

UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:	)	DOCKET NUMBER:
	)	
	)	PI0902200
KENNETH LEE HOUSE	)	
	)	
	)	
RESPONDENT	)	

**INITIAL DECISION AND ORDER**

**Issued:**

July 12, 2011

**Issued By:**

Hon. Dean C. Metry

**Appearances:**

**For the National Oceanic and Atmospheric Administration**

Alexa A. Cole, Esq.  
Senior Enforcement Attorney  
National Oceanic and Atmospheric Administration  
Office of General Counsel  
Pacific Islands Region  
1601 Kapiolani Blvd., Suite 1110  
Honolulu, Hawaii 96814 -

**For the Respondent Kenneth Lee House**

Michael G.M. Ostendorp, Esq.  
P.O. Box 3345  
Honolulu, Hawaii 96801

## STATEMENT OF THE CASE

The National Oceanic and Atmospheric Administration (NOAA or Agency) initiated this administrative proceeding for assessment of civil penalty under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) as amended and codified at 16 U.S.C. §§ 1801-1882 and its underlying regulations found at 50 C.F.R. Part 600. On December 29, 2009, NOAA issued and served a Notice of Violation and Assessment (NOVA) alleging Respondents Kenneth Lee House and AO Shibi, Inc. violated 16 U.S.C. § 1801 *et seq.*, as applied through 50 C.F.R. § 600.725(t). Specifically, Respondents were charged with intimidation of a NOAA-approved observer. The NOVA proposed a monetary civil penalty of two thousand five hundred dollars (\$2,500).

Respondents made a timely request for a hearing in accordance with 15 C.F.R. § 904.102(a) and (e), and NOAA forwarded this matter to the U.S. Coast Guard Administrative Law (ALJ) Docketing Center for assignment of an impartial ALJ.<sup>1</sup> The ALJ Docketing Center forwarded this matter to the undersigned for adjudication on February 18, 2010. The Agency filed and served on Respondents their Preliminary Positions on Issues and Procedures (PPIP) on March 9, 2010; Respondents submitted their PPIP on March 19, 2010. On June 8, 2010, a stipulated Order of Dismissal against Respondent AO Shibi, Inc. was executed and approved by the undersigned; however, the charges against Respondent Kenneth Lee House were unaltered.

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<sup>1</sup> Title 15 U.S.C. § 1541 provides that the United States Coast Guard may perform all adjudicatory or judicial functions required by Chapter 5 of Title 5 of the United States Code to be performed by a U.S. Administrative Law Judge for any marine resource conservation law or regulation administered by the U.S. Secretary of Commerce acting through the National Oceanic and Atmospheric Administration.

A hearing was held on November 17, 2010 at the PJKK Federal Building in Honolulu, Hawaii. Mr. Kenneth Lee House, while not present, appeared through counsel Mr. Michael G.M. Ostendorp. The Agency was represented by Ms. Alexa A. Cole, with assistance from Ms. Keisha Sedlacek, a third-year law student from Vermont Law School.<sup>2</sup> The Agency offered ten (10) exhibits and presented the testimony of (3) witnesses. Respondent offered no exhibits and one (1) witness. The list of witnesses and exhibits is contained in ATTACHMENT I.

### **EVIDENCE PRESENTED**

In his opening statement, Respondent's counsel acknowledged that while Mr. House may have lacked social grace, his actions aboard the Ao Shibi Go did not amount to intimidation. (Tr. at 8). By contrast, the Agency proffered that Mr. House exhibited several instances of inappropriate behavior while aboard the Ao Shibi Go, and that these outbursts rendered the NOAA Observer Allegra Banducci fearful of being alone with him. (Tr. at 7).

The Agency's first witness was Mr. Nicholas Wagner, a National Marine Fisheries Service (NMFS) Observer Program Enforcement Liaison. Mr. Wagner indicated that he had debriefed Ms. Banducci shortly after her trip aboard the Ao Shibi Go. (Tr. at 18-19). Based on Ms. Banducci's report, Mr. Wagner prepared an incident report and passed the information to the Office of Law Enforcement. (See Tr. at 16).

