

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:

D&A FISHWORKS LLC
JIMMIE B. PHRAMPUS
E/V SOUTHWIND

RESPONDENTS.

DOCKET NUMBER

SE0703253FM

HON. BRUCE T. SMITH
ADMINISTRATIVE LAW JUDGE

INITIAL DECISION & ORDER

DATE ISSUED:

MAY 18, 2010

ISSUED BY:

HON. BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE

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I. PRELIMINARY STATEMENT

On December 11, 2008, the United States Department of Commerce, National Oceanic and Atmospheric Administration (NOAA or Agency) issued a Notice of Violation and Assessment of Administrative Penalty (NOVA) to Respondents D & A Fishworks, LLC and Jimmie B. Phrampus (collectively, Respondents or individually, Respondent D & A; Respondent Phrampus). The NOVA alleged Respondents are jointly and severally liable for four violations of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act or Act), as provided at 16 U.S.C. § 1858, and its implementing regulations codified at 15 C.F.R. Part 904. Specifically, Respondents are jointly and severally charged with, while within the Exclusive Economic Zone (EEZ) of the United States, the following: (1) possessing undersized fish and/or failing to release undersized fish; (2) failing to maintain fish intact until offloaded ashore; (3) failing to comply with provisions related to the Gulf red snapper IFQ program; and (4) failing to comply with provisions related the vessel monitoring system (VMS). The Agency alleged such actions are violative of 16 U.S.C. §1857(1)(A), 50 C.F.R. §622.7(n), (o), (gg), and (ee) and sought a civil penalty totaling \$21,000.¹ Concurrently, under the authority of the Magnuson-Stevens Act at 16 U.S.C. §1858(g) and 15 C.F.R. §§904.301, 904.302, NOAA issued a Notice of Permit Sanction (NOPS) to D & A Fishworks, LLC, as owner of the F/V SOUTHWIND, setting forth the same four charges as set forth in the NOVA and seeking suspension all federal fisheries permits issued to the F/V SOUTHWIND for seventy-five days.

¹ The NOVA assessed a civil penalty for each count as follows: Count 1: \$4,500; Count 2: \$1,000; Count 3: \$500; Count 4: \$15,000.

On December 29, 2008, Respondent D & A provided NOAA with a written request for an administrative hearing to contest the allegations contained within the NOVA and NOPS. Pursuant to 15 C.F.R. §904.107(b), “[a] hearing request by one joint and several respondents is considered a request by the other joint and several respondent(s).” Therefore, Respondent Phrampus is deemed to have requested a hearing in the instant matter.

On October 5, 2009, NOAA transmitted the request for hearing to the Administrative Law Judge (ALJ) Docketing Center. NOAA explained that the request for hearing in the instant matter was delayed due to Respondent D & A’s request to present financial-related data to the Agency. On October 8, 2009, Chief Administrative Law Judge (CALJ) Joseph N. Ingolia issued a Notice of Transfer and Assignment of Administrative Law Judge and Order Requesting Preliminary Positions on Issues and Procedures (PPIPs). On November 9, 2009, NOAA and Respondent D & A timely filed their respective PPIPs with the assigned ALJ, the Honorable Bruce Tucker Smith.² On December 18, 2009, the court set the matter for hearing in Ocala, Florida on March 8, 2010.

On March 8, 2010, this matter came on for hearing at the Marion County Courthouse in Ocala, Florida. Cynthia S. Fenyk, Esq. appeared on behalf of NOAA; James L. Moody, Esq. appeared on behalf Respondent D & A. Despite having receiving all appropriate notices and documents, Respondent Phrampus failed to appear.

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

NOAA presented the testimony of seven witnesses and offered thirty-seven exhibits into evidence, thirty-six of which were admitted. Respondent D & A presented the testimony of two witnesses and offered no exhibits into evidence. The parties' respective witnesses, as well as Agency exhibits entered into evidence are identified in Attachment I.³ The hearing was concluded in less than one day.

On March 29, 2010, the court convened a telephonic post-hearing conference for purposes of ensuring that the transcript accurately reflected exhibits entered into evidence and setting the post-hearing briefing schedule. Post-hearing briefs were timely submitted by the respective parties; however, only NOAA included a Proposed Findings of Fact and Conclusions of Law section for the court's consideration. Greater weight was not accorded to the Agency's argument by virtue of this section. In the interest of fairness, the court does not accept NOAA's Proposed Findings of Fact and Conclusions of Law and has made its own findings of fact as set forth infra.

II. FINDINGS OF FACT

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

1. At all times relevant herein, the F/V SOUTHWIND was and is a registered and flagged vessel of the United States, documentation number 600680. (Agency Ex. 10).
2. Respondent D & A Fishworks is a for-profit business entity organized as a Florida Limited Liability Corporation (LLC) and its principal, president or alter-ego is Dale Ray Sheffield. (Tr. at 212, 222, 238; ALJ Ex. I).

³ 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.

3. At all times relevant herein, the F/V SOUTHWIND was and is owned by D & A Fishworks, LLC. (Tr. at 50; Agency Ex. 10).
4. At all times relevant herein, Dale Sheffield was and is the president and owner of D & A Fishworks, LLC. (Tr. at 50; 238; ALJ Ex. I).
5. At all times relevant herein, Respondent Jimmie B. Phrampus was an employee of D & A Fishworks, and specifically at all times alleged in the NOVA and NOPS. (Tr. 220-231).
6. At all time relevant herein, Respondent D & A Fishworks maintained the right to hire and fire Respondent Jimmie B. Phrampus. (Tr. at 248).
7. Respondent D & A Fishworks purchased the F/V SOUTHWIND and hired Respondent Jimmie B. Phrampus with the expressed intent of making a profit. (Tr. at 243, 259).
8. At all times relevant herein, the F/V SOUTHWIND held a “Gulf of Mexico Reef Fish Commercial” Federal Fisheries Permit issued by the National Marine Fisheries. (Tr. at 48, 52; Agency Ex. 8, 10).
9. At all times relevant herein, it was and is unlawful for any person to violate any provision of the Magnuson-Stevens Fishery Conservation and Management Act, or any regulation or permit issued pursuant to the Magnuson-Stevens Fishery Conservation and Management Act. 16 U.S.C. §1857(1)(A).
10. At all times relevant herein, the Magnuson-Stevens Fishery Conservation and Management Act defined a “person” as “any individual, . . . any corporation, partnership, association, or other entity. . .”. 16 U.S.C. §1802(36).
11. D & A Fishworks, LLC is a “person” as defined by 16 U.S.C. §1802(36).
12. Jimmie B. Phrampus is a “person” as defined by 16 U.S.C. §1802(36).
13. The owner/operator of a vessel may be held jointly and severally liable for the actions of a crewmember that violates the Magnuson-Stevens Act or its underlying regulations under the doctrine of respondeat superior. 15 C.F.R. §904.107.

