

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:

MICHAEL STRAUB and
STEVEN SILK

Respondents.

DOCKET NUMBER:

SE1100711
(F/V TIGHTEN UP)

INITIAL DECISION

Issued by: Hon. Walter J. Brudzinski, Administrative Law Judge

Issued: February 1, 2012

Appearances

For the National Oceanic and Atmospheric Administration

Cynthia S. Fenyk, Esquire
Enforcement Attorney
National Oceanic and Atmospheric Administration
Office of General Counsel, Southeast Region
263 13th Avenue South
St. Petersburg, FL 33701
Telephone: (727) 824-5369
Facsimile: (727) 688-5376

Respondents Pro Se

Michael Straub
178 175th Ter. East
Redington Shores, FL 33708

Steven Silk
1334 Winchester Road
St. Petersburg, FL 33710

STATEMENT OF THE CASE

The National Oceanic and Atmospheric Administration [NOAA or Agency] initiated this administrative proceeding for civil penalty assessment under the Magnuson-Stevens Fishery Conservation and Management Act [Magnuson-Stevens Act], as amended and codified at 16 U.S.C. §§ 1801-1883 and its underlying regulations at 50 C.F.R. Part 600. These proceedings are conducted in accordance with NOAA's procedural regulations at 15 C.F.R. Part 904 and the Administrative Procedure Act, 5 U.S.C. §§ 551-559.

On June 3, 2011, the Agency issued a Notice of Violation and Assessment of Administrative Penalty [NOVA] to Respondents Steven Silk and Michael Straub, jointly and severally, alleging a one count violation as follows:

On or about February 25, 2011, Respondent Steve Silk, owner of the F/V TIGHTEN UP (U.S. Documentation No. 606870), or an individual under his control, and Respondent Michael Straub, operator of the F/V TIGHTEN UP (U.S. Documentation No. 606870), or an individual under his control, jointly and severally, did fish in violation of the prohibition 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, as specified in Sec. 622.34(k), (closure provisions applicable to the Edges), in violation of the Magnuson-Stevens Fishery Conservation [and Management] Act, as amended, at 16 U.S.C. 1857(1)(A) and 50 CFR 622.7(1). Respondents Steve Silk and Michael Straub are persons subject to the jurisdiction of the United States.

NOVA at 1.¹

The Agency assessed a civil monetary penalty in the amount of \$7,500. NOAA also seized the Gulf reef fish Respondents harvested from the closed area and had them sold for \$3,247.75.

¹ The Agency refers to Respondent Silk as "Steven Silk" and "Steve Silk." For the purpose of this Initial Decision, it is recognized that Steven Silk and Steve Silk is the same person.

Pursuant to 15 C.F.R. § 904.201(a), Respondents filed their timely request for hearing. On August 29, 2011 the Agency forwarded the file to the U.S. Coast Guard ALJ Docketing Center pursuant to law and Memorandum of Understanding for assignment of an Administrative Law Judge. On September 7, 2011 the Chief Administrative Law Judge assigned this matter to the undersigned. On October 7, 2011, the Agency filed its Preliminary Position on Issues and Procedures [PPIP]. Respondents did not file a PPIP. The hearing was held on November 9, 2011 in St. Petersburg, Florida.

At the beginning of the hearing, Respondent Michael Straub advised the undersigned as follows:

I really understood that actually you would be getting the information on the case and have the ability to just change the fine or lower the fine or eliminate the fine. That's really all that I, you know, I am guilty of this offense. I didn't know that I was, you know, breaking the law. But, you know, we got sent home. Stopped our trip and, you know, we were treated well through the whole thing. The federal people allowed me to just unload the fish that I caught in the closed area just for that day and we got to keep the rest of our fish and they got a check for \$3,200 or something like that and, you know, I was just - - this is all about the fine. I was told that you can lower, or eliminate or raise or, you know, whereas Ms. Fenyk explained that she was kind of held to the guidelines, like a point system almost for the offense.

Tr. at 6-7.

Agency counsel agreed that Mr. Straub's statement is "essentially accurate" and that she told Mr. Straub "the only way to get the evidence in front of you [the undersigned Administrative Law Judge] was for him [Straub] to request a hearing." *Id.* The undersigned then advised that it was necessary to hear the evidence before any decision on the civil penalty can be made. The undersigned also advised Respondents that they have the opportunity to make opening and closing statements and arguments, offer evidence, and testify on their own behalf.

