

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:

Bartholomew O. Niquet,

and

Thomas C. Niquet

Respondents

Docket Number:

SE1100310
F/V GALILEAN

INITIAL DECISION

Issued:

May 4, 2012

Issued By:

Hon. Michael J. Devine

Appearances:

For the National Oceanic and Atmospheric Administration:

Cynthia S. Fenyk, Esq.
National Oceanic and Atmospheric Administration
Office of General Counsel
Southeast Region
263 13th Avenue South, Suite 177

For the Respondents

Russell R. Stewart, Esq.
900 E. Fourth Street
P.O. Box 2542
Panama City, FL 32402

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT3

II. FINDINGS OF FACT4

III. DISCUSSION.....5

 A. Agency’s Burden of Proof.....5

 B. Charged Violation – Fishing and/or Having Gear Ready to Fish in Closed Area.....6

Undisputed Facts7

Operating within the Edges8

Respondent’s Post-Hearing Brief9

Longline Gear Requirements10

Specific Intent or Knowledge is not required for violation of the Magnuson Act11

Violations Proved.....13

 C. PENALTY ASSESSMENT AND PERMIT SANCTION.....13

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW15

V. CONCLUSION.....16

VI. ORDER.....17

LIST OF WITNESSES AND EXHIBITS18

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW20

PROCEDURES GOVERNING ADMINISTRATIVE REVIEW24

I. PRELIMINARY STATEMENT

The National Oceanic and Atmospheric Administrative (NOAA or Agency) initiated this proceeding for assessment of civil penalty sanctions against respondents Bartholomew O. Niquet and Thomas C. Niquet. NOAA, on June 3, 2011, issued a Notice of Violation and Assessment (NOVA) on Respondents. In the issued NOVA, Respondents were charged with one (1) violation of the Magnuson-Stevens Fisheries Conservation Act (Magnuson-Stevens Act). The alleged violation occurred aboard the Fishing Vessel (F/V) GALILEAN, a vessel owned by respondent Bartholomew O. Niquet and, at all relevant times, operated by respondent Thomas C. Niquet. The NOVA alleged violations of:

50 C.F.R. § 622.34(k) – did fish in violation of the prohibitions, restrictions, and requirements applicable to seasonal and/or area closures included but not limited to: prohibitions of all fishing, gear restrictions, restrictions on take or retention of fish.

The Agency seeks to impose a civil penalty totaling \$7,500, jointly and severally against Respondents. Respondents filed a request for hearings and these matters were transferred to the United States Coast Guard Administrative Law Judge (ALJ) Docketing Center for adjudication pursuant to the legal authority contained in 15 U.S.C. § 1541 and the interagency agreement between NOAA and the United States Coast Guard.

On July 27, 2011, this matter was assigned to the undersigned judge. Following receipt of Preliminary Positions on Issues and Procedures (PPIP) from the parties and after holding scheduling conferences, the hearing in the above referenced proceedings was held on January 12, 2012, in Panama City, Florida. At the hearing, attorney Cynthia S. Fenyk appeared on behalf of NOAA. Attorney Russell R. Stewart appeared on behalf of Respondents.

In support of the allegations against Respondents, NOAA introduced the testimony of five (5) witnesses and offered twenty-three (23) exhibits into evidence, all twenty-three (23) of

which were admitted into evidence. Agency counsel did not offer Agency Exhibit 6 into evidence so there is a gap in the numbering of the exhibits. (Transcript (Tr.) at 151). Counsel for Respondents introduced the testimony of one (1) witness and offered one (1) exhibit into evidence.

On February 27, 2012, the Agency filed a post-hearing brief which included the Agency's Proposed Findings of Fact and Conclusions of Law. Likewise, Respondents, through counsel, filed a post-hearing brief/argument on March 2, 2012. Respondents' post-hearing brief did not contain any enumerated proposed findings of fact and/or conclusions of law. On March 14, 2012, the Agency filed a reply brief in keeping with the schedule agreed to by the parties at the hearing. Respondents have not filed any further argument. The record is now closed for decision. Rulings on the Agency's Proposed Findings of Fact and Conclusions of Law are included in Attachment II.

After careful review of the entire record in this matter, I find NOAA established by a preponderance of reliable and credible evidence that Respondents, Bartholomew O. Niquet and Thomas C. Niquet, committed one (1) violation of the Magnuson-Stevens Act.

