



**Date Issued: December 22, 2014**

<sup>1</sup> The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011.

## **I. Statement of the Case**

On November 1, 2012, the National Oceanic and Atmospheric Administration (“NOAA” or “Agency”), on behalf of the Secretary of Commerce, issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”) to Respondent Christopher Dutton (“Dutton”) and Respondent Aquatic Edge Expeditions LLC (“AEE”). The NOVA alleges that Respondent Dutton, operator of the vessel CATITA II, acting for himself and on behalf of Respondent AEE, violated the Northern Pacific Halibut Act, 16 U.S.C. §§ 773 et seq. (“Halibut Act”), in two counts. Count 1 alleges that on or about August 15 through 20, 2011, Dutton operated the vessel CATITA II “in regulatory area 2C with one or more charter vessel anglers on board that caught and retained [Pacific] halibut without an original valid charter halibut permit for the regulatory area in which the vessel was operating,” in violation of the Halibut Act, 16 U.S.C. § 773e(a)(1) and (5), and the implementing regulation at 50 C.F.R. § 300.66(r). Count 2 alleges that on or about August 20, 2011, Dutton possessed on board halibut that had been filleted, mutilated, or otherwise disfigured; specifically, Pacific halibut that had been cut into chunks that were smaller pieces than the allowed 2 ventral pieces, 2 dorsal pieces, and 2 cheek pieces, with skin on all pieces, in violation of 16 U.S.C. § 773e(a)(1) and (5), 50 C.F.R. § 300.66(a), and Annual Management Measure § 28(3)(a). The Agency proposed to assess against Respondents jointly and severally a total penalty of \$19,750, comprised of a \$15,750 proposed penalty for Count 1, and a \$4,000 proposed penalty for Count 2.

On November 30, 2012, Respondents submitted through counsel a request for hearing before an Administrative Law Judge. Pursuant an Order to Submit Preliminary Positions on Issues and Procedures (“PPIP”) issued by Chief Administrative Law Judge Susan Biro, the parties timely filed their respective PPIPs. On February 26, 2013, Judge Biro designated the undersigned judge to preside in this proceeding.

The hearing in this matter was held on September 23 and 24, 2013, in Juneau, Alaska. At the hearing, the Agency presented the testimony of four witnesses and offered twenty seven exhibits, twenty six of which were admitted into evidence. Respondents introduced four exhibits, three of which were admitted in evidence. *Id.* On behalf of Respondents, only Dutton testified as a witness. The parties each filed post-hearing briefs with proposed findings of fact and conclusions of law, and reply briefs.

After careful review of the entire record, it is concluded NOAA established by a preponderance of reliable and credible evidence that Respondent Dutton violated federal fisheries laws and regulations as alleged in both Counts 1 and 2 of the NOVA.

## **II. Statutory and Regulatory Background**

The Halibut Act, 16 U.S.C. §§ 773-773k, was enacted in 1982 to implement the Convention between the United States and Canada for the Preservation of the Halibut

Fishery of the Northern Pacific Ocean and Bering Sea, as amended (“Convention”). It governs halibut fish (*hippoglossus stenolepis*) inhabiting Convention waters off the west coast of the United States and Canada, as described in Article 1 of the Convention. 16 U.S.C. §§ 773(d), (e).

The Halibut Act gives the Secretary of Commerce general responsibility to carry out the Convention and the Halibut Act, including adopting regulations necessary to carry out the purposes and objectives of the Convention and the Act. 16 U.S.C. §§ 773c. The Act provides in pertinent part that “[i]t is unlawful – (a) for any person subject to the jurisdiction of the United States – (1) to violate any provision of the Convention, this Act, or any regulation adopted under this Act . . . [and] (5) to ship, transport, offer for sale, sell, purchase, import, export or have custody, control or possession of, any fish taken or retained in violation of the Convention, this Act, or any regulation adopted under this Act . . . .” 16 U.S.C. § 773e(a)(1) and (5).

The Halibut Act and Convention established the International Pacific Halibut Commission (“IPHC”), which develops and adopts regulations referred to as the Annual Management Measures, published annually by NOAA in the Federal Register. 16 U.S.C. §§ 773(b), 773a, 773b.

Annual Management Measure 28(3)(a), effective April 15, 2011, states in pertinent part as follows:

In Convention Waters in and off Alaska, no person shall possess on board a vessel, including charter vessels and pleasure craft used for fishing, halibut that has been filleted, mutilated, or otherwise disfigured in any manner, except that (a) Each halibut may be cut into no more than 2 ventral pieces, 2 dorsal pieces, and 2 cheek pieces, with skin on all pieces. . . .

Pacific Halibut Fishery Regulations (“Annual Management Measure(s)”), 76 Fed. Reg. 14300, 14313 (Mar. 16, 2011).

The North Pacific Fishery Management Council (“Council”) has authority over the area of Alaska and its waters, and is authorized to develop regulations in addition to and not in conflict with regulations adopted by the IPHC. 16 U.S.C. §§ 773c(c), 1852(a)(1)(G). The Council developed a limited access program for charter vessel businesses, and on January 5, 2010, NOAA’s National Marine Fisheries Service (“NMFS”) published a final rule implementing the program for guided sport charter vessels in Alaska in IPHC Areas 2C (Southeast Alaska) and 3A (Central Gulf of Alaska). Pacific Halibut Fisheries; Limited Access for Guided Sport Charter Vessels in Alaska, 75 Fed. Reg. 554 (Jan. 5, 2010) (codified at 50 C.F.R. part 300).<sup>2</sup> The intent of

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<sup>2</sup> The regulations define the pertinent regulatory areas as follows: “Area 2C includes all waters off Alaska that are east of a line running 340° true from Cape Spencer Light (58°11’56” N. latitude, 136°38’26” W. longitude) and south and east of a line running 205° true from said light . . . Area 3A

the program was to curtail growth of fishing capacity by limiting the number of charter vessels that may participate in the guided sport fishery for halibut in Areas 2C and 3A. 75 Fed. Reg. 554. The principal concern was overcrowding of productive halibut grounds due to the growth of the charter vessel sector. *Id.* The Council found that the charter vessel sector was the only halibut harvesting sector that was experiencing growth in IPHC Areas 2C and 3A, whereas other harvesting sectors already had catch limits in place. *Id.* Under the program, NMFS issues a charter halibut permit (“CHP”) to qualified applicants based on their historic (in 2004 and 2005) and recent (in 2008) participation in the charter halibut fishery. 75 Fed. Reg. 555. The Charter Halibut Regulations established on January 5, 2010 provide in pertinent part that --

. . . it is unlawful to for any person to do any of the following:

(a) Fish for halibut except in accordance with the annual management measures published pursuant to 50 CFR 300.62.

\* \* \*

(r) Be an operator of a vessel in Commission regulatory area 2C or 3A without an original valid charter halibut permit for the regulatory area in which the vessel is operating when one or more charter vessel anglers are on board that are catching and retaining halibut.

50 C.F.R. § 300.66(r)(2011).<sup>3</sup> That provision became effective on February 1, 2011. 75 Fed. Reg. 554. The January 5, 2010 regulations included the following revised definitions:

*Charter vessel angler*, for purposes of §§ 300.65(d), 300.66 and 300.67, means a person, paying or non-paying, using the services of a charter vessel guide.

*Charter vessel fishing trip*, for purposes of §§ 300.65(d), 300.66 and 300.67, means the time period between the first deployment of fishing gear into the water from a vessel after any charter vessel angler is onboard and the offloading of one or more charter vessel anglers or any halibut from that vessel.

*Charter vessel guide*, for purposes of §§ 300.65(d), 300.66 and 300.67, means a person who holds an annual sport guide license issued by the Alaska Department of Fish and Game, or a person who provides sport fishing guide services.

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includes all waters between Area 2C and a line extending from the most northerly point on Cape Aklek (57°41'15" N. latitude, 155°35'00" W. longitude) to Cape Ikolik (57°17'17" N. latitude, 154°47'18" W. longitude), then along the Kodiak Island coastline to Cape Trinity (56°44'50" N. latitude, 154°08'44 W. longitude), then 140° true." Pacific Halibut Fishery Regulations, 75 Fed. Reg. 13.024, 13.028 (Mar. 18, 2010) (codified at 50 C.F.R. pt. 300).

<sup>3</sup> Section 300.66(r) of Title 50 C.F.R. was subsequently redesignated as section 300.66(s), along with numerous similar changes, by rule amendment published at 78 Fed. Reg. 75,844 on December 12, 2013. References herein to Section 300.66(r) are to the version in effect in 2011.



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*Crew member*, for purposes of §§ 300.65(d), and 300.67, means an assistant, deckhand, or similar person who works directly under the supervision of, and on the same vessel as, a charter vessel guide or operator of a vessel with one or more charter vessel anglers on board.

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*Sport fishing guide services*, for purposes of §§ 300.65(d), and 300.67, means assistance, for compensation, to a person who is sport fishing, to take or attempt to take fish by being onboard a vessel with such person during any part of a charter vessel fishing trip. Sport fishing guide services do not include services provided by a crew member.

75 Fed. Reg. at 599, codified at 50 C.F.R. § 300.61 (2010).

### **III. Findings of Fact**

The following findings of fact are based on a thorough and careful analysis of the testimony of witnesses, the exhibits entered into evidence, and the entire record as a whole:

1. The CATITA II (USCG No. 254687) is a wooden vessel of approximately 85 feet in length that was built in 1942 for the United States Army as an air/sea rescue vessel. Tr. 377-378; NOAA's Exhibits ("NOAA Exs.") 4, 19, 26
2. Calvin Schipper ("Schipper") owned and operated the CATITA II for several years for guided sport fishing in Southeast Alaska as Captain Cal's Southeast Alaska Charter Service until Dutton executed an agreement on behalf of himself and/or his assigns to purchase the CATITA II and Captain Cal's Southeast Alaska Charter Service, Inc. from Schipper on November 12, 2005. Transcript ("Tr.") 374-377, 380-382; NOAA Ex. 18.
3. WDS Leasing, LLC ("WDS") was created in January 2006 by Dutton for the purpose of purchasing the CATITA II, and was owned by Dutton, his mother Holly Ward, and his stepfather Tom Ward. NOAA Exs. 21, 22; Tr. 381-83. On January 1, 2008, Dutton transferred his voting rights to Tom and Holly Ward. Respondents' Exhibit ("R Ex.") 3; Tr. 385, 539-540. At all times relevant to this proceeding, WDS owned the CATITA II. NOAA Ex. 4; Tr. 65, 381-91.
4. AEE was created in January 2006 by Dutton for the purpose of purchasing Captain Cal's Southeast Alaska Charter Service, Inc. As of January 1, 2008, Dutton was the sole owner and managing member of AEE. NOAA Exs. 18, 23, 24; R Ex. 2; Tr. 381-385, 390-391, 540, 560.

