UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
WASHINGTON, D.C. 20230

In the Matters of:	)	Docket Numbers:
Josh W. Churchman (F/V PALO)	)	SW0703629
And	)	
Edward T. Paasch (F/V HAZEL A),	)	
Respondents.	)	

ORDER AFFIRMING INITIAL DECISION

This matter arises from a petition for discretionary review filed by Edward Paasch and Josh Churchman (Respondents). Respondents appeal an Initial Decision issued by an Administrative Law Judge (ALJ) on February 18, 2011. In that decision, the ALJ found that both Respondents fished for groundfish within a restricted area using prohibited fishing gear in violation of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Respondents do not deny liability, but rather appeal the penalties assessed by the ALJ. For the reasons set forth below, the Initial Decision is affirmed.

LEGAL BACKGROUND

This case involves fishing for Pacific Coast groundfish. By regulation, NOAA has established several conservation areas to protect groundfish, including the Nontrawl Rockfish Conservation Area (RCA) located offshore of Bodega Bay, California. Fishing within this RCA is restricted. Relevant here, vessels issued a Pacific Coast Groundfish Limited Entry Permit (with a longline gear endorsement) may not fish within this RCA using longline gear.[1] A violation of this restriction is a violation of the Magnuson-Stevens Act.[2]

[1] 50 C.F.R. § 660.306(h)(2).

[2] 16 U.S.C. § 1857(1)(A).

FACTUAL AND PROCEDURAL BACKGROUND

Respondents are both commercial fishers. Mr. Paasch is the owner and operator of the fishing vessel (F/V) HAZEL A. Mr. Churchman is the owner and operator of the F/V PALO. Each vessel held a Pacific Coast Groundfish Fishery Limited Entry Permit bearing a longline gear endorsement. On multiple occasions in 2008, Respondents fished for chilipepper rockfish (a species of groundfish) within the RCA using longline gear. On July 29, 2009, the Enforcement Section of NOAA's Office of General Counsel (NOAA Enforcement) initiated this enforcement action, issuing a separate Notice of Violation and Assessment of Administrative Penalty (NOVA) to each Respondent. Mr. Paasch was charged with fishing in the RCA on two occasions in March and April of 2008. Mr. Churchman was charged with fishing in this same area on four occasions from May through July 2008. NOAA Enforcement sought a $13,754 penalty against Mr. Paasch and a $35,786 penalty against Mr. Churchman.

Both Respondents challenged these assessments and the cases were consolidated for hearing. While conceding liability, Respondents contested the civil penalties assessed by NOAA Enforcement, arguing that their violations were unintentional and that an appropriate penalty was either a verbal or written warning. In his Initial Decision, the ALJ rejected Respondents' request, but also concluded that NOAA Enforcement's penalty assessment was too high, and instead assessed an $8,754 penalty against Mr. Paasch and a $21,786 penalty against Mr. Churchman.

Respondents timely appealed this Initial Decision. On July 15, 2011, I accepted discretionary review.

DISCUSSION

Respondents do not deny unlawfully fishing within the RCA. Rather, they challenge the penalties assessed, claiming that their violations were unintentional and warranted only a verbal or written warning. On appeal, Respondents allege a number of errors committed by the ALJ. Specifically, Respondents: (1) challenge the ALJ's factual findings; (2) argue that assessing penalties in this instance violates NOAA policies and practices; and (3) claim the ALJ erred by using NOAA Enforcement's proposed penalty assessment as the "starting point" for calculating the penalties. Absent these errors, Respondents claim the ALJ would have assessed no penalty or only a *de minimis* penalty.

Each alleged error is examined in turn. As discussed below, Respondents arguments are rejected. Instead, I find the ALJ's conclusions are well reasoned and supported by the record.

A. The ALJ's factual findings

Respondents argue that the ALJ ignored testimony that showed the violations were inadvertent. At the hearing, Mr. Paasch claimed he was unfamiliar with the RCA boundaries and usually steered clear of the area given his lack of skill plotting boundaries and limited ability to fish along a plotted line. Rather, he relied exclusively upon Mr. Churchman's understanding of the boundary, never attempting to independently verify its accuracy. For his part, Mr. Churchman claimed that he was mistaken about the boundary, but this mistake was reasonable since: (1) he

had fished the same area since 2003 when the boundary was established and had never been challenged, even though he routinely reported his fishing location to NOAA; and (2) on several prior occasions, he fished the same location with NOAA observers on board, who never alerted him to a problem.