The second witness for the Agency was Special Agent Roy Take Tomson. Agent Tomson testified that the NOAA Observer Program had contacted the Office of Law Enforcement and indicated there had been an incident involving an observer aboard a vessel. (Tr. at 26). Shortly thereafter, Agent Tomson interviewed the observer, two

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<sup>2</sup> On March 15, 2011, Mr. Ostendorp filed a Motion to Withdraw as Counsel. On April 12, 2011, the Motion was granted.

crewmembers, and the captain. (Tr. at 27, Agency Ex. 2, Agency Ex. 3, Agency Ex. 4, Agency Ex. 5).

Special Agent Tomson indicated that crew member Swinden Ezra's opinion of Ms. Banducci was that she worked very hard, often staying up late to do her job. (Tr. at 35, Agency Ex. 4). Mr. Ezra characterized Ms. Banducci as a good observer, and characterized Mr. House's behavior towards Ms. Banducci as harsh, explaining that Mr. House often put a lot of pressure on her. (Tr. at 36). Mr. Ezra also related that he saw Mr. House swear and yell at Ms. Banducci while she was on the back deck of the boat. (Tr. at 37). Mr. Ezra was aware there were issues between the observer and the captain, and knew that Ms. Banducci did not want to be alone with the captain. As a result, the crew would often accompany her into the cabin to eat, get food, and, at times, get food for her. (Tr. at 37).

Special Agent Tomson also interviewed crew member Tiwaity Dewey. (Tr. at 37, Agency Ex. 3). Mr. Dewey also had a good impression of Ms. Banducci, indicating she often stayed up late to complete her work. (Tr. at 38). Mr. Dewey specifically recounted an instance in which he and Ms. Banducci were talking in the galley and the captain began yelling and swearing at them. Notably, Special Agent Tomson, was unable to get a full statement from Mr. Dewey regarding this incident, as Respondent and his girlfriend walked in mid-interview. (Tr. at 38-39).

Special Agent Tomson also interviewed Respondent. (Tr. at 40, Agency Ex. 5). Respondent initially indicated that the observer did a fine job and worked hard, often staying up late; his only complaints were that she smelled bad and ate a lot of the food. (Tr. at 40). However, according to Special Agent Tomson, when he started asking more pointed questions, Respondent's opinion changed. (Tr. at 40-41). Respondent indicated that Ms. Banducci slept more than twelve hours at one point, and intimated that she ate

all of the cereal. Mr. House also referred to Ms. Banducci as "the most selfish observer." (Tr. at 41). Soon after, Respondent became visibly upset and began shouting, telling Special Agent Tomson to leave his boat. (Tr. at 40-41).

Under cross-examination by Respondent's counsel, Special Agent Tomson acknowledged that the crew did not like the captain. (Tr. at 51). However, during his investigation, Special Agent Tomson had received conflicting opinions about how Respondent treated the crew. According to the observer, Respondent treated the crew well. (Tr. at 60). Contra wise, neither Mr. Ezra nor Mr. Dewey felt they were treated well by Respondent. (See Tr. at 58).

The final Agency witness was the observer, Allegra Banducci. Ms. Banducci explained that observers are instructed to maintain the Hawaii Longline Observer Program Documentation Notebook and that she did so during her trip on the Ao Shibi Go. (Tr. at 70, Agency Ex. 8). After reviewing her documentation, she pointed out that sometime on May 25, 2009, the captain's anger became directed at her. (Tr. at 72). She recounted that, on this date, while the captain was in the wheelhouse, he began yelling and cursing at her for tapping a spoon on oatmeal. (Tr. at 73).

The witness further testified that, during the last set, the captain indicated he wanted to drink her coffee. (Tr. at 74). Ms. Banducci informed the captain that she was saving the coffee and did not wish to share. (Tr. at 75). At that point, the captain started to yell and scream at her, calling her selfish and stating that he was the captain and could therefore have whatever he wanted on the boat. (Tr. at 75). Ms. Banducci explained that during this incident, Respondent clenched and raised his fists, and began stepping towards her. She testified that her heart was racing and she was "pretty freaked out". (Tr. at 75-77). She was unable to take more than a couple of steps back due to a wall

behind her. Ms. Banducci stated that she was definitely scared and that the incident made her feel "really uncomfortable." (Tr. at 77).

Ms. Banducci explained that the crew began looking out for her. (Tr. at 78). Crew members would escort her places and not leave her alone because they knew she did not want to have any individual interactions with the captain. Ms. Banducci testified that she was afraid of what the captain could do, and that she did not want to give him an opportunity to have the chance to physically harm her, call her any more names, yell at her, or demand things of her. (Tr. at 81).