The Agency offered the testimony of four (4) witnesses and submitted seventeen (17) exhibits all of which were admitted without objection. Respondents did not testify or offer witnesses or exhibits. At the close of the hearing, the undersigned advised that the parties may submit proposed findings of fact and conclusions of law in accordance with 15 C.F.R. § 904.261(a) and the briefing schedule to be issued once the transcript is prepared. The Agency submitted its closing brief and proposed findings on January 3, 2012. Respondents did not submit a closing brief or proposed findings and the time has expired for the parties to submit reply briefs. This matter is now ripe for decision.

After careful review of the entire record, I find that the Agency proved by a preponderance of reliable, probative, and credible evidence that Respondents violated the Magnuson-Stevens Act as alleged in the above referenced NOVA.²

FINDINGS OF FACT

Jurisdiction

1. At all times relevant to these proceedings, Respondent Steven Silk was the owner of the F/V TIGHTEN UP (U.S. Documentation No. 606870). See Agency Ex. 12.
2. At all times relevant to these proceedings, Respondent Michael Straub was the operator of the F/V TIGHTEN UP (U.S. Documentation No. 606870). See Agency Exs. 1 and 7.
3. Respondents Steven Silk and Michael Straub are both “persons” within the meaning of the Magnuson-Stevens Fishery Conservation and Management Act and are both subject to the jurisdiction of the United States. See Tr. at 10; 16 U.S.C. § 1802 (31).
4. At all times relevant to these proceedings, Respondent Steven Silk possessed an Agency issued Federal Fisheries permit for “Gulf of Mexico Reef Fish Commercial” permit No. RR-296 and authorized Michael Straub to operate the F/V TIGHTEN UP pursuant to the permit’s privileges. See Agency Ex. 13; Tr. at 68-69.

² The owner of a vessel is liable for violations the operator commits under the Magnuson-Stevens Act. In re Kepecz, 6 O.R.W. 556, 562, 1991 WL 432069 (NOAA 1991).

The Violation

5. From January 1, 2011 through April 30, 2011, in the Gulf of Mexico Exclusive Economic Zone and within the boundaries known as “The Edges,” fishing and possessing any fish species was prohibited except that such possession is allowed aboard a vessel in transit with fishing gear stowed. See Agency Exs. 14-16.
6. The boundaries of the area known as “The Edges” are as follows:

Point	North lat.	West long.
A	28°51'	85°16'
B	28°51'	85°04'
C	28°14'	84°42'
D	28°14'	84°54'
A	28°51'	85°16'

See Agency Exs. 14-16.

7. The Federal Register at 74 Fed. Reg. 30,001, 30,002 (June 24, 2009) announced “The Edges” closure in a Final Rule codified at 50 C.F.R § 622.34(k). See Agency Ex. 14.
8. The Agency’s “Southeast Fishery Bulletin” announced “The Edges” closure on July 7, 2009. See Agency Ex. 15.
9. The Agency’s “Southeast Fishery Bulletin” also announced “The Edges” closure on January 28, 2011. See Agency Ex. 16.
10. On February 25, 2011, at approximately 3:35 PM local time, the F/V TIGHTEN UP, owned by Respondent Steven Silk and operated by Respondent Michael Straub, was actively fishing at 28-38.487N, 84-57.684W, approximately 1 nautical mile inside the boundary of the closed area known as “The Edges” and within the Exclusive Economic Zone (EEZ) as defined at 16 U.S.C. § 1802(11) and 50 C.F.R. § 600.10. See Agency Exs. 1, 2, 6 and 7 at 2; Tr. at 16 and 17.
11. As a result of Respondents actively fishing and harvesting fish in “The Edges” closed area, the Agency issued a NOVA as described above on June 3, 2011 to the Respondents. See Agency’s Notice of Violation and Assessment.

