

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:)
)
)
BILLY P. ARCHER,)
LINDA M. ARCHER, &)
F/V SEMINOLE WIND,) DOCKET No. SE0704151FM
)
RESPONDENTS.)
_____)

INITIAL DECISION AND ORDER

DATE ISSUED: APRIL 22, 2010

ISSUED BY: HON. BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE

APPEARANCES:

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

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I. STATEMENT OF THE CASE

On March 6, 2009, the National Oceanic and Atmospheric Administration (NOAA or Agency) referred this matter for hearing. On April 18, 2008, NOAA issued a Notice of Violation and Assessment of Penalty (NOVA) and Notice of Permit Sanction (NOPS) to Respondents Billy P. Archer and Linda M. Archer (Respondents), owners/operators of the F/V SEMINOLE WIND (U.S. Documentation Number 918276), alleging that Respondents violated the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act or the Act) as set forth at 16 U.S.C. §1801 et seq. and 50 C.F.R. §622.7(p).

Specifically, the NOVA alleged that on or about August 19, 2007, within the Exclusive Economic Zone of the United States (EEZ),¹ Respondents, as owners/operators of the F/V SEMINOLE WIND (U.S. Documentation Number 918276), or an individual under their control, jointly and severally, did exceed a bag or possession limit for red snapper, as specified in the Magnuson-Stevens Act, as amended, at 16 U.S.C. §1957(1)(A) and 50 C.F.R. §622.7(p). Accordingly, the NOVA proposed a monetary penalty of \$4,000 and the NOPS sought a thirty day suspension of all permits issued to Respondents.

¹ See 16 U.S.C. §1802(11). The term "Exclusive Economic Zone," herein, EEZ, is the zone established by Presidential Proclamation 5030, 3 C.F.R. 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 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. See 50 C.F.R. § 600.10. The seaward boundary for the west coast of the state of Florida is nine (9) nautical miles. (U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Ocean and Coastal Resource Management (2006), at <http://coastalmanagement.noaa.gov/mystate/docs/StateCZBoundaries.pdf>).

On April 9, 2009, the Agency filed its Preliminary Position on Issues and Procedures (PIIP) stating that 50 C.F.R. §622.39(b)(1)(viii) set a “zero” possession or bag limit for red snapper in the EEZ and including the language providing that: “[n]o red snapper may be retained by the captain of crew of a vessel operating as a charter vessel or head boat. The bag limit for such captain and crew is zero.” In addition, NOAA cited 50 C.F.R. §622.7(p), which makes it unlawful for any person to exceed a bag limit or possession limit as specified in 50 C.F.R. §622.39.²

On September 15, 2009, this matter came on for hearing at the Okaloosa County Courthouse Annex in Shalimar, Florida. Cynthia Fenyk, Esq. appeared on behalf of

² At the request of the undersigned, NOAA submitted the codified text of 50 C.F.R. §622.7(p) in effect on August 19, 2007; (2) Florida regulations in effect for red snapper bag limits on August 19, 2007 at Florida Administrative Code (F.A.C.) Chapter 68B-14.0036. The Agency, however, could not provide the text codified at 50 C.F.R. §622.39(b)(1)(viii) other than via the Federal Register because that rule was never published in the Code of Federal Regulations.

Each volume of the Code of Federal Regulations is revised once each calendar year and issued on a quarterly basis, with Title 50 revised yearly as of October 1. The temporary rule, interim measures published on April 2, 2007 (72 F.R. 15617) added §622.39(b)(1)(viii), effective May 2, 2007 through September 29, 2007, to establish bag and possession limits for red snapper as follows: “Red snapper – 2. However, no red snapper may be retained by the captain or crew of a vessel operating as a charter vessel or headboat. The bag limit for such captain and crew is zero.” The rule at issue in the instant matter was set to expire before the 2007 scheduled revision of Title 50, and therefore not appropriate for inclusion.

As authorized by section 305(c) of the Magnuson-Stevens Reauthorization Act, this temporary rule was set to expire on September 29, 2007, could have been extended for an additional 186 days, provided the public had an opportunity to comment on the rule and provide the Gulf of Mexico Fishery Management Council as actively preparing proposed regulations to address overfishing of Gulf red snapper on a permanent basis. As these prerequisite criteria were met, on September 24, 2007 (72 F.R. 54223), National Marine Fisheries Service (NMFS) published a temporary rule to extend the effective date of the temporary rule published by NMFS on April 2, 2007. The effective date of this extended rule was September 30, 2007, through March 28, 2008. §622.39(b)(1)(viii) should have been codified in the October 1, 2007 revision of the Code of Federal Regulations. However, an inadvertent technical error resulted in the extended interim measures published on September 24, 2007 not being incorporated into the Code of Federal Regulations as intended. Therefore, NMFS had to republish the regulatory text of the interim measures contained in the April 2, 2007 temporary final rule (72 FR 66080). Nonetheless, the Federal Register Act, 44 U.S.C. §1501, 1507, provides that regulations are effective when filed with the Office of the Federal Register, thus 50 C.F.R. §622.39(b)(1)(viii) published on April 2, 2007 at 72 FR 15617 was controlling on August 19, 2007. Fifty Code of Federal Regulations §622.39(b)(1)(viii) was removed by a final rule published on January 29, 2008 (73 FR 5117). Revised 50 C.F.R. § 622.39(b)(1)(iii) contained verbatim text originally found at §622.39(b)(1)(viii) and was incorporated in Code of Federal Regulations Title 50, revised as of October 1, 2008. (Codified text for 50 C.F.R. §622.39(b)(1)(iii) is attached as ALJ Ex. I-VII).

NOAA; Russell Stewart, Esq. appeared on behalf of Respondents.³ On September 16, 2009, the hearing was suspended and then reconvened and concluded on January 21, 2010, at the Okaloosa County Courthouse Annex in Shalimar, Florida. The administrative record was closed after the parties had received transcripts of the proceedings and submitted their respective post-hearing briefs. Neither party offered proposed findings of fact or conclusions of law for the court's consideration.