14. At all relevant times herein, D & A Fishworks, LLC authorized Jimmie B. Phrampus to operate the F/V SOUTHWIND and utilize the "Gulf of Mexico Reef Fish Commercial" Federal Fisheries Permit issued by the National Marine Fisheries to the F/V SOUTHWIND. (Tr. at 205, 240).
15. At all relevant times herein, D & A Fishworks, LLC and Jimmie B. Phrampus shared the proceeds of the F/V SOUTHWIND's catch. (Tr. at 206, 215, 227-32).
16. D & A Fishworks, LLC is liable for the actions of Jimmie B. Phrampus under the doctrine of respondeat superior.
17. D & A Fishworks, LLC and Jimmie B. Phrampus are jointly and severally liable for violations of the Magnuson-Stevens Act that occurred June 21, 2007, through August 31, 2007.
18. At all times relevant herein, Red Grouper caught in the Gulf exclusive economic zone (EEZ) must measure at least twenty inches in total length. 50 C.F.R. §622.37(d)(2).
19. At all times relevant herein, it was unlawful to possess undersized fish or fail to release undersized fish. 50 C.F.R. §622.7(n).
20. The exclusive economic zone (EEZ) "is that area adjacent to the United States which . . . encompasses all waters from the seaward boundary of each of the coastal states to a line on which each point is 200 nautical miles from the baseline from which the territorial sea of the United States is measured. 16 U.S.C. §1802(11); 50 C.F.R. §600.10.
21. At all relevant times herein, the seaward boundary for the west coast of the state of Florida was and is nine nautical miles. <http://coastalmanagement.noaa.gov/mystate/docs/StateCZBoundaries.pdf>
22. On August 16, 2007, while in the Gulf EEZ, Florida Fish and Wildlife Conservation Commission (FWCC) officers boarded the F/V SOUTHWIND and discovered sixty-six undersized Red Grouper fish. At the time the F/V SOUTHWIND was boarded, Jimmie B. Phrampus identified himself as the operator of the vessel. (Tr. at 120; Agency Ex. 21, 22, 23, 24, 25)
23. On August 23, 2007, while in the Gulf EEZ, Florida Fish and Wildlife Conservation Commission (FWCC) officers boarded the F/V SOUTHWIND and discovered six undersized Red Grouper fish.

At the time the F/V SOUTHWIND was boarded, Jimmie B. Phrampus identified himself as the operator of the vessel. (Tr. at 144, 166; Agency Ex. 26).

24. On August 29, 2007, in the Gulf EEZ, Florida Fish and Wildlife Conservation Commission (FWCC) officers boarded the F/V SOUTHWIND, and discovered eight undersized Red Grouper fish. At the time the F/V SOUTHWIND was boarded, Jimmie B. Phrampus identified himself as the operator of the vessel. (Agency Ex. 32)
25. At all times relevant herein, Red Grouper fish landed in the Gulf EEZ must remain with head and fins intact until the fish are offloaded ashore. 50 C.F.R. §622.7(o); §622.38(a).
26. On August 23, 2007, while in the Gulf EEZ, Florida Fish and Wildlife Conservation Commission (FWCC) officers boarded the F/V SOUTHWIND and discovered strips of Red Grouper fish being used as bait. At the time the F/V SOUTHWIND was boarded, Jimmie B. Phrampus identified himself as the operator of the vessel. (Tr. at 161, 166; Agency Ex. 31).
27. At all times relevant herein, owners or operators of a vessel landing individual fish quota (IFQ) Gulf Red Snapper fish must provide advance notice to the National Marine Fisheries Service (NMFS) Office of Law Enforcement. 50 C.F.R. §622.16(c)(3)(i).
28. At all times relevant herein, it was unlawful to fail to comply with any provision relating to the Gulf Red Snapper fish individual fish quota (IFQ). 50 C.F.R. §622.7(gg).
29. None of the agency's witnesses who boarded the F/V SOUTHWIND on August 16, 23 and/or 29, 2007 (Officers Chambers, Hooker, Loyed, Jones and DiMartino), and who personally examined Respondent Jimmie B. Phrampus' catch, actually saw Respondent Phrampus in possession of Red Snapper fish.
30. At all times relevant herein, "[a]n owner or operator of a vessel that has been issued a commercial vessel permit for Gulf reef fish, . . . must ensure that such vessel has an operating VMS approved by NMFS for use in the Gulf reef fish fishery on board at all times whether or not the vessel is underway, unless exempted by NMFS under the power down exemption. . . . An operating VMS includes an operating mobile transmitting unit on the vessel and a functioning communication link between the unit and NMFS as provided by a NMFS-approved communication service provider. [A] VMS must

transmit a signal indicating the vessel's accurate position at least once an hour, 24 hours a day every day." 50 C.F.R. §622.9.