Facts Bearing on Sanction

12. Respondent Straub asserts he did not know that “The Edges” was a closed area. See Agency Ex. 9; Tr. at 67.
13. Respondent Straub admitted to fishing in the closed area and said “ignorance is no excuse and he should have known, but he did not know about the closed area.” See Agency Ex. 7 at 2; Ex. 9; and Tr. at 67.
14. Respondent Straub offered his GPS and computer information to the NOAA Special Agent as well as his logbook which explained how the poundage of red snapper was estimated. See Agency Ex. 7 at 3.
15. Respondent Straub estimated the F/V TIGHTEN UP had 2,600 - 2,700 pounds of assorted Gulf reef fish of which 809 pounds, including 450-500 pounds of red snapper, 130 pounds of red grouper, and 20 pounds of scamp, were harvested from “The Edges” closed area. See Agency Ex. 1, 2; Tr. at 16-17.
16. The assorted Gulf reef fish harvested from “The Edges” closed area were seized and sold for \$3,247.75. See Agency Ex. 7 at 4-5; and Ex. 10.
17. Respondent Straub signed a voluntary abandonment form for the fish caught in the closed area. See Agency Ex. 7 at 4.
18. Respondent Straub was very polite and cooperative throughout the investigation. See Agency Ex. 7 at 1.
19. Respondent Silk stated that one of the problems he had with the F/V TIGHTEN UP was that the sea plot onboard was not updated for the new closures because it is “extremely expensive [\$600] to get a new chip for the computer that updates the closures.” See Tr. at 68-69.
20. Respondents have no prior violations. See Agency’s PPIP at 7; and Agency’s closing brief at 11.

LAW

The Magnuson-Stevens Fisheries Act at 16 U.S.C. § 1857(1)(A) states, in pertinent part, as follows: “It is unlawful – (1) for any person—(A) to violate any provision of this Act or any regulation or permit issued pursuant to this Act.” The regulations at 50 C.F.R. Part 622 implement various provisions of the Act. In this case, **50 C.F.R. § 622.34(k)** describes “The Edges” closed area as follows:

The Edges is bounded by rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
A	28°51'	85°16'
B	28°51'	85°04'
C	28°14'	84°42'
D	28°14'	84°54'
A	28°51'	85°16'

50 C.F.R. § 622.34(k)(1)(iii).

A “rhumb line” is a path taken by a vessel or aircraft that maintains constant compass direction. See Disctionary.com at <http://disctionary.reference.com/browse/rhumb+line>.

Title 50 C.F.R. § 622.34(k)(3) provides in pertinent part as follows:

[W]ithin 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 as specified in paragraph (k)(4) of this section. The provisions of this paragraph, (k)(3), do not apply to highly migratory species.

Title 50 C.F.R. § 622.34(k)(4) provides as follows:

For the purpose of paragraph (k) of this section, transit means 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.

(ii) A trawl net may remain on deck, but trawl doors must be disconnected from the trawl gear and must be secured.

(iii) A gillnet must be left on the drum. Any additional gillnets not attached to the drum must be stowed below deck.

(iv) A rod and reel must be removed from the rod holder and stowed securely on or below deck. Terminal gear (i.e., hook, leader, sinker, flasher, or bait) must be disconnected and stowed separately from the rod and reel. Sinkers must be disconnected from the down rigger and stowed separately.

Title 50 C.F.R. § 622.7(l) provides as follows:

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

* * *

(l) 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 §622.33, §622.34, or §622.35, or as may be specified under §622.46 (b) or (c).

* * *

Exclusive Economic Zone [EEZ] “means the zone established by Proclamation Numbered 5030, dated March 10, 1983. For the purposes of applying this chapter, the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States.” 16 U.S.C. § 1802(11).

The EEZ is also defined at 50 C.F.R. § 600.10 as follows:

“*Exclusive economic zone (EEZ)* means the zone established by Presidential Proclamation 5030, 3 CFR part 22, dated March 10, 1983, and is that area adjacent to the United States which, except where modified to accommodate international boundaries, encompasses all waters from the seaward boundary of each of the coastal states to a line on which each point is 200 nautical miles (370.40 km) from the baseline from which the territorial sea of the United States is measured.”

DISCUSSION

Burden of Proof

The Agency must prove the violation alleged in the NOVA by a preponderance of the evidence. 5 U.S.C. § 556(d); Steadman v. Securities and Exchange Commission, 450

U.S. 91, 107 (1981); In the Matter of Cuong Vo, 2001 WL 1085351 (NOAA 2001).