II. FINDINGS OF FACT

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

1. On or about January 21, 2011, and at all times relevant to the above-captioned matter, Respondent Bartholomew Niquet was the owner of the F/V GALILEAN. (Tr. at 131; Agency Ex. 18, 19).
2. On or about January 21, 2011, and at all times relevant to the above-captioned matter, Respondent Thomas C. Niquet was the operator of the F/V GALILEAN, United States documentation number 579208. (Tr. at 16, 130-31; Agency Ex. 1, 17, 18).

3. On January 21, 2011, a federal fisheries permit for the Gulf of Mexico Reef Fish Fishery, Permit No. RR-203 had been issued to F/V GALILEAN and Bartholomew Niquet. (Agency Ex. 19).
4. A federal regulation implementing closure to fishing of an area known as “the Edges,” from January 1 through April 30 each year, was filed with the Federal Register and published as part of 50 C.F.R. § 622.34(k) on June 24, 2009. 74 FR 30001; (Tr. At 133-135; Agency Ex. 20, 21).
5. The boundaries of the Edges’ closed area set forth in 50 C.F.R. 622.34(k) are within lines drawn between the following coordinates:
 - Northwest corner = 28 degrees 51 minutes North; 85 degrees 16 minutes West
 - Northeast corner = 28 degrees 51 minutes N; 85 degrees 04 minutes West
 - Southwest corner = 28 degrees 14 minutes N; 84 degrees 54 minutes West
 - Southeast corner = 28 degrees 14 minutes N; 84 degrees 42 minutes West(Agency Ex. 20, 21).
6. On or about January 21, 2011, the F/V GALILEAN was boarded at approximately 4:45 a.m. by a boarding party from the U.S. Coast Guard Cutter COBIA while inside the Edges. (Tr. at 13-26; Agency Ex. 1, 2, 3, 4). Approximately 8,000 pounds of Red Grouper and 300 pounds of Scamp were found on board the vessel. (*Id.*).
7. During the Boarding on January 21, 2011, baskets with baited hooks were observed on deck. (Tr. at 16-24; Agency Ex. 1, 2, 3, 4).
8. On January 21, 2011, the F/V GALILEAN was tracked within the boundaries of the area known as the Edges which is within the exclusive economic zone (EEZ), as defined at 16 U.S.C. § 1802(6), and was boarded in the location of 28 degrees 40.059 minutes North and 85 degrees 0.154 minutes West. (Tr. at 13-16, 34-58; Agency Ex 1, 2, 8, 9, 10, 13, 14, 15, 16).
9. On January 21, 2011, after the F/V GALILEAN was boarded, Respondent Thomas Niquet stated that he was unaware he was in a closed fishing area. (Tr. at 127, 144-145; Agency Ex. 2).
10. After the boarding of the F/V GALILEAN on January 21, 2011, the catch was seized and sold. (Tr. at 124-143; Agency Ex. 16, 17).
11. Respondents have no record of any prior fishing violations within the past five years. (Tr. at 150-51).

III. DISCUSSION

A. Agency’s Burden of Proof

In this case, Respondents were charged with one (1) violation. In order to prevail on the charge instituted against Respondents, NOAA must prove the violations alleged by a preponderance of the evidence. See 5 U.S.C. § 556(d); see also In the Matter of: Cuong Vo, 2001 WL 1085351 (NOAA 2001). Preponderance of the evidence means the Agency must show it is more likely than not Respondents committed the violation with which they are charged. See In the Matter of: John Fernandez, III, 1999 WL 1417462 (NOAA 1999). NOAA may rely on either direct or circumstantial evidence to establish the violation and satisfy the burden of proof. See In the Matter of: Cuong Vo, *supra*. The burden of producing evidence to rebut or discredit the Agency's evidence will only shift to Respondents after NOAA proves the allegations contained in the NOVA by a preponderance of reliable, probative, substantial, and credible evidence. Id.

B. Charged Violation – Fishing and/or Having Gear Ready to Fish in Closed Area

The Magnuson-Stevens Act includes the provision it is unlawful for any person to violate the Act or any regulation or permit issued pursuant to the Act. 16 U.S.C. § 1857(1)(A). Regulations contained in 50 C.F.R. Part 622 implement provisions of the Magnuson-Stevens Act, to include implementing fishery closures to manage fishery resources. In particular, it is unlawful for any person to fish in violation of the prohibitions, restrictions and requirements applicable to seasonal and/or area closures, including but not limited to: prohibition of all fishing gear restrictions, restrictions on take or retention of fish, fish release requirements, and restrictions on use of an anchor or grapple, as specified in 50 C.F.R. § 622.34. See 50 C.F.R. § 622.7(1).