NOAA presented the testimony of seven witnesses and offered twenty-three exhibits, twenty-two all of which but one were admitted into evidence. Respondents presented the testimony of three witnesses, including that of Respondent Billy P. Archer. Respondents offered nine exhibits, all of which were admitted into evidence. The list of witnesses and exhibits are set forth in Attachment I.⁴

After careful review of the entire record, including the evidence, the testimony of witnesses, applicable statutes, regulations and case law, the court hereby finds that NOAA **DID NOT PROVE** that Respondents committed the alleged violations of the Magnuson-Stevens Act, as amended, at 16 U.S.C. §1957(1)(A) and 50 C.F.R. §622.7(p).

Accordingly, the proposed sanction of a \$4,000 fine and a thirty day suspension of all permits issued to Respondents and the F/V SEMINOLE WIND is hereby **DENIED**.

II. FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire record taken as a whole.

³ The court notes that Respondent Billy P. Archer was present; however Respondent Linda Archer did not attend these proceedings.

⁴ Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at ___). Citations to Agency Exhibits are marked Agency Ex. 1, 2, 3, etc.; Respondent's Exhibits are marked Resp. Ex. A, B, C, etc.; ALJ Exhibits are marked ALJ Ex. I, II, III etc.

1. At all relevant times mentioned herein, including all dates corresponding with the allegations included in the NOVA, Respondents Billy P. Archer and Linda M. Archer were the owners of the F/V SEMINOLE WIND, U.S. Documentation Number 918276. (Agency Ex. 9).
2. Title 50 C.F.R. §§622.7(p), 622.39(b)(1)(viii) provides that on August 19, 2007, it was unlawful for the captain or crew of a charter vessel to retain any red snapper fish in the EEZ. On that date, the bag limit for such captain and crew was zero. (ALJ Ex. I, III-VII).
3. On August 19, 2007, Florida state law allowed each person aboard a charter vessel to possess four (4) red snapper and each crew member to possess four (4) red snapper in "state waters." (ALJ Ex. II).
4. At all relevant times herein, Officer David Erdman, was and is a state law enforcement officer with the Florida Fish and Wildlife Commission. (Tr. Vol. I at 19).
5. Officer David Erdman was the principal investigator into the activities of the F/V SEMINOLE WIND and Respondent Billy P. Archer on August 19, 2007. Officer David Erdman prepared a written report of his investigation into the activities and alleged violations. (Agency Ex. 1).
6. On August 19, 2007, Officer David Erdman observed the F/V SEMINOLE WIND in the waters off of Panama City, Florida. (Tr. Vol. I at 23). Officer David Erdman relied upon his eyesight (aided by binoculars) and the technology aboard his patrol boat to ostensibly establish the F/V SEMINOLE WIND's position in federal waters or the EEZ. (Tr. Vol. I at 24-26.)
7. Officer David Erdman's law-enforcement patrol boat was equipped with integrated radar and Global Positioning System (GPS) and an electronic chart plotter. (Tr. Vol. I at 23-25).
8. Officer David Erdman determined the F/V SEMINOLE WIND's location on the water by use of visual and electronic means and, thereafter, Officer David Erdman followed the F/V SEMINOLE WIND back to its dock. (Tr. Vol. I at 27-28).
9. Upon the F/V SEMINOLE WIND's docking after its voyage of August 19, 2007, its nine passengers disembarked and the crew offloaded a total of forty-four red snapper fish. (Tr. Vol. I at 29-30; see also Agency Ex. 1, 2).

10. Officer David Erdman has never received formal training or education to determine whether his on-board (GPS) unit is working properly; other than his own reading of the owner's manual. (Tr. Vol. I at 105).
11. Officer David Erdman has never attended any professional courses on the use of GPS for law-enforcement purposes. (Tr. Vol. I at 105). The Florida Fish and Wildlife Commission, anticipates that law enforcement personnel will, essentially, become self-educated in the use of GPS. (Tr. Vol. I at 105).
12. Officer David Erdman has never attended any professional courses on the use of radar for law-enforcement purposes. (Tr. Vol. I at 109-110).
13. Officer David Erdman could not establish an appropriate foundation for the reliability or accuracy of the electronic navigational chart display aboard his law enforcement patrol boat. (Tr. Vol. I at 115-117).
14. Officer David Erdman could not establish an appropriate foundation for the reliability or accuracy of the GPS unit aboard his law enforcement patrol boat. (Tr. Vol. I at 106-108).
15. Officer David Erdman could not establish an appropriate foundation for the reliability or accuracy of the radar unit aboard his law enforcement patrol boat. Nor could he independently determine whether his radar unit was actually working correctly or not. (Tr. Vol. I at 109-114).
16. Officer David Erdman obtained approval from the State of Florida to engage in off-duty work as a self-employed "fishing charter" captain after August 19, 2007. Officer David Erdman participated in the investigation and prosecution of the instant matter since the date he was granted approval for off-duty employment. (Agency Ex. 7).
17. Officer David Erdman holds a Coast Guard-issued 100-ton captain's license and a 50-ton master's captain's license, credentials that are necessary to operate as a charter fishing captain. (Tr. Vol. I at 19).
18. Officer David Erdman and Respondent Billy P. Archer have known each other personally since 2000. Prior to the August 19, 2007, incident, Officer David Erdman approached Respondent

Billy P. Archer about starting a charter fishing business, specializing in reef fishing for red snapper, etc. The personal relationship between Officer David Erdman and Respondent Billy P. Archer was not amicable. (Tr. Vol. III at 190).

19. Officer David Erdman, in his private capacity as captain of a charter boat known as the F/V CAPE CARNAGE, operates in direct commercial competition with Respondent Billy P. Archer and in and near the same waters and dock area at St. Andrew's Marina in Panama City, Florida, where Respondent Billy P. Archer operates. (Tr. Vol. III at 193, 209).
20. Officer David Erdman had been planning to start a commercial charter fishing business for many years prior to the August 19, 2007 investigation; that he had attempted to engage Respondent Billy P. Archer in some manner relative to that planned commercial venture; that Respondent Billy P. Archer rejected Officer David Erdman's overtures; and that tenuous, personal relationship existed between the two men prior to and since August 19, 2007; and that Officer David Erdman is a direct business competitor of Respondent Billy P. Archer's in and near the waters off of Panama City, Florida.
21. On August 19, 2007, the F/V SEMINOLE WIND was subject to monitoring by the Vessel Monitoring System (VMS). VMS is a satellite-based vessel monitoring which allows environmental and fisheries regulatory organizations to monitor the position, time at a position, and course and speed of fishing vessels. VMS is often used to monitor vessels in the Exclusive Economic Zone (EEZ), which extends 200 nautical miles seaward from the coastal mainland.
22. Agency Exhibit 15 is a print-out of the VMS tracking data on the F/V SEMINOLE WIND, on August 19, 2007. The twenty-four entries on Agency Exhibit 15 reflect the automatic hourly radio transmissions from F/V SEMINOLE WIND, via satellite, to the VMS system on August 19, 2007. Agency Exhibit 15 reveals that the F/V SEMINOLE WIND transited both state and federal waters on its August 19, 2007, journey.
23. Agency Exhibit 16 is NOAA nautical chart, No. 11389, which reflects the waters off Panama City, Florida, and the location of the events alleged in NOAA's NOVA and NOPS. Some of the VMS data contained in Agency Exhibit 15 are plotted on Agency Ex. 16. (Tr. Vol. III at 12; see also Agency Ex. 22, NOAA Chart 11360). The green lines hand-drawn refer to the F/V SEMINOLE WIND's