Preponderance of the evidence is proved when the agency illustrates, through evidence presented in the record that it is more likely than not 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 Cuong Vo, 2001 WL 1085351 (NOAA 2001). The burden of production to rebut agency evidence shifts to the respondent after NOAA proves the allegations contained in the NOVA by a preponderance of reliable, probative and credible evidence. Id.

The Violation

Respondent Michael Straub, operator of the F/V TIGHTEN UP, owned by co-Respondent Steven Silk harvested approximately 809 pounds of Gulf reef fish, including 450-500 pounds of red snapper, 130 pounds of red grouper, 20 pounds of scamp, in “The Edges,” a closed area within the Exclusive Economic Zone (EEZ) of the Gulf of Mexico. Respondent Straub admitted to fishing in the closed area and said “ignorance is no excuse and he should have known, but he did not know about the closed area.” Agency Ex. 7 at 2; Agency Ex. 9; Tr. at 67.

Knowledge or Intent

Despite Respondent Straub’s lack of knowledge that “The Edges” was closed, the Magnuson-Stevens Fishery Conservation and Management Act and its regulations do not require knowledge or intent on the part of the violator in order for the violator to be held liable. “Because conservation-related offenses under the [Magnuson Act] are strict liability offenses, [Northern Wind]’s protests as to [its] state of mind are irrelevant.” Northern Wind, Inc. v. Daley, 200 F.3d 13, 19 (1st Cir. 1999) (brackets in original);

internal quotations 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)).

According to Black’s Law Dictionary (9th ed. 2009), “*scienter*” is fundamentally “a degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission.” Therefore, “regulators need not prove intentional or knowing violation. Roche v. Evans, 249 F. Supp. 2d 47, 59 (D. Mass. 2003). It also well settled that “ignorance of the law is no excuse.” In the Matter of Robert Richard Hellmuth and Rich Charters, Inc., 2003 WL 21734020 (NOAA 2003).

Highly Regulated Industry

Commercial fishing is a highly regulated industry and those engaged in it are required to keep abreast of and abide by the laws and regulations that affect them. As stated In the Matter of Dennis O’Neil, 1995 WL 1311365 (NOAA 1995):

As to the Notice issue, commercial fishing is regulated and those engaged in it for profit activities are required to keep abreast of and abide by the laws and regulations that affect them (See, e.g., In the Matter of Benjamin Sprinkle, 4 O.R.W. 635, 640 (NOAA 1986); In the Matter of Accursio Alba, 2 O.R.W. 425, aff’d 2 O.R.W. 670 (NOAA App. 1982). This responsibility extends to all laws, federal and state. Further, if a fisherman is confused about a law or regulation, that fisherman has an affirmative duty to seek clarification (See In the Matter of Roger Brayton, 4 O.R.W. 155, aff’d 4 O.R.W. 247 (NOAA App. 1985); Alba, 2 O.R.W. 670 (NOAA App. 1982). Finally, “just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents ... regardless of actual knowledge of what is in the regulations or the hardship resulting from innocent ignorance.” Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-385 (1947). That legal presumption is now codified in 44 U.S.C § 1507.

In addition to the legal notice in the Federal Register, the Agency also announced the closure on July 7, 2009 and again on January 28, 2011 in the “Southeast Fishery Bulletin.” Agency Exs. 15 and 16.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondents Michael Straub and Steven Silk as well as the subject matter of this hearing are properly within the jurisdiction of the National Oceanic and Atmospheric Administration in accordance with the Magnuson-Stevens Act, 16 U.S.C. §§ 1801-1883, its implementing regulations at 50 C.F.R. Part 622, and its procedural regulations at 15 C.F.R. Part 904.
2. Respondents had legal notice of the seasonal closure.
3. The Agency PROVED by the preponderance of reliable, probative, and credible evidence that on or about February 25, 2011 Respondents Michael Straub and Steven Silk violated the Magnuson-Stevens Act and its implementing regulations by fishing in a closed area known as “The Edges” located in the Gulf of Mexico Exclusive Economic Zone
4. Respondents Michael Straub and Steven Silk are jointly and severally liable for civil monetary penalties.
5. Respondents offered no evidence concerning their ability to pay the assessed penalty.