5. In 2007, 2008, 2009 and 2010, Respondents had sport fish guide licenses, and provided clients with fully guided sportfishing and sightseeing charters in Southeast Alaska. Tr. 52, 397-400, 406-408, 414-416, 418-421. During these charters, Dutton chose where, when and what to fish for, what gear to use, and what depth to fish at, and marked specific fishing spots for halibut on an electronic chart program. Tr. 421-425.
6. During 2010 and 2011, a website for AEE designed by Dutton offered Alaska fishing and sightseeing charters on the CATITA II, with Dutton as captain. Tr. 64, 369-370; NOAA Exs. 19, 26. The website suggested that AEE offered guided fishing trips. NOAA Exs. 19, 26; R Ex. 1 pp. 24-25, 65; Tr. 64, 437-438.
7. When the requirement for charter halibut permits went into effect in early 2010, Dutton on behalf of AEE filed on February 4, 2010 an application for a charter halibut permit. Tr. 366, 426-427; NOAA Ex. 18. The application listed Dutton as a full interest holder of AEE and the CATITA II as the charter halibut fishing vessel, and represented that AEE made 26 halibut fishing trips in 2008. NOAA Ex. 18.
8. On December 15, 2010, NMFS denied Respondents' charter halibut permit application. Tr. 28, 366; NOAA Ex. 7.
9. Steven Atkinson was a passenger on three or four trips on board the CATITA II when it was owned and operated by Schipper. Tr. at 166-168; NOAA Ex. 12. Activities during the trips included fishing, and Schipper took Atkinson to some good fishing spots for halibut and salmon, which Atkinson could identify on an Alaska map book. Tr. 168-170, 176-177. When Steven Atkinson caught a large halibut, Schipper shot the halibut and brought it on board, and Schipper cleaned, iced, and stored the fish caught. Tr. 173-174. Both Schipper and Atkinson baited hooks, and gaffed, brought on board, and packaged fish. Tr. 173-175.
10. Steven Atkinson is an experienced sport fisherman, having taken 60 to 75 fishing trips in Alaska and British Columbia over 20 years. Tr. 192, 224-225, 271-272, 278, 598. The trips were guided fishing trips, in which the guide determined what spots to fish in, what to fish for, what depth to fish, and what gear to use. Tr. 225-231.
11. In the summer of 2010, Steven Atkinson contacted Dutton for a combination sightseeing, hiking, kayaking and fishing trip in Southeast Alaska for a family group in 2011 aboard the CATITA II. Tr. 178, 180-182, 234, 472.
12. Southeast Alaska is designated as IPHC Regulatory Area 2C. Tr. 439.
13. Steven Atkinson told Dutton that he wanted to fish the same places he fished with Schipper, and assumed that Dutton knew the coordinates of those places, as Atkinson had seen them plotted on the electronic map on the CATITA II when

Schipper operated the vessel. Tr. 182-183, 243-244. He had definite ideas of where he wanted to anchor each night, but "the fishing times and places were more flexible," depending on tides, progress of the trip, and "how good the fishing was." Tr. 237-238, 619-620.

14. Steven Atkinson did not ask whether Dutton had a fishing guide license or a charter halibut permit, and Dutton never told him he did not have them. Tr. 184, 188. Atkinson assumed that the services "would be the same type of services" that he had with Schipper. Tr. 184. Atkinson looked at the AEE website before the 2011 trip. Tr. 202.
15. Dutton told Steven Atkinson before the trip that he would not guide the party, but would take the vessel where Atkinson wants to go, and that Atkinson "could specify exactly what, where, when and how he wanted to do the activities." Tr. 471-473; R Ex. 1 p. 30, 55. Dutton also told him that Atkinson was leasing the vessel and crew, and therefore the bag limit for halibut would be for an unguided trip. Tr. 189-190.
16. Dutton and Steven Atkinson did not talk about any other assistance that might be provided by Dutton in the course of the trip. Tr. 190.
17. The Atkinson party, consisting of seven clients, namely Steven Atkinson, Donald E. Atkinson, Donald Roger Atkinson, Ross Atkinson, James Atkinson, Marion Montgomery and Ted Hubbard, began a six day trip ("Atkinson trip") in Southeast Alaska aboard the CATITA II on August 15, 2011, departing from Juneau, Alaska, with Dutton as the captain. NOAA Ex. 1 p. 1, Ex. 11.
18. Respondents did not have a charter halibut permit onboard the CATITA II during the Atkinson trip. NOAA Ex. 1 p. 2.
19. Dylan Klose was an independent contractor for AEE who served as a deckhand crewmember on the CATITA II for the Atkinson trip. NOAA Exs. 8, 11; Tr. 487-488, 559. Klose was a commercial fisherman, and had previously been hired by Dutton in 2010 to serve as crew member on several guided fishing trips. Tr. 487, 494; R Ex. 1 p. 56; NOAA Exs. 8, 20. A cook also served onboard the CATITA II for the Atkinson trip as an independent contractor for AEE. Tr. 487, 559.
20. Klose understood from Dutton that the Atkinson party rented the vessel and hired Dutton as captain and Klose as deckhand, and that for the year 2011, the CATITA II is not a chartering vessel. NOAA Exs. 8, 20.
21. Steven Atkinson paid Respondents approximately \$23,700, or \$3,950 per day, for a six day trip on the CATITA II for the Atkinson party. Tr. 186-187, 200, 555-556; NOAA Ex. 11; R Ex. 1 pp. 94-95. For each day, Dutton allocated \$3,000 to pay WDS, out of which were allocated costs for fuel. Tr. 76-78; 556-559, 564; R

- Ex. 1 pp. 94-96. The remaining \$950 per day was allocated to AEE, to pay for expenses including Dutton's services, Klose's services, the cook's services, and food on board the CATITA II during the Atkinson trip. Tr. 556-558, 638; R Ex. 1 p. 14.
22. Klose also received tips from the Atkinsons as a large part of his compensation for his work on board the CATITA II. Tr. 489, 558-560; NOAA Exs. 8, 20.
  23. Some members of the Atkinson party had experience fishing. Tr. 192-194. Several of the clients had been passengers on the CATITA II in the past. Tr. 166; R Ex. 1 p. 107.
  24. The members of the Atkinson party obtained their own fishing licenses. Tr. 475-476 R Ex. 1 p. 119.
  25. Steven Atkinson "didn't know what the law is" about charter halibut permits and fishing guide licenses, and "did not pay a lot of attention" when Dutton explained fishing regulations on August 15, 2011, the first day of the trip, because he had heard it before. Tr. 188, 191-192.
  26. Dutton did not talk to any members of the Atkinson party other than Steven Atkinson about whether or not he could guide them. Tr. 612; R Ex. 1 p. 123; NOAA Ex. 9.
  27. On August 15, 2011, Steven Atkinson signed a document entitled "Uniform Terms and Conditions of Crew Hire Contract" presented by Dutton. Tr. at 200-203, 452, 459; NOAA Ex. 13. The document does not name any crew members or state any period or rate of hire. NOAA Ex. 13. Atkinson testified that he "may have skimmed" the document, but did not read it closely. Tr. 203, 232-233.
  28. Before the trip or upon boarding the vessel, Atkinson told Dutton several places that he wanted to go on the trip, including Hawk Inlet on Admiralty Island, Tenakee Springs, Baranof, Gut Bay, Whitestone Harbor, Red Bluff and Gambier Bay. Tr. 206-207, 243, 250-251, 279-280, 500-501; R Ex. 1 pp. 29-30, 46, 119. The locations were familiar to Dutton from previous trips on the CATITA II. Tr. 489. Atkinson told Dutton he wanted to fish for halibut. Tr. 514. Atkinson looked at maps with Dutton, including the Delorme map book, which has markers where fish are located. Tr. 279-280, 283-284, 476-477. Atkinson pointed to the places he wanted to go, they discussed spots where Schipper had taken Atkinson, and they charted the places they intended to go every day. Tr. 279-282, 307, 476-477, 619, 623; R Ex. 1 p. 46. They did not discuss coordinates or particular halibut fishing spots. Tr. 281-282. During the trip, they went to the places Atkinson wanted to go, except they did not go to one or two of the places due to bad weather. Tr. 207, 209, 284, 501.

29. All fishing gear was provided on the CATITA II for the Atkinson party, and was normally stowed onboard the vessel. Tr. 71, 205-206, 480-481, 496; R Ex. 1 pp. 32-33. The Atkinson party used six fishing rods at a time during the August 2011 trip. R Ex. 1 pp. 30, 34-35, 111.
30. At some point during the trip, Steven Atkinson told Dutton "We want to stop for two hours here and fish," and picked a spot to fish at the time when the tide was changing. Tr. 208, 245, 619-620. Other times, Dutton drove the CATITA II to the general area where Steven Atkinson wanted to go and then slowed or stopped the vessel. Tr. 644-646; R Ex. 1 pp. 109-110. Dutton drove the vessel to a spot where members of the party had been before, and "ran the contours." R Ex. 1 pp. 34, 81, 82.
31. Successful halibut fishing depends on the location of fishing, finding the fishing spots, "halibut holes" or "halibut humps" where halibut are feeding and therefore are plentiful. Tr. 43, 92-94. It also depends on skill in anchoring and drifting the vessel over a halibut hole or hump, and use of electronic charting programs and depth sounders, with which the vessel operator can direct the anglers what to do with their fishing lines. Tr. 41-42, 105-111, 246. Furthermore, it depends on the type of jig, method of operating the jig, the tide, and other factors. Tr. 92-95, 618
32. For members of the Atkinson party during their trip, Dutton anchored and drifted the CATITA II on the fishing spots including halibut fishing spots, rigged gear, baited hooks, changed lures, explained how to operate the manual downrigger and cranked it up, identified bottom fish caught, filleted fish, helped land halibut, and netted and brought fish on board. Tr. 69-71, 197-198, 216, 245-246, 497-498, 518-520, 528, 623-625; R Ex. 1 pp. 31-32, 36-38, 41-47, 49-53, 82, 108, 121-122; NOAA Exs. 8, 9, 20.
33. Klose did most of the netting of fish, switching lures, baiting hooks, and cleaning and filleting of fish for the Atkinson party during their trip. R Ex. 1 pp. 108-109, 115, 116-117; NOAA Exs. 8, 9, 12, 20; Tr. 489-490, 528. He also set up, tended, and moved fishing rods, and removed fish from hooks. Tr. 499; NOAA Exs. 8, 9, 12, 20. The services he provided as a deckhand on previous guided fishing trips were the same as those he provided for the Atkinson party. NOAA Exs. 8, 20.
34. On August 16, 2011, when the CATITA II was in Whitestone Harbor, Dutton suggested to Steven Atkinson to try a different color lure, and Dutton gave a silver lure that he had with him to Atkinson, and either handed it to Atkinson or put it on his hook. Tr. 213-214, 239-240, 261, 505; R Ex. 1 p. 49-50.
35. With that lure, Steven Atkinson caught a coho salmon that was of potential trophy size. Tr. 213, 216-217, NOAA Exs. 5, 6. Dutton netted the salmon and brought it on board. Tr. 216. Atkinson had Dutton arrange a float plane to take

them ashore with the fish to Jerry's Meats in Juneau to be weighed with an official scale. Tr. 80-81, 218-219, 510-511; NOAA Exs. 5, 6.