outbound trip and the red hand-drawn lines identify the vessel's inbound trip. (Tr. Vol. III at 12).

24. Neither Agency Exhibits 15, 16, nor 22 establish whether Respondents illegally possessed red snapper fish in the EEZ.
25. Henry Paul Baumgartner was employed by Respondents aboard the F/V SEMINOLE WIND as a deck hand or mate on August 19, 2007. He testified that he has an eleventh-grade education and has worked as a deckhand or mate aboard fishing vessels for twelve years. (Tr. Vol. III at 134, 149).
26. Henry Paul Baumgartner had previously operated the F/V SEMINOLE WIND and was generally familiar with its navigational components. On August 19, 2007, he was positioned in the stern of the vessel. (Tr. Vol. III at 149-151).
27. On August 19, 2007, Henry Paul Baumgartner was not stationed near any navigational devices and was positioned in the stern of the vessel attending to the passengers aboard the F/V SEMINOLE WIND. (Tr. Vol. III at 151).
28. Henry Paul Baumgartner readily did not know whether the F/V SEMINOLE WIND in state or federal waters on August 19, 2007, because he was not operating the vessel, he was not looking at the Long Range Navigation device (LORAN), he was not looking at the GPS and he was not looking at a navigational chart. (Tr. Vol. III at 151-153, 155).

III. DISCUSSION

A. Agency's Burden of Proof

In order to prevail on the charge instituted against Respondents, NOAA must prove the violation alleged in the NOVA and NOPS by a preponderance of evidence. See 5 U.S.C. § 556(d); See also In the Matter of: Cuong Vo, 2001 WL 1085351 (NOAA 2001). Preponderance of the evidence means that the Agency must show it is more likely than not that Respondents' committed the violations with which they are charged. See In the Matter of: John Fernandez, III, 1999 WL 1417462 (NOAA 1999). NOAA may rely on either direct or circumstantial evidence to establish the violation and satisfy the burden

of proof. See In the Matter of Cuong Vo. The burden of producing evidence to rebut or discredit the Agency's evidence will only shift to Respondents after the Agency proves the allegations contained in the NOVA by a preponderance of reliable, probative, and substantial evidence. Id.

B. Charges

The United States Congress enacted the Magnuson-Stevens Act to protect, conserve, and manage the fishery resources of the United States and its adjacent waters. 16 U.S.C. §1801(b)(A).⁵ To achieve this purpose, Congress empowered the Secretary of the Department of Commerce to assess civil penalties and/or impose permit sanctions against any person who violates the Act. 16 U.S.C. §1858; see also In the Matter of: Corsair Corporation, F/V CORSAIR, 1998 WL 1277924 (NOAA 1998).

C. Respondeat Superior & Joint and Several Liability

Under the doctrine of respondeat superior, the owner/operator of the vessel may be held jointly and severally liable for the actions of a crewmember that violates the Magnuson-Stevens Act or its underlying regulations. See In the Matters of James Chan Song Kim, Askar Ehmes, Ulheelani 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. Cir. 1986). Joint and several liability is imposed on the vessel's owner if the violation occurs within the scope of the

⁵ 16 U.S.C. §1857 (1)(A) makes it unlawful for any person “to violate any provision of this chapter or any regulation or permit issued pursuant to this chapter.” Section 1802(31) defines the term “person” to mean any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any state), and any Federal, State, local, or foreign government or any entity of any such government.

crewmembers duties. See In the Matter of Corsair Corporation, F/V CORSAIR, 1998 WL 1277924 (NOAA 1998); see also In the Matter of Blue Horizon, Inc., 6 O.R.W. 467 (NOAA 1991) (holding that owners of a fishing vessel are jointly and severally liable for the acts of an employee if the acts are directly related to duties that the employees have broad authority to perform).

The doctrine of respondeat superior is applied to joint and several liability in order to “prevent vessel owners and operators from reaping the benefits of illegal fishing activities while avoiding the responsibility that goes along with such tactics.” See In the Matters of James Chan Song Kim, Askar Ehmes, Ulheelani Corporation, 2003 WL 22000639 (NOAA 2003); see also 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). The vessel owner should not be allowed to escape responsibility for the transgressions of the captain he hires to operate his boat and whom the vessel owner has the authority to fire. Id. In this case, however, Respondent Billy P. Archer, was owner and operator of the F/V SEMINOLE WIND at all relevant times herein. Under the doctrine of respondeat superior, Respondent Linda M. Archer, as a co-owner of the F/V SEMINOLE WIND, potentially incurred joint and several liability if NOAA can prove the truth of the violations alleged herein.

D. Analysis

This case is not factually or legally complex. NOAA charged Respondents, jointly and severally, with a violation of the Magnuson-Stevens Act and its underlying regulations. Specifically, NOAA alleged that on or about August 19, 2007, and within

the EEZ, Respondents, as owners/operators of the F/V SEMINOLE WIND, did exceed a bag or possession limit for red snapper fish, as proscribed by the Magnuson-Stevens Act.

According to 50 C.F.R. §622.39(b)(1)(viii), as in effect at the time of the alleged violation, the bag or possession limit for red snapper in federal waters was restricted to two per person. Importantly, neither the captain nor crew of a charter fishing vessel may possess any red snapper in federal waters. Id. (emphasis added). Pursuant to 50 C.F.R. §622.7(p), it is unlawful for any person to exceed a bag limit or possession limit as specified in 50 C.F.R. §622.39. In this case, the nine passengers aboard the F/V SEMINOLE WIND could have lawfully possessed a total of eighteen red snapper fish in federal waters. The captain and crew could possess none.