31. On August 29, 2007, while in the Gulf EEZ, Florida Fish and Wildlife Conservation Commission (FWCC) officers boarded the F/V SOUTHWIND and discovered the vessel's VMS unit inoperable. At the time the F/V SOUTHWIND was boarded, Jimmie B. Phrampus identified himself as the operator of the vessel. (Tr. at 189-90; Agency Ex. 32 and 33).
32. On January 10, 2007, D & A Fishworks, LLC president and owner, Dale Ray Sheffield, purchased a Thrane & Thrane VMS unit, for installation aboard the F/V SOUTHWIND. On February 16, 2007, the Thrane & Thrane VMS unit purchased by Dale Ray Sheffield, as president and owner of D & A Fishworks, LLC, for use aboard the F/V SOUTHWIND was activated. (Agency Ex. 6).
33. The Thrane & Thrane VMS unit aboard the F/V SOUTHWIND was operable from March 28, 2007, through May 20, 2007. (Tr. at 45, 99; Agency Ex. 7)
34. The Thrane & Thrane VMS unit aboard the F/V SOUTHWIND ceased transmitting May 20, 2007 through August 20, 2007. (Tr. at 45; Agency Ex. 7)
35. The Thrane & Thrane VMS unit aboard the F/V SOUTHWIND transmitted one report on August 20, 2007. (Tr. at 93; Agency Ex. 7, 18)
36. The Thrane & Thrane VMS unit aboard the F/V SOUTHWIND failed to regularly transmit reports from August 20, 2007 through August 31, 2007. (Tr. at 99, 105; Agency Ex. 7, 8).
37. The Thrane & Thrane VMS unit aboard the F/V SOUTHWIND resumed regular transmissions of reports on August 31, 2007. (Tr. at 105; Agency Ex. 7).
38. Neither Respondent offered proof that either of them was exempt from the VMS reporting requirements set forth in 50 C.F.R. §622.9(a)(2). Neither did either Respondent provide evidence that either had reported the transmission failure(s) to NMFS as required by 50 C.F.R. §622.9(d).

III. DISCUSSION

A. Agency's Burden of Proof

In order to prevail on the charges instituted against a respondent, the Agency must prove the violations alleged by a preponderance of the evidence. 5 U.S.C. § 556(d); see also Dept. of Labor v. Greenwich Collieries, 512 U.S. 267 (1994). Preponderance of the evidence means the Agency must show it is more likely than not a respondent committed the charged violation. See Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983). The Agency may rely on either direct or circumstantial evidence to establish the violation and satisfy the burden of proof. See generally, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764-765 (1984). The burden of producing evidence to rebut or discredit the Agency's evidence will only shift to Respondent after the Agency proves the allegations contained in the NOVA by a preponderance of reliable, probative, substantial, and credible evidence. See Steadman v. S.E.C., 450 U.S. 91, 101 (1981).

B. The Magnuson-Stevens Act—in brief

1. Purpose, Persons & Proclamations

The Magnuson-Stevens Act was enacted to protect, conserve and manage the fishery resources of the United States and its adjacent waters. 16 U.S.C. §1801(b)(1)(A). In order 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 Magnuson-Stevens Act. See 16 U.S.C. §1858; see also In the Matter of Corsair Corporation, F/V CORSAIR, 1998 WL 1277924 (NOAA 1998).

The term "person" is broadly defined by the Act to include any individual, corporation, partnership, association or other entity. 16 U.S.C. §1802(36). Therefore, it is wholly possible that a business entity may be assessed a civil penalty as a person for any

violation of the Magnuson-Stevens Act or any regulation adopted thereunder. See In the Matter of Northern Wind Seafood, Inc., 1998 WL 1277922 (NOAA 1998).

The term “Exclusive Economic Zone” (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 from the baseline from which the territorial sea of the United States is measured. 16 U.S.C. §1802(11); 50 C.F.R. §600.10. The seaward boundary for the west coast of the state of Florida is nine nautical miles. 16 U.S.C. §1802(11); United States Department of Commerce National Oceanic and Atmospheric Administration, Ocean and Coastal Resource Management (2006), at <http://coastalmanagement.noaa.gov/mystate/docs/StateCZBoundaries.pdf>.

2. Application of Strict & Vicarious Liability under the Magnuson-Stevens Act

The Magnuson-Stevens Act, and the regulations promulgated thereunder, do not set forth a scienter requirement. Northern Wind, Inc. v. Daley, 200 F.3d 13, 19 (1st Cir. 1999) (citing Tart v. Massachusetts, 949 F.2d 490, 502 (1st Cir.1991) for the proposition that “scienter is not required to impose civil penalties for regulatory violations when the regulation is silent as to state of mind.”). Accordingly, any violations are strict liability offenses. Id. (internal citations omitted).

The law is well-settled that an employer may be vicariously liable for its employee’s acts committed in the scope of employment while furthering the employer’s business. In the Matter of: Robert R. Flores and Astara, 2009 WL 2053602 (NOAA

2009) (internal citations omitted). Therefore, “the owner of a vessel may be held liable for the actions of a crewmember that violates the Magnuson-Stevens Act or its underlying regulations.” Id., citing In the Matters of James Chan Song Kim, Askar Ehmes, Ulheelani Corp., 2003 WL 22000639 (NOAA 2003). Joint and several liability, as it applies in cases arising under the Act, is set forth at 15 C.F.R. §904.107 and provides that:

(a) A NOVA may assess a civil penalty against two or more respondents jointly and severally. Each joint and several respondent is liable for the entire penalty but, in total, no more than the amount finally assessed may be collected from the respondents.

* * *

(c) A final administrative decision by the Judge or the Administrator after a hearing requested by one joint and several respondent is binding on all parties including all other joint and several respondent(s), whether or not they entered an appearance unless they have otherwise resolved the matter through settlement with the Agency.

Id. (emphasis added).

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

The doctrine of respondeat superior also applies to individuals who claim to be independent contractors. In the Matter of Kenneth Shulterbrandt, William Lewis, 1993 WL 495728 (NOAA 1993); See also, In the Matter of Charles P. Peterson, James D. Weber, 1991 WL 288720 (NOAA 1991). The rationale behind applying the doctrine of respondeat superior to independent contractors is that the contract may be “characterized as a joint venture if there is the intention of the parties to carry out a single business undertaking, a contribution by each of the parties to the venture, and inferred right of control and a right to participate in the profits.” Id. “Generally, the test used to determine whether the doctrine applies is whether the vessel owner had, at the time of the violation, the right to control the actions of the wrongdoer.” Id.

Here, Respondent D & A contends that because Respondent Phrampus was an independent contractor, Respondent D & A is thereby insulated from liability. This argument ignores settled law that in NOAA cases, an owner is jointly and severally liable with an operator for any infractions committed by either; accordingly, the “independent contractor” defense is not available herein.

Testimony elicited at the hearing of this matter revealed that Respondent D & A hired Respondent Phrampus for the express purpose of earning a profit for D & A (Tr. 220-231), clearly, “in furtherance of its ends.” See In the Matters of James Chan Song Kim, Askar Ehmes, Ulheelani Corporation, 2003 WL 22000639 (NOAA 2003).

