



July 25, 2018

Via First Class Mail--Return Receipt Requested

Jeffrey Kraus
95 North Sea Mecox Road
Southampton, NY 11968

RE: Jeffrey Kraus, F/V *Alisha J*
Appeal No. NE1708252 (I1708252)
Appeal of Written Warning

This appeal concerns a Written Warning issued to Respondent, Jeffrey Kraus, the owner and operator of the F/V *Alisha J*. On February 3, 2018, NOAA's Office of Law Enforcement ("OLE") issued a Written Warning to Respondent citing refusal to carry an observer onboard a vessel, in violation of the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act" or "MSA"), 16 U.S.C. § 1857, and National Oceanic and Atmospheric Administration ("NOAA") regulation, 50 C.F.R. § 648.14(e)(2). On May 14, 2018, the NOAA's Office of General Counsel - Enforcement Section affirmed the Written Warning. By letter received on May 30, 2018, Respondent requested further review by the NOAA Deputy General Counsel. For the reasons stated below, I affirm the Written Warning.

I. Background

Respondent is the owner and operator of the F/V *Alisha J*, a vessel that held a Greater Atlantic Federal Fishing Permit (#152014) issued by the National Marine Fisheries Service ("NMFS") during the 2017 fishing year.

On September 13, 2017, F/V *Alisha J* was selected to carry an observer from the Northeast Fisheries Observer Program for its upcoming trip on September 15, 2017. Notification was sent via email to the Respondent through the Groundfish Pre-Trip Notification System (PTNS) 48 hours prior to Respondent's planned fishing trip.¹ On September 15, 2017, the observer selected for the F/V *Alisha J* observer coverage arrived at the F/V *Alisha J* docked in Shinnecock, NY, and began the pre-boarding safety check, as required by 50 C.F.R. § 600.746(f). Upon inspection of the life raft, the observer told Respondent that the raft only had a four-man capacity, which was

¹ 50 C.F.R. § 648.11(g)(3), (k)(1), (m)(1), (n)(1)(i) (48 hour notice requirement). For notification of selection for observer coverage, see *Email from nefsc.ptns@noaa.gov to jmkraus@optonline.net* dated 9/13/18.



insufficient since there was already a four-man crew on board the vessel.² The observer noted in his Incident Report that Respondent told the observer that he usually has only three men on board the vessel, "but the day before they had so much catch to work through he felt he needed an extra guy to help out. He also said that he thought he had a 6 man raft." The observer explained to the Respondent that "if he thinks he may exceed his life raft capacity in the future, he could notify [NMFS] in advance and [they could] bring a valise life raft." The observer further explained that he would need to give Respondent a form for failing the safety exam and the vessel would not be authorized to go fishing, since it could not carry him, the observer. Respondent replied he was unwilling to lose a fishing day with a hurricane coming. Respondent then embarked on his fishing trip without the observer onboard.³

At the end of the day, Respondent returned to dock and sold \$3,587 worth of sea scallops to Cor-J Seafood Inc. Respondent also landed skates wings, angler tails, and black sea bass in the round.⁴

On February 3, 2018, OLE issued a Written Warning to Respondent for refusing to carry an observer onboard a vessel, in violation of 50 C.F.R. § 648.14(e)(2). Respondent appealed this Written Warning in a letter dated February 22, 2018 to the Enforcement Section. The Enforcement Section affirmed the Written Warning on May 14, 2018.⁵ Respondent requested further review by the NOAA Deputy General Counsel by letter received on May 30, 2018. Respondent requests a dismissal of the Written Warning upon substantive grounds.

II. Procedural Framework

Under 15 C.F.R. § 904.403(b), a respondent who receives a written warning affirmed by Agency counsel may appeal to the NOAA Deputy General Counsel. On appeal, the NOAA Deputy General Counsel may affirm, vacate, or modify a written warning.⁶ The NOAA Deputy General Counsel makes the decision on a case-by-case basis, and this decision constitutes final agency action for judicial review purposes.⁷

III. Discussion

Respondent appeals the Written Warning, citing to inaccuracies and misrepresentations, and fundamental unfairness of the observer requirements. In reviewing the record before me, I have not identified any inaccuracies, or fairness or policy considerations warranting vacating the Written Warning.

² *Id.* § 600.746(f)(6), a survival craft must have "sufficient capacity to accommodate the total number of persons, including the observer(s), that will embark on the voyage."

³ OLE Incident Report #: 1708252 at 1-3.

⁴ GCE Warning Appeal Determination Letter, May 14, 2018, at 2, *citing* VTR #12733957.

⁵ *Id.* at 3.

⁶ 15 C.F.R. § 904.403(c).

