UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	)	**Docket No. SE1200825FM**
David D. Stillwell and Rocco J. Scalone,	)	**(F/V Miss Stephanie)**
Respondents.	)	**Issued: April 12, 2016**

ORDER DENYING RESPONDENTS' MOTION FOR RECONSIDERATION

I. Procedural Background

On September 25, 2012, the National Oceanic and Atmospheric Administration ("NOAA" or "Agency") issued a Notice of Violation and Assessment of Administrative Penalty ("NOVA") to David D. Stillwell and Rocco J. Scalone (collectively "Respondents," or individually "Stillwell" or "Scalone," respectively). In the NOVA, the Agency alleged that Respondents jointly and severally violated the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), 16 U.S.C. § 1857(1)(A), and its implementing regulation at 50 C.F.R. § 622.7(ff)[1], by failing to comply with sea turtle conservation measures set forth in 50 C.F.R. § 622.10(b)(1).

On February 28, 2013, Respondents submitted a request for a hearing before an administrative law judge. The hearing in this matter was held on March 26, 2014, in Tampa, Florida. After the hearing, the parties submitted post-hearing briefs and reply briefs. Thereafter, on May 29, 2015, I issued an Initial Decision and Order finding the Respondents jointly and severally liable for a civil penalty of $5,000. *See In re David D. Stillwell*, 2015 NOAA LEXIS 11 (NOAA May 29, 2015) (Initial Decision). Specifically, I found that Respondents failed to show that they had on board during a fishing trip in February 2012 four of the seven items of Turtle Mitigation Gear required to be on board gulf reef fish commercial vessels.

On June 23, 2015, Respondents filed a Motion for Reconsideration ("Motion" or "Mot.")[2] on grounds that the Agency and Coast Guard violated fundamental due process by

[1] All citations to the regulations are to the regulations that were in effect at the time of the violation. 16 U.S.C. § 1857(1)(A) (2012); 50 C.F.R. §§ 622.7(ff), 622.10(b)(1) (2011).

[2] Respondents' Motion for Reconsideration of the Initial Decision and Order is construed as a "Petition for Reconsideration" under 15 C.F.R. § 904.272.

imposing an unnecessarily high burden to show compliance with the sea turtle conservation measures. The Agency filed an Answer in Opposition to the Respondents' Motion for Reconsideration ("Opposition" or Opp.") on July 7, 2015. The Agency argues that the Motion was not timely filed and is without merit, as Respondents have not demonstrated that any matter was erroneously decided.

II. Applicable standards

The rule that governs petitions for reconsideration is set forth in 15 C.F.R. § 904.272 provides as follows:

> Unless an order or initial decision 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.

15 C.F.R. § 904.272 (emphasis added). The twenty-day response period to file a petition for reconsideration "begin[s] to run on the day following the service date of the document, paper, or event that begins the time period," and "Saturdays, Sundays, and Federal holidays will be included in computing such time." 15 C.F.R. § 904.4. To serve an initial decision, the Judge serves "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." 15 C.F.R. § 904.271(c). The "[s]ervice of documents and papers will be considered effective upon the date of postmark (or as otherwise shown for government-franked mail), facsimile transmission, delivery to third party commercial carrier, electronic transmission or upon personal delivery." 15 C.F.R. § 904.3(b).

The rules do not articulate a standard for granting motions for reconsideration, but the requirement in 15 C.F.R. § 904.272 that the petition "must state the matter claimed to have been erroneously decided" indicates that reconsideration of an initial decision may be granted only where the petitioner shows that the decision was based on one or more errors of fact or law. In federal court, reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enterprises, Inc. v. Estate of Bishop,* 229 F.3d 877, 890 (9th Cir. 2000). It is not merely an opportunity for a party to state arguments that were made or could have been made previously in the proceeding. *Motorola Inc. v. J.B. Rogers Mechanical Contractors, Inc.,* 215 F.R.D. 581, 582 (D. Ariz. 2003)("Motions for reconsideration are disfavored, . . . and are not the place for parties to make new arguments not raised in their original briefs"); *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)(improper on motion for reconsideration to ask court "to rethink what it had already

thought through"); *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985) (reconsideration properly denied where movant presented no argument that had not previously been raised).

III. Respondents' Arguments

Respondents assert that "the burden to show compliance is unjust and unnecessarily high to the point that it is impossible to refute [the Coast Guard and Agency's] claims with relevant and competent evidence that shows compliance with NOAA's sea turtle mitigation requirements." Mot. at 1.[3] They assert that certain evidence should have been treated differently in the Initial Decision, which would have led to a conclusion that they had on board all seven of the required Turtle Mitigation Gear items - not only the three shown to the inspector, but also a dipnet, cushioned surface, bolt cutters, and mouth openers or mouth gags. If one of the latter items was on board the vessel, then under Coast Guard policy, as Officer Ruane testified, a warning would have been issued rather than a NOVA. Mot. at 5.