In this matter, NOAA has presented evidence regulations were in force on January 21, 2011, that prohibited fishing in the area known as the Edges from January 1, 2011 through April

30, 2011. 50 C.F.R. § 622.34(k). Both fishing in the area and/or having possession of any fish in the area, except when transiting with fishing gear stowed, is prohibited. *Id.* The regulations emphasize that transiting through the area is only allowed if it is, “non-stop progression through the area; fishing gear appropriately stowed means – (i) A longline may be left on the drum if all gangions and hooks are disconnected and stowed below deck. Hooks cannot be baited. All buoys must be disconnected from the gear; however, buoys may remain on deck.” *Id.* at 622.34(k)(4).

NOAA alleged Respondents, while operating the F/V GALILEAN within the exclusive economic zone (EEZ) on January 21, 2011, violated these provisions by fishing in violation of seasonal area closures, violating fishing gear restrictions in a closed area, and violating take or retention of fish restrictions. The minimum elements necessary to prove these allegations require the Agency to prove by a preponderance of the evidence:

- (1) Regulations were in effect, at the time of the alleged violation, which prohibited fishing in a closed area and/or prohibited possession of fish on board when having fishing gear on deck baited or ready to fish in the closed area (known as the Edges).
- (2) Respondents, while operating the F/V GALILEAN on or about January 21, 2011, were within the closed fishing area known as the Edges.
- (3) Respondent, while operating the F/V GALILEAN within the closed area, fished or possessed fish while maintaining fishing gear on deck and baited and ready to fish on or about January 21, 2011.

Undisputed Facts

Respondents do not dispute regulations were in affect at the time of the allegations which closed the area known as the Edges. (Tr. at 133-35; Agency Ex. 20-22). In fact, Respondents did not dispute that NOAA provided public notice of these closures via the Federal Register and bulletins. (*Id.*). Despite these published notices, Respondent contended they were unaware of the closure. (Agency Ex. 2). Respondents stipulated the F/V GALILEAN was owned by

Respondent Bart Niquet and the fishing permits were in his name at all times relevant to these proceedings. (Tr. at 131; Agency Ex. 18, 19). It is also not disputed that Respondent Thomas Niquet was operating the F/V GALILEAN on January 21, 2011, when the vessel was boarded. (Tr. At 145-146). Nor is it disputed there were baited hooks on deck when the F/V GALILEAN was boarded. (Id.). Finally, it was agreed Respondents have no previous violations. (Tr. at 151).

By reviewing these undisputed facts, two of the three minimum elements needed to prove the violations have already been established in the record. The first element requires proof that regulations were in affect that closed the Edges. Respondents admitted the Edges were closed to fishing by published regulations at the time of the alleged violations. Proof that Respondents had actual knowledge of the closure is not required to establish a violation. The third element requires proof that Respondents fished or possessed fish and/or had fishing gear on deck and baited in the closed area. As stated earlier, the regulations do not just prohibit fishing in a closed area, they also prohibit possession of any fish in that area except when transiting the area with fishing gear properly stowed. See 50 C.F.R. § 622.34(k)(3). Respondents do not dispute they possessed fish, that gear was on deck, and that hooks were baited when they were boarded; the gear was not stowed below deck. Based upon these undisputed facts, the one remaining issue involves the second element. Was Respondent operating within the closed area, known as the Edges, on or about January 21, 2011?

Operating within the Edges

On January 21, 2011, Coast Guard Sector Mobile asked the Coast Guard Cutter COBIA to proceed to the Edges and board the vessel F/V GALILEAN. (Tr. at 13-14). The Edges was closed to federal fishing at that time, and the Coast Guard Cutter COBIA was to investigate the