Respondent testified telephonically on his own behalf. (Tr. at 100-101). Mr. House indicated that he did not recall any problems with Ms. Banducci except for the fact that she did not shower and smelled bad. (Tr. at 108-109). When asked about specific instances such as the argument over oatmeal, Mr. House indicated that he merely asked her to be quieter. (Tr. at 103).

When Mr. House's attention was directed to a separate incident concerning an argument in the galley with Ms. Banducci, the captain indicated he had simply asked Ms. Banducci and a crew member to keep the noise down. (Tr. at 104-105). Mr. House explained that he could not recall whether or not he had used the "F word," but explained that when he gets tired he might use the word every now and then. However, Mr. House testified that Ms. Banducci frequently used the "F word." (Tr. at 105).

Mr. House's attention was then drawn to the incident testified to by Ms. Banducci in which she described a confrontation over use of her coffee. (Tr. at 106-107). Mr. House denied that any confrontation occurred. (Tr. at 107). Instead, Mr. House indicated that he simply didn't have any coffee until the ship returned to port. He further testified that he was never under the impression that Ms. Banducci was avoiding him during the

trip. Instead, he explained that one crew member had a crush on the observer. (Tr. at 108).

On cross-examination, Mr. House testified that, during his interview, he answered the agents' questions and tried to be helpful. (Tr. at 114). He further testified, in contradiction of Agent Tomson, that he did not lose his temper nor did he terminate the interview. Instead, he testified that he was very cordial and simply wanted to clear up the matter. (Tr. at 114).

### **FINDINGS OF FACT**

1. At all relevant times mentioned herein, Ms. Allegra Banducci was a National Marine Fisheries Service (NMFS) observer. (See Agency Ex. 2, Agency Ex. 9).
2. At all relevant times mentioned herein, Ms. Banducci was the NMFS observer on the Ao Shibi Go. (See Tr. at 18-19).
3. At all relevant times mentioned herein, Kenneth Lee House was captain of the Ao Shibi Go. (See Tr. at 26-27).
4. The NOAA Observer Program contacted the Office of Law Enforcement regarding May 2009 incidents involving an observer aboard the Ao Shibi Go. (Tr. at 26-27, Agency Ex. 1).
5. Special Agent Roy Take Tomson and Special Agent Brandon Jim On interviewed Ms. Banducci regarding these incidents on June 4, 2009. (Agency Ex. 1, Agency Ex. 2, Tr. at 27).
6. On May 25, 2009, Ms. Banducci tapped a spoon while cooking oatmeal. Mr. House began to swear and yell at her, telling her she was making too much noise. (Tr. at 33, 53, 72-73, Agency Ex. 8, Agency Ex. 10).
7. When questioned about the oatmeal incident, Mr. House testified that Ms. Banducci began beating a pot of oatmeal around three o'clock in the morning, that this broke his concentration, and that he asked Ms. Banducci to stir quietly or use the microwave. (Tr. at 102-103).
8. On May 30, 2009, Mr. House asked Ms. Banducci for some of her coffee. When she declined, Mr. House began to yell, swear, stomp his feet, raise his hands, and clench his fists. (Tr. at 33, 55-56, 75, Agency Ex. 2, Agency Ex. 8).

9. In response, Ms. Banducci stepped back from Mr. House, but he continued to approach her until she was backed up against a board and could no longer move backwards. (Tr. at 76).
10. The coffee incident caused Ms. Banducci's heart to race and made her "pretty freaked out," and "really, really uncomfortable." (Tr. at 75, 77).
11. Mr. House testified that he "didn't do anything" after Ms. Banducci told him he couldn't have any coffee. (Tr. at 107-108).
12. On May 31, 2009, Mr. House woke up Ms. Banducci and asked her to go over the logs with him. When she asked to do it later, he began to shake her leg. (Tr. at 33, Agency Ex. 8, Agency Ex. 9).
13. Regarding this incident, Mr. House testified that he wanted to go over the daily log with Ms. Banducci, and that she had been "laying in front" for about fourteen (14) hours. He further testified that after Ms. Banducci indicated she didn't want to go over the logs he simply stated to her, "If you don't want to do your job then don't." (Tr. at 115-116).
14. Mr. House testified that at the time of this incident he was annoyed that Ms. Banducci had not showered, so he was "already kind of put out with her." (Tr. at 116).
15. On May 26, 2011, Ms. Banducci was talking to another crew member in the galley and Mr. House began yelling and cursing, telling the two they were making too much noise. (Tr. at 59, 79, 98, Agency Ex. 8).
16. Mr. House testified that Ms. Banducci was discussing something "insignificant" with a crew member while he was trying to concentrate, and he could not recall whether or not he cursed during this incident. (Tr. at 105, 113).
17. Crew member Tiwaity Dewey stated that Mr. House yelled and cursed at him and Ms. Banducci while they were talking in the galley. (Tr. at 59, Agency Ex. 3).
18. Mr. House frequently yelled and cursed at people, including Ms. Banducci. (Tr. at 57, Agency Ex. 4, Agency Ex. 9).
19. Mr. House testified that the only confrontation he had with Ms. Banducci occurred when he asked Ms. Banducci to slow down on eating shredded wheat because it was part of his diet. (Tr. at 118, See Agency Ex. 5).
20. As a result of Mr. House's behavior, Ms. Banducci did not want to eat or use the bathroom while Mr. House was around. (Tr. at 34, 56, Agency Ex. 10).