Likewise, Respondent D & A retained the authority to fire Respondent Phrampus. (Tr. at 248).

Dale Ray Sheffield, president and owner of Respondent D & A, testified that he was generally inexperienced in commercial fishing at the time he hired Respondent Phrampus. (Tr. at 258). He testified that he did not concern himself with the day-to-day operations aboard the F/V SOUTHWIND and that he even had failed to purchase liability insurance for the vessel or Respondent Phrampus or the crew. (Tr. at 259-260).

Respondent Phrampus, as the operator of F/V SOUTHWIND, was an employee of Respondent D & A. Consequently, Respondent Phrampus’ actions are imputed to his employer, Respondent D & A, under 15 C.F.R. §904.107 and the doctrine of respondent superior, as that doctrine is described in NOAA jurisprudence discussed supra. Therefore, Respondent D & A is jointly and severally liable for the actions of Respondent Phrampus.

The facts of this case are straightforward and were generally uncontested by Respondent D & A.

C. Analysis

The Agency has charged Respondents, jointly and severally, with four violations of 16 U.S.C. §1857 (1) (A), which is a general prohibition stating that “[i]t is unlawful for any person to violate any provision of this chapter or any regulation or permit issued pursuant to this chapter.” *Id.* Accordingly, NOAA further charged Respondents, jointly and severally, with having violated 50 C.F.R. §622.7(n), (o), (gg) and (ee). Each violation is discussed in brief, infra.

I. Charges: Regulated Activities

At the time of Respondents alleged violations, 50 C.F.R. §622.7 provided as follows:

In addition to the general prohibitions in § 600.725 of this chapter, it is unlawful for any person to do any of the following:

...

(n) Except as allowed under § 622.37(c)(2) and (3) for king and Spanish mackerel, possess undersized fish, fail to release undersized fish, or sell or purchase undersized fish, as specified in § 622.37.

(o) Fail to maintain a fish intact through offloading ashore, as specified in § 622.38.

...

(ee) Fail to comply with any provision related to a vessel monitoring system as specified in § 622.9, including but not limited to, requirements for use, installation, activation, access to data, procedures related to interruption of VMS operation, and prohibitions on interference with the VMS.

...

(gg) Fail to comply with any provision related to the Gulf red snapper IFQ program as specified in § 622.16.

50 C.F.R. §622.7 (n), (o), (ee), (gg).

a. Possession of Undersized Fish

Count 1 of the Agency's Notice of Violation and Assessment of Administrative Penalty (NOVA) and the Notice of Permit Sanction (NOPS) issued to Respondents alleges that "on or about August 16, 23, and 29, 2007, and within the EEZ, . . . , Respondent[s] . . . , jointly and severally, possessed undersized fish or fail[ed] to release undersized fish (red grouper), as specified in §622.37, in violation of the Magnuson-Stevens . . . Act, as amended, at 16 U.S.C. 1857 (1)(A) and 50 CFR 622.7(n)."

For NOAA to prevail on Count 1 in the instant matter, it was obliged to establish by a preponderance of the evidence that Respondents possessed undersized Red Grouper fish in the EEZ of the Gulf of Mexico on August 16, 23, and 29, 2007, dates when it was illegal to do so.

August 16, 2007 Boarding

NOAA offered the testimony of former FWCC Officer Edward K. Chambers regarding Respondents' August 16, 2007, undersized fish violation. Officer Chambers testified that in his capacity as a law enforcement officer with FWCC he performed offshore patrols of fisheries to include offshore charters, commercial and recreational. (Tr. at 111). Officer Chambers further testified he boarded the F/V SOUTHWIND on August 16, 2007, "just inside the eastern boundary of the Florida Middle Grounds." (Tr. at 112). Upon boarding the F/V SOUTHWIND on August 16, 2007, Respondent Phrampus advised Officer Chambers that he was captain of the vessel. Officer Chambers

testified he inspected the catch aboard the F/V SOUTHWIND and it was apparent that Respondent Phrampus was in the possession of numerous fish measuring less than the requisite twenty inches. (Tr. at 113; 124). Photographic evidence obtained by Officer Chambers clearly reveals the undersized Red Grouper aboard the F/V SOUTHWIND. (Agency Ex. 27). Officer Chambers, in the presence of Respondent Phrampus, measured the catch aboard the F/V SOUTHWIND and determined that approximately sixty-six Red Grouper fish were undersized, ranging from sixteen to nineteen and a half inches long. (Tr. at 113-15, 122-124; Agency Ex. 21, 27). Officer Chambers completed federal form titled "Undersized Catch Measurement." (Agency Ex. 25). Respondent Phrampus had the opportunity to dispute the measurements and/or the count. Respondent Phrampus initialed the document indicating his agreement with Officer Chambers' measurements and counts. Respondent Phrampus provided a handwritten statement to Officer Chambers admitting that on August 16, 2007, he was in possession of sixty-six undersized Red Grouper. (Tr. at 122-26; Agency Ex. 25, 26). The sixty-six undersized fish were seized by the FWCC. (Agency Ex. 23).

August 23, 2007 Boarding

NOAA offered the testimony of FWCC Officers Doug B. Loyed and John W. Jones concerning Respondents' August 23, 2007, undersized fish violation. As FWCC law enforcement officials, Officers Loyed and Jones testified they were assigned the responsibility of conducting offshore patrols and performing fisheries and boat safety inspections while offshore. (Tr. at 141, 151). While on offshore patrol on August 23, 2007, Officers Loyed and Jones boarded the F/V SOUTHWIND, which was at anchor in the Gulf EEZ, and observed undersized Red Grouper fish and a bucket of Red Grouper

fish strips. (Tr. at 142, 144). Officers Loyed and Jones, while aboard the F/V SOUTHWIND and in the presence of Respondent Phrampus, measured six red grouper fish to be less than twenty inches in length and therefore undersized. (Tr. at 144, 163; Agency Ex. 28). Officer Loyed also testified that Respondent Phrampus orally acknowledged that the Red Grouper fish were shorter than the required twenty inches. (Tr. at 144, 150). Photographic evidence obtained by Officer Jones clearly reveals the undersized Red Grouper aboard the F/V SOUTHWIND. (Agency Ex. 31). A FWCC citation was thereupon issued to Respondent Phrampus. (Agency Ex. 29).