Conversely, at the time of the alleged violation herein, on August 19, 2007, Florida state law allowed each person, including each crew member, to possess four red snapper in state waters. In this case, the nine passengers aboard the F/V SEMINOLE WIND could have lawfully possessed a total of thirty-six red snapper fish—and the captain and crew could have lawfully possessed eight red snapper fish—for a total of forty-four red snapper fish in state waters.

For the purposes of this decision, the nine nautical miles from the Florida coast seaward, are described as state waters, and the term federal waters or “EEZ” describes those waters seaward from the state waters boundary to a point 200 nautical miles from the state waters nine nautical mile line.

For NOAA to prevail in the instant matter, it was obliged to establish by a preponderance of the evidence that Respondent and his crew possessed red snapper fish in the EEZ of the Gulf of Mexico on August 19, 2007, a date when it was illegal to do so.

NOAA's first witness was Officer David Erdman, a state law enforcement officer with the Florida Fish and Wildlife Commission. (Tr. Vol. I at 19). Officer Erdman was the principal investigator into the facts and circumstances of Respondent's alleged violation. He prepared a written report of his investigation, which was admitted as Agency Exhibit 1. Officer Erdman testified that he personally viewed Respondent's vessel, the F/V SEMINOLE WIND in federal waters or the EEZ on August 19, 2007. (Tr. Vol. I at 23). More importantly, Officer Erdman testified that he relied upon his eyesight (aided by binoculars) and the technology aboard his patrol boat to establish Respondent's position in federal waters or the EEZ. (Tr. Vol. I at 24-26.) Officer Erdman testified that his patrol boat was equipped with radar and GPS, which were integrated with an electronic nautical chart. (Tr. Vol. I at 23-25).

Officer Erdman's written report reflects his oral testimony, revealing that on August 19, 2007, the officer:

. . . was making was at a speed of 1.4 N.M.P. [sic] at position N29°59.306 W85°49.626 just outside the nine nautical mile line in federal waters. At approximately 1600 hours I saw a vessel underway heading inbound from federal waters. I used my state issued Raymarine C-70 4-K radar, pointed my vessel right toward the inbound vessel, located and confirmed that to be the vessel due to the fact that it was the only vessel in the area except for about a 600 foot freighter approximately ten miles away from me east of the inbound vessel. I zapped its position to be that of N29°55.970 W85°47.269 approximately 6.4 NM from my current position. Looking at the position marked on my chart plotter the vessel was offshore from the 9nm line approximately 1.92 NM still heading inbound.

(Agency Ex. 1).

Officer Erdman testified that after "zapping" Respondent's vessel, he "shadowed" the F/V SEMINOLE WIND back to its dock and that the F/V SEMINOLE WIND did not

stop in state waters at any time during its transit from federal waters to its dock. (Tr. Vol. I at 27-28).

Officer Erdman further testified that after the F/V SEMINOLE WIND docked, its nine (9) passengers disembarked and that the crew of the F/V SEMINOLE WIND offloaded a total of forty-four (44) red snapper fish. (Tr. Vol. I at 30, Agency Ex. 2).

As discussed supra, on August 19, 2007, federal law allowed each passenger to possess two red snapper fish in federal waters; the captain and crew could each possess no red snapper fish. Likewise, state law allowed each person to possess four red snapper fish and the captain and crew could each possess four red snapper fish in state waters. On August 19, 2007, the F/V SEMINOLE WIND carried a complement of nine passengers, plus Respondent Billy P. Archer and a deck hand. Thus, the maximum bag limit for that day would have been eighteen red snapper possessed in federal waters and twenty-six red snapper possessed in state waters (Tr. Vol. I at 68, Vol. III at 186) for a total of forty-four red snapper fish.

If Officer Erdman's testimony is correct — that the F/V SEMINOLE WIND did not stop or fish in state waters—then the forty-four fish seen at dockside were possessed entirely in federal waters. Hence, Respondents would be liable for the alleged violation as charged by NOAA.

The agency's case rests almost entirely upon the admissibility and/or credibility of Officer Erdman's testimony.

i. Failure to Establish an Evidentiary Foundation

NOAA agency regulations specify that the judge in NOAA hearings “has all powers and responsibilities necessary to preside over the parties and the hearing...” and

is empowered to “receive, exclude, limit and otherwise rule on...evidence.” 15 C.F.R. §904.204(h). Likewise, NOAA agency regulations specify that “all evidence that is relevant, material, reliable and probative...is admissible at the hearing.” 15 C.F.R. §904.251(a)(2). A judge is given broad discretion in resolving preliminary or foundation questions concerning the qualifications of a person to be a witness or the admissibility of evidence. An appellate court will not substitute its judgment for that of the trial court regarding relevance, but will determine only whether the court has abused its discretion. See United States v. Ashley, 555 F.2d 462 (5th Cir. 1977); F.R.C.P. 104(a).⁶

There is no sacrosanct “foundation” for any particular item of evidence or testimony. Rather, it is the sum of reliable indicators, in a particular case, which reveal that the proffered testimony or item is relevant, material, reliable and probative. Here, significant questions were raised concerning the foundation for Officer’s Erdman’s testimony concerning GPS, radar, and electronic nautical chart so as to render his testimony in that regard almost meaningless. Likewise, significant questions were raised concerning Officer Erdman’s general credibility so as to render his testimony of little probative value.

Officer Erdman admitted that he had never received any formal training on the use of the GPS (Tr. Vol. I at 105). This is material, inasmuch as the GPS, here, is integral to a law enforcement effort. Officer Erdman testified that he had received no training or education to determine whether his on-board GPS unit was working properly;

⁶ “Only through the requirement of a minimal yet distinct, specific offer of articulated and identifiable evidence can a court examine the relevance or the completeness of evidence, as well as all other elements bearing on the admissibility of the offer.” Maggipinto v. Reichman, 481 F.Supp. 547, 551 (E.D. Pa., 1979). Evidence need not be infallible to be admissible and deficiencies do not necessarily make evidence inadmissible, but go to its weight. Bailey v. Southern Pac. Transp. Co., 613 F.2d 1385 (5th Cir., 1980); United States v. Jacobs, 547 F.2d 772 (2nd Cir., 1976).

other than his own reading of the owner's manual. (Tr. Vol. I at 105). He testified that his employer, the Florida Fish and Wildlife Commission, anticipated that law enforcement personnel will, essentially, become self-educated in the use of GPS. (Tr. Vol. I at 105).