vessel located within the closed area. (*Id.*). At approximately 4:45 a.m. on January 21, 2011, the F/V GALILEAN was tracked within the boundaries of the area known as the Edges, as defined at 16 U.S.C. § 1802(6), and was boarded in the location of 28 degrees 40.059 minutes North and 85 degrees 0.154 minutes West. (Tr. at 13-16; Agency Ex 1, 2, 8, 9, 10, 13, 14, 15, 16). Approximately 8,000 pounds of Red Grouper and 300 pounds of Scamp were found on board the vessel. (*Id.*). During the boarding, baskets with baited hooks were observed on deck. (Tr. at 16-24; Agency Ex. 1, 2, 3, 4). Captain Thomas Niquet cooperated with the boarding and indicated he was not aware the area was closed. (Tr. at 16-19, 28, 144-16; Agency Ex. 2). Upon completion of the inspection, the Captain was directed to return to port and the catch was seized and sold. (Tr. at 147-48). The evidence presented by NOAA establishes that Respondent Thomas Niquet was the operator of the F/V GALILEAN and the F/V GALILEAN was within the Edges (the closed area) when it was boarded on January 21, 2011.

Respondent's Post-Hearing Brief

Respondents did not dispute the Coast Guard boarded the F/V GALILEAN within the area known as the Edges in their PPIPs, during the hearing, or in their Post-Hearing Brief. However, in their Post-Hearing Brief, Respondents do argue Respondent Thomas Niquet only admitted to fishing in a location outside of the closed area. Respondents also argue the baited hooks on board the F/V GALILEAN were being repaired from earlier fishing and there was nowhere else to stow them below decks. In response, NOAA filed a Reply Brief asserting the evidence shows the F/V GALILEAN was engaged in "fishing" as defined in the Magnuson-Stevens Act 16 U.S.C. § 1802(16)¹. Longline gear was aboard the vessel and gangions and

¹ Fishing is defined under 16 U.S.C. § 1802(16) at including "(A) the catching, taking or harvesting of fish; (B) the attempted catching, taking or harvesting of fish; (C) and other activity which can reasonably be expected to result in the catching, taking or harvesting of fish; or (D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C)."

hooks were baited. (Agency Exhibit 1, 2, 3, 4). The Agency also noted that since Respondent Thomas Niquet testified his fishing operation shut down at dusk on January 20, 2011, that he essentially admitted he was fishing inside the Edges closed area.

While Respondent only admitted to fishing at a location outside the closed area, he also stated he did not know the Edges area was closed. During the hearing, NOAA presented substantial evidence showing the F/V GALILEAN was tracked inside the closed area on January 20 and 21, 2011, before the boarding. (Tr. at 18-19, 87-88; Agency Ex. 1, 13, 14). VMS tracking showed the F/V GALILEAN spent a lot of time in the Edges closed area during the January 2011 fishing voyage. (*Id.*). Based upon this evidence, Respondents' Post-Hearing Brief's contention that fishing only occurred outside of the closed area is not a credible argument. However, a finding of fact need not be made on this issue. In order to prove the violation alleged, NOAA can either prove Respondents fished in the closed area or failed to properly stow gear when transiting a closed fishing area with fish on board. NOAA has established Respondents were within the closed area without having their gear properly stored while having fish on board.

Longline Gear Requirements

Respondents argued the baited hooks aboard F/V GALILEAN were just being repaired and there was nowhere to stow them below deck. (Tr. at 146-48). However, even though Respondent Thomas Niquet testified that the storage available below was full of bait and fish, Respondents were still required to comply with the gear restrictions that require gear be properly stowed when transiting a closed fishing area.

Respondents' argument is rejected. The facts show there was gear on deck including baited hooks, contrary to the requirements of the regulations. Additionally, NOAA is not

required to prove the vessel was actually engaged in fishing in the closed area. Being in possession of fish and having gear baited on deck is enough to constitute a violation. I find NOAA established by a preponderance of reliable and credible evidence that the F/V GALILEAN had fishing gear aboard on deck, that this gear was capable of being used for fishing, it was not properly stowed, the vessel was in possession of fish, and it was in a closed area; therefore, the violation is proven.

Specific Intent or Knowledge is not required for violation of the Magnuson Act

As noted above, Respondent Thomas Niquet stated he did not know the Edges area was closed. The Magnuson Act is a strict liability statute and whether Respondent had actual knowledge the Edges area was closed or that he was fishing within the closed area intentionally is not a defense to the charged violation. There is no dispute that closure of the Edges, annually from January 1 through April 30, was published in the Federal Register in 2009 and subsequently in the Code of Federal Regulations in 50 C.F.R. § 622.34(k). Legal notice was sufficient and actual knowledge is not required. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Wolfson v. United States, 492 F.2d 1386 (Ct.Cl. 1974); 44 U.S.C. § 1507. Liability for unintentional violations in a closed area is not a new issue. Eg. In the Matter of Weymouth Fishing Corp., 1996 WL 1566072 (NOAA); In the Matter of James Smith, Jr., 2003 WL 549343 (NOAA).