36. The Atkinson party fished for halibut from the CATITA II on at least three days, but caught halibut that were retained on two days. Tr. 195, 516-517, 628; R Ex. 1 p. 38, 40.
37. On one of those days, the Atkinson party retained 14 halibut, or two halibut per person. R Ex. 1 p. 41; Tr. 628. In total, the Atkinson party retained 21 halibut, averaging 20 pounds or less per fish. R Ex. 1 pp. 41, 86; NOAA Exs. 8, 9; Tr. 195, 212, 264-265, 517. All in the party, except two who were over 80 years old, caught halibut. Tr 165, 212.
38. During the time period of the Atkinson trip for Regulatory Area 2C, the daily bag limit for charter vessel anglers was one halibut caught and retained by each charter vessel angler per calendar day, and for sport fishermen was two halibut per person per day, and the maximum a person may possess is two daily bag limits. Annual Management Measure 28(1)(b) and (c), 76 Fed. Reg. 14300, 14313 (Mar. 16, 2011); 50 C.F.R. § 300.65(d)(2)(i) (2010).
39. The Atkinson party fished for salmon on five separate days. R Ex. 1 p. 40. They did not catch as many fish as on Steven Atkinson's other fishing trips, primarily due to very bad weather. Tr. 208, 266-267.
40. During the trip, Dutton directed the halibut to be cut into "fletches" or four pieces, but sliced only through the meat into smaller portions, leaving the skin of each of the four pieces intact, and then placed into the freezer. Tr. 526, 529-531; NOAA Ex. 8.
41. On August 20, 2011, on the way back to port, when the CATITA II was traveling in the Gastineau Channel from Stephens Passage to the south, Dutton and/or Klose cut the halibut into chunks which were smaller and in a greater number of pieces than two ventral, two dorsal, and two cheek pieces of each halibut with skin on. Tr. 221-222, 531-536; R Ex. 1 pp. 85-87, 117-118; NOAA Exs. 8, 9, 14, 16. The Atkinson party then helped vacuum pack the chunks into sealed freezer bags. Tr. 222; R Ex. 1 pp. 116-118.
42. Steven Atkinson knew "something about" the regulations, and he and Dutton talked about the regulations regarding cutting up halibut into chunks "toward the end of the trip." Tr. 192; 221-222, 631-633. Dutton told him that cutting halibut into chunks once they got into the channel was legal. Tr. 254-255.
43. Dutton and the Atkinson party returned to port and were docked at approximately 5:15 p.m. on August 20, 2011 at Aurora Harbor, Alaska. NOAA Ex. 1 p. 1; NOAA Ex. 12; R Ex. 1.



44. On August 20, 2011, NOAA Special Agent Andrew Stoffa, Alaska Wildlife Trooper Aaron Frenzel, and Alaska Wildlife Trooper Landvatter, along with a technician, boarded the CATITA II in Aurora Harbor, Juneau, Alaska after it tied up at port, and interviewed Dutton, Klose, the cook, and each member of the Atkinson party as part of an investigation of Respondents' activities with regard to sport fishing. Tr. 34, 43-46, 50-51; NOAA Exs. 1, 8, 9, 10, 11, 12; R Ex. 1.
45. Dutton was cooperative and answered all questions during the investigation. Tr. 350-351.
46. Special Agent Stoffa seized from the CATITA II 151 packages, approximately 165 pounds, of the vacuumed sealed halibut that had been cut into chunks onboard the CATITA II on August 20, 2011. NOAA Ex. 1, 16, 17.
47. In 2011, Dutton took only two groups out on the CATITA II that went fishing, the Atkinson party and the Bee family, which included very experienced anglers. R Ex. 1 pp. 15-16, 20, 25, 59-60; Tr. 316, 450-451, 578-579.
48. Although enforcement officers have boarded the CATITA II several times previously in prior years when Dutton was operating the vessel, he had never been charged with any violation. Tr. 520, 547.

#### **IV. Liability**

##### **A. Burden of Proof**

To prevail on the charges against Respondents, NOAA must prove the alleged violations by a preponderance of the evidence. *See* 5 U.S.C. § 556(d); *see also* *Cuong Vo.*, NOAA Docket No. SE010091FM, 2011 NOAA LEXIS 11, at \*\*16-17 (ALJ, Aug. 17, 2001) (*citing* 5 U.S.C. § 556(d); *Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100-03 (1981)). Preponderance of the evidence means the Agency must show it is more likely than not that a respondent committed the charged violation. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). The Agency "may rely on either direct or circumstantial evidence to establish a violation and satisfy the burden of proof." *Cuong Vo, supra* (*citing* *Reuben Paris, Jr.*, 4 O.R.W. 1058, 1987 NOAA LEXIS 13 (ALJ Sept. 30, 1987) (finding liability on basis of circumstantial evidence)). The burden of producing evidence to rebut or discredit the Agency's evidence will only shift to the Respondent after NOAA proves the allegations contained in the NOVA by a preponderance of reliable, probative, substantial and credible evidence. *Id.*

##### **B. Count 1 - Charter Halibut Permit Violation**

###### **1. Elements of violation**



To establish a violation of the Northern Pacific Halibut Act, 16 U.S.C. § 773e(a)(1) and (5) by failure to comply with 50 C.F.R. § 300.66(r), NOAA must prove that: (1) a Respondent is an operator of a vessel, (2) in Regulatory Area 2C, (3) without an original valid charter halibut permit for Regulatory Area 2C, (4) when one or more charter vessel anglers were on board, (5) who were catching and retaining halibut. 50 C.F.R. § 300.66(r).

The term “operator,” with respect to any vessel, is defined in the general fisheries regulations as “the master or other individual aboard and in charge of that vessel.” 50 C.F.R. § 300.2. Respondents admit, “[i]t is not disputed that Mr. Dutton was the operator of the CATITA II, and hence the first phrase of section 300.66(r) is not at issue in this case.” R Brief at 9; Finding of Fact 17.

There is no dispute that the Atkinson trip occurred within Southeast Alaska, Regulatory Area 2C, and that the Atkinson party caught and retained halibut during the trip. Findings of Fact 11, 12, 28, 36, 37. It is also undisputed that Respondents did not possess a charter halibut permit during the trip. Findings of Fact 8, 18. The only element of violation which is contested is whether one or more “charter vessel anglers” were on board.

“Charter vessel angler” is defined as a “person . . . using the services of a charter vessel guide” and “charter vessel guide” is defined as “a person who provides sport fishing guide services.” 50 C.F.R. 300.61.<sup>4</sup> The definition of the term “person” includes an “individual, corporation, firm, or association.” *Id.* The issue therefore is whether Respondents were persons who provided “sport fishing guide services,” defined as “assistance, for compensation, to a person who is sport fishing, to take or attempt to take fish by being on board a vessel with such person during any part of a charter vessel fishing trip.” *Id.*

The definition of “charter vessel fishing trip” simply refers back to a “charter vessel angler” being onboard and delineates the time period of the trip. *Id.*

The definition of “sport fishing guide services” specifically excludes “services provided by a crew member,” which in turn is defined as “an assistant, deckhand, or similar person who works directly under the supervision of . . . a charter vessel guide or operator of a vessel with one or more charter vessel anglers on board.” *Id.*

## 2. Arguments of the Parties

The Agency’s position is that Dutton, AEE, and AEE’s independent contractor Dylan Klose assisted the Atkinson party, for compensation, to take or attempt to take halibut when neither Dutton nor AEE had a charter halibut permit, and that Respondents operated the vessel in Regulatory Area 2C with one or more charter vessel anglers on

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<sup>4</sup> A charter vessel guide is also defined as a person who holds an annual sport guide license issued by the Alaska Department of Fish and Game. It is undisputed that Dutton did not hold such a license. R Brief at 9.

board who caught and retained halibut, when neither Respondent had a charter halibut permit, in violation of 50 C.F.R. § 300.66(r). NOAA asserts that Dutton provided “sport fishing guide services” in several ways, including working with Steven Atkinson to develop a “float plan” to identify the locations where the CATITA II would travel with “known halibut fishing holes,” navigating the vessel to fishing spots and “contour lines” appropriate for catching halibut, operating the vessel to enable jigging for halibut, maneuvered the vessel to dislodge fishing gear that got hung up on the bottom, providing all of the halibut fishing gear, informing clients when they could fish at a particular spot, advising clients on fishing regulations, and discussing halibut fishing techniques with some of the clients. NOAA’s Post Hearing Brief (“NOAA Brief”) at 16; NOAA’s Post Hearing Reply Brief (“NOAA Reply”) at 3-4. The Agency asserts that Dutton and Klose assisted the Atkinson clients “in even more direct ways,” including helping clients deploy fishing lines, setting and checking hook depths, and helping to land halibut. NOAA Brief at 16.

NOAA takes the position that the regulatory language does not support Dutton’s assertions that he did not provide “sport fishing guide services” as long as the clients told him where to go with the float plan and asked him to provide particular assistance. NOAA Brief at 16.

