



Via First Class Mail – Return Receipt Requested

April 8, 2019
Russell R. Stewart, Attorney
900 East Fourth Street
Panama City, Florida 32402

Re: Russell R. Stewart III
Case No. SE 1600652
Appeal of Written Warning

Dear Mr. Stewart:

This appeal concerns a written warning issued on September 17, 2018 by Agency counsel against Russell R. Stewart III (Respondent), the owner and operator of FV *Gag Reflex*. The written warning states that Respondent violated the Magnuson Stevens Fishery Conservation and Management Act (the Magnuson Act), 16 U.S.C. § 1857(1)(A), and regulations issued pursuant to the Magnuson Act, 50 C.F.R. §§ 635.19(a), (d) and 635.71(a)(19), by utilizing a secondary gear to capture a free-swimming highly migratory species (HMS) – as defined under 50 C.F.R. § 635.2. Specifically, on or about April 1, 2015, “Respondent fished for a shortfin mako shark with a harpoon, in violation of applicable law.” For the reasons discussed below, I affirm the Written Warning.

1. Legal Framework

The Magnuson Act charges the Secretary of Commerce with responsibility for managing the nation’s fisheries in ways that will maintain optimum yield, through policies that can prevent overfishing and rebuild fisheries that are depleted. 16 U.S.C. § 1801 *et seq.* These policies are developed and enforced by the National Marine Fisheries Service (NMFS).

Subchapter IV of the Magnuson Act describes the structure and function of a National Fishery Management Program. 16 U.S.C. §§ 1851-69. Among other things, the Program provides for the establishment of eight regional Fishery Management Councils to assist the Secretary by developing strategies that are appropriate for each coastal region’s unique fisheries. 16 U.S.C. § 1852. There are also certain “highly migratory species” or HMS that range throughout geographical areas extending beyond the authority of a single Council, including species that may be found throughout the Atlantic Ocean. Thus, the Magnuson Act assigns management authority for HMS in the Atlantic, the Gulf of Mexico, and the Caribbean Sea distinctly to the Secretary, 16 U.S.C. § 1852(a)(3), who, in turn, has delegated that HMS management authority to NMFS. Atlantic HMS include tunas, sharks, swordfish and billfish.

In 2006, NMFS finalized its Consolidated Atlantic HMS Fishery Management Plan which reflects a wide range of management measures for these HMS fisheries. 71 Fed. Reg.



58058 (Oct. 2, 2006): The Consolidated Plan is implemented by regulations codified at 50 C.F.R. Part 635. Subpart C of Part 635 contains specific Atlantic HMS management measures and identifies the species to which they apply. In particular, section 635.19 addresses "Authorized Gears" which are the types of fishing gear that may be used in particular management units. 50 C.F.R. § 635.19.

In describing the uses that are authorized for particular types of gear, section 635.19 makes an important distinction between "primary gears" and "secondary gears." Section 635.19(a) states that "[n]o person may fish for, catch, possess, or retain any Atlantic HMS with gears other than the *primary gears* specifically authorized in this part." 50 C.F.R. § 635.19(a) (emphasis added). Primary gears are those that are used to capture, or attempt to capture free-swimming HMS. Section 635.19(d) identifies the primary gears authorized for capturing a free-swimming shark, stating, in relevant part: "No person issued a Federal Atlantic commercial shark permit under section 635.4 may possess a shark taken by any gear *other than* rod and reel, handline, bandit gear, longline, or gillnet..." 50 C.F.R. § 635(d)(2) (emphasis added).

"Secondary Gears," on the other hand, are gears that may be used at boat side to aid or assist in subduing or bringing an Atlantic HMS on board a vessel. 50 C.F.R. § 635.19(a). Secondary gears may include, without limitation, dart harpoons, gaffs, flying gaffs and tail ropes. *Id.* However, the Atlantic HMS must have first been caught or captured using primary gears. *Id.* "Secondary gears may *not* be used to capture, or attempt to capture, free-swimming or undersized HMS." *Id.* (emphasis added). This prohibition is repeated in section 635.71(a)(19) which states that it is unlawful for any person or vessel subject to the jurisdiction of the United States to "[u]tilize secondary gears as specified in § 635.19(a) to capture, or attempt to capture, any undersized or free-swimming Atlantic HMS...."

2. Background

On April 1, 2015, Officer David Brady of the Florida Fish and Wildlife Conservation Commission (FFWCC) received word that someone had posted a video on Facebook showing a person harpooning a shark from a vessel in state waters, in the vicinity of Panama City beach. The vessel was identified as *FV Gag Reflex*. The officer then positioned his patrol boat to intercept the vessel as it was entering Panama City pass from the Gulf of Mexico. He noticed five people on board and a large shark tail hanging over the port side of the vessel. The officer pulled alongside and asked the master, who was subsequently identified by his driver's license as the Respondent, what he had on board. Respondent answered: "A mako shark." The officer asked how it was taken and Respondent said that he had harpooned the shark. The officer informed Respondent that, under Rule 68B-44.003 of the Florida Administrative Code, he was not permitted to harpoon a shark. *See* 68 FL ADC 68B-44.003(2) (2015). Respondent replied that he was not aware of that. The officer then asked to see Respondent's commercial shark permit. Although the permit was not on board the vessel, the officers received information that Respondent did possess a current HMS Incidental Shark Permit. FFWCC, David F. Brady, Incident Summary Report, Case # FWNW15OFF003078 (April 1, 2015) at 2.

