



Via First Class Mail – Return Receipt Requested

April 2, 2018

Edward J. Barrett
67 Marginal Street
Marshfield, MA 02050

RE: Appeal of Written Warning (NE170420)

Dear Mr. Barrett:

This appeal concerns a Written Warning issued to you, Edward J. Barrett (Respondent), as the owner and operator of the *F/V Sirius*.¹ Respondent was issued a Written Warning for unlawfully possessing Atlantic sea scallops in federal waters without a valid federal scallop permit in violation of the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act” or “MSA”), 16 U.S.C. § 1857, and the National Oceanic and Atmospheric Administration (“NOAA” or “the Agency”) regulations, 50 C.F.R. § 648.4(a)(2). For the reasons discussed below, I affirm the Written Warning.

I. Background

On November 26, 2016, Massachusetts Environmental Police (MEP) Officers Andrew Pierce and Chris Baker observed the *F/V Sirius* while on patrol in federal waters, specifically the Stellwagen Bank National Marine Sanctuary.² The Officers contacted the vessel and asked Respondent to decrease his speed so they could board, whereupon Respondent stated over the radio that he was experiencing fuel issues and could not slow down.³ The record indicates that Respondent was eventually able to slow his vessel and shift to neutral, at which point Officer Pierce boarded Respondent’s boat and inspected his permits.⁴

Officer Pierce observed a basket containing approximately 15 large unshucked scallops on board.⁵ Respondent had not been issued a valid scallop permit for federal waters. Respondent

¹ See Written Warning to Edward J. Barrett, dated July 17, 2017 (“Written Warning”) and Respondent’s Appeal of Written Warning, dated October 23, 2017 (“Deputy General Counsel Appeal”); see also Respondent’s Appeal of Written Warning, dated August 11, 2017 and Decision Affirming Written Warning from John Han, Section Chief, dated September 5, 2017.

² See generally, Offense Investigation Report (OIR) filed by Enforcement Officer Timothy Wilmarth, dated July 13, 2017. The OIR compiles various other documents into a single packet, which are listed on the last page of the OIR as Attachments (Att.) 1 through 7.

³ Prior to the boarding, the vessel was traveling at approximately 12 knots, and was not actively fishing. At the time of the boarding, Respondent informed the Massachusetts Environmental Police (MEP) Officers that he was returning to port. See OIR, Att. 1, Massachusetts Environmental Police Report filed by Officer Andrew Pierce, dated November 28, 2016.

⁴ Respondent’s vessel was federally permitted for American lobster (non-trap), monkfish, Northeast multispecies, and skate. The vessel also had several state permits, but at the time of the boarding, was fishing in federal waters. See *id.*

⁵ *Id.*



and Officer Pierce also measured approximately 25 American lobsters on board the vessel, including two that Officer Pierce identified as oversized lobsters.⁶ All of the scallops and the two, oversized lobsters were subsequently returned to the sea alive, and the incident was referred to NOAA's Office of Law Enforcement (OLE).⁷

On July 17, 2017, OLE Officer Timothy Wilmarth mailed to Respondent a Written Warning for possessing scallops in federal waters without a valid federal scallop permit in violation of 50 C.F.R. § 648.4(a)(2), and a Summary Settlement offer for possessing oversized lobsters in violation of 50 C.F.R. § 697.7(c)(1)(xxix).

On August 11, 2017, Respondent appealed the Written Warning to the NOAA Office of General Counsel, Enforcement Section (Enforcement Section). The Enforcement Section affirmed the Written Warning on September 5, 2017. Respondent currently requests a dismissal of the Written Warning on substantive and procedural grounds, as detailed below.

Respondent has also requested a dismissal of the Summary Settlement offer. Respondent has requested in the alternative that the Written Warning and the Summary Settlement offer be consolidated and returned to OLE or the Enforcement Section. Respondent has not paid the Summary Settlement and the Enforcement Section has not taken any further action in connection with this violation. Accordingly, based upon the procedures set forth in 15 C.F.R. § 904.403, the Summary Settlement case is not ripe for review by the Deputy General Counsel and will not be addressed in this decision.