Respondent's Exhibit A is a subsequent notice sent out by NOAA on January 28, 2011. This evidence has no bearing on the proof of a violation that occurred on or about January 21, 2011. NOAA is tasked with managing fisheries and providing additional information to ensure that closed area restrictions are observed is clearly within their authority. Subsequent

preventative measures by NOAA are fully consistent with its mission and authority.² As noted above, publication in the Federal Register and Code of Federal Regulations is sufficient. While lack of knowledge may not be a defense to liability, it may be considered in mitigation of a proposed sanction. Id.

The Agency also asserts the seizure of Respondent's catch is not a basis for mitigating the proposed penalty. See 16 U.S.C. § 1860; In the Matter of Ocean Obsession, Ltd. And Northern Wind Seafood, Inc., 1996 WL 1352597 (NOAA). In the Matter of Ocean Obsession is not directly on point. In that case, the ALJ exceeded his authority by ruling part of the forfeited catch of scallops were not properly seized and directed the Agency to return a portion of the proceeds of sale of the catch. Respondents here are not seeking a return of proceeds from the seizure but are instead contending Respondents should receive some mitigation consideration because (1) their violation was unintentional, (2) they expended a substantial amount of funds and effort in the fishing voyage of January 2011 but all benefits were taken by the forfeiture of the catch, and (3) the value of the catch sold should somehow be considered in mitigating any proposed sanction. Respondents' argument regarding consideration of the loss of value of the catch and the effort of the fishing voyage is not persuasive and contrary to the design of the statutory scheme. Forfeiture provisions are in place, at least in part, to deter violators by preventing any benefit or incentive from failing to comply with the law and implementing regulations. Mitigation is possible in the rare occasion where individuals act to return a resource. E.g. In the Matter of Martuna, S.A. 2010 WL 1676737 (NOAA) (release of bluefin tuna considered as mitigating factor). Under the circumstances in this case, I find the expense of the

² Cf. Federal Rule of Evidence 407. Subsequent remedial measures are generally inadmissible to attempt to prove that such actions are an admission of some previous neglect of duty.

voyage and loss of the catch are not mitigating factors. The evidence that the violation was unintentional and Respondents prior good record may properly be considered in mitigation.

Violations Proved

Through the evidence presented by NOAA, of the boarding of the F/V GALILEAN on January 21, 2011, it is found the F/V GALILEAN had fishing gear on deck with baited hooks in baskets while it was located in the EEZ in the closed area known as the Edges and also had a substantial amount of fish on board. Respondents' possessed fish in the restricted (closed) area without transiting the closed area with gear properly stowed. The evidence presented is sufficient to meet each of the elements necessary to prove the alleged violation. Respondents are found to have violated 50 C.F.R. § 622.34(k) and 622.7(l).

C. PENALTY ASSESSMENT AND PERMIT SANCTION

The Magnuson-Stevens Act authorizes the imposition of a civil penalty of up to \$140,000 for each violation involved and/or permit sanctions, both of which must be commensurate to the violation(s) involved. 16 U.S.C. § 1858(a), 1858(g). In assessing penalties and/or permit sanctions, the undersigned must consider a number of factors. "Factors to be taken into account in assessing a penalty . . . may include 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." 15 C.F.R. § 904.108(a). On June 23, 2010, NOAA promulgated a change in the sanction assessment portion of the regulations. See 75 FR 35631-32 (Wed. June 23, 2010). On March 16, 2011, NOAA issued new civil penalty policy guidance which expressly supersedes previous guidance. (See http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf). The new policy was announced in the Federal Register on April 14, 2011. 76 Fed. Reg. 20959 (Apr. 14, 2011).

