent Houghaboom's understanding that Respondent Thompson was referring to the trip ending on September 21, 2007, not the trip ending on August 30, 2007, when Respondent Thompson said he "called in 8 - 9 hours early this time." **ACCEPTED AND INCORPORATED.**
24. Neither Respondent Abrams nor Respondent Thompson presented any financial information regarding an inability to pay the penalty. **ACCEPTED AND INCORPORATED.**

ATTACHMENT C**ADMINISTRATIVE REVIEW RIGHTS**

15 CFR 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.