II. Procedural Framework

NOAA regulations set forth a two-part administrative appeal process for Written Warnings issued by OLE agents and other authorized officers.⁸

As part of this process, Written Warning recipients may first appeal to the Assistant General Counsel for Enforcement and Litigation (recently retitled the Section Chief for the Enforcement Section) and may thereafter appeal the Section Chief's decision to the NOAA Deputy General Counsel.⁹ Respondents have 60 days to file an appeal after receiving the Written Warning notification or the Section Chief's determination.¹⁰

On appeal, the Deputy General Counsel may affirm, vacate, or modify a Written Warning.¹¹ The Deputy General Counsel's determination constitutes final agency action for judicial review purposes.¹²

⁶ *Id.*

⁷ After disembarking the *F/V Sirius*, the MEP Officers observed the vessel, visually and on radar, returning safely to port. *Id.*

⁸ See 15 C.F.R. § 904.403(a),(b).

⁹ *Id.*

¹⁰ See *id.* at § 904.403(b).

¹¹ See *id.* at § 904.403(c).

¹² See *id.* at § 904.403(b), (c).

III. Legal Framework

Congress enacted the Magnuson-Stevens Act to “promote domestic commercial and recreational fishing under sound conservation and management principles”¹³ The MSA prohibits, and specifically makes unlawful, the violation of any provision of any regulation or permit issued pursuant to the statute.¹⁴

Regulations implementing the Magnuson-Stevens Act for the fisheries of the Northeastern United States require that “any vessel of the United States that fishes for, possesses, or lands Atlantic sea scallops, except vessels that fish exclusively in state waters for scallops,” be issued and carry on board a valid federal scallop vessel permit.¹⁵

IV. Discussion

Respondent does not contest the fact that approximately 15 in-shell scallops were on board his vessel, the *F/V Sirius*, at the time of the Massachusetts Environmental Police (MEP) boarding, nor does he dispute that he did not have a valid federal permit to possess Atlantic sea scallops in federal waters.¹⁶ Instead, Respondent makes two main, substantive arguments: (1) the Agency’s interpretation of “possess,” which does not require a showing of intent, is unreasonable, and (2) Respondent’s lack of intent to retain the scallops is sufficient to demonstrate that Respondent did not “possess” the scallops in violation of 50 C.F.R. § 648.4(a)(2).¹⁷ Respondent also contends that the Written Warning should be dismissed due to alleged procedural defects.

Based on the plain language of 50 C.F.R. § 648.4(a)(2) and the information before me, I find Respondent’s arguments unconvincing.

A. Under the Agency’s reasonable interpretation of the word “possess,” Respondent violated the Magnuson-Stevens Act by possessing Atlantic sea scallops in federal waters without a valid federal permit.

Under 50 C.F.R. § 648.4(a)(2):

Any vessel of the United States that fishes for, possesses, or lands Atlantic sea scallops, except vessels that fish exclusively in state waters for scallops, must have been issued and carry on board a valid scallop vessel permit pursuant to this section.

Respondent contends that OLE’s interpretation of “possess,” which was based upon Officer Pierce’s observation of the scallops on board the *F/V Sirius*, is overly broad and not within the intent of the regulations. Respondent argues that to “possess” something, one must have the intent to retain it.

¹³ 16 U.S.C. § 1801(b)(3).

¹⁴ 16 U.S.C. § 1857(1)(A).

¹⁵ 50 C.F.R. § 648.4(a)(2).

¹⁶ See Deputy General Counsel Appeal.

¹⁷ *Id.*

The Magnuson-Stevens Act and its underlying regulations do not define “possess.” However, pursuant to settled rules of statutory and regulatory construction, the plain, common, and ordinary meaning of the term controls when the relevant statute and regulations are silent.¹⁸ Past NOAA administrative decisions have also held that the ordinary meaning of “possess” controls in the absence of a definition within the MSA regulations.¹⁹ Black’s Law Dictionary defines “possess” as “to have in one’s actual control; to have possession of.”²⁰ This plain meaning supports the Agency’s interpretation that physical presence of the scallops on board Respondent’s vessel is sufficient to constitute “possession.” Meanwhile, case law affirms that, “[a]n agency’s interpretation [of its regulations] must be given ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’”²¹ The Agency’s interpretation also aligns with the general principles of construction. MSA regulations frequently use “possess” alongside the following terms, some of which are defined in the general MSA regulations: “catch,” “take,” “harvest,” “fish for,” and “land.”²² Certain definitions in the regulations for fisheries of the Northeastern United States, in particular, juxtapose “possessed” with “fished for,” “caught,” and “retained.” To construe “possess” as having the same meaning as these terms would render this language superfluous.²³

Administrative law judges (ALJs) adjudicating NOAA cases have concluded, in line with OLE’s interpretation, that “possession” under similar NOAA regulations does not require ownership or a possessory property right to the object at issue.²⁴ In particular, the ALJ in *In re Whitney* held that “there is no time determinative aspect to the definition of possess” such that merely having something within one’s “actual physical control” is sufficient to constitute “possession” under the MSA.²⁵ On appeal, the First Circuit upheld this decision, finding that the ALJ’s conclusion is “clearly not erroneous and is consistent with other NOAA cases interpreting the term ‘possession.’”²⁶ Thus, I find Respondent’s argument – that the Agency’s interpretation of “possess” is overly broad and not within the intent of the regulations – to be unconvincing.