In the NOVA, the Agency proposed a civil penalty of \$7,500 for the single Count. The Agency did not propose any permit sanction against Respondents. The Court has reviewed the new NOAA Policy for Assessment of Penalties and Permit Sanctions.³ The Guidance for the Magnuson Stevens Act Schedule indicates Level II for violating area specific gear requirements. The Civil Penalty Matrix for the Magnuson-Stevens Act shows the following penalty range for Level II violations unintentional = \$2,000-5,000; Negligent = \$4,000-6,000; Reckless \$6,000-10,000; and intentional = \$10,000-20,000. Since hooks were baited intentionally and the F/V GALILEAN spent a substantial amount of time in the closed area during the fishing voyage of January 2011, the evidence indicates the violations could be considered intentional, unintentional, or negligent in disregarding the restrictions in the regulations. It could also have been considered a level III violation for fishing in a closed area. Entering or transiting the closed area with gear not properly stowed under the facts in the record in this case fits within level II. With respect to the nature, circumstances, extent, and gravity of the charged and proven violation, and in view of the past good record of Respondents, I give them the benefit of the doubt and find the violation was unintentional and will be evaluated as a level II unintentional violation.

As noted, in reviewing the history of violations, the parties agreed there were no prior violations to consider for purposes of this matter. The issue of ability to pay was not asserted in this matter. The overall facts and circumstances of the violations in issue is a matter to be considered by the ALJ within the process provided and in the interests of justice. In consideration of the above mentioned factors, I find the Agency's proposed civil penalty with respect to the single count and the evidence presented at the hearing (\$7,500) is within the limits of the new NOAA policy guidance. However, in this case, in keeping with the authority to

³ See NOAA internet site. http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf

determine a penalty *de novo* (15 C.F.R. § 904.204), I find the proposed penalty for the Count should be reduced to \$3,500, which is the approximate midpoint of the schedule guidance for an unintentional violation. Respondents may not have prior violations, however the Magnuson Act is a strict liability statute and while there may be a substantial amount of regulations in this area, fisherman are required to follow the restrictions imposed to close areas for the protection of the species and continued availability of the ocean resources. Contentions of lack of actual knowledge do not excuse the violation. Both Respondents are jointly and severally liable for the \$3,500 penalty assessed for the violations.

The above noted civil penalty assessment has been made in consideration of all the aggravating and mitigating factors as permitted by 15 C.F.R. § 904.108, in view of the facts and circumstances presented in this matter in the record, and considering the post hearings briefs submitted by the parties. NOAA did not propose a permit sanction in this matter and that is consistent with the determination that the violation was unintentional.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

1. Respondents Bartholomew Niquet and Thomas Niquet, are “persons” within the meaning of the Magnuson-Stevens Act, 16 U.S.C. § 1802(36) and subject to the jurisdiction of the United States.
2. The Magnuson-Stevens Act is a strict liability statute, which makes it unlawful for any person to violate “any regulation or permit issued pursuant to [the] Act.” 16 U.S.C. § 1857(1)(A).
3. NOAA has proved by a preponderance of reliable, probative, substantial and credible evidence that: On or about January 21, 2011, Respondents, while operating the F/V GALILEAN within the EEZ, possessed fish and had fishing gear with baited hooks on deck in the area known as the Edges during a period when it was closed to fishing as

provided by 50 C.F.R. § 622.34(k).

4. Under the theory of *Respondeat Superior*, Respondents Bartholomew Niquet and Thomas Niquet are jointly and severally liable for violation of the Magnuson-Stevens Act. See 15 C.F.R. § 904.107; See Also In the Matter of Bruce Stiller, et al, 1998 WL 1277931 (Aug. 10, 1998).
5. After consideration of all of the evidence of record and the factors contained in 15 C.F.R. § 904.108, an appropriate sanction for the violations in this matter is \$3,500. Both Respondents are jointly and severally liable for the assessed penalty.

V. CONCLUSION

Based on the record developed in this proceeding, NOAA has established by a preponderance of the reliable and credible evidence that Respondents Bartholomew Niquet and Thomas Niquet violated 50 C.F.R. § 622.34(k) and 50 C.F.R. § 622.7(l) – operating a fishing boat with gear not stowed in an area where fishing is prohibited and for failing to then be in compliance with 50 C.F.R. § 622.34(k) and 50 C.F.R. § 622.7(l).

Having taken into consideration the nature and circumstances surrounding the events presented in this case, and the factors in 15 C.F.R. § 904.108, I have determined the following sanction to be appropriate.