21. The crew of the Ao Shibi Go would often "look after" Ms. Banducci, accompanying her into her cabin to eat or get food for her because she didn't want to be alone with Mr. House. (Tr. at 37, 56, 78, Agency Ex. 4).
22. After the boat reached port, the crew waited with Ms. Banducci until a cab arrived because Ms. Banducci did not want to be on the dock or the boat with Mr. House. (Tr. at 81).
23. Ms. Banducci feared for her personal safety while around Mr. House. (Tr. at 81, 84).
24. Although Ms. Banducci had access to a satellite phone while aboard the Ao Shibi Go, she did not use it. (Tr. at 67-69).
25. On June 5, 2009, Special Agent Tomson and Special Agent Jeff Pollack interviewed Mr. House. (Agency Ex. 1, Agency Ex. 5).
26. Mr. House stated in his interview that Ms. Banducci worked hard, but complained that she smelled bad and ate a lot of food. (Tr. at 40, Agency Ex. 5).
27. Mr. House referred to Ms. Banducci as "the most selfish observer." (Tr. at 41, Agency Ex. 5).
28. During his interview, Mr. House began shouting and told the Special Agents to leave. (Tr. at 41, 51, Agency Ex. 5).
29. As the Special Agents were leaving the interview, Mr. House stated that the Agents could "take [Ms. Banducci's] stinky self and put her on another boat." (Agency Ex. 5).
30. Mr. House testified that he was very cordial and never lost his temper during the interview with the Special Agents. (Tr. at 114).

## **DISCUSSION**

NOAA must prove the violations alleged in the NOVA by a preponderance of the evidence. See 5 U.S.C. § 556(d); Steadman v. Securities and Exchange Commission, 450 U.S. 91, 107 (1981); In the Matter of Cunog Vo, 2001 WL 1085351 (NOAA 2001). Preponderance of the evidence is proven when the agency illustrates through evidence presented in the record that it is more likely than not that the respondent committed the violation alleged in the NOVA. In the Matter of John Fernandez, III, 1999 WL 1417462

(NOAA 1999). Direct and circumstantial evidence may be relied upon to satisfy the burden of proof. In the Matter of Cunog Vo, 2001 WL 1085351 (NOAA 2001). The burden of producing evidence to rebut agency evidence shifts to the respondent after NOAA proves the allegations contained in the NOVA by a preponderance of reliable, probative and substantial evidence. Id.

Respondent is charged with an offense under the Magnuson-Stevens Act which contains a general prohibition that makes it illegal for a person to violate any of its regulations. See 16 U.S.C. § 1857(1)(A). Specifically, the Magnuson-Stevens Act, through its governing regulations, states it is unlawful to assault, oppose, impede, intimidate, or interfere with a NMFS-approved observer. 50 C.F.R. § 600.725(t).

The Magnuson-Stevens Act was enacted to protect, conserve, and manage the fishery resources of the United States and its adjacent waters. See 16 U.S.C. § 1801(b)(1)(A). 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; In the Matter of Corsair Corporation, F/V CORSAIR, 1998 WL 1277924 (NOAA 1998). Furthermore, it has consistently been held that conservation related violations under the Magnuson-Stevens Act are strict liability offenses. See In Re Northern Wind Seafood, Inc.; *see also In the Matter of: Clarke A. Reposa*; In Re Meredith Fish Co., 4 O.R.W. 66 (NOAA).