August 29, 2007 Boarding

NOAA next offered the testimonies of FWCC Officers Travis Martin Hooker and Frank DiMartino regarding Respondents' August 29, 2007, undersized fish violation. Officers Hooker and DiMartino both testified that on August 29, 2007, they were assigned to offshore patrol vessel GUARDIAN and was responsible for conducting vessel safety and marine fisheries inspections. (Tr. at 171; 189). Both officers testified that on August 29, 2007, they boarded the F/V SOUTHWIND for the purposes of conducting vessel safety and marine fisheries inspections. (Tr. at 171-72; 189). Officer Hooker measured the catch aboard the F/V SOUTHWIND and determined that approximately eight Red Grouper fish measured less than the required twenty inches. (Tr. at 176-177). Officer DiMartino completed the catch management form detailing the measurements of each undersized fish. (Tr. at 193; Agency Ex. 34).

August 30, 2009 Interview

Special Agent Kalamas testified she initially received notice from FWCC of Respondents' possession of undersized red grouper on August 16, 2007, and was again

notified of Respondents' possession of undersized red grouper on August 29, 2007. (Tr. at 17-18). Special Agent Kalamas further testified that on August 30, 2007, she met and spoke with Respondent Phrampus at the dock in Cedar Key. Special Agent Kalamas stated that during the course of the interview, Respondent Phrampus demonstrated a "very cooperative" attitude and that he discussed that his vessel had been boarded on 3 occasions wherein undersized fish were discovered. (Tr. at 18). Respondent Phrampus thereupon agreed to provide Special Agent Kalamas with a voluntary written statement. (Tr. at 19; Agency Ex. 1). Respondent's cross-examination of Special Agent Kalamas regarding the undersized fish focused on whether the undersized fish were sold and whether Respondent D&A Fishworks, LLC was aware of the undersized fish.

Respondent's argument is misplaced as NOAA jurisprudence is replete with "[c]ase law . . . support[ing] the proposition that 'intent' is not required to prove possession." In the Matter Of: Gregory N. Duckworth Reaper, Inc., 2004 WL 1472849 (NOAA 2004) citing In the Matter of Timothy A. Whitney, 6 O.R.W. 479 (NOAA 1991), (spear-fishing and releasing an undersized red grouper while still in water sufficient to find unlawful possession); In the Matter of Axelsson & Johnson Fish Co., Inc., 5 O.R.W. 51 (1987), (dock facility unlawfully possessed undersized scallops even though it did not purchase same); In the Matter of Campbell, 5 O.R.W. 328 (1988), (no intent required to find unlawful possession of illegally taken salmon).

Thus, Count 1 was **PROVED**.

b. Failure to Maintain Fish Intact

Count 2 of the Agency's NOVA and NOPS issued to Respondents alleges that "on or about August 23, 2007, and within the EEZ, . . . , Respondent[s] . . . ,

jointly and severally, did fail to maintain a fish intact through offloading ashore (red grouper), as specified in §622.38, in violation of the Magnuson-Stevens . . . Act, as amended, at 16 U.S.C. 1857 (1)(A) and 50 CFR 622.7(o). . . .”

Here, 50 C.F.R. §§622.7(o) and 622.38 specify that it is unlawful to fail to maintain “South Atlantic Snapper-Grouper from the South Atlantic EEZ” intact through offloading ashore.

Section 622.2 defines “South Atlantic Snapper-Grouper” to include those species of fish listed in Table 4 of Appendix A of Part 622. Reference to that table clearly reveals Red Grouper as one of the species of fish included within the definition of “South Atlantic Snapper-Grouper” for the purposes of §622.38.

As discussed supra, FWCC Officer Douglas B. Loyed testified that when he boarded the F/V SOUTHWIND on August 23, 2007 the vessel was located in the EEZ off-shore from the Florida coast in the Gulf of Mexico. (Tr. at 142). Officer Loyed further testified that during the course of his boarding inspection aboard the F/V SOUTHWIND on August 23, 2007 he observed, and photographed, Respondent Phrampus in possession of Red Grouper strips in a bucket. (Tr. at 144; Agency Ex. 31). Officer Loyed testified stated that upon inquiry, Respondent Phrampus admitted that he was using the Red Grouper strips for fishing bait. (Tr. at 144).

Similarly, FWCC Officer John W. Jones testified that he also boarded the F/V SOUTHWIND on August 23, 2007, as that vessel lay in the Florida Middle Grounds of the EEZ. (Tr. at 158-159). Officer Jones, who has seventeen years of experience and training in the identification of various fish species, further testified that on August 23,

2007, he observed Respondent Phrampus in possession of “fillets of Red Grouper” aboard the F/V SOUTHWIND. (Tr. at 162-163, 166-167).

The testimonial and photographic evidence clearly reveals strips or fillets of Red Grouper, in violation of the requirement that those fish be maintained intact until they were offloaded, per 50 C.F.R. §§622.7(o) and 622.38.

Thus, Count 2 was **PROVED**.

c. Failure to Comply with IFQ Program

Count 3 of the Agency’s NOVA and NOPS issued to Respondents alleges that “[d]uring a period in August, 2007, Respondent[s] . . . , jointly and severally, did fail to comply with any provision related to the Gulf red snapper IFQ program (advance notice of landing IFQ red snapper and validating dealer transaction report), as specified in §622.16, in violation of the Magnuson-Stevens . . . Act, as amended, at 16 U.S.C. 1857 (1)(A) and 50 CFR 622.7(gg). . . .”

Here, 50 C.F.R. §§622.7(gg) makes it illegal to fail to comply with the provisions of the Individual Fishing Quota (IFQ) program more fully explained in §622.16. Section 622.16, is entitled “Gulf Red Snapper individual fishing quota (IFQ) program,” and purports to “establish an IFQ program for the commercial fishery for Gulf Red Snapper.”

The IFQ program requires the owner or operator of a commercial fishing vessel to notify the National Marine Fisheries Service (NMFS) Office of Law Enforcement at least three hours in advance of landing Red Snapper. 50 C.F.R. §622.16(c)(3)(i). The intent of the IFQ program is to ensure compliance with that fisherman’s, or shareholder’s, quota before the fish are landed. It is incumbent upon the fisherman to notify the NFMS if he

possesses Red Snapper in advance of landing and reception by a dealer with a Gulf Red Snapper dealer endorsement.