There is no indication that the ALJ ignored evidence presented at hearing. It is the ALJ's role as finder of fact to determine witness credibility, and consider all relevant facts and testimony.[3] This is precisely what the ALJ did. As to Mr. Paasch, the ALJ accepted his explanation, but found that it did not absolve him of the requirement to be aware of the RCA boundaries. As to Mr. Churchman, the ALJ determined that his explanation was simply not credible. Significant to his analysis:

- The ALJ found that Mr. Churchman continued to fish inside the RCA after learning of an interview of Mr. Paasch, conducted by Special Agents for the National Marine Fisheries Service (NMFS), in which the agents told Mr. Paasch he was fishing inside the RCA. Mr. Churchman learned about this conversation from Mr. Paasch's brother Kenny. Mr. Churchman admitted that Kenny Paasch "at least implied" that the fishing location was not a "good spot," that the conversation with NMFS's agents "wasn't pretty," and that Mr. Paasch was "scared" and was "moving his boat."[4, 5]

- After learning of this conversation, Mr. Churchman participated in an email exchange with the California Department of Fish and Game, requesting that the state change the coordinates to the RCA. Mr. Churchman claimed this exchange was only intended to suggest moving the boundary of the RCA to open up more areas to fish. The ALJ concluded that Mr. Churchman's explanation was not credible, and that the exchange reasonably evidenced an awareness that there was at least a potential, if not real, enforcement problem.[6]

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[3] *See e.g., In re Town Dock Fish, Inc.*, 6 O.R.W. 580 (NOAA App. 1991); *In re Meredith Fish Company*, 4 O.R.W. 914 (NOAA App. July 15, 1987).

[4] Initial Decision at 9.

[5] Respondents claim that testimony concerning this interview of Edward Paasch constitutes "triple hearsay" (because it was a conversation that was conveyed to his brother Kenny, who in turn mentioned it to Mr. Churchman). The statement, however, is not hearsay since it was not offered to prove the truth of the matter asserted. Rather, it was offered to show that Mr. Churchman had notice of a potential problem. Even if hearsay, however, the statement was admissible. Hearsay evidence is admissible in NOAA enforcement proceedings if it is "relevant, material, reliable and probative, and not unduly repetitious or cumulative." *See* 15 C.F.R. § 904.251(a)(2). Here, Mr. Churchman does not deny key elements of the conversation. In fact, Mr. Churchman admitted that he knew that Mr. Paasch had been interviewed by NMFS Special Agents about alleged RCA violations, and that based upon this conversation Mr. Paasch was scared and decided to move his boat from the area because the fishing spots were "not good." Given these considerations, I find the conversation between Edward Paasch and NMFS Special Agents was correctly admitted into evidence by the ALJ and was relevant as to when Mr. Churchman was placed on notice of a problem.

[6] Initial Decision at 29.

While the ALJ was unwilling to conclude that Mr. Churchmen knew he was fishing in the RCA, he found that the evidence reflected at minimum "a willful act of maintaining one's ignorance" as to the actual boundary.[7] The ALJ reached this conclusion after having had the opportunity to hear both Respondents testify, see their demeanor, and assess their credibility. I see no basis for disturbing the ALJ's assessment of the evidence.

B. Enforcement under NOAA policies and practices

Respondents next raise several objections to the manner in which the case was charged. Respondents claim that NOAA delayed bringing this enforcement action, which resulted in additional violations that were "stacked" in order to build a stronger case. Respondents' argument is without merit. Under Section 308 of the Magnuson-Stevens Act, each day of a continuing violation is a separate offense.[8] Additionally, there is no agency policy or procedure requiring NOAA to immediately notify respondents upon learning of a potential violation. Finally, the record shows that the ALJ considered NOAA's failure to immediately notify Churchman of RCA incursions, and treated it as "a minor mitigating factor" when determining the appropriate penalty.[9]

Respondents also contend that the decision to impose civil penalties is contrary to NOAA policy and practices. This argument is without merit. Indeed, NOAA's actions were consistent with the Agency's penalty schedule in effect at that time that recommended monetary sanctions.[10]

Finally, Respondents claim that they were treated unfairly because others who committed similar violations received a written warning. In fact, the ALJ considered evidence relating to a past violation by another fisher, John Mellor, which was resolved with a warning. In the ALJ's view, the facts associated with Mr. Mellor's violation were significantly different, justifying a lesser penalty than those levied against Respondents.[11] I agree with the ALJ's conclusions.