In order to sustain the Agency's burden of proof of a preponderance of the evidence that Respondent violated the aforementioned, it must be proven that: 1) Respondent is subject to the jurisdiction of this Court; 2) that the alleged victim was a

NMFS approved observer; and 3) that Respondent did assault, oppose, impede, intimidate, or interfere with the approved observer.

Respondent's counsel did not contest the first two elements of the charge, and it is clear from the testimony, evidence, and exhibits submitted that those two elements are satisfied.

Regarding the third element, it is important to note that neither the statute nor the regulation speaks to a requirement that the intimidation must interfere with the observer's lawful duties. As such, the "reasonable person" standard will be applied to determine whether Ms. Banducci was intimidated by Mr. House's behavior aboard the Ao Shibi Go. The common meaning of intimidation is to place someone in fear. (BLACK'S LAW DICTIONARY (6th ed. 1991)).

The undersigned has carefully considered the arguments of Respondent's counsel. Notably, Respondent's testimony was somewhat contradictory. At times, Respondent indicated that Ms. Banducci did her job just as well as anybody else, aside from the fact that she didn't shower as much as he felt she should have. (Tr. at 118). This would indicate to the undersigned that there were no professional disagreements between Ms. Banducci and Mr. House. However, upon examination by the undersigned, Mr. House acknowledged an incident in which he wanted Ms. Banducci to go over the log with him. (Tr. at 115). When Ms. Banducci indicated that she didn't want to, Respondent stated to her "If you don't want to do your job, then don't." (Tr. at 115-116). Clearly, based on this testimony, there were disagreements between the two over Ms. Banducci's professionalism and willingness to perform her duties.

Throughout his testimony, Respondent minimized many of the incidents Ms. Banducci described. For example, Respondent testified that when Ms. Banducci told him he could not have any of her coffee he simply responded, "Great, not a problem." (Tr. at

107). He denied ever raising his voice, stomping his feet, or threatening the observer. (Tr. at 107-108).

Ms. Banducci's testimony regarding these incidents was both credible and substantiated by the statements and actions of other crew members. Crew member Tiwaity Dewey also recounted the incident in which Mr. House began to yell and curse while he and Ms. Banducci were talking in the galley. (Tr. at 59, 105, 113, Agency Ex. 3). As a result of these transgressions, the crew of the vessel began to "look after" Ms. Banducci while she was aboard the Ao Shibi Go, even going so far as to wait with her at the dock until a cab arrived. (Tr. at 37, 56, 78, Agency Ex. 4). Furthermore, Ms. Banducci noted many of these incidents contemporaneously in her log book, and consistently described these incidents in both her de-briefing and subsequent interview with NOAA special agents. (Agency Ex. 8). As a result, the undersigned is convinced by a preponderance of the evidence that the acts complained of were committed by Mr. House.

The undersigned must consider all the facts and circumstances surrounding the incidents that occurred on the May-June 2009 voyage on the Ao Shibi Go to determine whether or not the observer was intimidated. This includes the fact that Ms. Banducci was a female observer on a vessel for approximately three and a half weeks among the crew of strangers. According to all reports by the crew members and Ms. Banducci, the captain had an unpredictable temper, yelled, and swore at people.

Ms. Banducci credibly testified that she was called into an enclosed area and confronted by Mr. House over her refusal to allow him to drink her coffee. Ms. Banducci described the coffee incident as rendering her "pretty freaked out" and "very, very uncomfortable." (Tr. at 75, 77). She credibly testified that as a result of Mr. House's outbursts and behavior, she did not want to eat or use the bathroom while he was nearby.

(Tr. at 34, 56, Agency Ex. 10). As a result of the incidents aboard the Ao Shibi Go, Ms. Banducci indicated that she feared for her personal safety while around Mr. House. (Tr. at 81, 84).

A reasonable person similarly situated to Ms. Banducci would be expected to feel anxiety, intimidation, and fear. The common meaning of intimidation is to place someone in fear. (BLACK'S LAW DICTIONARY (6th ed. 1991)). Considering the above, it is clear that a reasonable person in Ms. Banducci's situation would feel intimidated as a result of Mr. House's behavior.