“Red Snapper” is defined at 50 C.F.R. §622.2 as “Lutjanus campechanus” whereas 50 C.F.R. Part 622, App. A, Table 4, identifies “Red Grouper” as “Epinephelus morio” – a different and distinct species.

The Agency’s witnesses who boarded the F/V SOUTHWIND and who personally examined Respondent Phrampus’ catch, (including Officers Chambers, Hooker, Loyed, Jones and DiMartino) all described Respondent Phrampus’ possession of Red Grouper – not Red Snapper. None of the Agency’s witnesses who personally boarded the F/V SOUTHWIND on any of the dates alleged testified to having actually seen Respondent Phrampus in possession of Red Snapper.

Agency Exhibit 5 ostensibly contains a page titled “2007 Logbook Trip Report Form” and bears a date stamp of “August 20, 2007.” The page is putatively signed by “Jimmie Phrampus” and bears a reference to “10” Red Snapper. NOAA contends that this is proof that Respondent offloaded ten Red Snapper without having given the pre-offloading notification required by 50 C.F.R. §622.16(c)(3)(i). NOAA offered Exhibit 5 through the testimony of Agent Kalamas, who did not participate in any of the boardings of the F/V SOUTHWIND, and whose only knowledge of the boardings came from the reports prepared by the several FWCC officers. (Tr. at 86-87). The court assigns little probative weight to Exhibit 5. Although the document is admissible hearsay, it bears little indicia of reliability. It cannot be said with any degree of certainty “who” completed the document or whether Respondent Phrampus was knowledgeable about the distinctions between Lutjanus campechanus and Epinephelus morio!

Special Agent Kalamas' report of investigation makes only a vague reference to Red Snapper. Her report makes no reference to any admission by Respondent Phrampus relative to his possession of Red Snapper nor to any direct observation by law enforcement personnel of Red Snapper aboard the F/V SOUTHWIND. (Agency Ex. 3). Special Agent Kalamas' report does recite that:

...upon review of the F/V SOUTHWIND logbook records and the ...IFQ database, no IFQ advanced notice of landing report exists and as a result no transactional approval code was generated for the ten (10) pounds of Red Snapper landed from the June 26 – 29, 2007 trip.

(Agency Ex. 3)

However, Special Agent Kalamas' report cannot prove that a landing actually occurred. The report relies upon hearsay information contained in Exhibit 3, described supra. The absence of an "advanced notice of landing" in the computerized IFQ database tends to prove that no landing occurred—just as much as it tends to prove a violation. Hence, the report and the conclusions drawn in that report are of little value, here. In sum, since no witness observed respondent Phrampus land Red Snapper without having provided proper advanced notice, the court is disinclined to accept a conclusion drawn from a computer database.

NOAA failed to prove that Respondent Phrampus possessed Red Snapper aboard the F/V SOUTHWIND on the dates alleged. Accordingly, the Agency cannot prove Respondent Phrampus failed to follow the provisions of the Red Snapper IFQ Program or 50 C.F.R. §622.16(c)(3)(i).

Thus, Count 3 was **NOT PROVED**.

d. Failure to Comply with VMS System

Count 4 of the Agency's NOVA and NOPS issued to Respondents alleges that "[d]uring a period from about June 26, 2007, to August 29, 2007, Respondent[s] . . . , jointly and severally, did fail to comply with any provision related to a vessel monitoring system as specified in §622.9, including but not limited to, requirements for use, procedures related to interruption of VMS operation, and the prohibitions on interference with the VMS, in violation of the Magnuson-Stevens . . . Act, as amended, at 16 U.S.C. §1857 (1)(A) and 50 C.F.R. §622.7(ee). . . ."

Here, 50 C.F.R. §622.9(a)(2) provides that:

An owner or operator of a vessel that has been issued a commercial vessel permit for Gulf reef fish...must ensure that such vessel has an operating VMS approved by NMFS for use in the Gulf reef fishery on board at all times whether or not the vessel is underway, unless exempted...Unless exempted...a VMS must transmit a signal indicating the vessel's accurate position once an hour, 24 hours a day every day....The requirements of this paragraph apply throughout the Gulf of Mexico.

Section 622.9(d) further provides that "When a vessel's VMS is not operating properly, the owner or operator must immediately contact NMFS..."

D & A Fishworks, LLC was and is the holder of a Department of Commerce, NOAA, NMFS "Gulf of Mexico Reef Fish Commercial" permit. (Tr. at 52)(Agency Ex. 10). That permit obligated Respondent D & A to obtain and operate a VMS tracking unit aboard the F/V SOUTHWIND. 50 C.F.R. §622.9(a)(2), supra.

Dale Ray Sheffield testified that he obtained a VMS for the F/V SOUTHWIND in February, 2007. (Tr. at 241). He further testified that he was unaware of any interruption of VMS transmissions until August, 2007. (Tr. at 242).

Officer Jones, an officer with the Florida Fish and Wildlife Conservation Commission, testified that he boarded the F/V SOUTHWIND on August 23, 2007 as that vessel lay at anchor in the Florida Middle Grounds of the EEZ. (Tr. at 158-159). He further testified that on August 23, 2007, he personally observed the VMS unit aboard the F/V SOUTHWIND and saw that the VMS unit was inoperative. (Tr. at 164, 168).

Officer Frank DiMartino, a law enforcement officer with the Florida Fish and Wildlife Conservation Commission, testified that he boarded the F/V SOUTHWIND on August 29, 2007. (Tr. at 189). Officer DiMartino testified that at the time he boarded the F/V SOUTHWIND, the vessel was located sixty five or seventy miles off-shore from the Florida coast in the Gulf of Mexico. (Tr. at 191). Officer DiMartino testified that when he observed the VMS unit aboard the F/V SOUTHWIND, it was not operational. He further testified that upon inquiry, Respondent Phrampus admitted that the VMS unit “has been off for several weeks.” (Tr. At 197-198).

