

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

IN THE MATTER OF:)	
)	
)	
TOMMY NGUYEN;)	DOCKET NO. SE0801361FM
WILLIAM J. HARPER;)	
F/V CAPT. TOM;)	HON. BRUCE TUCKER SMITH
)	ADMINISTRATIVE LAW JUDGE
)	
RESPONDENTS.)	

DECISION & ORDER

Preliminary Statement

On May 12, 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 Tommy Nguyen and William J. Harper (collectively, Respondents; individually, Respondent Nguyen and Respondent Harper). The NOVA alleged that Respondents are jointly and severally liable for violating the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act or Act), as provided at 16 USC §1857(1)(A), and its implementing regulation as codified at 50 CFR §§622.7(gg).

Specifically, NOAA charged that on or about March 27, 2008, Respondents, jointly and severally, failed to comply with the advance notice of landing requirements of the Gulf red snapper IFQ program as specified at 50 CFR §622.15(c)(3)(i).¹

As a result, the Agency sought a civil penalty totaling \$3,000.00. The court notes that the Agency had previously seized proceeds in the amount of \$1,812.00 from the sale of 453 pounds of red snapper taken from Respondents on March 27, 2008.

On May 12, 2008, the Agency issued a Notice of Permit Sanction (NOPS) to Respondent Nguyen, proposing to suspend all federal fisheries permits issued to the F/V CAPT. TOM for 30 days.

On June 18, 2008, Respondents, through counsel, transmitted a request to NOAA for an administrative hearing to contest the allegations contained within the NOVA.

On January 31, 2011, NOAA transmitted Respondents' request for hearing to the Administrative Law Judge (ALJ) Docketing Center. On February 7, 2011, Chief ALJ Joseph N. Ingolia issued a Notice of Transfer and Assignment of ALJ and Order Requesting Preliminary Positions on Issues and Procedures (PPIPs).² The parties were directed to file their respective PPIPs not later than March 7, 2011. NOAA timely filed its PPIP; Respondents filed their PPIP on March 9, 2011.

On March 17, 2011, the court held a telephonic pre-hearing conference with the parties. The court explained the basic form and structure of a NOAA administrative case

¹ On March 7, 2011, the Agency amended the NOVA to reflect the correct regulatory citation as 50 CFR §622.16(c)(3)(i). At the hearing, counsel for Respondents conceded his case was not prejudiced by the change in citation. (Tr. at 7).

² Pursuant to 15 USC §1541, United States Coast Guard Administrative Law Judges 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.

as it developed, as well as Respondents' various procedural rights at the administrative hearing.

On June 23, 2011, the Agency filed a Supplemental PPIP in this matter.

On June 30, 2011, this matter came on for hearing at the Okaloosa County Courthouse Annex in Shalimar, Florida. Cynthia S. Fenyk, Esq. appeared on behalf of the Agency; Russell R. Stewart, Esq., appeared on behalf of all Respondents. Respondent Nguyen was present in court; however Respondent Harper failed to appear. At the hearing, NOAA presented the testimony of two witnesses and offered eight exhibits into evidence, all of which were admitted into evidence by stipulation with Respondents' counsel. (Tr. at 19). Respondents did not offer any testimony into the record nor did they offer any items of documentary exhibits into evidence.³ The hearing was concluded in one day.

The Agency's witnesses and exhibits are listed in Attachment A.

At the conclusion of the hearing, Respondent's counsel asked that he be granted leave of court to supplement the record with Respondent Harper's deposition. (Tr. at 10). The court granted Respondents' request and announced that the hearing would be continued to allow the taking of Respondent Harper's telephonic testimony. (Tr. at 72).

On July 13, 2011, Respondents' counsel notified the court that Respondent Harper had been located and asked if Respondent Harper could testify telephonically. On August 10, 2011, the court granted that request and ordered that the telephonic testimony

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. I, 2, 3, etc.; Respondent's Exhibits are marked Resp. Ex. A, B, C, etc.; ALJ Exhibits are marked ALJ Ex. I, II, III etc.

of Respondent Harper would be taken on August 31, 2011. However, due to scheduling conflicts, the telephonic hearing date was reset to commence on October 20, 2011.

On October 20, 2011, Respondents' counsel advised the court that although Respondent Harper was aware he was scheduled to testify, Respondent Harper failed to appear at the supplemental telephonic hearing. Accordingly, the court announced the record was closed and set deadlines for the submission of closing briefs. Both parties timely submitted their respective closing briefs.