SANCTION

The Magnuson-Stevens Act provides at 16 U.S.C. § 1858(a) for assessment of a civil penalty not to exceed \$100,000. Adjusted for inflation, the maximum currently may not exceed \$140,000. See 73 Fed. Reg. 75,321, 75,322 (Dec. 11, 2008), codified at 15 C.F.R. § 6.4(e)(14). The Agency assessed a civil monetary penalty in the amount of \$7,500 applying the *NOAA Policy for the Assessment of Civil Administrative Penalties and Permits Sanctions of March 16, 2011* [Penalty Policy]. Agency Ex. 17. Prior to June 23, 2010, the Agency’s assessed civil penalty was presumed to be correct and the Administrative Law Judge was required to state good cause for an upward or downward departure. See In the Matter of: AGA Fishing Corp., 2001 WL 34683852 (NOAA 2001).

On June 23, 2010, the Agency eliminated the presumption in favor of the NOVA’s assessed civil penalties. See, 75 Fed. Reg. 35,631 (Jun. 23, 2010) (Final Rule) (now codified at 15 C.F.R. § 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.

The applicable law is found at 16 U.S.C. § 1858(a) and 15 C.F.R. § 904.108(a). Those sections list the following factors that must be taken into consideration when assessing a civil penalty and imposing a permit sanction: “. . . the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require . . .” Respondents have not submitted any evidence showing an inability to pay as required under 15 C.F.R. § 904.108(e) so ability to pay will not be taken into consideration.

Agency’s Assessed Civil Monetary Penalty

The Agency’s closing brief at page 8 refers to Appendix 3 in the Penalty Policy under the heading “Violations Regarding Time, Area, Effort, or Sector Restrictions” as its starting point to determine the civil penalty. Agency Ex. 17 [Penalty Policy] at 36. Under that section the following language closely describes Respondents’ violation: “Fishing in a closed area or during a closed season; U.S. vessel fishing illegally in EEZ.” Adjacent to that language is the Roman numeral which describes the Offense Level, with Roman numeral I the least severe and Roman numeral VI being the most severe for Magnuson-Stevens Act violations. In this case, the Agency determined Respondents’ violation is a level III offense.

The next determination is the degree of culpability. The Penalty Policy provides four levels of culpability in increasing order of severity: A) Unintentional; B) Negligent;

C) Reckless; and D) Intentional. *Id.* at 8-9. The Agency determined that Respondents' culpability is "negligent" because "failure to know of applicable laws/regulations or to recognize when a violation has occurred may itself be evidence of negligence." Agency's closing brief at 8. The Penalty Policy defines negligence as follows:

Negligence is the failure to exercise the degree of care that a reasonably prudent person would exercise under the circumstances. Negligence denotes a lack of diligence, a disregard of the consequences likely to result from one's actions, or carelessness. Negligence may arise where someone exercises as much care as he or she is capable of, yet still falls below the level of competence expected of him or her in the situation. The failure to know of applicable laws/regulations or to recognize when a violation has occurred may itself be evidence of negligence.

Agency Ex. 17 [Penalty Policy] at 9.

Referring to Appendix 2 of the "Penalty Matrix of the Magnuson-Stevens Act" on page 25 of the Penalty Policy, the Agency located the intersection of Respondents' Gravity Offense Level which is Level III, with their Level of Culpability, which is (B) "Negligence." The intersection reflects a civil monetary penalty range from \$10,000 - \$15,000. The Penalty Policy directs the Agency attorney to start from the midpoint [in this case \$12,500] of the appropriate matrix box to move up or down in penalty range or to a different box altogether. "In extraordinary circumstances, the initial base penalty may be adjusted above (or below) the high (or low) end of the based penalty range that would otherwise apply using the guidance described below, but only with the specific prior approval of the NOAA General Counsel or Deputy General Counsel." Agency Ex. 17 [Penalty Policy] at 10.

Agency counsel "obtained supervisory approval to reduce the penalty to \$7,500 to be consistent with a charging decision issued prior to the publication of the Policy involving fishing in the Edges that occurred very near in time to the violation in this matter." Agency's closing brief at 8; Agency's PPIP at 6-7. Although not articulated in

the Agency's closing brief, \$7,500 is also the midpoint of the \$5,000 - \$10,000 range for a Level III Offense at the lowest Level of Culpability, "Unintentional."