On August 30, Respondent Phrampus admitted to NMFS Special Agent Kalamas that the VMS unit aboard the F/V SOUTHWIND “hadn’t been working for approximately two-and-a-half months and that the he had been told that the unit was being repaired and “not to worry about it.” (Tr. at 18, 72; Agency Ex. 1, 3).

Jonathan Howard, a VMS enforcement technician with NOAA’s office of law enforcement, testified regarding the VMS unit aboard the F/V SOUTHWIND. Mr. Howard testified that he had reviewed the VMS database for transmissions from the VMS unit aboard the F/V SOUTHWIND and found that the VMS unit aboard the F/V SOUTHWIND ceased transmissions on May 20, 2007, and resumed transmissions on August 31, 2007, a period of more than three months. (Tr. at 99, 105; Agency Ex. 18).

Respondent D & A did not establish that it was exempt from the VMS reporting requirements set forth in 50 C.F.R. §622.9(a)(2). Additionally, Respondent D & A did not provide evidence that either D & A, as owner of the F/V SOUTHWIND, or Respondent Phrampus, as operator of the F/V SOUTHWIND had reported the transmission failure to NMFS as required by 50 C.F.R. §622.9(d).

The evidence clearly establishes that Respondents' VMS failed to "transmit a signal indicating the vessel's accurate position once an hour, 24 hours a day every day" as required from May 20, 2007 until August 31, 2007.

Portions of 50 C.F.R. §622.9(a),(d) obligate either the "owner or operator" to ensure compliance with VMS operations. (emphasis added). However, 15 C.F.R. §904.107, provides that NOAA may assess a civil penalty against two or more respondents jointly and severally. Hence, Respondent D & A cannot argue that because Respondent Phrampus bore an obligation to ensure proper VMS operation, D & A was relieved of the same obligation.

The overwhelming weight of the evidence establishes that Respondents failed to maintain an operating VMS system aboard the F/V SOUTHWIND as required by 50 C.F.R. §622.9(a)(2).

Thus, Count 4 was **PROVED**.

IV. ULTIMATE FINDINGS OF FACT

1. At all times relevant herein, the F/V SOUTHWIND was and is a registered and flagged vessel of the United States, documentation number 600680. (Agency Ex. 10).
2. At all times relevant herein, the F/V SOUTHWIND was and is owned by D & A Fishworks, LLC. (Tr. at 50; Agency Ex. 10). At all times relevant herein, D & A Fishworks, LLC was and is a duly registered Florida Limited Liability Company. (ALJ Ex. I).

3. At all times relevant herein, Dale Sheffield was and is the president and owner of D & A Fishworks, LLC. (Tr. at 50; 238; ALJ I)
4. At all times relevant herein, the F/V SOUTHWIND held a “Gulf of Mexico Reef Fish Commercial” Federal Fisheries Permit issued by the National Marine Fisheries. (Tr. at 48, 52; Agency Ex. 8, 10).
5. D & A Fishworks, LLC is a “person” as defined by 16 U.S.C. §1802(36).
6. Jimmie B. Phrampus is a “person” as defined by 16 U.S.C. §1802(36).
7. D & A Fishworks, LLC is liable for the actions of Jimmie B. Phrampus under the doctrine of respondeat superior.
8. D & A Fishworks, LLC and Jimmie B. Phrampus are jointly and severally liable for violations of the Magnuson-Stevens Act that occurred June 21, 2007, through August 31, 2007.
9. On August 16, 2007, the F/V SOUTHWIND, owned by D & A Fishworks, LLC and operated by Jimmie B. Phrampus, illegally possessed sixty-six undersized Red Grouper fish. (Tr. at 120; Agency Ex. 21, 22, 23, 24, 25)
10. On August 23, 2007, the F/V SOUTHWIND, owned by D & A Fishworks, LLC and operated by Jimmie B. Phrampus, illegally possessed six undersized Red Grouper fish. (Tr. at 144, 166; Agency Ex. 26).
11. On August 29, 2007, the F/V SOUTHWIND, owned by D & A Fishworks, LLC and operated by Jimmie B. Phrampus, illegally possessed eight undersized Red Grouper fish. (Agency Ex. 32)
12. On August 23, 2007, the F/V SOUTHWIND, owned by D & A Fishworks, LLC and operated by Jimmie B. Phrampus, illegally possessed strips of Red Grouper fish being used as bait. (Tr. at 161, 166; Agency Ex. 31).
13. The Thrane & Thrane VMS unit aboard the F/V SOUTHWIND, owned by D & A Fishworks, LLC and operated by Jimmie B. Phrampus, failed to continuously and regularly transmit reports from May 20, 2007, through August 31, 2007. (Tr. at 45, 93, 99; Agency Ex. 7, 18)

14. Respondent D&A Fishworks, LLC has not submitted verifiable financial information in accordance with 15 C.F.R. § 904.108(c).

V. PENALTY ASSESSMENT

The Magnuson-Stevens Act authorizes the imposition of a civil penalty of up to \$100,000 and permit sanctions commensurate to the violations involved.⁴ In assessing penalties and or permit sanctions, the court must consider a number of factors including the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior offenses, and ability to pay; and such other matters as justice may require." 16 U.S.C. § 1858(g)(2); 15 C.F.R. § 904.108(a).

The Southeast Region Magnuson-Stevens Act Penalty Schedule in effect at the time of the violations shows a penalty range for first time violators as follows:

Violations Regarding Size/Condition/Quantity of Fish: \$500 - \$50,000; Permit Sanctions 0 - 45 days

Violations Regarding Fishing/Possessing: \$500 -\$50,000; Permit Sanctions 0 - 45 days

In the instant matter, the Agency proposed a civil penalty of \$21,400 and a seventy-five day suspension of permits. Both the Magnuson-Stevens Act and Agency regulations provide that a respondent's inability to pay the penalty can be considered but a respondent must provide information to support that position. 16 U.S.C. § 1858(a); and 15 C.F.R. § 904.108. A respondent must submit financial information to NOAA at least 15 days before the hearing and the failure to do so may support an inference that he cannot support that defense. 15 C.F.R. § 904.108(c); (e). Although D & A Fishworks, LLC indicated in its PPIP that it contested the proposed penalty, D & A Fishworks, LLC

⁴ Civil monetary penalties are subject to the Federal Civil Penalties Inflation Adjustment Act of 1990 and are adjusted regularly for inflation. The current adjustment established the statutory maximum at \$130,000. See 15 C.F.R. § 6.4.

nonetheless failed to provide any substantiating documentation to NOAA. Therefore, such failure bars D & A Fishworks, LLC from asserting financial inability to pay the assessed penalty herein.