Respondents assert that 50 C.F.R. § 300.66(r) is unconstitutional and a violation of due process “because it either penalizes lawful conduct or fails to provide adequate notice of what conduct is permissible.” Respondents’ Post-Hearing Brief (“R Brief”) at 8. Following the chain of terms referenced, from “charter vessel angler” to “sport fishing guide services,” Respondents assert that “‘assistance to a person who is sport fishing’ is defined only within the definition of ‘sport fishing guide services’: ‘by being onboard a vessel with [a person who is sport fishing] during any part of a charter vessel fishing trip.’” R Brief at 10. Respondents argue that the regulatory text is “obviously overbroad,” providing that “any person who operates a vessel for compensation while another person aboard the vessel sport fishes for halibut is *per force* a charter vessel guide who must possess a charter halibut permit.” *Id.* Respondents argue that the regulations fail to specify what constitutes fishing guidance, so hired vessel operators have no notice of what conduct subjects them to civil penalties. *Id.* at 11-15. Respondents’ position is that if a hired vessel operator simply abides by requests of sport fishermen who completely control the destination, function and operation of their sport fishing venture, then he is not a charter vessel guide. *Id.* at 15.

Respondents contend that a charter halibut permit was not required and that Dutton “clearly and genuinely believed that he had ascertained what he could and could not do” without such permit, and that “he did no more than was permissible.” R Brief at 3. Dutton’s belief was based on his testimony that before the Atkinson trip, he discussed with Alaska state and federal offices by telephone what he could do as a hired captain leasing the vessel to fishermen, and understood that he would not be considered a sport fishing guide if he operated entirely at the direction of the clients. *Id.* at 7, citing Tr. 442-449. Respondents also cite Dutton’s testimony that he did not take the Atkinsons to any of his own fishing spots. *Id.* at 8, citing Tr. 480. Respondents point

out that the Atkinson party chose where to fish, when to fish and what species to fish for, and that Steven Atkinson made the discretionary decisions for the trip. *Id.* at 15, citing Tr. 182, 516-517; R Ex. 1 at 47. Respondents emphasize Dutton's testimony that if he had provided his expertise to the Atkinsons, they would have gone home with substantially more fish, that is, larger size fish. R Brief at 16; R Reply at 5. Respondents urge that a presumption that a hired vessel operator is a charter vessel guide "interferes with the ability of skippers such as Mr. Dutton to rent out their services as vessel operators to those who wish to engage in sport fishing" and prevents sport fishers who are not comfortable operating a vessel from fishing unless they retain a charter vessel guide. R Brief at 11.

In reply, NOAA cites to testimony that it believes diminishes the credibility of Dutton's assertions that he received regulatory advice from enforcement officers as what he could and could not do if he leased the vessel and was hired as captain. NOAA Reply at 5-6. NOAA also challenges Dutton's assertion that the CATITA II was leased as a bare boat charter by Steven Atkinson through WDS rather than through Dutton, referring to his testimony regarding the relationship between Respondents and WDS as "littered with inconsistencies, evasions, and half-truths." NOAA Reply at 11.

Respondents argue that navigating the vessel to places the Atkinsons wanted to fish and so they could jig for halibut, maneuvering it to dislodge gear from the bottom, and advising on regulations to avoid assessment of fines against the vessel, are standard actions of a skipper, whereas sport fishing guides are paid for expertise in where, when and how to catch fish. R Reply at 2-3. They assert that Dutton did not choose which days the party would fish, the depth at which they fish, or whether they should stay or move when they started catching fish. *Id.* at 6. They assert that Dutton did not net or gaff any halibut, and that hooking up gear and landing fish are duties of a crew member, not discretionary expertise of a sport fishing guide. *Id.* at 3. They argue that actions of crew cannot be evidence of providing sport fishing guide services, because services of crew members are expressly excluded from the definition. *Id.* at 1.

### 3. Discussion and Conclusions as to Liability

Liability for Count 1 turns on applying the definition of "sport fishing guide services" to the facts of this case. The definition of "sport fishing guide services" can be divided into the following elements:

- 1) assistance to a person who is sport fishing, to take or attempt to take fish
- 2) by being on board a vessel with such person during any part of a charter vessel fishing trip
- 3) for compensation.

50 C.F.R. § 300.61.<sup>5</sup> The general question as to Respondent Dutton is whether he provided “sport fishing guide services” to members of the Atkinson party.

The first question to address is whether Dutton’s services to the Atkinsons constitute “assistance to a person who is sport fishing, to take or attempt to take fish.” The evidence shows that during the Atkinson trip, Dutton anchored and drifted the CATITA II on the fishing spots including halibut fishing spots, rigged gear, baited hooks, changed lures, suggested use of a different lure and provided it, explained how to operate the manual downrigger and cranked it up, identified bottom fish caught, helped land halibut, and netted and brought fish on board. Findings of Fact 30, 32, 34, 35. These activities were indisputably for the benefit of members of the Atkinson party while they were sport fishing, and for the purpose of their taking or attempting to take fish. *Id.* The term “assistance” is not defined in the regulations, and therefore its common meaning as defined in a dictionary is appropriate for purposes of interpreting the definition of “sport fishing guide services.” The word “assistance” is defined as “the act or action of assisting” or “the help supplied or given,” and the term “assist” is defined as “to give support or aid.” *Websters Third New International Dictionary, Unabridged* p. 132 (2002). The activities of Dutton in anchoring and drifting the vessel on the fishing spots, rigging gear, baiting hooks, changing lures, suggesting use of a different lure and providing it, explaining how to operate the manual downrigger and cranking it up, identifying bottom fish caught, helping land halibut, and netting and bringing fish on board, undeniably were helping members of the Atkinson party to take or attempt to take fish. Dutton’s identification of fish caught by the Atkinsons helped ensure that they did not exceed bag limits, so they would know whether they could retain fish they caught. R Ex. 1 p. 42. Dutton’s driving the vessel to fishing areas and along contours that he knew, and using his skill in anchoring and drifting the vessel to spots where halibut were plentiful, enabled successful halibut fishing by the Atkinson party. Findings of Fact 30, 31, 36, 37. There is no ambiguity in applying the term “assistance” to these activities of Dutton.

Respondents’ argument that the regulatory text is overbroad is based on reading the definition of “sport fishing guide services” in Section 300.61 with an assumption that the word “assistance” is defined solely as “being on board a vessel with such person during any part of a charter vessel fishing trip.” This assumption nullifies the word “assistance” and renders the whole definition nonsensical. Under Respondents’ interpretation of the definition, any person who receives compensation and is simply on board a vessel with one who is sport fishing during a charter vessel fishing trip would be deemed to be providing sport guide fishing services. This interpretation would encompass a person who serves onboard merely as a cook, a bartender, a nurse, or in any other capacity that has nothing to do with fishing. Respondents’ reading of the definition does not render it or Section 300.66(r) overbroad or unconstitutional, but

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<sup>5</sup> Unlike the definitions of the “charter” terms in § 300.61, the definition of “sport fishing guide services” does not state that it is for purposes of § 300.66. This does not render it inapplicable to determinations of violation of § 300.66, because it is incorporated in the definition of “charter vessel guide,” which is referenced by “charter vessel angler,” both of which terms expressly reference applicability to § 300.66.

rather, renders the definition absurd. "Axiomatic in statutory interpretation is the principle that laws should be construed to avoid an absurd or unreasonable result." *United States v. Female Juvenile*, 103 F.3d 14, 16-17 (5<sup>th</sup> Cir. 1996). Respondents' interpretation, canceling the word "assistance" out of the definition, also violates the basic canon of statutory interpretations that statutes should be interpreted to give meaning to each word. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). The canons of statutory interpretation apply to interpretation of regulations. *Smith v. Brown*, 35 F.3d 1516, 1523 (Fed. Cir. 1994). The definition might have been better drafted by using the word "while" rather than "by" before the words "being on board a vessel," but the definition as drafted emphasizes the word "assistance" by placing it as the first word of the definition, and it cannot reasonably be read to eliminate that word.

Respondents' argument, that Dutton could not be a charter vessel guide or sport fishing guide because his actions were those of a skipper or crew member without providing discretionary expertise but simply abiding by requests of sport fishermen who control the whole sport fishing venture, assuming *arguendo* that it were consistent with the facts, ignores the definition of "sport fishing guide services." The exclusion from "sport fishing guide services" of "services provided by a crew member," with "crew member" being defined as an "assistant, deckhand, or similar person who works directly under the supervision of the charter vessel guide or vessel operator," distinguishes services of a *person who is being supervised* by the charter vessel guide or vessel operator rather than duties typical of crew members. 50 C.F.R. §300.61. Dutton being the vessel operator, the "crew member" exclusion clearly does not apply to him. There is no exclusion, express or implied, from the definitions of "charter vessel guide" and "sport fishing guide services," for skippers or captains who act upon requests or directions of sport fishermen.

It is concluded that Dutton's activities fall within the meaning of the term "assistance" in the definition of "sport fishing guide services."

Any argument as to whether 50 C.F.R. § 300.66(r) nevertheless might be unconstitutional and violate due process is not ruled upon herein. The Procedural Rules governing this proceeding expressly state that the presiding Administrative Law Judge "has no authority to rule on constitutional issues or challenges to the validity of regulations promulgated by the Agency or statutes administered by NOAA." 15 C.F.R. § 904.200(b); *Lars Vinjerud Fisheries, Inc.*, 6 O.R.W. 210, 214, 1990 NOAA LEXIS 34 (NOAA App. Oct. 26, 1990); *Gonzalez v. Dep't of Commerce*, 420 Fed. App'x 364, 369 (5<sup>th</sup> Cir. 2011)(claims that NOAA's actions were unconstitutional are to be pursued in federal court).

The next step in the analysis is whether Dutton's "assistance to a person who is sport fishing to take or attempt to take fish" was "for compensation." From Steven Atkinson's total payment of \$23,700 for the trip, which is equivalent to \$3,950 per day, \$950 per day was allocated to AEE, which adds up to \$5,700 to AEE for the six day trip. Finding of Fact 21. During the interview with Trooper Frenzel on August 20, 2011, Dutton stated that the Atkinsons "paid Aquatic Edge Expeditions, which is kind



of for my service,” and paid WDS for the boat rental, and that “they [WDS] kind of have a set rate to rent the boat, and then you know, I – I told them what I’d run the boat for and what I could find crew for.” R Ex. 1 pp. 14, 22. He specified that hiring him would include the duties of “running the boat,” boat maintenance, and a safety briefing. *Id.* p. 23.