¹⁸ See e.g., *BP Am. Prod. Co. v. Burron*, 549 U.S. 84, 91 (2006); *S. D. Warren Co. v. Me. Bel. of Envtl. Prof.*, 547 U.S. 370, 375-78 (2006).

¹⁹ *Timothy A. Whitney*, 1991 NOAA LEXIS 33, at *4-5 (NOAA App. 1991) (citing *Campbell*, 5 O.R.W. 328, 331 (NOAA 1988)).

²⁰ Black’s Law Dictionary (10th ed. 2014). “Possession” is defined as “the fact of having or holding property in one’s power; the exercise of dominion over property.” *Id.*

²¹ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

²² “Catch, take, or harvest” is defined as including, but not limited to “any activity that results in killing any fish or bringing any live fish on board a vessel.”²² On the other hand, “land” means “to begin offloading fish, to offload fish, or to arrive in port or at a dock, berth, beach, seawall, or ramp.” 50 C.F.R. § 600.10.

²³ See *Mkt. Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879).

²⁴ See *Northern Wind v. Daley*, 200 F.3d 13, 18-19 (1999) (citing *In re Whitney*, 6 O.R.W. 479 (NOAA 1991); *In re L.D. Amory & Co.*, 5 O.R.W. 100 (NOAA 1988); *In re Axelsson & Johnson Fish Co.*, 5 O.R.W. 51 (NOAA 1987)).

²⁵ In this case, the Coast Guard observed the respondent surfacing from a dive next to his vessel. Two hog snappers and one red grouper, all of which had been speared, appeared in the water shortly thereafter. When the respondent boarded his vessel, he had a spear gun. These were sufficient grounds for the ALJ to determine the respondent “possessed” the fish. *Whitney*, 1991 NOAA LEXIS 33, at *8 (NOAA App. 1991).

²⁶ See *Northern Wind*, 200 F.3d at 18.

As noted above, 50 C.F.R. § 648.4(a)(2) prohibits any person from fishing for, possessing, or landing Atlantic sea scallops in federal waters without a valid federal permit. Taking into consideration past administrative decisions and general rules of statutory and regulatory interpretation, “possess” does not require a person to have an intent to retain the Atlantic sea scallops in order to run afoul of the regulations. A person may violate the regulations by “possessing,” or having on board the vessel Atlantic sea scallops without a valid permit.

Based on the facts and the Agency’s reasonable interpretation of “possess,” Respondent violated 50 C.F.R. § 648.4(a)(2).

B. The Magnuson-Stevens Act imposes strict liability and NOAA is not required to prove Respondent’s intent to retain the scallops.

Respondent argues that he did not “possess” the Atlantic sea scallops because he had no intent to retain the scallops. As support for this claim, Respondent cites to the fact that the catch had not been sorted, measured, or otherwise processed when the MEP Officer boarded his vessel. Respondent further claims that due to the engine problems with his vessel, he did not have a reasonable amount of time to discard the catch prior to the MEP boarding.²⁷

Respondent’s arguments are without merit. Conservation-related violations under the Magnuson-Stevens Act are strict liability offenses, and, thus, the Agency need not prove Respondent’s intent or knowledge.²⁸ As a general matter, intent is not required to impose civil penalties for regulatory violations when the regulation is silent as to state of mind.²⁹ Furthermore, confusion or ignorance of the law is not a valid excuse for violating the MSA.³⁰

Moreover, even if the Agency were required to prove intent, the record does not support Respondent’s claims that he did not intend to retain the scallops for his own consumption. In particular, the evidence in Officer Pierce’s report indicates that Respondent stated, “It’s a sad day that you can’t keep a few scallops for dinner.”³¹ Respondent’s wife, who was also onboard the vessel, filmed Officer Pierce returning the scallops to the sea and stated, “Well, there goes dinner.”³²

²⁷ See Deputy General Counsel Appeal.