Officer Erdman's self-education in the use and understanding of GPS was evident from the following colloquy with the court:

Q. Do you know how many satellites your [GPS] unit must be able to acquire in order for there to be a valid reading?

A. Three.

Q. It must be three?

A. Yes.

...

Q. Do you have any independent recollection whether or not your satellites were working that day?

A. Yes, they were. I never heard any lack of acquisition on towers that never went off. [sic]

(Tr. Vol. I at 106-108).

The court takes notice that some GPS units require four, not three, satellites to fix a position. Further, some GPS systems include reliance upon ground-based towers to relay and gather electronic information. It is unknown whether Officer Erdman's GPS is one of those units. No appropriate foundation was laid in regard to whether Officer Erdman's GPS system relied upon only satellite transmissions, tower relays, either or both.

Officer Erdman further testified that the electronic navigational chart in his patrol boat visually displays inputs from both the GPS system and on-board radar. Officer Erdman testified:

Q. If I understand you correctly, what you've just been describing is the software that compiles data from the GPS and the radar and puts a nautical chart together with that and gives you one product to look at.

A. It's all integrated together.

Q. Are there any certificates from the manufacturer of the software—the provider of the software that will verify the accuracy of the information contained in those electronic charts?

A. I would have to ask Ray Marine....

Q. Is there any way that you, in your official duties, are able to verify the accuracy of the software to ensure that it is correct?

A. I personally don't have that.

Q. So you're just relying on the software that's in the unit.

A. They supplied it.

Q. You're just trusting that it's right?

A. Yes, sir. . .

...

Q. Yeah, in other words, the shorter way to ask this is, have you never verified that the software is correct relative to the official government map [chart]?

A. No, sir.

(Tr. Vol. I at 115-117).

Agency Exhibit 3 is the “GPS Verification Form” Officer Erdman completed on August 19, 2007. The court notes with particularity Officer Erdman’s handwritten entry that he “Verified [his location] on Chart # San Disk, Gulf of Mexico, Code 1G907XLS, s/n 4420048 Raymarine C-70, Ed. Dated March 2004.” Officer Erdman testified that he had never verified that the commercial software known as “San Disk” was correct or in accord with an official NOAA navigational chart. See, supra. The verification form clearly calls for reference to a “Chart #” that is, a numbered, officially-produced, government navigational chart like the ones produced by NOAA at trial. Moreover, the court notes that the software was at least three years old at the time of the alleged infraction. Query: Was that software ever updated? What evidence exists that it is/was correct? Absent a proper foundation, there can be no reliable correlation between the display from commercially-produced software and an officially-produced government navigational chart.

Furthermore, Officer Erdman testified that he had not been trained in the use of radar.

Q. So the display that you're looking actually receives input from both the GPS and the radar unit?

A. Yes.

...

Q. Have you had any training paid for either by the state government or by the federal government in the use of or the interpretation of radar?

A. No.

Q. . . Is it safe to say that what you know of radar use and interpretation is something you've acquired on your own?

A. Yes.

(Tr. Vol. I at 109-110).

Additionally, after a lengthy and disjointed colloquy with the court whether he understood the idea of calibrating his radar before using it in law enforcement activities, Officer Erdman admitted he would not independently know whether his radar unit was actually working correctly or not. (Tr. Vol. I at 111-114).

The court notes that Agency Exhibit 4, a report written by Officer Erdman in July, 2009—more than two years after the August 17, 2007 incident at issue—reveals that Officer Erdman's original offense report (Agency Ex. 1) contained important errors in interpretation of radar data. (See also, Tr. Vol. III at 181). The court regards the interplay between Agency Exhibits 1 and 4 to reveal a general lack of sophistication and understanding of the technology used by Officer Erdman in his investigation of Respondent's activities.

Taken together, the court is satisfied that NOAA was able to establish only a marginal foundation for Officer Erdman's testimony as it related to his use of electronic navigational charts, GPS and radar in his investigation of Respondent's activities on

August 19, 2007. Although admissible, Officer Erdman's testimony relating to Respondent's locations vis-à-vis state or federal waters on August 19, 2007 is of only marginal probative value and weight to either the undersigned or any other witness whose testimony was reliant upon Officer Erdman's information.

As stated above, there is no sacrosanct "foundation" for any particular item of evidence or testimony. By this decision, the court does not impose upon NOAA an obligation to ensure that any particular witness attend specific courses or obtain specific certifications. Each case, each witness is and will be evaluated on the particular facts and merits extant at that time. However, for the limited purpose of this litigation, the sum of reliable indicators reveal that the proffered testimony, although relevant and material, is generally unreliable and only marginally probative.

ii. Credibility of Officer David Erdman

Officer David Erdman's off-duty employment as a fishing charter-boat captain placed him in direct commercial competition with Respondent Billy P. Archer in and near the same waters where Officer Erdman cited Respondents for the instant violation. Hence, a clear conflict of interest arises which diminishes Officer Erdman's credibility.

Agency Exhibit 7 is entitled "Florida Fish and Wildlife Conservation Commission – Division of Law Enforcement Request for Approval of Dual Non-Law Enforcement Employment." Therein, Officer Erdman obtained approval from his law enforcement superiors to be self-employed in the "fishing charter" business. NOAA argues that such approval vitiates any taint that might arise by virtue of Officer Erdman's dual status vis-à-vis Respondent Billy P. Archer. NOAA offered two ethics opinions from the State of Florida which discuss the propriety of a law enforcement officer working as a charter

boat captain. (Agency Ex. 20). Both of those opinions address the question whether the off-duty officers were improperly “doing business” or engaging in inappropriate contractual relations with the state. Neither opinion addresses the issue whether it is proper for a Florida law enforcement officer to enforce laws against his off-duty business competitors.