At the hearing, however, Dutton testified that he did not recall how the money paid to AEE was allocated, but that it covered expenses for food and that the two crewmembers, Klose and the cook, were paid from it. *Id.* Tr. 558, 638. He could not recall how much Klose or the cook were paid, and there is no evidence in the record as to how much they were paid or how much the food cost for the trip, or whether any other expenses were paid from the funds allocated to AEE. However, it may be inferred that compensation paid to Klose was not a large percentage of the total amount paid to AEE, because a large part of Klose’s income from the trip was from tips. Finding of Fact 22. When Dutton was asked at the hearing how much he got paid per day, he testified, “I don’t know that I got paid anything per day,” and “I may have not, at the end of the day or end of the year, made any money or have been paid.” Tr. 558, 560. When asked whether any amount of the \$950 per day was paid to him or to AEE, he testified that he did not recall, and “[t]hat \$950 included a lot of things.” Tr. 561. Dutton reviewed the transcript of the interview with Trooper Frenzel before the hearing, and likely was aware at the hearing that compensation was an element of “sport fishing guide services.” Tr. 571. His testimony at the hearing with respect to his compensation is vague, evasive, self-serving, and not credible. Considering this evasiveness at the hearing together with his statements to Trooper Frenzel during the interview, supports a finding that he did in fact provide assistance to members of the Atkinson party during their trip for compensation. Finding of Fact 21.

Neither the contract signed by Steven Atkinson nor any other record evidence indicates any distinction of duties or assistance for which Dutton was being compensated from any for which he was not being compensated during the Atkinson trip. Finding of Fact 27. The evidence shows that he took on responsibility for, and believed he was being paid to do, various tasks. In the interview with Trooper Frenzel, Dutton admitted that the Atkinson party “hired us and we’re at their disposal, as far as they’re concerned” and “they thought we were at their disposal, and, you know, so they’d ask us to do all sorts of stuff,” and that he even did their laundry. R Ex. 1 pp. 100, 101. A preponderance of the evidence shows that Dutton’s activities of anchoring and drifting the vessel on the fishing spots, rigging gear, baiting hooks, changing lures, explaining how to operate the downrigger, cranking it up, and netting, landing, bringing on board and identifying fish, collectively, were performed for compensation.

It is concluded that Dutton provided “assistance, for compensation, to a person who is sport fishing, to take or attempt to take fish by being onboard a vessel with such person during any part of a charter vessel fishing trip.” Thus, Dutton provided “sport fishing guide services” and was a “charter vessel guide” within the meaning of 50 C.F.R. § 300.61 for members of the Atkinson party. It is further concluded that members of the Atkinson party were “charter vessel anglers” in that they were persons, “paying or non-

paying, using the services of a charter vessel guide.” 50 C.F.R. § 300.61. Consequently, it is concluded that on or about August 15 through 20, 2011, Dutton was “an operator of a vessel in Commission regulatory area 2C . . . without an original valid charter halibut permit for the regulatory area in which the vessel is operating when one or more charter vessel anglers are on board that are catching and retaining halibut.” 50 C.F.R. § 300.66(r). NOAA has proven by a preponderance of reliable, probative, substantial and credible evidence that Dutton violated 50 C.F.R. § 300.66(r) and 16 U.S.C. § 773e(a)(1) and (5) as alleged in Count 1.

“[T]he Northern Pacific Halibut Act is a strict liability statute.” *Floyd M. Minks*, NOAA Docket No. AK040096, 2009 NOAA LEXIS 1, \* 12, 35 (ALJ, March 17, 2009); *Pavlik v. United States*, 951 F.2d 220, 223 (9th Cir. 1991)(citing *United States v. Cameron*, 888 F.2d 1279, 1282 (9th Cir. 1989)(“Taking halibut in violation of the Halibut Act is a strict liability offense.”). Therefore, although Dutton may have believed in good faith that he was in compliance, and he may have in good faith attempted to limit his actions to what he thought was legal, he is liable for violating 50 C.F.R. § 300.66(r) nevertheless. To the extent that Respondents make an argument of equitable estoppel, Dutton’s testimony that he consulted with government officials on operating as a hired captain is uncorroborated and not credible; not only did he not recall the name of any person he contacted, but he also could not identify the office of any such person. Tr. 353-354, 442-449, R Ex. 1 pp. 62-65, 89-91. Moreover, Respondents have not demonstrated the kind of “affirmative misconduct” by the government necessary to estop the United States. *United States v. Marine Shale Processors*, 81 F.3d 1329, 1350 (5th Cir. 1996). That is, Respondents have not shown that an official “intentionally or recklessly misle[d]” Dutton. *Id.*; see, *FDIC v. Hulsey*, 22 F.3d 1472, 1490 (10th Cir. 1994)(“The erroneous advice of a government agent does not reach the level of affirmative misconduct.”). Respondents have not established any defense to liability for Count 1.

The final issue with respect to liability for Count 1 is whether AEE is liable for violating 50 C.F.R. § 300.66(r). AEE cannot be an “operator of a vessel” within the meaning of Section 300.66(r) because the term “operator,” defined as “the master or other individual aboard and in charge of that vessel,” applies to an individual rather than a business entity. 50 C.F.R. § 300.2; 75 Fed. Reg. 554, 595 (Preamble to Final Rule, Jan. 5, 2010)(the words “be an operator of” in § 300.66(r) and “charter vessel operator” in § 300.61 are intended to ensure consistency with the definition of “operator” in §300.2).

While NOAA asserts that Dutton and Klose acted on behalf of AEE in providing sport fishing guide services, 50 C.F.R. § 300.66(r) does not prohibit such services, but rather, makes the operator of the vessel liable for failing to have a charter halibut permit when sport fishing guide services are being provided. As to whether NOAA’s assertion is an argument that Dutton’s or Klose’s activities give rise to AEE’s liability under a theory of respondeat superior, it is observed that “NOAA has repeatedly utilized the doctrine of respondeat superior to impose joint and several liability on a vessel’s owner or operator, if the violation occurred within the scope of [a]



crewmember's duties." *James Chan Song Kim*, NOAA Docket No. SW010208A, 2003 NOAA LEXIS 4 at \*28 (ALJ, Jan. 7, 2003). Owners of vessels who are the beneficiaries of its operation have consistently been held responsible for illegal activity, and the owner of a vessel may be held vicariously liable for actions of its captains under the theory of respondeat superior, where there is an employer-employee relationship, or where there is evidence of a joint venture between the owner and operator. *Charles P. Peterson & James D. Weber*, 6 O.R.W. 486, 491, 1991 NOAA LEXIS 34, at \*10-11 (ALJ July 19, 1991). However, the evidence shows that WDS, rather than AEE, was the owner of the CATITA II at all relevant times, and that Dutton was the sole owner and managing member of AEE. Findings of Fact 3, 4. NOAA acknowledges that "[a]t best, the lines of ownership, management and control between AEE, Dutton and WDS Leasing are incredibly blurred," but NOAA has not set forth arguments or facts in support of any theory that would establish liability of AEE for violating 50 C.F.R. § 300.66(r). NOAA Reply at 13. NOAA therefore has not established that AEE is liable for the violation alleged in Count 1. Accordingly, it is not necessary to determine whether Klose also provided "sport fishing guide services" for the Atkinson party.<sup>6</sup>

### C. Count 2 – Disfigurement of Halibut

#### 1. Elements of Violation

To establish a violation of 50 C.F.R. § 300.66(a) by noncompliance with Annual Management Measure 28(3)(a) (2011), NOAA must prove that: (1) a Respondent is a "person" (2) who fished for halibut, and (3) possessed halibut that has been filleted, mutilated, or otherwise disfigured in any manner other than being cut into no more than 2 ventral pieces, 2 dorsal pieces, and 2 cheek pieces, with skin on all pieces (4) on board a vessel, including charter vessels and pleasure craft used for fishing. (5) in Convention Waters in and off Alaska. Annual Management Measure 28(3)(a), 76 Fed. Reg. 14300, 14313 (Mar. 16, 2011); 50 C.F.R. § 300.66(a).

#### 2. Arguments of the Parties

The Agency maintains that Respondents Dutton and AEE possessed halibut on board that had been cut into chunks that were smaller pieces than those allowed under Annual Management Measure § 28(3)(a).

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<sup>6</sup> Klose was not referenced in the NOVA. Klose's activities of switching lures, baiting hooks, setting up, tending, and moving fishing rods, netting fish, and removing fish from hooks for members of the Atkinson party are encompassed by the regulatory language "assistance, for compensation, to a person who is sport fishing, to take or attempt to take fish by being onboard a vessel with such person during any part of a charter vessel fishing trip." Finding of Fact 21, 22, 33. The evidence indicates that he did not work under Dutton's direct supervision. He was an independent contractor, and when Dutton was asked whether he would have been able to see or hear what Klose was doing when the Atkinsons were fishing, Dutton testified, "Absolutely not. Most of the deck I would not be able to see or hear what he was doing." Tr. 493; Finding of Fact 19. Thus, he would not be excluded from the definition of "sport fishing guide services" as a "crew member." 50 C.F.R. § 300.61.

Respondents assert that one member of the Atkinson party had a flight to catch soon after the CATITA II would be pulling into port at Auke Bay, and that while the vessel was about two hours from port, the halibut was cut into smaller steaks and packaged. They point out that Dutton thought in good faith that this was permissible, on the basis that he had received advice from enforcement officials that was okay to finish cutting up the fish while heading into port. R Brief at 16-17.

NOAA challenges the credibility of Dutton's testimony that he received advice from government officials, and asserts that Dutton violated the regulation for one client's convenience. NOAA Reply at 9-10.

### 3. Discussion and Conclusions

There is no dispute that each Respondent is a "person" within the meaning of 50 C.F.R. §§ 300.66 and 300.61. As to the second element of liability, the term "to fish" is defined as "(1) [t]he catching or taking of fish; (2) [t]he attempted catching or taking of fish; (3) [a]ny other activity that can reasonably be expected to result in the catching or taking of fish; or (4) [a]ny operations at sea in support of, or in preparation for, any activity described in paragraphs (1) through (3) of this definition." 50 C.F.R. § 300.2. The term "fishing" is defined in 50 C.F.R. § 300.61 as "the taking, harvesting, or catching of fish, or any activity that can reasonably be expected to result in the taking, harvesting, or catching of fish . . . ." Dutton's anchoring and drifting the vessel on halibut fishing spots, rigging gear, baiting hooks, changing lures, explaining how to operate the manual downrigger and cranking it up, identifying bottom fish caught, and helping land halibut, are activities that, collectively, "can reasonably be expected to result in the catching or taking of fish," namely halibut, and furthermore, constitute "operations at sea in support of, or in preparation for" such activities. Findings of Fact 30, 31, 32, 36, 37.