The Penalty Policy factors for adjustment are: A) History of Non-Compliance; B) Commercial versus Recreational Activity; and C) Activity after Violation, such as good faith factors which may mitigate a penalty; e.g., self-reporting and cooperating with the Agency. Agency Ex. 17 at 10-12. Respondents have no history of non-compliance. Because Respondents are commercial fishermen with a duty to know applicable laws/regulations and recognize when a violation has occurred, mitigating factors that might be available to recreational fishermen under certain circumstances are not present here. Concerning activity after the violation, Respondents did not self-report; however, the record shows they have been cooperative once their activity came to the Agency's attention.

Having discussed how the Agency arrived at the \$7,500 civil penalty, the undersigned now assesses a civil penalty "taking into account all of the factors required by applicable law" as directed by the Agency. The undersigned also takes into consideration that Agency counsel maintains \$7,500 is an appropriate civil penalty and Respondents ask that the civil penalty be lowered or eliminated.

The Nature, Circumstances, Extent, and Gravity of the Prohibited Acts Committed

Respondent Michael Straub, operator of the F/V TIGHTEN UP, owned by co-Respondent Steven Silk, caught approximately 806 pounds of Gulf reef fish in a closed area within the Exclusive Economic Zone (EEZ) of the Gulf of Mexico known as "The Edges." As stated in NOAA's Final Rule of June 24, 2009:

The Edges season closure prohibits fishing for any species under Council [Gulf of Mexico Fishery Management Council] jurisdiction from January 1 through April 1 each year. This closure creates a larger contiguous area within which fishing activity and fishing mortality will be reduced. This

will provide additional protection for spawning aggregations of various grouper species, some of which are experiencing overfishing, benefit other reef fish undergoing overfishing, and facilitate more effective enforcement.

* * *

74 Fed. Reg. 30001, 30002 (Jun. 24 2009).

As stated in the “Southeast Fishery Bulletin” of July 7, 2009, and January 28, 2011, “[t]he intent of the closure is to protect gag and other groupers during their respective spawning seasons.” See, Agency Exs. 15 and 16. By actively catching Gulf reef fish in an area that was closed to protect spawning and limit overfishing, Respondents frustrated the intent of the law to protect the fishery resources. It also enabled them to gain a significant commercial advantage over law-abiding fishermen who comply with the restrictions in order to preserve fishery resources for the future.

The Degree of Culpability, and History of Prior Offenses

The Penalty Policy identifies fishing in a closed area or during a closed season as a Level III Offense. Agency Ex. 17 [Penalty Policy] at 36. The Penalty Policy also breaks down the “degree of culpability” into four levels in decreasing order of severity: A) intentional; B) recklessness; C) negligence; and D) unintentional acts. Id. at 8. The Agency has correctly identified Respondents’ degree of culpability as “negligence.” As discussed above, “commercial fishing is regulated and those engaged in it for profit activities are required to keep abreast of and abide by the laws and regulations that affect them.” In the Matter of Dennis O’Neil, 1995 WL 1311365 (NOAA 1995). By not keeping abreast and abiding by the law and regulations that affect them, Respondents breached that duty; however, there is also no evidence Respondents have committed prior offenses. The absence of prior offenses and Respondents’ truthfulness and cooperation throughout this process tends to favor a low civil monetary penalty.

Other Matters as Justice May Require

Respondents have been cooperative, contrite, and truthful in their interactions with the Agency from the outset. Tr. at 7, 67-69; Agency Exs. 1, 2, 7, 8, 9, and 11. They made no excuses about their violation nor did they attempt to force a strained interpretation of the regulation to justify their incursion. They simply owned up to their mistakes and asked for a reduction in the amount of Agency's assessed civil penalty.

In view of the foregoing, a downward departure to a civil monetary penalty in the amount of \$3,500 would be appropriate for these Respondents under these circumstances. That amount is still significant but fair and is based on Respondents' truthfulness with enforcement personnel. Assuming Respondents continue to interact with enforcement personnel truthfully and are willing to cooperate, this civil monetary penalty should deter future conduct that places them at risk for violating the law.