Assuming, arguendo, Officer Erdman’s conduct was “ethical” under Florida law, his credibility vis-à-vis this investigation remains dubious.⁷

It is true that Officer Erdman received permission to work as a charter fishing captain eighteen months after the incident giving rise to the instant matter. It is equally true that Officer Erdman participated in the investigation and prosecution of this case long after permission was granted for him to work as both a law enforcement officer and in commercial competition with Respondent Billy P. Archer. (Tr. Vol. I at 48; Agency Ex. 7).

The circumstantial evidence reveals that, in all probability, Officer Erdman was planning to become a charter fishing captain long before the events of August 19, 2007.

The court notes, for instance, that Officer Erdman holds a Coast Guard-issued 100-ton captain’s license and a 50-ton master’s license, which are required to operate as a charter fishing captain. (Tr. Vol. I at 19). By his own testimony, Officer Erdman began taking classes to obtain his Coast Guard-issued licenses in early 2008. (Tr. Vol. I at 85).

⁷ Pertinent state law, F.S.A. §112.311(5) provides, in part, “...no employee of a state agency...shall have any interest, financial or otherwise, direct or indirect;; engage in any business transaction or professional activity...which is in substantial conflict with the proper discharge of his...duties in the public interest.” This admonition is plainly written on the face of Agency Ex. 7. Whether Officer Erdman’s off-duty employment—vis-à-vis Respondent-- runs afoul of this statute is for others to decide. However, the court cannot ignore what appears to be a clear conflict of interest as defined by state law as that conflict bears on Officer Erdman’s conduct and credibility.

In all likelihood, he had been preparing to obtain those licenses and start a charter fishing business in the latter part of 2007 – the time of the incident at issue herein.

Officer Erdman has had a personal and familiar relationship with Respondent Billy P. Archer for many years. Respondents' Exhibit B is a pre-hearing deposition given by Officer Erdman. Therein, he made a revealing statement:

Q. How long have you known Billy? [Respondent]

A. I've known Billy a long time.

(Resp. Ex. D at 29).

The court notes the degree of personal familiarity between Officer Erdman and Respondent Billy P. Archer to be highly probative. That personal relationship included an overture by Officer Erdman toward Respondent Billy P. Archer that they go into business together.

Officer Erdman admitted that he possessed the “spot book” or the LORAN navigational readings of a Captain Horace Posey, who died several years prior to the events of August 2007. (Tr. Vol. I at 84). Officer Erdman explained that the significance of Captain Posey's “spot book” was that it listed not only the prime fishing spots of a long-term, long-time successful charter captain—but it also contained a list of the deceased captain's fishing customers. (Tr. Vol. I at 84). Officer Erdman testified that he used Captain Posey's customer list to contact potential clients, telling them he was operating a charter fishing business. (Tr. Vol. I at 86).

Respondent Billy P. Archer testified that beginning in 1980, he built and placed a series of artificial reefs in Florida state waters where his charter fishing boat operates. (Tr. Vol. III at 184). The significance of these artificial reefs is that they provide a commercial charter captain with good fishing grounds for his paying clientele, and, thus,

enhance his business opportunities. The court takes notice that charter captains generally regard these “honey holes” or “weather holes” as proprietary and keep their locations in great secrecy. (See Tr. Vol. III at 185). Any competing charter captain would profit from Respondent Billy P. Archer’s proprietary knowledge of prime fishing locations.

Respondent Billy P. Archer testified that he has known Officer Erdman since 2000. In particular, Respondent Billy P. Archer testified that prior to August 19, 2007, Officer Erdman approached him about starting a charter fishing business, specializing in reef fishing for red snapper, etc. (Tr. Vol. III at 190).

Respondent Billy P. Archer testified that he also knew the deceased Captain Horace Posey and testified to the significance of Captain Posey’s LORAN book.

Respondent Billy P. Archer explained that Officer Erdman:

A. . . . was explaining to me that he wanted me to look at the book and tell which were the artificial reefs and what was the natural bottom. I was—to be honest with you, I was offended by that because he is a state wildlife officer that is going to be in competition with me...Later on that summer, I had passengers on my boat from Montgomery and Enterprise, Alabama, that said that Officer Erdman had contacted them, via telephone, and told them that he had Horace Posey’s LORAN book, and Horace Posey’s son was going to work deck for him, and the needed to fish with David Erdman and not fish with Billy Archer. . .

...

Q. He [Erdman] says that he asked you to show him one of your spots on the chart where you say you would have caught these fish?

A. He did.

Q. And you refused to do that?

A. I was offended by that.

(Tr. Vol. III at 191-194).

Neither NOAA nor Officer Erdman refuted Respondent Billy P. Archer’s testimony that prior to August 19, 2007, Officer Erdman had approached Respondent

Billy P. Archer seeking his help in establishing a charter fishing business. (Tr. Vol. III at 192). Nor did NOAA refute the long-standing and strained personal relationship between Officer Erdman and Respondent Billy P. Archer that existed prior to August 19, 2007. (Tr. Vol. III at 203).

The evidence reveals the appearance of impropriety and that Officer Erdman, in his private capacity as Captain of the charter boat the F/V CAPE CARNAGE, operates in direct competition with Respondent and in and near the same waters and dock area at St. Andrew's Marina in Panama City, Florida. (Tr. Vol. III at 193, 209). Respondent's Exhibit B contain a series of screen shots" taken from Officer Erdman's Internet web page which advertises his services as Captain of the F/V CAPE CARNAGE. Most telling is his statement that since the age of fifteen, Officer Erdman "realized where his passion for boating and salt water fishing was headed." (Resp. Ex. B at 1).

From the foregoing, the court believes that Officer Erdman had been planning to start a commercial charter fishing business for many years prior to the August 19, 2007 incident; that he had attempted to engage Respondent Billy P. Archer in some manner relative to that planned commercial venture; that Respondent Billy P. Archer rejected Officer Erdman's overtures; that a tenuous, personal relationship existed between the two men prior to and since August 19, 2007; and that Officer David Erdman is a direct business competitor of Respondents in and near the waters off of Panama City, Florida.

Because of his obvious personal interest, Officer Erdman's participation in the investigation of Respondent Billy P. Archer's activities was inappropriate and his testimony is inherently flawed.