The uncontested evidence shows that on August 20, 2011, on board the CATITA II, Dutton and/or Klose cut the halibut into chunks which were smaller and in a greater number of pieces than two ventral, two dorsal, and two cheek pieces of each halibut with skin on. Finding of Fact 41. There were 21 halibut retained onboard the CATITA II, and they were cut into pieces and packaged into 151 packages. Findings of Fact 37, 41, 46. Respondents do not dispute that Dutton possessed the halibut pieces and that they were cut into a greater number of pieces than two ventral, two dorsal, and two cheek pieces of each halibut. Therefore, NOAA has met the third and fourth elements of liability.

As to the fifth element of liability, the halibut were cut into pieces and packaged on board the CATITA II while it was traveling in the Gastineau Channel from Stephens Passage to the south. Findings of Fact 41, 46. Respondents acknowledge that the halibut were cut into the smaller pieces "[w]hile the CATITA II was still about two hours out" from port in Auke Bay. R Brief at 16. "Convention waters" are defined in the Halibut Act as "the maritime areas off the west coast of the United States and

Canada described in article I of the Convention.” 16 U.S.C. § 773(d). Respondents do not dispute that the halibut were cut into a greater number of pieces than two ventral, two dorsal, and two cheek pieces while in Convention waters in and off Alaska.

It is concluded that the Agency has shown by a preponderance of the evidence that on or about August 20, 2011, Dutton possessed on board halibut that had been filleted, mutilated, or otherwise disfigured; specifically, Pacific halibut that had been cut into chunks that were smaller pieces than the allowed 2 ventral pieces, 2 dorsal pieces, and 2 cheek pieces, with skin on all pieces, in violation of 16 U.S.C. § 773e(a)(1) and (5), 50 C.F.R. § 300.66(a), and Annual Management Measure § 28(3)(a).

As discussed above, AEE is not the owner of the vessel, and NOAA has not alleged a theory of AEE’s liability for violating 50 C.F.R. § 300.66(a), and Annual Management Measure § 28(3)(a). Consequently, NOAA has not established that AEE is liable for Count 2.

Respondents’ argument that Dutton received advice from enforcement officials is based on his testimony that he inquired from two different law enforcement officers during two previous boardings of the CATITA II, whether it was acceptable after fishing is completed and where a passenger does not have much time to get to the airport to catch a flight, to process the halibut fletches to fit into airline boxes, right before or as they get to the dock, and he understood from those discussions that such a process was reasonable. Tr. 523-526, 544-553. However, he could not recall which years it was or whether he spoke with state or federal officers, which reduces the credibility of his testimony. Tr. 524, 549-551. Even if this testimony were credited, cutting up the halibut right before or as they get to the dock is not the same as cutting up halibut two hours prior to arriving at the dock. Furthermore, Respondents have not demonstrated the kind of “affirmative misconduct” by the government necessary to estop the United States, that an official “intentionally or recklessly misle[d]” Dutton. *United States v. Marine Shale Processors*, 81 F.3d at 1350.

It is concluded that the Agency has established by a preponderance of the evidence that Respondent Dutton is liable for possessing on board, halibut that had been cut into chunks that were smaller pieces than the two ventral pieces, two dorsal pieces, and two cheek pieces, with skin on all pieces, allowed by and Annual Management Measure § 28(3)(a), in violation of 16 U.S.C. § 773e(a)(1) and (5) and 50 C.F.R. § 300.66(a).

## **V. Penalty**

### **A. Statutory and Regulatory Provisions**

The authority for imposing a penalty for violations of the Northern Pacific Halibut Act is found at 16 U.S.C. § 773f(a). Once a violation has been established, the Halibut Act provides that a maximum civil penalty of \$200,000 may be assessed for

each violation.<sup>7</sup> The Halibut Act states that in determining the amount of such penalty, 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” be taken into account. In addition, any information regarding ability to pay, provided at least 30 days prior to hearing by the violator to NOAA may be considered. 16 U.S.C. § 773f; *see*, 15 C.F.R. § 904.108. The burden is on the respondent to prove its inability to pay the penalty “by providing verifiable, complete, and accurate financial information to NOAA.” 15 C.F.R. § 904.108(c).

The Administrative Law Judge is responsible for assessing a civil penalty, “taking into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m).

## B. Penalty Policy

On March 16, 2011, NOAA issued a “Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions” (“Penalty Policy”) which provides guidance for penalty assessments under multiple statutes enforced by NOAA. While it states that it “provides guidance for the NOAA Office of the General Counsel” and refers to NOAA attorneys determining proposing penalties, it may be useful, yet is not binding, for Administrative Law Judges to use as an analytical framework for determining a penalty in an initial decision. *See Student Public Interest Research Group, Inc. v. Hercules, Inc.*, No. 83-3262, 1989 U.S. Dist. LEXIS 16901, at \*5 (D. N.J. Apr. 6, 1989) (a penalty policy “provides a helpful analytical framework” for the court in arriving at a civil penalty). The Penalty Policy was not included as an exhibit by the Agency, but was referenced in the NOVA along with the web address to access the Penalty Policy online, and Dutton received a copy of it prior to the hearing. NOAA Ex. 25, ¶ 24. Under the applicable procedural rules, official notice may be taken of “any reasonably available public document; provided that the parties will be advised of the matter noticed and given reasonable opportunity to show the contrary.” 15 C.F.R. § 904.204(l). Official notice is taken of the Penalty Policy.

Under the Penalty Policy, a civil penalty is calculated as follows:

- 1) A “base penalty,” which represents the seriousness of the violation, calculated by:
  - a) an initial base penalty amount reflecting:
    - i. the gravity of the violation and
    - ii. the culpability of the violator, and
  - b) adjustments upward or downward to reflect:
    - i. history of non-compliance,
    - ii. commercial or recreational activity, and
    - iii. good faith efforts to comply after the violation,

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<sup>7</sup> The penalties provided under the Northern Pacific Halibut Act were increased from \$25,000 to \$200,000 in the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006. *See* Pub. L. No. 109-479, § 301. 120 Stat. 3575 (2007).

- iv. cooperation/non-cooperation;
- 2) plus an amount to recoup the proceeds of any unlawful activity and any additional economic benefit of noncompliance.

Penalty Policy at 4.

To determine the gravity component of an initial base penalty, a search is made for the particular violation on the schedules in Appendix 3 of the Penalty Policy. The schedules assign an “offense level” to the most common violations charged by the Agency, and are designed to reflect the nature, circumstances, and extent of the violations. *Id.* at 4-5, 7-8. Under the Halibut Act, the listed common violations range from Offense Level I (least significant) to Offense Level III, but the Halibut Act penalty matrix lists Offense Levels I to VI (most significant). *Id.* at 30, 53-55. Where no offense level has been assigned to a violation, the Penalty Policy directs use of the offense level of an analogous violation or, if no similar offense can be identified, by assessing the gravity based on criteria listed in the Penalty Policy. *Id.* at 5 n.4, 7-8. The criteria include: nature and status of the resource at issue in the violation; extent of harm done or potential harm to the resource or regulatory scheme or program; whether the violation involves fishing in closed areas, in excess of quotas, without a required permit, or with unauthorized gear; whether the violation provides a significant competitive advantage over those operating legally; the nature of the regulatory program (limited versus open access fishery); and whether the violation is difficult to detect without on-scene enforcement presence or other compliance mechanisms. *Id.* at 8.

Next, the culpability of the alleged violator is assessed as one of four levels in increasing order of severity: A) unintentional, including accident, mistake, and strict liability; B) negligence; C) recklessness; and D) intentional. *Id.* at 8-9. The Penalty Policy lists factors to be considered when assigning culpability, including whether the alleged violator took reasonable precautions against the events constituting the violation, the level of control the alleged violator had over these events, whether the alleged violator knew or should have known of the potential harm associated with the conduct, and “other similar factors as appropriate.” *Id.* at 9.

There are four levels of culpability reflected in the matrices:

An intentional violation generally exists when a violation is committed deliberately, voluntarily or willfully, i.e. the alleged violator intends to commit the act that constitutes the violation.\* \* \* \*

Recklessness is a conscious disregard of a substantial risk of violating conservation measures that involves a gross deviation from the standard of conduct a law-abiding person would observe in a similar situation. Recklessness occurs where someone does not intend a certain result, but nonetheless foresees the possibility that his or her actions will have that result and consciously takes that risk. Recklessness may also occur where

someone does not care about the consequences of his or her actions. Recklessness involves a lesser degree of fault than intentional wrongdoing but a greater degree of fault than negligence.

Negligence is the failure to exercise the degree of care that a reasonably prudent person would exercise in like 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.

Finally, an unintentional act is one that is inadvertent, unplanned, and the result of an accident or mistake. An unintentional act is one not aimed at or desired. This culpability level reflects the strict liability nature of regulatory violations, and the fact that the statutes NOAA enforces are designed to protect marine resources even where a violation is unintended.

#### Penalty Policy at 8-9.

The gravity component and culpability component form the two axes of penalty matrices for each of the statutes, set out in Appendix 2 of the Penalty Policy. A range of penalties appears in each box on the matrix. A penalty range is thus determined by selecting the appropriate level for gravity and culpability on the axes. The initial base penalty is the midpoint of the penalty range within that box. *Id.* at 5.

The adjustment factors provide a basis to increase or decrease a penalty from the midpoint of the penalty range within a box, or to select a different penalty box in the matrix. *Id.* at 10. The Penalty Policy states that a prior violation of natural resource protection laws are evidence of intentional disregard for them, or reckless or negligent attitude toward compliance, and may indicate that the prior enforcement response was insufficient to deter violations. Therefore, the Penalty Policy provides that a penalty may be increased where a respondent had a prior violation.