Respondent Harper's absence is not an inconsequential matter. Under the provisions of 15 CFR §904.211(a)(2), a party who, after proper service of notice, fails to appear at a hearing, may find himself the recipient of a default judgment. Moreover, the presiding judge may find the facts alleged in the NOVA and NOPS as proved against that respondent. Id. Additionally, 15 CFR §904.212 provides that "whenever the record discloses the failure of any party to respond to orders or notices from the Judge, the Judge may issue . . . Any order, except dismissal, as is necessary for the just and expeditious resolution of the case." Id. (emphasis added).

Thus, the court may, and hereby does, enter a default judgment against Respondent Harper and finds as proved all of the allegations contained in the NOVA and NOPS. Such a finding also results in the automatic imposition of liability upon Respondent Nguyen under the doctrine of joint and several liability, discussed, infra. However, even without the imposition of a default judgment against Respondent Harper, the evidence of Respondent Harper's violations clearly implicates and obligates Respondent Nguyen, also by virtue of joint and several liability.

After careful review of the entire record, the court finds that NOAA proved by a preponderance of reliable, probative, and credible evidence that Respondents did, jointly and severally, on or about March 27, 2008, violate the Magnuson-Stevens Act by failing to comply with the advance notice of landing restrictions as specified in 16 USC §1857(1)(A) and 50 CFR §§622.7(gg), 622.16(c)(3)(i).

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 CAPT. TOM was and is a registered and flagged vessel of the United States, documentation number 680456. (Agency Ex. 7).
2. At all times relevant herein, the F/V CAPT. TOM was and is owned by Respondent Tommy Nguyen. (Tr. at 51; Agency Ex. 7).
3. At all times relevant herein, and specifically on or about March 27, 2008, Respondent William J. Harper operated the F/V CAPT. TOM. (Agency Ex. 1, 2, and 4; Respondents' PPIP)
4. At all times relevant herein, the F/V CAPT. TOM held a "Gulf of Mexico Reef Fish Commercial" Federal Fisheries Permit issued by the National Marine Fisheries Service. (Agency Ex. 8).
5. Respondent Tommy Nguyen is a "person" as defined by 16 USC §1802(36).
6. Respondent William J. Harper is a "person" as defined by 16 USC §1802(36).
7. Respondent Tommy Nguyen, as owner/operator of a vessel, is held jointly and severally liable for those actions of Respondent William J. Harper which violated the Magnuson-Stevens Act or its underlying regulations under the doctrine of respondeat superior. 15 CFR §904.107.

8. Respondent Tommy Nguyen is liable for the actions of Respondent/Captain William J. Harper under the doctrine of respondeat superior. 15 CFR §904.107.
9. Grouper and red snapper are among the species included in Gulf of Mexico Reef Fish. 50 CFR §622.4.
10. On March 27, 2008, Officer Neil Gordon Goss, IV of the Florida Fish and Wildlife and Conservation Commission in Bay County, Panama City, Florida, was advised by appropriate NOAA authorities that the F/V CAPT. TOM was scheduled to land at Greg Abrams Seafood dock, Panama City, Florida at 09:00 AM CT. (Tr. at 21; Agency Ex. 5).
11. On March 27, 2008, at approximately 0800 hours, Officer Neil Gordon Goss, IV of the Florida Fish and Wildlife and Conservation Commission in Bay County, Panama City, Florida, was on duty and was present in the vicinity of the Greg Abrams Seafood dock, Panama City, Florida, and personally observed the F/V CAPT. TOM tied to the dock in violation of 50 CFR §600.10 (2008); 50 CFR §622.4(a)(2)(ix) (2008); 50 CFR §§622.7(gg); 50 CFR §622.16(c)(3)(i) (2008). (Tr. at 21).
12. On March 27, 2008, at approximately 0819 hours, Officer Neil Gordon Goss, IV of the Florida Fish and Wildlife and Conservation Commission in Bay County, Panama City, Florida, was on duty and was present in the vicinity of the Greg Abrams Seafood dock, Panama City, Florida, and personally observed fish being offloaded from the F/V CAPT. TOM, in violation of 50 CFR §600.10 (2008); 50 CFR §622.4(a)(2)(ix) (2008); 50 CFR §§622.7(gg); 50 CFR §622.16(c)(3)(i) (2008). (Tr. at 23).
13. On March 27, 2008, Officer Neil Gordon Goss, IV of the Florida Fish and Wildlife and Conservation Commission in Bay County, Panama City, Florida, seized 453 lbs of red snapper, obtained three bids from seafood dealers in the area and sold the catch to the highest bidder for \$1,812.00 (Tr. at 39; Agency Ex. 1, 4).