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

1. Respondent is a person within the meaning of the Magnuson-Stevens Act. (See 16 U.S.C. §1802(31)).
2. At all relevant times mentioned herein, Ms. Banducci was a National Marine Fisheries Service (NMFS) observer. (See Agency Ex. 2, Agency Ex. 9).
3. Respondent did intimidate Ms. Banducci pursuant to 16 U.S.C. § 1801 *et seq.* and 50 C.F.R. § 600.725(t).

#### **WHEREFORE,**

#### **PENALTY ASSESSMENT**

The Magnuson-Stevens Act authorizes the imposition of a civil penalty up to \$100,000<sup>3</sup> and permit sanctions commensurate to the violation(s) involved. In assessing penalties and permit sanctions, the undersigned must consider a number of factors. These include the nature, circumstances, extent, gravity of the violations, degree of culpability, history of prior offenses, and any other factors justice may require. A respondent's ability to pay is another factor which may be taken into consideration, but only if it is

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<sup>3</sup> Civil monetary penalties are subject to the Federal Civil Penalties Inflation Adjustment Act of 1990 and are adjusted regularly for inflation.

raised by Respondents in a timely fashion. 15 C.F.R. § 904.108. Since Respondent did not raise the ability to pay as an issue in this case, it is deemed that Respondent has the ability to pay any civil penalty assessed herein. Id.

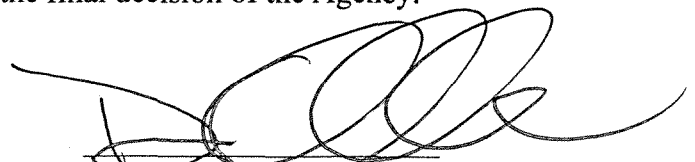
Finding that the Agency has proven by a preponderance of the evidence that Respondent violated the Magnuson-Stevens Act, and considering the factors enumerated above, including the severity of the violation, I find the requested \$2,500 penalty reasonable and appropriate in nature.

### ORDER

IT IS HEREBY ORDERED that the Notice of Violation and Assessment of Administrative Penalty against Respondent Kenneth Lee House, is **PROVED** and a civil penalty in the amount of two thousand five hundred dollars (\$2,500) is assessed.

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



Hon. Dean C. Metry  
Administrative Law Judge  
United States Coast Guard

Done and Dated on this 12th day of July 2011  
Houston, Texas

## **ATTACHMENT I**

### **LIST OF WITNESSES AND EXHIBITS**

#### **AGENCY'S WITNESSES**

1. Mr. Nicholas Wagner
2. Special Agent Roy Take Tomson
3. Ms. Allegra Banducci

#### **RESPONDENT'S WITNESS**

1. Mr. Kenneth Lee House

#### **AGENCY'S EXHIBITS**

1. Offense Investigation Report by Special Agent Roy Take Tomson
2. Memorandum of Interview of Allegra Banducci
3. Memorandum of Interview of Tiwaity Dewey
4. Memorandum of Interview of Swinden Ezra
5. Memorandum of Interview of Kenneth Lee House
6. Magnuson-Stevens Fishery Conservation and Management Act regulations, 50 CFR § 600.725(t)
7. Western Pacific Pelagic Fishery Civil Penalty Schedule
8. Hawaii Longline Observer Program Documentation Notebook
9. Incident Report
10. Supplemental Incident Report

#### **RESPONDENT'S EXHIBITS**

None

## **ATTACHMENT II**

### **PROCEDURES GOVERNING ADMINISTRATIVE REVIEW**

#### **15 CFR § 904.273 Administrative review of decision.**

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address:

Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

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

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

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

(1) The petition must include a concise statement of the case, which must contain a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;

(2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;

(3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations, and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;



- (4) A copy of the Judge's initial decision must be attached to the petition;
- (5) Copies of all cited portions of the record must be attached to the petition;
- (6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and
- (7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.
- (e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.
- (f) No oral argument on petitions for discretionary review will be allowed.
- (g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.
- (h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.
- (i) If the Administrator issues an order denying discretionary review, the order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.
- (j) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be briefed and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.
- (k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the

Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

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

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

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

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

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

## Certificate of Service

I hereby certify that I have this day served the forgoing document(s) upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated:

Alexa A. Cole, Senior Enforcement Attorney  
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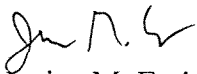
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Dated on July 12, 2011, at  
Houston, Texas

  
Janice M. Emig  
Paralegal Specialist to  
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