As stated above, there is no sacrosanct “foundation” for any particular item of evidence or testimony. Again, by this decision, the court does not impose upon NOAA a future obligation to ensure that every agency witness avoid all personal or professional contact with every potential respondent. For the limited purposes of this litigation, however, the sum of reliable indicators reveal that the proffered testimony, although admissible, is so inherently unreliable as to render its probative value as a near nullity.

iii. Vessel Monitoring System Data

NOAA next offered the testimony of Jonathon Howard, a Vessel Monitoring System (VMS) technician employed by NOAA, to testify regarding the F/V SEMINOLE WIND’s nautical movements on August 17, 2007. (Agency Ex. 14). The undersigned takes notice that the VMS is a satellite-based vessel monitoring which allows environmental and fisheries regulatory organizations to monitor the position, time at a position, and course and speed of fishing vessels. VMS is often used to monitor vessels in the territorial waters of a country EEZ that extend 200 nautical miles from the coastal mainland. 15 C.F.R. §904.251(g).

Mr. Howard testified that Agency Exhibit 15 contains the VMS tracking data on Respondents’ vessel, the F/V SEMINOLE WIND, on August 19, 2007. The twenty-four entries on Exhibit 15 reflect the automatic, hourly radio transmissions from the F/V SEMINOLE WIND, via satellite, to the VMS on that date.

Agency Exhibit 16 is a NOAA nautical chart, No. 11389, reflects the waters off Panama City, Florida and the location of the violations as alleged by NOAA. Using pen and ink and the VMS data contained in Agency Exhibit 15, Mr. Howard attempted to identify the various locations of the F/V SEMINOLE WIND on August 19, 2007 on the

NOAA chart (Agency Ex. 16; Tr. Vol. III at 12; see also Agency Ex. 22, NOAA Chart 11360). Mr. Howard explained that hand-drawn green lines referred to the F/V SEMINOLE WIND's outbound trip and the hand-drawn red lines identified the vessel's inbound trip. (Tr. Vol. III at 12). Unfortunately, none of Mr. Howard's hand-drawn plotting contains time or longitude/latitude references (Agency Ex. 16, 22) which might otherwise correlate the to the F/V SEMINOLE WIND's hourly VMS transmissions (Agency Ex. 15). Hence, Agency Exhibits 16 and 22 lack significant probative value.

Although the parties labored extensively with Mr. Howard's testimony, the only probative information actually obtained from his presentation was that on August 19, 2007, Respondents' vessel, the F/V SEMINOLE WIND, departed St. Andrew Bay near Panama City, Florida and that it returned to the same location later in the day. The VMS evidence reveals that on its outbound journey, Respondents' vessel transited state waters into federal waters and returned along a similar, somewhat parallel course through federal then state waters en route to port. (Agency Ex. 15). NOAA asks the court to infer that Respondent Billy P. Archer and his crew possessed red snapper fish, illegally, in federal waters simply because the F/V SEMINOLE WIND spent most of the day navigating in federal waters and that time spent fishing in state waters on the return journey was limited to, at most, fifteen minutes. (Tr. Vol. III at 39-40, 42-43). The court rejects that inference, as explained, infra.

NOAA also presented the testimony of Henry Paul Baumgartner, Respondent's former and current deckhand aboard the F/V SEMINOLE WIND. (Tr. Vol. III at 120). Mr. Baumgartner was aboard the F/V SEMINOLE WIND on August 19, 2007.

Mr. Baumgartner testified that he has only an eleventh-grade education and has worked as a deckhand or mate aboard fishing vessels for twelve years. (Tr. Vol. III at 134, 149). He testified that although he had previously operated the F/V SEMINOLE WIND and was generally familiar with its navigational components, on August 19, 2007 he was positioned in the stern of the vessel and occupied assisting passengers. (Tr. Vol. III at 149-151). Of greatest import to this litigation is the fact that all relevant times on August 19, 2007, Mr. Baumgartner was not situated near any navigational devices and that he was in the stern of the vessel attending to Respondents' customers. (Tr. Vol. III at 151).

Mr. Baumgartner readily admitted that he did not accurately know whether the F/V SEMINOLE WIND was in state or federal waters on August 19, 2007, because he was not driving the vessel, he was not looking at the LORAN, he was not looking at the GPS and he was not looking at a navigational chart. (Tr. Vol. III at 151-153, 155). The court regards his testimony as more reliable and more probative than any statements he may have made to NOAA investigators and which were offered as hearsay at trial. (Agency Ex. 23, 24, 25, 26).

Moreover, absent reliable testimony or evidence to the contrary, the court accepts Respondent Billy P. Archer's testimony that on August 19, 2007, he and his crew and his passengers could have, and did, catch their "state limits" of red snapper fish in state waters, using double-hooked rigs and electric reels in state waters as they returned to port. (Tr. Vol. III at 188, 197-199). The VMS data reflected in Agency Exhibits 16 and 22 support Respondents' assertion that some time was spent fishing in state waters while en route to port.

Balancing Respondent's testimonial account against the inferences NOAA suggests that that the court draws from Agency Exhibits 15, 16 and 22, the court finds Respondent Billy P. Archer's testimony more credible. Absent probative evidence to the contrary from the Agency, the court is disinclined to reject Respondents' assertion that the total catch on August 19, 2007, was lawfully obtained.

IV. ULTIMATE FINDINGS OF FACT & CONCLUSIONS OF LAW

1. Respondents Billy P. Archer and Linda M. Archer are both persons within the meaning of the Magnuson-Stevens Act. (See 16 U.S.C. §1802(31)).
2. At all relevant times mentioned herein, including all dates corresponding with the violations included in the NOVA and NOPS, Respondents Billy P. Archer and Linda M. Archer were and are the owners of the F/V SEMINOLE WIND, U.S. documentation number 918276.
3. At all relevant times mentioned herein, including all dates corresponding with the eighteen counts included in the NOVA and the allegations in the NOPS, Respondent Billy P. Archer was the operator of the F/V SEMINOLE WIND.
4. At all relevant times herein, Officer David Erdman, was and is a state law enforcement officer with the Florida Fish and Wildlife Commission.
5. Officer David Erdman was the principal investigator into the F/V SEMINOLE WIND's movements and Respondent Billy P. Archer's activities on August 19, 2007.
6. Officer David Erdman's law-enforcement patrol boat was equipped with integrated radar and GPS and an electronic chart plotter. However, NOAA was able to establish only a marginal foundation for Officer David Erdman's testimony as it related to his use of electronic navigational charts, GPS and radar in his investigation of Respondent's activities on August 19, 2007.
7. Officer David Erdman had been planning to start a commercial charter fishing business for many years prior to August 19, 2007; that he had attempted to engage Respondent Billy P. Archer in some manner relative to that planned commercial venture; that Respondent Billy P. Archer rejected Officer David Erdman's

overtures; that a tenuous, personal relationship existed between the two men prior to and since August 19, 2007; and that Officer David Erdman is a direct business competitor of Respondents in and near the waters off of Panama City, Florida.