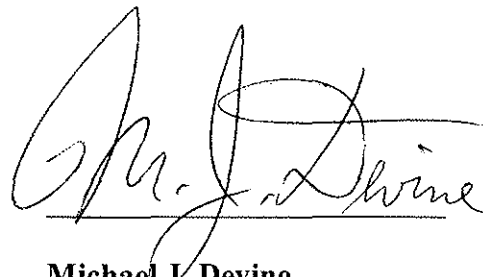
WHEREFORE,

VI. ORDER

IT IS HEREBY ORDERED that for the Notice of Violation and Assessment of Administrative Penalty regarding Respondents, violation of 50 C.F.R. § 622.34(k) and 50 C.F.R. § 622.7(l), a civil penalty in the amount of **\$3,500** (three thousand-five hundred) **DOLLARS** is assessed against Respondents Bartholomew Niquet and Thomas Niquet.

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.

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

A handwritten signature in black ink, appearing to read "Michael J. Devine", written over a horizontal line.

Michael J. Devine
Administrative Law Judge
United States Coast Guard

Done and dated this 4th day of May, 2012
Baltimore, Maryland

ATTACHMENT I

LIST OF WITNESSES AND EXHIBITS

AGENCY'S WITNESS LIST

1. Andrew Brannon
2. Caleb Patterson
3. Michael Briner
4. Jonathan Howard
5. Allan Coker

AGENCY's EXHIBITS

(All of NOAA's Exhibits were admitted into evidence, except Exhibit #6 which was withdrawn and not offered into evidence.)

1. Fisheries Violation Report dated 1/21/11
2. Statement of MK2 Andrew Brannon of Coast Guard Cutter COBIA regarding January 21, 2011 boarding of the F/V GALILEAN
3. Digital Photograph Log and attached photos from January 21, 2011 boarding of F/V GALILEAN
4. Coast Guard form for Commercial Vessel Boarding Report regarding F/V GALILEAN dated 1/21/11
5. GPS Verification Form
6. (not offered)
7. Closed Area contact Log
8. Charlet from CGC COBIA derived from #11400
9. excerpts showing closed area

10. Coast Guard Cutter COBIA Log remarks sheet for 20 January 2011 through 22 January 2011.
11. Coast Guard Cutter COBIA Log weather observation and operational summary sheet for 20 January 2011 through 22 January 2011.
12. CV for Jonathan T. Howard
13. Chart Excerpts from NOAA Nautical Chart 11006 plotted on February 1, 2011 by VMS technician Jonathan Howard
14. Data from VMS on F/V GALILEAN locations on January 15, 2011 through January 22, 2011.
15. Complete Chart 11006
16. Investigative Report by Special Agent Alan Coker dated February 23, 2011
17. Harbor Docks Seafood Market report of fish landed.
18. Certificate of Documentation and abstract of title for F/V GALILEAN
19. Federal Fisheries Permits for F/V GALILEAN
20. Southeast Fishery Bulletin dated July 7, 2009 announcing closure of "the edges."
21. Federal Register publication of change to 50 C.F.R. part 622 to require seasonal closures Vol. 74, No. 120 June 24, 2009 Pages 30001-30002.
22. Federal Register publication of change in policy for assessment of Civil Administrative Penalties and Permit Sanctions by NOAA. Vol. 76 FR number 72 of April 14, 2011 pages 20959-20960.
23. Policy for Assessment of Civil Administrative Penalties and Permit Sanctions
24. NOVA dated June 3, 2011 sent to Bartholomew O. Niquet regarding alleged violation.

RESPONDENTS' WITNESS LIST

1. Thomas C. Niquet

RESPONDENTS' EXHIBIT

- A. Southeast Fishery Bulletin dated January 28, 2011

ATTACHMENT II

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. AGENCY'S PROPOSED FINDINGS OF FACT

1. On or about June 3, 2011, NOAA issued a single count Notice of Violation and Assessment (NOVA) to Respondent Bartholomew O. Niquet and Respondent Thomas C. Niquet, proposing a \$7,500 assessment and alleging the following:

On or about January 21, 2011, Respondent Bartholomew O. Niquet, owner of the F/V GALILEAN (U.S. documentation number 579208), or an individual under his control, and Respondent Thomas C. Niquet, operator of the F/V/ GALILEAN (U.S. documentation number 579208), or an individual under his control, jointly and severally, did fish in violation of the prohibitions, restrictions, and requirements applicable to seasonal and/or area closures, including but not limited to: Prohibition of all fishing, gear restrictions, restrictions to take or retention of fish, as specified in 622.34 (k) (closure provisions applicable to the Edges), in violation of the Magnuson-Stevens Fishery Conservation Act, as amended, at 16 USC 1857 (1)(A) and 50 C.F.R. 622.7(l).