Summary of Decision

The evidence adduced at the hearing clearly established that Respondents were on notice that the advance notice of landing requirements applied to them and their fishing operations. (Agency Ex. 6). The evidence also demonstrates that, on March 27, 2008,

Respondent Harper notified the NMFS Office of Law Enforcement, via cellular telephone, at approximately 06:09 AM CT, of the F/V CAPT. TOM's intent to land. The evidence further reveals that Respondent Harper was assigned a landing time of 09:00 AM CT, thus giving Respondent Harper a "lead time" of two hours and fifty one minutes. (Agency Ex. 5).

However, the undisputed evidence also establishes that the F/V CAPT. TOM landed at approximately 8:00 a.m. (CDT), at least one hour before the assigned landing time. (Agency Ex. 1, 2, 4; Respondents' PPIP and Closing Brief).

Thus, the early landing and offloading constituted a violation of the express provisions of 50 CFR §600.10 (2008); 50 CFR §622.4(a)(2)(ix) (2008); 50 CFR §§622.7(gg); 50 CFR §622.16(c)(3)(i) (2008). Accordingly, Respondent Harper's violations are attributable to Respondent Nguyen via the doctrine of respondeat superior, per 15 CFR §904.107.

Discussion

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 USC §556(d); see In the Matter of Cunog VO, 2001 WL 1085351 (NOAA 2001); see also Dept. of Labor v. Greenwich Collieries, 512 US 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 US 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 US 752,

764-65 (1984). 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, substantial, and credible evidence. See Steadman v. S.E.C., 450 US 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 USC §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 USC §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 USC §1802(36). The parties do not contest that Respondents herein are “persons” as that term is contemplated by 16 USC §1802(36).

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).

“Individuals are properly charged with the responsibility to be aware of the pertinent content of the laws and regulations that are applicable to their fishing activities.” In the Matter of Giuseppe Taormina, 6 O.R.W. 249, 251 (N.O.A.A. App. 1990).

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 CFR §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). It is not necessary that a vessel owner exercise detailed control over the operations of his vessel in order to be held liable for the illegal activities of its master and crew. It is sufficient that the owner of the vessel, and the major beneficiary of its operations, authorized the fishing expedition that was illegally conducted. Since it acquires a share of the vessel's production, so must it bear a major responsibility, along with the captain, for the latter's unlawful acts. To hold otherwise would be to allow vessel owners to escape responsibility for the transgressions of the captains that they hire, authorize to operate their boats, and have the authority to fire. Such a holding would substantially inhibit the effective enforcement of the Magnuson Act and the applicable regulations. 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).

There is no dispute herein that Respondent Harper, as the operator of the F/V CAPT. TOM, was an employee of Respondent Nguyen at the time of the alleged violation.⁴ Consequently, Respondent Harper's actions are imputed to his employer, Respondent Nguyen, under 15 CFR §904.107 and the doctrine of respondeat superior, as that doctrine is described in NOAA jurisprudence discussed supra. Therefore, Respondent Nguyen is jointly and severally liable for the actions of Respondent Harper.

C. Analysis

The Agency charged Respondents, jointly and severally, with one violation of 16 USC §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 “fail[ing] to comply with any provision related to the Gulf red snapper

⁴ Although Respondent Nguyen did not attempt to argue Respondent Harper was an independent contractor, the court notes that such an argument would nevertheless fail as 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.

IFQ program as specified in §622.16(c)(3)(i)⁵ (advance notice of landing) in violation of the Magnuson-Stevens Fishery Conservation and Management Act, as amended at 16 USC §1857(1)(A) and 50 CFR §622.7(gg).” (NOVA, May 12, 2008).

At all times relevant herein, Respondent Tommy Nguyen owned the F/V CAPT. TOM, a registered and flagged vessel of the United States and holder of a duly issued Federal Fisheries Permit for Gulf of Mexico Reef Fish Commercial. (Agency Ex. 7 and 8). Accordingly, on or about March 27, 2008, it was incumbent upon “a person aboard a red snapper IFQ endorsed vessel to comply with the requirements the Gulf red snapper IFQ program as set forth at §622.16” 50 CFR §622.4(a)(2)(ix). As a red snapper endorsed vessel, Respondents were obligated to, *inter alia*, obey the advance notice of landing requirements as set forth at 50 CFR §622.16(c)(3)(i).