WHEREFORE,


ORDER

IT IS HEREBY ORDERED that a civil monetary penalty in the amount of three thousand five hundred dollars (**\$3,500**) is assessed jointly and severally against Respondents Steven Silk and Michael Straub; that is, both Respondents jointly and each of them individually, are liable for the total assessed penalty

PLEASE BE ADVISED that under 31 U.S.C. § 3737, failure to pay the assessed civil penalty within 30 days will generally result in interest charges and assessments to cover the cost of processing any delinquency. If the penalty, or any portion of it, becomes more than 90 days overdue, you may be assessed an additional charge of up to six percent per year.

ANY PARTY may petition the Administrator of the National Oceanic and Atmospheric Administration for administrative review of this decision. The petition must be filed within thirty (30) days from the date of this Initial Decision as provided in 15 C.F.R. § 904.273, **Attachment A**. Copies of the petition shall also be sent to the undersigned judge, the Coast Guard ALJ Docketing Center, and NOAA counsel. If neither party seeks administrative review within 30 days after issuance of this Order, the Initial Decision will become the final decision of the Agency.

Done and dated February 1, 2012
New York, New York



WALTER J. BRUDZINSKI
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD

ATTACHMENT A

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.

ATTACHMENT B

WITNESS AND EXHIBIT LISTS

WITNESS LIST

AGENCY'S WITNESSES

1. Special Agent Paige Casey, NOAA Office of Law Enforcement (OLE)
2. Officer Randall Hart, Florida Fish and Wildlife Conservation Commission (FWCC)
3. Officer Ken Thompson, FWCC
4. Jonathan Howard, NOAA OLE

RESPONDENTS' WITNESSES

Respondents made arguments but did not offer any witnesses or testify under oath.

EXHIBIT LIST

AGENCY'S EXHIBITS

Agency Ex. 1 Florida Fish and Wildlife Conservation Commission Incident Summary Report, 2 pages

Agency Ex. 2 NOAA OLE form containing written statement of Respondent Michael Straub to Officer Hart, FWCC, 1 page

Agency Ex. 3 Portion of NOAA Chart 11400 depicting latitude and longitude position of Respondent's fishing vessel, signed by Respondent Michael Straub, 1 page

Agency Ex. 4 Proof Sheet and Negative File Index with attached photographs of GPS unit at vessel location, log book, and red snapper, 7 pages

Agency Ex. 5 GPS Verification Form showing outbound and return readings, 1 page

Agency Ex. 6 VMS print out of F/V TICHTEN UP track line overlaid on NOAA chart 11006 showing incursion into The Edges Closed Area, 12 pages

Agency Ex. 7 Special Agency Paige Casey Investigation Report, 9 pages

Agency Ex. 8 Two photocopied pages from Respondents' Logbook

Agency Ex. 9 NOAA OLE form containing written statement of Respondent Michael Straub to Special Agent Paige Casey, 1 page

Agency Ex. 10 Proof Sheet and Negative File Index with attached photographs depicting the F/V TIGHTEN UP and fish boxes, 14 pages

Agency Ex. 11 Photocopy of one page excerpt from Respondents' Logbook, 1 page

Agency Ex. 12 F/V TIGHTEN UP Certificate of Documentation together with Abstract of Title, 5 pages

Agency Ex. 13 F/V TIGHTEN UP Federal Fisheries Permit depicting Gulf of Mexico Reef Fish Commercial, together with application, 4 pages

Agency Ex. 14 Copy of Federal Register printout of Volume 74, pages 30001 and 30002 containing Final Rule on seasonal closure of "The Edges," to be codified at 50 C.F.R. § 622.34(k), 2 pages

Agency Ex. 15 National Marine Fisheries Service, Southeast Regional Office "Southeast Fishery Bulletin" dated July 7, 2009 announcing the four month closure of "The Edges," 1 page

Agency Ex. 16 National Marine Fisheries Service, Southeast Regional Office "Southeast Fishery Bulletin" dated January 28, 2011 reminding fishermen of "The Edges" area closure prohibiting fishing from January 1st through April 30th, 1 page

Agency Ex. 17 Printout of NOAA Policy for Assessment of Penalties and Permit Sanctions dated March 16, 201, 28 pages

RESPONDENTS' EXHIBITS

Respondents offered no exhibits.