Respondents Bartholomew O. Niquet and Thomas C. Niquet are persons subject to the jurisdiction of the United States. (TR 5).

ACCEPTED, as provided in the Decision and Order. This just restates the charged violation.

2. Respondents Bartholomew O. Niquet and Thomas C. Niquet are both a "person" within the meaning of the Magnuson-Stevens Fishery Conservation and Management Act (M-S Act), 16 U.S.C. §1802(36), and are both subject to the jurisdiction of the United States.

ACCEPTED, as provided in the Decision and Order.

3. Through January 21, 2011, Respondents Bartholomew O. Niquet was the owner and Respondent Thomas C. Niquet was the operator of F/V GALILEAN, United States documentation number 579208. (AX#1, 18).

ACCEPTED, as provided in the Decision and Order.

4. Through January 21, 2011, a federal fisheries permit for the Gulf of Mexico Reef Fish Fishery, Permit No. RR-203, had been issued to the F/V GALILEAN, and Respondent Bartholomew O. Niquet authorized Respondent Thomas C. Niquet to fish for Gulf reef fish pursuant to the privileges conferred by permit no. RR-203 during the trip at issue. (AX#19).

ACCEPTED, as provided in the Decision and Order.

5. Pursuant to 50 C.F.R. 622.34(k), and at all times relevant to this case, within the boundaries of an area known as the Edges during January through April, all fishing is prohibited, and possession of any fish species is prohibited, except for such possession aboard a vessel in transit with fishing gear stowed. Fifty C.F.R. 622.7)l) makes it unlawful for any person to fish in violation of the prohibitions, restrictions, and requirements applicable to seasonal closures as specified in 50 C.F.R. 622.34 (AX 21). **ACCEPTED**, as provided in the Decision and Order.

6. The boundaries of the Edges closed area set forth in 50 C.F.R. 622.34(k) are within lines drawn between the following coordinates:

Northwest corner = 28° 51' N, 85° 16' W
Northeast corner = 28° 51' N, 85° 04' W
Southwest corner = 28° 14' M, 84° 54' W
Southeast corner = 28° 14' N, 84° 42' W

(AX #20, 21). **ACCEPTED**, as provided in the Decision and Order.

7. On or about January 21, 2011, at approximately 0445 hours, the F/V GALILEAN was not in transit with its fishing gear stowed but instead was rigged for fishing with baskets loaded with baited hooks and fishing line attached located on the back deck of the vessel at positions 28° 40.05N – 085° 00.15W which is inside the boundary of the Edges closed area, and within the exclusive economic zone (EEZ) as defined at 16 U.S.C. § 1802(6). (AX # 1, 2, 15).

ACCEPTED, as provided in the Decision and Order.

8. On or about January 21, 2011, Respondent Thomas C. Niquet estimated the F/V GALILEAN was in possession of 8,000 pounds of red grouper and 300 pounds of scamp, which are both Gulf reef fish species. (AX #1, 1, 2; TR 16). **ACCEPTED**, as provided in the Decision and Order.

9. The regulation implementing the Edges closed area was properly filed with the Federal Register and published on June 24, 2009, to prohibit fishing for any species January 1 through April 30 each year; thus Respondents had legal notice of the seasonal closure (AX #21).

ACCEPTED, as provided in the Decision and Order.

10. NOAA has proven by a preponderance of the evidence that on or about January 21, 2011, Respondent Bartholomew O. Niquet and Respondent Thomas C. Niquet did fish in violation of the prohibitions, restrictions, and requirements applicable to the Edges seasonal closure as alleged in the Notice of Violation and Assessment issued June 3, 2011. **ACCEPTED IN PART**, as provided in the Decision and Order. The violation of being in possession of fish and having baited hooks on deck in a restricted area is proved but a specific finding of fishing in the restricted area was not made.

11. The records shows no prior violations by either Respondent of any statute or regulation enforced by NOAA. **ACCEPTED**, as provided in the Decision and Order.

12. Respondent Bartholomew O. Niquet and Respondent Thomas C. Niquet are jointly and severally liable to the Unites for a civil penalty in accordance with 16 USC 1858(a).

ACCEPTED, as provided in the Decision and Order.

ATTACHMENT III

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

§ 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party 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.