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

“Individuals are properly charged with the responsibility to be aware of the pertinent content of the laws and regulations that are applicable to their fishing activities.” In the Matter of Giuseppe Taormina, 6 O.R.W. 249, 251 (N.O.A.A. App.

⁵ Originally, the NOVA incorrectly cited to 50 CFR §622.15(c)(3)(i); in the Agency’s PPIP, it corrected the citation.

1990). As participants in a highly regulated industry, Respondents were obligated to keep abreast of the regulations that govern their business. See, e.g., In re Cuong Vo, 2001 WL 1085351 (N.O.A.A.) (noting that “when one participates in the highly regulated commercial fishing industry, that person is presumed to possess knowledge of the rules and regulations governing that industry and is subject to the rules and regulations governing that business, regardless of whether the individual has actual knowledge of such rules or regulations.”)

The applicable 2008 regulations require the owner or operator of a vessel landing IFQ red snapper to notify the relevant authorities at least three hours prior to landing. 50 CFR 622.16(c)(3)(i)(2008). It is undisputed that a person aboard the F/V CAPT. TOM, probably Respondent Harper, contacted the relevant authorities on March 27, 2008, at 07:09 AM ET (06:09 AM CT) and was assigned a landing time of 09:00 AM CT on March 27, 2008, at Greg Abrams Seafood, Panama City, Florida. The F/V CAPT. TOM was then provided with a confirmation code, 3H-032708-418, of its advance notice of landing. (Agency Ex. 5).

It is further undisputed that the F/V CAPT. TOM arrived at Greg Abrams Seafood dock at least one hour before to the designated 09:00 AM CT landing time. Officer Neal Gordon Goss, IV of the Florida Fish and Wildlife Conservation Commission in Bay County, Panama City, Florida, observed the “[F/V] CAPT. TOM tied off to the dock there at Abram’s Seafood” at approximately 08:00 a.m. (Tr. at 21). Although Officer Goss observed the F/V CAPT. TOM tied to the dock early, he did not immediately approach the vessel. Thereafter, however, Officer Goss returned to the dock where the F/V CAPT. TOM was docked and “saw them taking fish off the vessel.” (Tr. at 21). At

that time, Officer Goss approached the F/V CAPT. TOM and spoke with Respondent Harper. (Tr. at 22). During his conversation with Respondent Harper, Officer Goss observed “red snapper coming off the boat as well as grouper already in totes sitting on the dock.” (Tr. at 22). Officer Goss then communicated with NOAA personnel who confirmed that the landing time for the F/V CAPT. TOM was supposed to have been no earlier than 09:00 AM CT on March 27, 2008. (Tr. at 22; Agency Ex. 5).

Respondents incorrectly contend that “[t]he changes effective January 3, 2008, apply . . .” (Respondents’ Post-Hearing Brief). It is undisputed herein that the incident at issue occurred on March 27, 2008. Therefore, the authority relied upon Respondents was outdated as the regulatory changes effective January 3, 2008, were only in effect from January 3, 2008, to January 27, 2008. On January 4, 2008, new regulatory changes to 50 CFR §622.16 went into effect until March 27, 2008. See 73 FR 410 (Jan. 3, 2008).

VI. Penalty Assessment & Ability to Pay

In 2008, the Magnuson-Stevens Act authorized the imposition of a civil penalty of up to \$130,000 and permit sanctions commensurate to the violations involved. 16 USC §1858(a), (g). In assessing penalties and or permit sanctions, the court may 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 violations, and ability to pay. Id. at (a), (g)(2); 15 CFR §904.108(a). Furthermore, a respondent “has the burden of proving such inability to pay by providing verifiable, complete, and accurate financial information to NOAA.” 15 CFR §904.108(c). “Agency counsel may require the respondent to complete a financial information request form . . . if the respondent does not submit the requested financial information, he or she will be presumed to have the

ability to pay.” Id. Respondents did not comply with NOAA’s request for financial information nor did Respondents offer any financial information relative to their ability to pay at the hearing. Thus, Respondents are, jointly and severally, presumed to have the ability to pay any civil penalty imposed hereby.