ATTACHMENT C

RULINGS ON PROPOSED FINDINGS OF FACT / CONCLUSIONS OF LAW

AGENCY'S PROPOSED FINDINGS

1. On or about June 3, 2011, NOAA issued a single count Notice of Violation and Assessment (NOVA) to Respondent Steve Silk and Respondent Michael Straub, proposing a \$7,500 assessment and alleging the following:

On or about February 25, 2011, Respondent Steve Silk, owner of the F/V TIGHTEN UP (U.S. documentation no. 606870), or an individual under his control, and Respondent Michael Straub, operator of the F/V TIGHTEN UP (U.S. documentation no. 606870), or an individual under his control, jointly and severally, did fish in violation of the prohibitions, restrictions, and requirement 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 as specified in Sec. 622.34(k) (closure provisions applicable to the Edges), in violation of the Magnuson-Stevens Fishery Conservation [and Management] Act, as amended, at 16 USC 1857(1)(A) and 50 CFR 622.7(l). Respondents Steve Silk and Michael Straub are persons subject to the jurisdiction of the United States. (TR5).

ACCEPTED AND INCORPORATED

2. Respondent Steve Silk and Respondent Michael Straub 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. (TR 10).

ACCEPTED AND INCORPORATED

3. Through February 25, 2011, Respondent Steve Silk was the owner and Respondent Michael Straub was the operator of the F/V TIGHTEN UP, United States documentation number 606870 (AX #1, 7, 12).

ACCEPTED AND INCORPORATED

4. Through February 25, 2011, a federal fisheries permit for the Gulf of Mexico Reef Fish Fishery, Permit No. RR-296, had been issued to the F/V TIGHTEN UP, and Respondent Steve Silk authorized Respondent Michael Straub to fish for Gulf reef fish pursuant to the privileges conferred by permit no. RR-296 during the trip at issued. (AX #13; TR 68-69).

ACCEPTED AND INCORPORATED

5. Pursuant to 50 CFR 622.34(k), and at all times relevant to this case, within the boundaries of an area known as the Edges, 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 CFR 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 CFR 622.34 (AX 14).

ACCEPTED AND INCORPORATED

6. The boundaries of the Edges closed area set forth in 50 CFR 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'N, 84° 54'W
Southeast corner = 28° 14'N, 84° 42'W
(AX #14, 15, 16).

ACCEPTED AND INCORPORATED

7. On February 25, 2011, at approximately 1535 hours, the F/V TIGHTEN UP was actively fishing at position 28° 38.487N - 084° 57.684W which is approximately 1 nm inside the boundary of the Edges closed area, and within the exclusive economic zone (EEZ) as defined at 16 U.S.C. § 1802(11). (AX #1, 2, 6; TR 16-17).

ACCEPTED AND INCORPORATED

8. On or about February 25, 2011, Respondent Straub estimated the F/V TIGHTEN UP was in possession of 2,600 – 2,700 pounds of assorted Gulf reef fish, of which approximately 450 – 500 lbs red snapper, 130 lbs red grouper, and 20 lbs scamp were harvested from within the boundaries of the Edges closed area. (AX #1, 2; TR 17).

ACCEPTED AND INCORPORATED

9. Respondent Michael Straub asserts he did not know about the existence of the Edges closed area. (AX #9; TR 67).

ACCEPTED AND INCORPORATED

10. 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 20 each year; thus Respondents had legal notice of the seasonal closure.

ACCEPTED AND INCORPORATED

11. NOAA has proved by the preponderance of the evidence that on or about February 25, 2011, Respondent Steven Silk and Respondent Michael Straub did fish in violation of the prohibitions, restrictions, and requirement applicable to the Edges seasonal closure as alleged in the Notice of Violation and Assessment issued on June 3, 2011.

ACCEPTED AND INCORPORATED

12. The record shows no prior violations by either Respondent of any statute or regulation enforced by NOAA.

ACCEPTED AND INCORPORATED

13. Respondents Silk and Straub are jointly and severally liable to the United States for a civil penalty in accordance with 16 USC 1858(a).

ACCEPTED AND INCORPORATED

14. After consideration of the nature, circumstances, extent and gravity of the prohibited act committed, the penalty of \$7,500 set forth in the NOVA issued on June 3, 2011 is appropriate.

NOT ACCEPTED for the reasons set forth in the Initial Decision.