Considering the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, (there was no probative evidence of any history of prior offenses), and ability to pay; the penalties proposed for violations committed by Respondents are appropriate; except that no penalty will be assessed vis-a-vis Count 3, because it was not proved.

WHEREFORE,

VI. ORDER

IT IS HEREBY ORDERED, that a civil penalty in the amount of FOUR THOUSAND FIVE HUNDRED DOLLARS (\$4,500) is hereby jointly and severally assessed against Respondents D & A Fishworks, LLC and Jimmie B. Phrampus under Count 1.

IT IS FURTHER ORDERED, that a civil penalty in the amount of ONE THOUSAND DOLLARS (\$1,000) is hereby jointly and severally assessed against Respondents D & A Fishworks, LLC and Jimmie B. Phrampus under Count 2.

IT IS FURTHER ORDERED, that a civil penalty in the amount of FIFTEEN THOUSAND DOLLARS (\$15,000) is hereby jointly and severally assessed against Respondents D & A Fishworks, LLC and Jimmie B. Phrampus under Count 4.

IT IS FURTHER ORDERED, that all federal fisheries permits issued to the F/V SOUTHWIND are hereby suspended for a period of seventy (70) days.

PLEASE TAKE NOTICE, that a failure to pay the civil penalty to the Treasurer of the United States within thirty (30) days from the date on which this decision becomes final Agency action will result in the total penalty becoming due and payable, and 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 of the delinquent penalty. Further, in the event the penalty, or any portion thereof, becomes more than 90 days past due, Respondents may also be assessed an additional penalty charge not to exceed 6 percent per annum.

PLEASE TAKE FURTHER NOTICE, that any petition for review of this decision must be filed within 30 days of this date with the Administrator of the National

Oceanic and Atmospheric Administration as subject to the requirements of 15 C.F.R. §904.273. If neither party seeks administrative review within 30 days after issuance of this order, this initial decision shall become the final decision of the Agency. A copy of 15 C.F.R. §904.273 is attached hereto as Attachment II.

IT IS SO ORDERED.

Done and dated this the 18th day of May, 2010,
at New Orleans, Louisiana.



HONORABLE BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE

ATTACHMENT I: EXHIBIT & WITNESS LISTS

NOAA EXHIBITS – AS OFFERED/ADMITTED CHRONOLOGICALLY

- 01: Handwritten Statement by Jimmie B. Phrampus dated 8/30/2007 (3 pages)
- 02: NOAA Chart 11006 signed by Jimmie B. Phrampus (2 pages)
- 04: NOAA Chart 411 (1 page)
- 05: F/V SOUTHWIND No Fishing Reporting Forms and Logbook Trip Reporting Forms (13 pages)
- 06: Business Records and Correspondence relating to the F/V SOUTHWIND's acquisition of a Vessel Monitoring System (9 pages)
- 07: Vessel Monitoring System (VMS) data (41 pages)
- 08: NOAA-NMFS-SERO-IFQ: OLE View IFQ RS Information (4 page)
- 09: United States Coast Guard-issued Certificate of Documentation to F/V SOUTHWIND and title abstracts of the F/V SOUTHWIND (4 pages)
- 10: Federal Fisheries Permits issued to D&A Fishworks, LLC for F/V SOUTHWIND (12 pages)
- 11: Southeast Fishery Bulletin dated August 11, 2006 and 71 Federal Register 45428
- 12: Southeast Fishery Bulletin dated December 5, 2006 and 71 Federal Register 70680
- 13: Southeast Fishery Bulletin dated March 2, 2007, and 72 Federal Register 10088
- 14: VMS Program Frequently Asked Questions
- 15: Southeast Fishery Bulletin dated November 22, 2006 and 71 Federal Register 67447
- 16: CFR cites
- 17: MS Act Penalty Schedule for Southeast Region
- 03: NOAA Investigation Report by Kelly Moran Kalamas dated August 21, 2008, concerning GCEL Case # SE703253 (11 pages)
- 18: Duckling Report for F/V SOUTHWIND
- 19: TT-3026L/M Software Interface Reference Manual

- 20: SmartTrac Server Interface Detailed Design Table Definitions and Flowchart
- 21: Incident Summary Report, dated August 17, 2007
- 22: Citation No. 125968, dated August 16, 2007
- 23: Property Receipt, dated August 16, 2007
- 24: NOAA Chart 11400 signed by Jimmie B. Phrampus
- 25: Catch Management Form signed by Jimmie B. Phrampus, dated August 16, 2007
- 26: Voluntary Statement of Jimmie B. Phrampus, dated August 16, 2007
- 27: Photograph Log and 13 Photographs taken August 16 and 17, 2007
- 28: Incident Summary Report Narrative regarding August 23, 2007, boarding of the F/V SOUTHWIND
- 29: Citation No. 117993C, dated August 23, 2007
- 30: NOT ADMITTED
- 31: 1 color photograph of strips of red grouper
- 32: Incident Summary Report Report, dated August 30, 2007
- 33: Citation No. 086472C, dated August 29, 2007
- 34: Catch Management Form, dated August 29, 2007
- 35: Property Receipt, dated August 29, 2007
- 36: Incident Summary Report, Supplement, dated August 30, 2007

NOAA WITNESSES

- 1. Special Agent Kelly Moran Kalamas
- 2. Jonathan Todd Howard
- 3. Edward K. Chambers
- 4. Doug B. Loyed
- 5. John Wendell Jones
- 6. Travis Martin Hooker
- 7. Frank DiMartino

RESPONDENT D & A FISHWORKS, LLC'S WITNESSES

1. Edward Thomas Way
2. Dale Ray Sheffield

ATTACHMENT II: PROCEDURES GOVERNING ADMINISTRATIVE REVIEW

§ 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.

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.
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By FedEx

Done and dated this 18th day of May, 2010,
at New Orleans, Louisiana.



NICOLE E. SIMMONS
PARALEGAL SPECIALIST