The court notes that in 2010, the Agency eliminated the presumption in favor of assessed civil penalties and permit sanctions contained in the NOVA and NOPS. See, 75 Fed. Reg. 13050 (Mar. 18, 2010) (Proposed Rule); and 75 Fed. Reg. 250523 (Jun. 23, 2010) (Final Rule) (now codified at 15 CFR § 904.204(m)). Additionally, the Administrative Law Judge is no longer required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document. Id. Now, the Administrative Law Judge assesses a civil penalty and imposes a permit sanction “taking into account all of the factors required by applicable law.” Id. This regulatory change is procedural and not substantive in nature. Therefore, it applies to the instant proceedings even though the Agency issued its NOVA and NOPS in 2008.

Considering the nature, circumstances, extent, and gravity of the alleged violation; the respondent’s degree of culpability, no probative evidence of any history of prior offenses by any of the Respondents (Tr. at 52), and ability to pay; the following penalty is appropriate:

A civil penalty, in the amount of \$2,000.00, is jointly and severally imposed on all Respondents.

In this particular case, it appears that Respondent Harper attempted to take reasonable steps to notify the Agency of his planned landing. The facts reveal that

although Respondent Harper was given a 09:00 AM CT landing time, he nevertheless docked at least one hour earlier than assigned time: at or before 08:00 AM CT.

What is more interesting, however, is the fact that Officer Goss of the Florida Fish and Wildlife Conservation Commission in Bay County, Panama City, Florida was present (or in the near vicinity) at the time the F/V CAPT. TOM tied up at the dock. Query: since Officer Goss was present at the time the F/V CAPT. TOM tied up, albeit an hour early, why didn't he simply go to the vessel to expedite offloading?

There is no evidence that Respondents' actions harmed the fishery or contributed to the depletion of the natural resource. While it is true that Respondents' actions constitute a technical violation of the regulations, it is equally true that a law enforcement officer was present and could have easily boarded the F/V CAPT. TOM and supervised an otherwise lawful landing.

Thus, given the facts of this particular case, a permit sanction of three days shall also be imposed in addition to the penalty discussed, supra.

WHEREFORE,

Order

IT IS HEREBY ORDERED, that the following penalties are appropriate and imposed:

A civil penalty, in the total amount of \$2,000, is jointly and severally imposed on Respondents Tommy Nguyen and William J. Harper.⁶

IT IS FURTHER ORDERED that a permit sanction of **THREE DAYS** be imposed against the F/V CAPT. TOM.

⁶ The court notes that \$1,812.00 is currently held in escrow by NOAA subject to policies and practices with regard to such funds. (Agency Ex. 1, 4).

PLEASE TAKE NOTICE, that a failure to pay the civil penalty to the Department of Commerce/NOAA 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 CFR §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 CFR §904.273 is attached hereto as Attachment B.

IT IS SO ORDERED.

Done and dated this 18th day of January, 2012,
at New Orleans, Louisiana.



HON. BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE

ATTACHMENT A

Agency's Witnesses

1. Neal Goss
2. Elizabeth Nelson

Agency's Exhibits

1. Florida Fish and Wildlife Conservation Commission Division of Law Enforcement, Incident Summary Report Number FWNW08OFF-2439 (2 pages)
2. Florida Fish and Wildlife Conservation Commission Division of Law Enforcement, Citation Number 138886C (1 page)
3. Four color photographs: two depicting red snapper on ice; one depicting the stern and starboard sides of the F/V CAPT. TOM; one depicting the vessel number (1 page)
4. Offense Investigation Report on Case Number C0800722, completed by Special Agency Elizabeth Slavin, dated April 14, 2008 (3 pages)
5. OLE Notification Transaction Detail reported by the F/V CAPT. TOM (1 page)
6. Southeast Fishery Bulletin, FB08-002, dated January 4, 2007, captioned "NOAA Implements New Regulations for the Gulf of Mexico Vermilion Snapper Fishery and the Red Snapper Individual Fishing Quota (IFQ) Program: Small Entity Compliance Guide" (2 pages)
7. Department of Homeland Security, United States Coast Guard National Vessel Documentation Center Certificate of Documentation on the F/V CAPT. TOM, 680456 (4 pages)
8. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Federal Fisheries Permit, Gulf of Mexico Reef Fish Commercial (14 pages)

ATTACHMENT B

NOTICE OF APPEAL RIGHTS

15 C.F.R. § 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 30 days after the date the decision is served. The petition shall be addressed to 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 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.