The FFWCC officer charged Respondent with (a) harvesting a shark in state waters with prohibited gear, and (b) failure to possess a valid federal permit. *Id.* at 3. However, the State of Florida did not pursue the charges against Respondent. In January 2016, the Florida State Attorney's Office formally announced a "No Information" in the State's case, dropping the charges before an information or indictment had been filed.

Although the shark was taken in Florida State waters, the owner of a vessel with a valid federal HMS shark permit is bound by the federal HMS regulations no matter where he or she fishes. The owner of such vessel

must agree, as a condition of such permit, that the vessel's HMS fishing, catch, and gear are subject to the requirements of this part [50 C.F.R. Part 635] during the period of validity of the permit, without regard to whether such fishing occurs in the U.S. EEZ, or outside the U.S. EEZ, and without regard to where such HMS, or gear, are possessed, taken, or landed.

50 C.F.R. § 635.4(a)(10). *See Loga v. Daley*, No. CIV.A.00-1722, 2002 WL 188401, at 8-10 (E.D.La. Feb. 1, 2002).

In September 2016, NOAA Enforcement Officer Joseph Harwell issued a summary settlement offer in the amount of \$250, charging Respondent with only the unauthorized gear violation. Officer Harwell did not charge Respondent for the failure to carry the federal permit on board the vessel. Joseph I. P. Harwell, Investigation Report, OLE Incident # 1600652, at 2-4. Respondent subsequently rejected the offer of summary settlement. *Id.* at 5-6. The written warning, which is the subject of this appeal, was issued by Agency counsel in September 2016.

3. Procedural Framework

Under 15 C.F.R. § 904.403(b), a respondent has 60 days from receipt of a written warning issued or affirmed by Agency counsel to appeal that written warning to the NOAA Deputy General Counsel. 15 C.F.R. § 904.403(b). The NOAA Deputy General Counsel may then, in his or her discretion, affirm, vacate, or modify the written warning. *Id.* § 904.403(c). That decision constitutes final agency action for judicial review purposes. *Id.*

4. Discussion

The regulatory prohibition that has been violated in this case consists of two interrelated proscriptions: First, "[n]o person may fish for, catch, possess, or retain any Atlantic HMS with gears other than the primary gears specifically authorized in this part [50 C.F.R. Part 635]. . . . Secondary gears [which may include a dart harpoon] may not be used to capture, or attempt to capture, free-swimming or undersized HMS." 50 C.F.R. § 635.19(a) (emphasis added). Second, "[n]o person issued a Federal Atlantic commercial shark permit . . . may possess a shark taken by any gear other than rod and reel, handline, bandit gear, longline, or gillnet." 50 C.F.R. § 635.19(d)(2) (emphasis added). The prohibition is clear on its face; a harpoon may not be used to take or capture a free-swimming shark.

However, Respondent takes issue with the effective date of this regulatory prohibition. The violation occurred on April 1, 2015. Respondent asserts that the prohibition was not in effect on April 1, 2015. Respondent apparently argues that section 635.19(a) was not in effect until April 2017 and section 635.19(d) not until June 2018 – both subsections only becoming effective several years after the violation occurred.

In fact, section 635.19 – including both subsections (a) and (d) – was put into place by a final rule promulgated on December 2, 2014, with an effective date of January 1, 2015, 79 Fed. Reg. 71510 (Dec. 2, 2014) – effective three months before the violation occurred. Moreover, the prohibition was not newly promulgated by that final rule. It was merely moved from one section of the C.F.R. to another. The identical prohibition already existed, in its entirety, in the C.F.R. prior to January 1, 2015. See 50 C.F.R. §§ 635.21(b), (e)(3)(i) (2012). For example, in the 2012 edition of the C.F.R., section 635.21(b) contained the exact same primary/secondary gears language as quoted above and currently codified at section 635.19(a). *Id.* at § 635.21(b). Also, in 2012, section 635.21(e)(3)(i) contained the exact language currently codified at section 635.19(d)(2) (describing the only primary gears allowed for capturing a shark). *Id.* at § 635.21(e)(3)(i); see also 77 Fed. Reg. 59842, 59850-59851 (Oct. 1, 2012) – effective January 2, 2013.

Respondent also points to the *HMS Commercial Compliance Guide* to support his position. National Marine Fisheries Service, *HMS Commercial Compliance Guide* (Apr. 2014). This is a Guide that is periodically issued by NMFS to provide plain language assistance on how to comply with the HMS regulations for Atlantic tunas, sharks, swordfish and billfish. In fact, the *Commercial Compliance Guide* does not support Respondent's position. Rather, it makes clear that the only gears authorized for capturing a free-swimming shark were rod and reel, handline, bandit gear, longline or gillnet. *Id.* at 7, 13, 16, 21, 39. The then-current version of the *Commercial Compliance Guide*, available at the time of the violation, was published in April 2014. It directly references the primary gears allowed for capturing a shark. See *Id.* at 7, 39 (referencing 50 C.F.R. § 635.21(e)(3)). In any case, the *Commercial Guide* stresses in its introduction that if there were to be any discrepancy between the *Guide* and the regulations, “the regulations will take precedence.” *Id.* at 3.

5. Conclusion

For the reasons set forth above, I hereby affirm the written warning.

Sincerely,



Kristen L. Gustafson
Deputy General Counsel

cc: Loren Remsberg, Regional Enforcement Attorney, NOAA GC/Southeast Section