⁷ *Id.*

A. Magnuson-Stevens Act

Congress enacted the Magnuson-Stevens Act to “promote domestic commercial and recreational fishing under sound conservation and management principles”⁸ The MSA prohibits, and specifically makes unlawful, the violation of any provision of any regulation or permit issued pursuant to the MSA.⁹

Under MSA regulations, NOAA’s NE Regional Administrator may request any vessel holding a permit to carry a NMFS-certified fisheries observer.¹⁰ The goals of the observer program include: improve documentation of catch, reduce the cost of monitoring, incentivize reducing discards, provide additional data streams for stock assessments, and enhance safety.¹¹ The owner or operator of such vessel is required to facilitate, accommodate, and otherwise provide free and unobstructed access to the vessel and its records to allow the observer to fulfill his or her responsibilities.¹² Prior to the initial deployment, the vessel owner or operator must accompany the observer in conducting a vessel safety check, that includes ensuring that all required safety equipment is present,¹³ such as a survival craft large enough to accommodate all of the crew and the observer.¹⁴ Based on safety deficiencies, a vessel may be found “inadequate for the purposes of carrying an observer and for allowing operation of normal observer functions,” and the vessel is “prohibited from fishing without observer coverage.”¹⁵ It is unlawful to interfere with or impede the work of an observer,¹⁶ and to “refuse to carry onboard a vessel an observer or sea sampler if requested to do so by the Regional Administrator or the Regional Administrator's designee.”¹⁷

B. Respondent Does Not Demonstrate That the Observer Safety Regulations Are Unfair as Written or As Applied

Respondent does not challenge the basic factual underpinnings of the alleged citation. For instance, Respondent does not allege that NMFS failed to issue a timely notification of the request to carry an observer, nor assert that his life raft could accommodate the observer and his crew (five individuals). The only “misrepresentation” alleged in the appeal is whether the Observer

⁸ 16 U.S.C. § 1801(b)(3).

⁹ *Id.* § 1857(1)(A).

¹⁰ This provision specifically applies to holders of the following permits: Atlantic sea scallops, NE multispecies, monkfish, skates, Atlantic mackerel, squid, butterfish, scup, black sea bass, bluefish, spiny dogfish, Atlantic herring, tilefish, Atlantic surfclam, ocean quahog, or Atlantic deep-sea red crab; or a moratorium permit for summer flounder, hagfish, and sea scallops. 50 C.F.R. § 648.11(a).

¹¹ *Id.* § 648.11(l).

¹² *Id.* § 648.11(d). While the vessel provides accommodation, food, and access to the observer, all other observer costs are borne by NMFS approved Observer Service Providers. *Id.* §§ 648.11(d), (h)(5)(ii)(A-D).

¹³ *Id.* § 600.746(f).

¹⁴ *Id.* § 600.746(f)(6).

¹⁵ *See id.* § 600.746(i), which refers to subpart (c) defining “vessel inadequate for observer deployment” as not complying with applicable regulations regarding observer accommodations, or failing to pass a USCG Commercial Fishing Vessel Safety Examination.

¹⁶ *Id.* § 648.14(e)(1).

¹⁷ *Id.* § 648.14(e)(2).

Service Provider would have been able to provide additional safety equipment upon Respondent's request, as suggested by the observer on the date of the alleged violation. This fact is irrelevant to the alleged violation, as the regulations do not require the Observer Service to provide safety equipment, and clearly require the vessel owner or operator to do so.¹⁸

Respondent argues that the observer requirement is fundamentally unfair because it imposes a burden on his business, in particular, interfering with his flexibility to maximize his catch by adjusting his crew numbers on any given day. However, when NMFS initially adopted the observer safety regulations, it determined that ensuring the safety of observers weighed more heavily than the potential loss of fishing days.

NMFS recognizes that, in some circumstances, an observer may raise a safety question . . . It is true that this could result in a loss of fishing days. In structuring the rule this way, NMFS had to weigh the impacts of this approach versus the impacts of alternative approaches. Just as there is a potential for a vindictive observer declining to board and thereby delaying a vessel's departure, other approaches would have raised the possibility of an observer being coerced into boarding a vessel that he or she believes is unsafe. Given the safety risks at issue and the probability that most safety violations will be easily remedied, e.g., replacing PFDs [personal floatation device], NMFS determined that placing the presumptions in the selected manner was preferable. . . . By authorizing an observer to refuse to board an unsafe vessel and by making it illegal to fish without an observer in a mandatory observer fishery, there is a strong incentive for the vessel to meet all USCG safety regulations.¹⁹

The regulations when adopted and as applied to Respondent are a reasonable exercise of NMFS's discretion under the Magnuson-Stevens Act, and Respondent provides no compelling reason as to why the application of the regulation to his particular situation was disproportionately burdensome compared to similarly situated vessel operators.

Finally, exercising prosecutorial discretion, OLE and the Enforcement Section both demonstrated leniency to Respondent in merely issuing a Written Warning. A Written Warning is the lowest sanction that NOAA issues for violations of the statutes and regulations it is authorized

¹⁸ *Id.* §§ 600.746(f), 648.11(d), (h)(5)(ii). See also National Oceanic and Atmospheric Administration, Memorandum Regarding Pre-Trip Vessel Safety Checklist, NEFOP Memo: 17-003, 3-4 (2017), available at https://www.nefsc.noaa.gov/fsb/memos/2017/NEFOP_Memo_17-003_Informational_Reminders_Completion_PVTSC_Safety_Check.pdf (last visited July 20, 2018) ("If the presence of the observer exceeds the capacity of the life raft then arrangements can be made by the contractor to supply the vessel with a valise life raft. A valise life raft is provided as a courtesy to meet life raft capacity requirements. . .").

¹⁹ 63 Fed. Reg. 27,213, 27,216 (May 18, 1998).

to enforce. Nonetheless, a Written Warning may be considered a prior offense, and may be used as a basis for dealing more severely with a subsequent offense.

IV. Conclusion

Based on the foregoing, I affirm the Written Warning.

Sincerely,

Handwritten signature of Kristen L. Gustafson in black ink.

Kristen L. Gustafson
Deputy General Counsel

cc: John Han, NOAA Office of the General Counsel, Enforcement Section Chief