First, they insist that the photographs they provided showing the presence of a dipnet on the vessel were authentic and the date stamp indicated they were taken during the fishing trip at issue in this case. They argue that the photograph showing a dipnet and a dog on board the vessel "clearly impeach" the testimony of the inspector, Officer Ruane, that there was no dog on the vessel during the inspection on February 16, 2012. *Id.* at 4. They assert that alteration of the time stamp on the camera and taking new photos "was not done and it would be impossible to do with the dispersion of the crew." *Id.* at 2. To further demonstrate that the photographs were authentic, they assert that after they received the NOVA, their counsel requested photographs and Scalone responded within an hour and provided the photographs, which were then sent to the Agency. They argue that "it is a violation of due process to categorically reject otherwise valid and relevant and competent photographs that reflect that Respondents were in compliance . . . ." *Id.*

Second, Respondents attack Officer Ruane's credibility by arguing that he fabricated testimony of a conversation with Scalone during the inspection, concerning a stern light on the vessel. *Id.* at 2-3.

Third, Respondents assert that they were denied due process by my finding in the Initial Decision that the crew member was not familiar with each item of Turtle Mitigation Gear. Respondents assert that a failure of the crew member to recall alternative items at the hearing, two years after the inspection, and a particular statement he made during the hearing, do not support such finding. They argue that he could have pointed out almost all of the gear during the inspection if he had been allowed to participate during the inspection, and that Officer Ruane violated Respondents due process rights by not allowing his participation. *Id.* at 4-6.

Fourth, Respondents assert that the Initial Decision "goes beyond and over what is required by the Coast Guard." *Id.* at 6. They argue that the requirement of a mouth gag or "hank of rope" is not only met by a rope coiled into a hank but also by the presence of rope on board, given Officer Ruane's testimony that during inspections he would show vessel operators how to hank a rope.

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[3] The pages of the Motion are not numbered. Page numbers are provided herein for ease of reference.

Fifth, Respondents state that the bolt cutter shown in a photograph in evidence qualifies as Turtle Mitigation Gear, because it is "an 18" Pittsburgh bolt cutter, and the Court is not measuring the item correctly." *Id.* at 7.

Finally, Respondents complain that the Initial Decision did not include a finding as to whether Officer Ruane read a checklist of Turtle Mitigation Gear items during the inspection, which could have reflected his credibility, and thus he and the Agency are given "every benefit of the doubt . . . to the point that the burden to rebut is extraordinarily high no matter what evidence is offered." *Id.* at 7-8.

IV. Agency's Arguments

NOAA argues that credibility issues are within the purview of the administrative law judge, and Respondents have not made a case for revisiting the decision as to credibility issues. NOAA argues further that keeping Scalone separate from the crew member was not a violation of due process, as it was standard Coast Guard security for Officer Ruane to keep the crew member separate from Scalone, and it was Scalone's responsibility as captain to know where the Turtle Mitigation Gear was located and to produce it for inspection.

The Agency asserts that the assignment of little weight to the photographs does not constitute denial of due process. In addition, the Agency points out that Respondents are attempting to introduce new evidence – a timeline of events after the NOVA was issued, and identification of the bolt cutters -- after the evidentiary record was closed at the conclusion of the hearing.

As to Respondents' reference to Coast Guard policy of issuing warnings, NOAA states that its General Counsel, and not the Coast Guard, determines whether to issue a NOVA.

V. Discussion and Conclusions

A. Timeliness

The Initial Decision and Order was properly served on the parties and sent to the Respondents by both regular mail and e-mail on June 2, 2015. Therefore, the applicable twenty-day time period for the parties to file a motion for reconsideration began to run the following day, June 3, 2015. From June 3, 2015, the parties had twenty days to file a timely petition for reconsideration of the Initial Decision. Consequently, in order to be considered timely, a petition for reconsideration should have been filed by Respondents on or before June 22, 2015. However, Respondents filed their Motion on June 23, 2015, one day after the twenty-day time period to file a timely petition had elapsed. Moreover, Respondents have offered no explanation or extraordinary circumstance as an excuse for their tardiness in filing. Accordingly, Respondents' Motion must be denied.