8. Because of his obvious personal interest, Officer David Erdman's participation in the investigation of Respondent Billy P. Archer's activities was inappropriate and his testimony is inherently flawed. Officer David Erdman's testimony, although admissible, is so inherently unreliable as to render its probative value as a near nullity.
9. Although VMS evidence establishes that on its August 19, 2007 journey, the F/V SEMINOLE WIND navigated in the EEZ, Respondent Billy P. Archer and his crew did not possess or retain red snapper fish in the EEZ.
10. Respondent and his crew caught their "state limits" of red snapper fish in state waters, using double-hooked rigs and electric reels as they returned to port on August 19, 2007.
11. Respondent and his crew, aboard a charter vessel, did not possess or retain red snapper fish in the EEZ on August 19, 2007.

WHEREFORE,

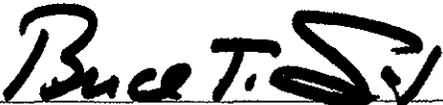
V. ORDER

IT IS HEREBY ORDERED that the allegations contained in the Notice of Violation and Assessment of Administrative Penalty against Respondents Billy P. Archer and Linda M. Archer and the F/V SEMINOLE WIND, are deemed **NOT PROVED**. Hence, neither a monetary penalty nor a suspension of any/ all federal fishery permits held by Respondents Billy P. Archer and Linda M. Archer and the F/V SEMINOLE WIND shall be imposed.

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

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

Done and Dated on this 22d day of April, 2010,
at New Orleans, Louisiana.



HONORABLE BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE

VI. ATTACHMENT I: WITNESS & EXHIBIT LISTS

Agency Witness List

1. Officer David Erdman
2. Officer Nick Price
3. Officer Gregg Haughaboom
4. Jonathan Todd Howard
5. Special Agent Allan John Coker
6. Special Agent Elizabeth F. Nelson
7. Henry Paul Baumgartner

Respondents' Witness List

1. David Scott Plummer
2. Officer David Erdman
3. Billy Preston Archer

Agency Exhibits

1. Citation
2. Photo
3. GPS Verification Form
4. Incident Summary Report
5. NOVA
6. OFFERED BUT NOT ADMITTED
7. Request for off-duty employment
8. Incident Summary Report
9. Offense Investigation Report
10. Handwritten notes
11. Handwritten notes
12. Handwritten notes
13. Southeast Fisher Bulletin
14. Howard CV
15. VMS data
16. NOAA Chart 11389
17. NOT OFFERED
18. NOT OFFERED
19. NOT OFFERED
20. Ethics opinion
21. NOAA letter – Feb 27, 2009
22. NOAA Chart 11360
23. Memorandum of Interview
24. Memorandum of Interview
25. Handwritten notes
26. Handwritten notes

Respondents' Exhibits

- A. NOT OFFERED
- B. Web page screen shots
- C. Plummer Affidavit
- D. Erdman deposition
- E. Price deposition
- F. Haughaboom deposition
- G. Baumgartner Affidavit
- H. Photo
- I. Transcript, State of Florida v. Nguyen, et al
- J. Transcript, State of Florida v. Nguyen, et al

ALJ Exhibits

- I. 50 C.F.R. §622.7
- II. Florida Admin Rule 68B-14.0036
- III. Fed. Register Vol. 72 No 184, 54223
- IV. Fed. Register Vol. 72 No 227, 66080
- V. Fed. Register Vol. 73 No. 19, 5117
- VI. 50 C.F.R. 622.29
- VII. Fed. Register Vol. 72, No 62, 15617

VII. ATTACHMENT II: APPEAL REGULATIONS

PROCEDURES GOVERNING ADMINISTRATIVE REVIEW 15 C.F.R. § 904.273

§ 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party may petition for review of an initial decision of the Judge within 30 days after the date the decision is served. The petition shall be addressed to the Administrator and filed at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue NW, Washington, DC 20230.

(b) Review by the Administrator of an initial decision is discretionary and is not a matter of right. A petition for review must be served upon all parties. If a party files a timely petition for discretionary review, or action to review is taken by the Administrator upon his or her own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator.

(c) Petitions for discretionary review may be filed only upon one or more of the following grounds:

(1) A finding of a material fact is clearly erroneous based upon the evidence in the record;

(2) A necessary legal conclusion is contrary to law or precedent:

(3) A substantial and important question of law, policy, or discretion is involved (including the amount of the civil penalty); or

(4) A prejudicial procedural error has occurred.

(d) Each issue must be separately numbered, concisely stated, and supported by detailed citations to the record, statutes, regulations, and principal authorities. Issues of fact or law not argued before the Judge may not be raised on review unless they were raised for the first time in the 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) No oral argument on petitions for discretionary review will be allowed.

(f) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. No further replies are allowed.

(g) If the Administrator declines to exercise discretionary review, such 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 decision of NOAA. The Administrator need not give reasons for declining review.

(h) If the Administrator grants a petition for discretionary review, he or she will issue an order specifying issues to be briefed and a briefing schedule. Such issues may constitute one or more of the issues raised in the petition for discretionary review and/or matters the Administrator wishes to review on his or her own initiative. Only those issues specified in the order may be argued in the briefs and considered by the Administrator. No oral argument will be permitted.

(i) After expiration of the period for filing briefs under paragraph (h) 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.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **INITIAL DECISION & ORDER** on the following parties in this proceeding as indicated below:

Cynthia S. Fenyk, Esq.
National Oceanic and Atmospheric Administration
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ALJ Docketing Center
United States Coast Guard
40 South Gay Street, Room 412
Baltimore, Maryland 21202-0001
Fax: 410-962-1746
By FedEx

Done and dated this 22d day of April, 2010,
at New Orleans, Louisiana.



KATY J.L. DUKE, ESQ.
ATTORNEY ADVISOR