²⁸ *Northern Wind*, 200 F.3d at 19 (citing *In re Whitney*, 6 O.R.W. at 483; *In re El Jefe*, 5 O.R.W. 453, 455 (NOAA 1989); *In re Meredith Fish Co.*, 4 O.R.W. 66, 67 (NOAA 1985)); *David D. Stillwell & Rocco J. Scalone*, 2015 NOAA LEXIS 11, at *25-26 (NOAA App. 2015); *Mark Cordeiro & Willie Etheridge, III*, 2007 NOAA LEXIS 16, at *15 (NOAA App. 2007).

²⁹ *Northern Wind*, 200 F.3d at 19 (citing *Tart v. Massachusetts*, 949 F.2d 490, 502 (1st Cir. 1991)). “The respondents’ claimed state of mind is irrelevant because conservation-related offenses under the Magnuson-Stevens Act are strict liability offenses.” See *Meredith Fish Co.*, 1985 NOAA LEXIS 59 (NOAA App. 1985).

³⁰ *Scalone*, 2015 NOAA LEXIS 11, at *21-22.

³¹ See OIR, Att. 1, Massachusetts Environmental Police Report filed by Officer Andrew Pierce, dated November 28, 2016.

³² *Id.*

C. The Agency has not violated its procedures, and there is no basis to vacate the Written Warning on procedural grounds.

Respondent contends that the Written Warning should be vacated due to the following alleged procedural flaws: (1) the OLE has failed to provide Respondent with the case file; (2) NOAA failed to serve Respondent with a Notice of Seizure within 90 days of the alleged seizure;³³ and (3) the gap in time between the boarding on November 26, 2016 and the OLE's Written Warning notification, dated July 17, 2017, has prejudiced the Respondent.

Under NOAA regulations, a Written Warning must state the factual and statutory or regulatory basis for its issuance.³⁴ Pursuant to 15 C.F.R. § 904.402(b), the Agency is not required to provide respondents with its case file.

On July 17, 2017, OLE mailed a Written Warning notification to Respondent with an enclosed Enforcement Action Report.³⁵ The letter indicated that the Written Warning was issued based on a violation of 50 C.F.R. § 648.4(a)(2) for the fishing of Atlantic sea scallops in the exclusive economic zone without a valid scallop permit.³⁶ The information contained in the Written Warning notification was sufficient to meet the Agency's regulatory requirements.³⁷

Respondent also argues that the Agency was required to serve him with a Notice of Seizure under 15 C.F.R. § 904.501. This regulatory provision requires the Agency to issue a notice of seizure following the seizure or other receipt of seized property, except where the owner, consignee, or other party with an interest in the seized property is personally notified, or where seizure is made under a search warrant.³⁸ Respondent was neither the owner nor consignee of the scallops, and did not have a valid legal interest in the scallops. Accordingly, 15 C.F.R. § 904.501 does not apply to the present circumstances.

Finally, the Written Warning notification dated July 17, 2017 did not prejudice Respondent. On the contrary, the Enforcement Section's Penalty Policy takes into account the length of time that has passed from the date of the violation and enables NOAA to choose to decrease the penalty accordingly. In this case, Respondent was issued a Written Warning, the most minor sanction available for violations of the statutes and regulations enforced by NOAA, and the appropriate sanction in this instance.³⁹

³³ Respondent incorrectly cites to 15 C.F.R. § 905.501, which does not exist. Respondent's appeal refers to Notice of Seizure procedures, which are contained in 15 C.F.R. § 904.501.

³⁴ 15 C.F.R. § 904.402(b)(2).

³⁵ Written Warning.

³⁶ *Id.*

³⁷ 15 C.F.R. § 904.402(b)(2).

³⁸ *Id.* at § 904.501.

³⁹ Pursuant to NOAA's Penalty Policy, Written Warnings are appropriate where the alleged activity has a limited impact on natural resources, the alleged violator demonstrates a high degree of cooperation, the alleged violator takes corrective action that substantially mitigates or eliminates the impact of the violation, or a substantial amount of time has passed from the date of the violation. Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions, NOAA Office of the General Counsel, Enforcement Section.

V. Conclusion

Based on the foregoing, I affirm the Written Warning.

Sincerely,

Handwritten signature of Kristen L. Gustafson in cursive script.

Kristen L. Gustafson
Deputy General Counsel

cc: Lauren Bregman, Attorney-Advisor
Regina Hsu, Attorney-Advisor