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[7] *Id.* at 29.

[8] *See* 16 U.S.C. § 1858(a).

[9] Initial Decision at 25, n. 7.

[10] The penalty schedule in effect at that time recommended a penalty of $5,000 to $20,000 per violation, plus forfeiture of the fair market value of the catch, and permit suspension of up to 90 day. *See* West Coast Groundfish Fishery Civil Administrative Penalty Schedule (Rev. 10/01/2005). NOAA Enforcement's penalty was at the low end of this recommendation, and the ALJ's ultimate assessment even lower.

[11] Mr. Mellor entered the RCA boundary on 2 separate occasions due to equipment malfunction and on a third separate occasion to retrieve lost gear, whereas Respondents Churchman and Paasch were actively and repeatedly fishing in the RCA - - a more egregious offense justifying a more severe penalty. Initial Decision at 35-36.

C. The ALJ's Civil Penalty Calculation

Respondents' final argument is that the ALJ erred in how he calculated the penalty, improperly using NOAA Enforcement's proposed penalty as the "starting point," instead of "starting at zero (warning) and looking to the evidence, and mitigating and aggravating factors, to support the imposition of any penalty at all."

This argument fails in two respects. First, there is no requirement that an ALJ use a written warning as a starting point in determining an appropriate sanction. Indeed, the penalty schedule in effect at that time recommended a monetary penalty for violations of this nature. Second, there is no evidence that the ALJ used the proposed penalty as a "starting point." Regulations applicable to NOAA administrative enforcement proceedings were revised in 2010 to eliminate any presumption in favor of the civil penalty recommended by NOAA Enforcement.[12] The ALJ noted this amendment and made clear that no "presumption of correctness" attached to NOAA Enforcement's proposed penalty amount. Rather, the ALJ based the penalty assessment "upon the applicable statute, regulations and law as revised Section 904.204(m) directs."[13]

The ALJ used the correct methodology when developing his penalty recommendation. The ALJ weighed the evidence against each statutory factor, considering aggravating and mitigating circumstances unique to each Respondent. After doing so, the ALJ found that NOAA Enforcement's assessment was too high. The ALJ also rejected Respondents' argument that a *de minimis* penalty or warning was appropriate. Instead, the ALJ concluded that the sanction must be sufficient to serve as a deterrent to Respondents and others, and that the value of the catch alone could not serve that purpose because violators would see such a sanction as simply a cost of doing business. Based upon the applicable factors, facts and circumstances of the case, the ALJ determined that "some additional amounts above the value of the catch is appropriate."[14] Ultimately, the ALJ imposed a sanction of $8,754 against Mr. Paasch (value of the catch plus $2,500 per violation), and $21,786 against Mr. Churchman (value of the catch plus $4,000 per violation). I believe these assessments are reasonable and affirm them.

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[12] 75 Fed. Reg. 35631 (Jun. 23, 2010). Before the regulations were amended, the ALJ could assess a penalty *de novo* only if "good reason" for the departure was expressly stated in the decision. *See* 15 C.F.R. § 904.204(m) (2009). Past decisions interpreting those regulations held that the penalty proposed by the Agency in the NOVA was "presumed appropriate" or "correct." *See e.g., In re AGA Fishing Corp.*, 2001 WL 34683652 (NOAA App. Mar. 17, 2001).

[13] Initial Decision at 24, n. 6.

[14] Initial Decision at 40.

CONCLUSION

For the reasons set forth above, the Initial Decision is affirmed. This Order constitutes the final administrative action of NOAA and becomes effective for the purpose of judicial review on the date of service.

Dec 10, 2012
Dated

Jane Lubchenco, Ph.D.
Under Secretary of Commerce
for Oceans and Atmosphere

Certificate of Service

I, Donna Robertson, hereby certify that on December 11, 2012, the Order Affirming Initial Decision was served on the parties or designated representatives by facsimile and certified mail, return receipt requested:

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