Another adjustment factor in the Penalty Policy provides for a decrease in the penalty in certain circumstances where the violation arises from non-commercial activity. *Id.* at 11. The Penalty Policy states that a decrease is appropriate because an individual recreational violator is likely to have a lesser impact on the natural resource or regulatory program, typically participates in regulated activities less frequently, and does not have the same degree of economic gain. However, such an adjustment in the penalty is not always appropriate. *Id.*

The final adjustment factor reflects the activity of the violator after the violation, in terms of good faith efforts to comply and cooperation or non-cooperation. The Penalty Policy lists the following examples of good faith factors to decrease a penalty:



self-reporting, providing helpful information to investigators, and cooperating with investigators. The Penalty Policy states that no downward adjustments are made for efforts primarily consisting of coming into compliance, or for self-reporting where discovery of the violation was inevitable. *Id.* at 12. The Penalty Policy describes bad faith factors, to increase a penalty, as attempts to avoid detection, destroying evidence, intimidating or threatening witnesses, or lying. *Id.*

Added to the base penalty is any value of proceeds gained from unlawful activity and any economic benefit of noncompliance to the violator. The Penalty Policy provides that proceeds are likely recouped and for purposes of penalty assessment will typically be zero where the illegal catch or product was seized and forfeited by NOAA or voluntarily abandoned by the violator. *Id.* at 13.

#### C. Agency's Proposed Penalty and Arguments in Support for Count I

The Agency calculated its proposed penalty utilizing the Penalty Policy. The Agency characterizes the gravity of the violation as Offense Level III for the offense listed in the penalty schedule, "fishing for, receiving, processing, or possessing limited entry or catch share species without holding a valid permit if ineligible for a permit." NOAA Brief at 20; Penalty Policy at 35. The Agency argues that the nature of the violation in Count 1 "undermines the core of an important program designed to more effectively manage the harvest pressure on Pacific Halibut, and that the purpose of the Charter Halibut program is to address the substantial growth rate in the guided sport charter vessel fishery, which affected the amount of halibut available for harvest by all sectors. NOAA Brief at 19. The Charter Halibut program is a limited entry program intended to address that problem, by issuing a limited number of permits to applicants who have at least 5 charter vessel fishing trips during certain years. *Id.* at 19-20. NOAA points to testimony of Special Agent Frank Bonadonna, of NOAA's NMFS Office of Law Enforcement that there is an increasing enforcement problem of vessel operators trying to avoid the Charter Halibut program by disguising their guided halibut fishing trips as unguided trips. NOAA Brief at 20; Tr. 125, 127.

The Agency argues that Dutton "acted in a reckless manner," because he knew about the charter halibut permit program but believed to have found a "loophole" in the regulations so that he could engage in charter halibut fishing without the required charter halibut permit. NOAA Brief at 20. Pursuant to the penalty matrix for the Halibut Act, the midpoint for an Offense Level III with a "reckless" culpability is \$17,500. *Id.* The Agency reduced the base penalty by 10% (\$1,750), because Dutton "provid[ed] helpful information to the investigators," and no prior violations or other mitigating or aggravating factors were taken into account by NOAA. *Id.* at 20-21. Thus it proposed a penalty of \$15,750.

#### D. Respondent's Arguments

Respondents dispute both the offense level and gravity of the proposed penalty. R Brief at 17-20. Respondents point out that the limited entry program requiring a



charter halibut permit has been in place only since 2011, the year of the Atkinson trip. *Id.* at 17-18. Respondents suggest that to reduce the enforcement problem of disguised halibut charter fishing trips, the regulations at 50 C.F.R. § 300.66(r) should be amended to clarify what actions are permissible. Respondents argue that the Agency used a penalty level which would be used “if someone had commercially harvested halibut without an IFQ permit,” which affects the resource much more than a skipper of a vessel chartered by sport fishermen who do not exceed the bag limit, and whose fish average only 20 pounds. *Id.* at 18-19.

Furthermore, Respondents argue that Dutton took “extensive and reasonable steps to determine what he could and could not do for the Atkinson party,” read the laws and spoke with regulatory personnel about them, and thus was not reckless. He left all discretionary decisions to the Atkinsons and refrained from “provid[ing] or offer[ing] his expertise or professional opinion on fishing matters,” whereas if the trip had been guided, it would have been very different in terms of fishing days and locations and fish caught. *Id.* at 20; Reply at 5-6.

#### E. Discussion and Conclusions for Count 1

##### 1. Offense Level

The Penalty Policy does not list in the Halibut Act schedule in Appendix 3 the offense alleged in Count 1. *See* Penalty Policy at 53-55. Therefore it is appropriate to find in Appendix 3 an offense level of an analogous violation, or independently determine the level by considering criteria listed in the Penalty Policy. Penalty Policy at 8.

To find an analogous violation, it is appropriate to look first to the violations listed under the particular statute violated, as they may concern the same or similar resource and nature of the regulatory program as the violation at issue. The Penalty Policy’s schedule of offenses under the Halibut Act lists as Offense Level III commercial fishing for halibut without obtaining an Individual Fishing Quota (IFQ) permit, and exceeding remaining IFQ quota by more than 100 %. Penalty Policy at 54. These offenses concern the same resource, halibut, but the potential harm to the resource would be far greater than the impact from sport fishermen, who have a daily bag limit of one or two halibut retained by each fisherman per day. Finding of Fact 38. The extent of harm done to the resource by the violation at issue, involving 7 anglers and 21 halibut retained, is minimal. Findings of Fact 17, 37. The violation in Count 1 is more analogous to the violations listed under the Halibut Act as Offense Level II than those listed as Offense Level III. However, operating a vessel with a charter vessel guide to sport fishermen without a charter halibut permit is difficult to detect without an on-scene enforcement presence or other compliance mechanism. The potential harm to the limited access system for charter vessels that would result from providing sport fishing guide services on vessels that do not have a charter halibut permit is significant, as the purpose of the program is thereby undermined. Therefore, considering the

offense levels of violations listed in Appendix 3 under the Halibut Act, and the criteria listed in the Penalty Policy for determining the offense level, the appropriate offense level for Count I is between a level II and level III.

The offense of “fishing for, receiving, processing, or possessing limited entry or catch share species without holding a valid permit if ineligible for a permit” referenced by the Agency is listed in the Penalty Policy Appendix 3 schedule for the Magnuson-Stevens Fishery Conservation and Management Act. Listed as Offense Level III, it corresponds to the same penalty range as that for an Offense Level III under the Halibut Act. While it describes generally the type of violation alleged in Count 1, it may apply to more egregious circumstances than those at issue, and is not fully analogous to the violation at issue. Here, Dutton had legally provided sport fishing guide services in previous years, and had applied for a charter halibut permit at the appropriate time, and the Atkinsons had the required licenses for the fishing trip. Findings of Fact 5, 7, 24. Other than the violation in Count 2, there is no evidence that anyone aboard the CATITA II during the Atkinson trip violated the daily bag limit or any other restrictions applicable to sport fishermen. Findings of Fact 29, 36-38.

## 2. Culpability

Dutton’s conduct cannot be described as “gross deviation from the standard of conduct a law-abiding person would observe in a similar situation” or lack of care about the consequences of this actions, which are defining characteristics of recklessness under the Penalty Policy. Penalty Policy at 9. The evidence does not establish that he foresaw the possibility that he would be performing sport fishing guide services and consciously took that risk. Rather, the evidence shows that he made significant efforts to abide by the regulatory program. First, he applied for a charter halibut permit, and then when it was denied, he made efforts to operate as a captain and avoid performing sport fishing guide services. Findings of Fact 7, 8. Dutton believed he could operate as a captain of the CATITA II for fishermen and not be considered a sport fishing guide if he followed the clients’ float plan and directions as to activities they want to do. Tr. 445, 448, 452, 473, 489. Indeed, Dutton seemed “confident in his answers” during the investigation when speaking with Trooper Frenzel. Tr. 298. The only fishing trips Dutton conducted without a charter halibut permit, once it was required, were the Atkinson trip and a trip with the Bee family, both of which included very experienced anglers who would likely not require much if any sport fishing guide services. Findings of Fact 9, 10, 23, 47. He told Steven Atkinson that he would not guide the fishing but would drive the vessel where the Atkinson party wants to go. Finding of Fact 15. He instructed Klose that the Atkinson trip would not be a charter, and Klose, rather than Dutton, did most of the netting of fish, switching lures, baiting hooks, and cleaning and filleting of fish for the Atkinson party. Finding of Fact 20, 33. Steven Atkinson chose the fishing locations on the trip based on his past experiences, chose a particular fishing spot at least once, and directed how long the party would fish. Finding of Fact 28, 30.

On the other hand, Dutton's efforts to avoid performing sport fishing guide services showed a lack of diligence and a disregard of the consequences likely to result from operating a vessel with only one deckhand and several anglers with varying degrees of fishing experience, when Dutton had provided sport fishing guide services before with Klose as crew. Findings of Fact 5, 19, 23. Dutton did not discuss with any of the Atkinsons the type of assistance that would or would not be provided on the trip, and only said generally to Steven Atkinson that he would not be providing fishing guide services. Finding of Fact 16, 26. Indeed, Steven Atkinson testified, "if we did it the way that we did it, that I was leasing the boat and the crew, then it was unguided, you know; so that's what I understood it to be . . . That I was supposed to tell him where we were going to go and, you know, then it was unguided." Tr. 189. He testified further:

Q: . . . Did you talk specifically about what Mr. Dutton could not do for you to avoid the trip being guided?"

A: I understood that he – that I had to pick the places we were going to go fishing. I had to decide when we were – when we were going to fish and how long we were going to fish and where we were going to fish.

Tr. 190.

Failure to discuss fishing guide services further with Steven Atkinson was particularly risky when Atkinson generally had been provided with sport fishing guide services in the past, even aboard the CATITA II, and indeed, Atkinson assumed that the services would be the same on this trip and that Dutton knew the coordinates of fishing spots he had fished before on the CATITA II. Finding of Fact 9, 10, 13, 14. The contract regarding the crew failed to specify services provided by Dutton. Finding of Fact 27. Dutton did not ensure that Atkinson understood the rules concerning charter halibut permits and sport fishing guide services. Finding of Fact 25. Dutton created a website which suggested that he provided guided fishing trips. Finding of Fact 6. Despite the fact that the Atkinson trip included activities other than fishing and the weather was bad during the trip, a substantial portion of the time on the trip was spent fishing. Findings of Fact 11, 36, 39. Dutton did not ensure that Klose would refrain from taking actions that could be considered providing sport fishing guide services. Finding of Fact 20. The efforts that Dutton made in trying to avoid operating as a charter vessel guide were significant, but fell below the competence that would be expected in the circumstances, which is a characteristic of a negligent level of culpability under the Penalty Policy.