Filing deadlines are essential procedural requirements, not mere niceties. Adhering to filing deadlines is imperative as delinquent filing "adversely affects the judicial goal of

addressing motions and cases in a timely and efficient manner and, therefore, such failure to abide by filing deadlines causes judicial resources to be utilized in a less efficient manner." *Allstate Ins. Co. v. Kelly*, No. 05-276J, 2006 U.S. Dist. LEXIS 27497, at *10 (W.D. Pa., Apr. 26, 2006). The strict application of a filing deadline means that a "filing deadline cannot be complied with, substantially or otherwise, by filing late – even by one day." *United States v. Locke*, 471 U.S. 84, 101 (1985). If this Tribunal were to allow a one-day late filing,

> a cascade of exceptions . . . would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it. Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced. "Any less rigid standard would risk encouraging a lax attitude toward filing dates."

Id. (quoting *United States v. Boyle*, 469 U.S. 241, 249 (1985)).

Respondents' Motion was filed twenty-one days after the service of the Initial Decision and Order, and therefore, was not timely filed in accordance with 15 C.F.R. § 904.272.

B. Whether standards for reconsideration are met

Even if the Motion were filed timely, Respondents have not demonstrated any error of fact or law. The photographs referenced by Respondents were admitted in evidence and carefully evaluated. Respondents have not demonstrated any denial of due process. They reiterate the argument made in their post-hearing brief, and addressed on pages 16 and 17 of the Initial Decision, that the photograph of the dipnet and dog on board the vessel impeaches Officer Ruane's credibility and reliability of his memory. In support of the argument, Respondents insist that the photographs are authentic, stating that Scalone immediately provided the photographs to his attorney upon request, and that the photographs could not have been altered due to "the dispersion of the crew." These statements are merely assertions of Respondents' attorney in the Motion. They do not include any citation to evidence of record and do not constitute evidence, and do not demonstrate any error of fact or law. Moreover, such reiteration of argument and assertions that were or could have been presented previously, does not warrant reconsideration. *Motorola Inc.,* 215 F.R.D. at 582; *Above the Belt, Inc..*, 99 F.R.D. at 101.

Respondents' challenge to the credibility of Officer Ruane on the basis of his testimony about a stern light is simply a reiteration of Respondents' previous argument that that was addressed on page 11 of the Initial Decision. Moreover, Respondents' disagreement with the assessment of Officer Ruane's credibility does not show any error of fact or law. Respondents contend that "the Court's statement the stern light was moved from the stern to the roof is erroneous," arguing, without citing to any evidence, that "this action was never done and no stern light was ever smashed as one was not required pursuant to Rule 23, even though Officer Ruane cited that vessel for not being in compliance with Rule 23." Mot. at 3. While the

Initial Decision (at p. 11) paraphrased Scalone's testimony as to moving a stern light, there was no finding of fact as to a stern light. *See*, Initial Decision pp. 4-8.

Respondents present two reasons for their disagreement with the finding that the crew member was not familiar with each item of Turtle Mitigation Gear. One is merely reiteration of an argument made in their post hearing brief (at § III.C.4). The other is their belief that a statement he made at hearing and his failure to remember the items when on the witness stand do not support the finding. Neither establishes an error of fact or law. The finding was based on a detailed analysis of his testimony, and Respondents have not pointed to any mistake or error in the analysis. Initial Decision p. 15.

Respondents merely reiterate an argument in their post hearing brief (§ III.C.2) that the presence of rope on board should suffice as a "hank of rope" to serve as a mouth gag. An inspector's helpful gesture, during an inspection, of showing how to hank a rope, and his exercise of discretion not to charge a violation where a rope of appropriate size is on board, does not change the language of the regulatory requirement, which specifies "a hank of rope" rather than "a length of rope."

As to Respondents' argument that they presented a photograph of tools on board, including a bolt cutter, they did not present any testimony or evidence that it met the regulatory minimum design standards. The photograph and testimony was insufficient to show that a bolt cutter that met the standards was on board on the date of the inspection. The attorney's assertion in the Motion of the type of bolt cutter that Respondents allege was on board and depicted in the photograph does not refer to evidence of record and does not establish an error of fact or law.

Finally, the Respondents' frustration that a finding was not made on a non-material issue of whether Officer Ruane read a checklist of Turtle Mitigation Gear items during the inspection does not demonstrate an error of fact or law.

Consequently, Respondents' Motion for Reconsideration is **DENIED.**

Pursuant to 15 C.F.R. § 904.272, the filing of the Motion stayed the effective date of the Initial Decision. By this Order, the stay is lifted.

SO ORDERED.

Lisa Busch

M. Lisa Buschmann
Administrative Law Judge
U.S. Environmental Protection Agency[4]

[4] 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.