### 3. Matrix Value

The Penalty Policy's matrix for the Halibut Act provides a penalty range of \$4,000 to \$6,000 for a Gravity Offense Level II, and a range of \$10,000 to \$15,000 for Gravity Offense Level III, where the level of culpability is negligent. The offense level for Count 1 is between Levels II and III, and an appropriate matrix value for Count 1 is \$8,000.

#### 4. Adjustment Factors

The Agency noted that “[n]o prior violations ha[d] been taken into account” in calculating the penalty. Enforcement officers boarded the CATITA II several times when Dutton was operating it, and he had not been charged with any violation. Finding of Fact 48. NOAA Brief at 20; see, Tr. 398-400, 520. Therefore no upward adjustment of the penalty is warranted for history of non-compliance. The Penalty Policy values are based on an assumption that there is no such history and therefore no downward adjustments are made for history of compliance.

No adjustment is warranted for the violation arising from commercial activity. Dutton operated AEE as a for-profit sport fishing and sightseeing business and was paid for his services by Steven Atkinson. Tr. 398-400; Finding of Fact 21. However, the Halibut Act distinguishes between commercial and guided sport fishing, and the violation at issue concerns the latter.

The evidence shows that Dutton cooperated with investigators and answered all questions, which provided helpful information. Finding of Fact 45. It is appropriate to reduce the base penalty by 15 % in the circumstances of this case. The adjusted penalty is \$6,800.

#### 5. Economic Benefit and Ability to Pay

The Agency did not account for any economic benefit, and the record does not support any upward adjustment to the penalty for an economic benefit of noncompliance.

The NOVA advised Respondents that they could seek to have the proposed penalty amount modified on the basis that they did not have the ability to pay, and that any such modification request would have to be made in accordance with 15 C.F.R. § 904.102 and be accompanied by supporting financial information. In this case, Respondents neither claimed an inability to pay a penalty, nor provided any information concerning their financial condition. Respondents are therefore “presumed to have the ability to pay the civil penalty.” 15 C.F.R. § 904.108(c).

#### 6. Conclusion

Taking into account the statutory penalty factors and the Penalty Policy, an appropriate penalty to assess for Count 1 is \$6,800.

#### F. Agency’s Proposed Penalty and Arguments in Support for Count II:

The offense of “disfigurement of halibut” is listed in the penalty schedule as Offense Level 1, and the Agency assesses the culpability of Dutton as reckless. NOAA Brief at 21-22. The Agency argues that Respondent Dutton was aware of the halibut mutilation restrictions and decided to ignore them for his and his clients’ convenience, although there was no real urgency that motivated the violation. *Id.*, NOAA Reply at 10-11. The Agency emphasizes the vagueness of testimony and failures of Dutton to recall at hearing the details about his claimed consultations with enforcement officers on the halibut mutilation restrictions. NOAA Brief at 21-22; NOAA Reply at 7.

Pursuant to the penalty matrix for the Northern Pacific Halibut Act, the midpoint of the penalty range for an Offense Level 1, with culpability of “reckless” is \$4,000. Penalty Policy at 30. The Agency states that no prior violations or other aggravating or mitigating circumstances were taken into account in proposing the penalty amount. NOAA Brief at 22.

#### G. Respondents’ Arguments

Respondents disagree with the culpability level proposed by NOAA. They point out Dutton’s testimony at hearing that he knew the regulation is only sporadically enforced and that “at least some law enforcement officials have authorized fishermen to go ahead and cut up their halibut while heading into port if they are catching a flight out of town shortly after arriving in port.” R Brief at 21. Dutton reasonably believed that it was acceptable to cut up and package the fish when they were done fishing and heading into port, and the family members wanted to divide the fish evenly, so it had to be done before reaching the dock so one of the members “could catch his flight with his fair share of the fish.” *Id.* Respondents assert that the time of the flight, minus two hours recommended by the airline for arrival, left only 45 minutes to tie up the vessel, offload, fishing packing fish and get to the airport. R Reply at 4. Respondents point out that there is no suggestion that this conduct prevented federal officials from determining the number of halibut retained by the Atkinsons.

#### H. Discussion and Conclusions

##### 1. Offense Level

The Penalty Policy assigns an Offense Level I, the lowest level, for the violation of “[d]isfigurement of halibut that prevents minimum size or catch limit determination.” Penalty Policy at 53. There is no reason asserted or otherwise found to assess any higher offense level for Count 2.

##### 2. Culpability

Dutton’s efforts in cutting the halibut into fletches that comply with the Annual Performance Measure so that it could be further cut and packaged upon arriving at port

does not suggest recklessness. However, not waiting until arriving at port, but cutting the halibut into smaller pieces when the vessel is approximately two hours from port indicates a significant degree of negligence. The evidence does not show that there was a great deal of urgency needed in getting the client to the airport. The CATITA II was docked at Aurora harbor at 5:15 p.m. on August 20, and Dutton acknowledged to Trooper Frenzel that the client needed to get to the airport by 7:00 p.m., and that it would likely take not more than 30 minutes to deliver the client to the airport and return to the vessel. R Ex. 1 at 97-98; NOAA Ex. 12; Finding of Fact 43. The parties agree that the flight departed at 8:00 p.m. NOAA Reply at 10; R Reply at 4. Dutton had significant control over the events constituting the violation and took some, but not enough, reasonable precaution against the events constituting the violation.

It is concluded that Dutton was significantly negligent in cutting the halibut into smaller chunks than allowed by the Annual Management Measure, despite the fact that he was familiar with the cutting restrictions.

### 3. Matrix Value

The penalty range for Gravity Offense Level I for a negligent level of culpability is a written warning to \$4,000. Given the degree of negligence, the appropriate value for Count 2 is \$3,000, which is above the midpoint of the range.

### 4. Adjustment Factors, Economic Benefit, Conclusion

For the same reasons as discussed as to the penalty for Count 1, the penalty is not adjusted for history of non-compliance or commercial activity. The penalty is reduced by 15% for Dutton's cooperation with investigators. Finding of Fact 45.

Accordingly, taking into account the statutory penalty factors and the Penalty Policy, an appropriate penalty to assess for Count 2 is \$2,550

## **ORDER**

**IT IS HEREBY ORDERED THAT** a civil penalty in the total amount of **\$ 9,350** is assessed against Respondent Christopher Dutton. Once this Initial Decision becomes final under the provisions of 15 CFR § 904.271(d), you will be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein.

**PLEASE TAKE NOTICE**, that this Initial Decision becomes effective as the final Agency action, sixty (60) days after the date this Initial Decision is served, unless the undersigned grants a petition for reconsideration or the Administrator reviews the Initial Decision. 15 C.F.R. § 904.271(d).



**PLEASE TAKE FURTHER NOTICE**, that upon failure to pay the civil penalty to the Department of Commerce/NOAA within thirty (30) days from the date on which this decision becomes effective as the final Agency action, "NOAA may request the U.S. Department of Justice to recover the amount assessed," plus interest and costs, "in any appropriate district court of the United States ... or may commence any other lawful action." 15 C.F.R. §904.105(b).

**PLEASE TAKE FURTHER NOTICE**, that any petition for reconsideration of this Initial Decision must be filed within twenty (20) days after the Initial Decision is served. 15 C.F.R. §904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. *Id.* Within fifteen (15) days after a petition is filed, any other party to this proceeding may file an answer in support or in opposition. The undersigned will rule on any petition for reconsideration.

**PLEASE TAKE FURTHER NOTICE**, that any petition for review of this decision by the Administrator of NOAA must be filed within thirty (30) days after the date this Initial Decision is served and in accordance with the requirements of 15 C.F.R. §904.273. If neither party seeks administrative review within thirty (30) days after issuance of this order, this initial decision shall become the final administrative decision of the Agency. A copy of 15 C.F.R. §§ 904.271-904.273 is attached.



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M. Lisa Buschmann  
Administrative Law Judge  
U.S. Environmental Protection Agency



TITLE 15 -- COMMERCE AND FOREIGN TRADE  
SUBTITLE B -- REGULATIONS RELATING TO COMMERCE AND FOREIGN  
TRADE  
CHAPTER IX -- NATIONAL OCEANIC AND ATMOSPHERIC  
ADMINISTRATION, DEPARTMENT OF COMMERCE  
SUBCHAPTER A -- GENERAL REGULATIONS  
PART 904 -- CIVIL PROCEDURES  
SUBPART C -- HEARING AND APPEAL PROCEDURES  
DECISION

*15 CFR 904.271-273*

§ 904.271 Initial decision.

(a) After expiration of the period provided in § 904.261 for the filing of reply briefs (unless the parties have waived briefs or presented proposed findings orally at the hearing), the Judge will render a written decision upon the record in the case, setting forth:

(1) Findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law, or discretion presented on the record;

(2) An order as to the final disposition of the case, including any appropriate ruling, order, sanction, relief, or denial thereof;

(3) The date upon which the decision will become effective; and

(4) A statement of further right to appeal.

(b) If the parties have presented oral proposed findings at the hearing or have waived presentation of proposed findings, the Judge may at the termination of the hearing announce the decision, subject to later issuance of a written decision under paragraph (a) of this section. In such cases, the Judge may direct the prevailing party to prepare proposed findings, conclusions, and an order.

(c) The Judge will serve the written decision on each of the parties, the Assistant General Counsel for Enforcement and Litigation, and the Administrator by certified mail (return receipt requested), facsimile, electronic transmission or third party commercial carrier to an addressee's last known address or by personal delivery and upon request will promptly certify to the Administrator the record, including the original copy of the decision, as complete and accurate.

(d) An initial decision becomes effective as the final administrative decision of NOAA 60 days after service, unless:

(1) Otherwise provided by statute or regulations;

(2) The Judge grants a petition for reconsideration under § 904.272; or

(3) A petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative under § 904.273.

#### § 904.272 Petition for reconsideration.

Unless an order or initial decision of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or initial decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of such order or initial decision. The filing of a petition for reconsideration shall operate as a stay of an order or initial decision or its effectiveness date unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the administrative proceeding may file an answer in support or in opposition.

#### § 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.