



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

JAN 25 2013

Via First-Class Mail Return Receipt Requested

Mr. Stephen M. Ouellette, Esq.
127 Eastern Avenue
Suite 1
Gloucester, MA 01930

RE: In the Matter of Yvonne Dobre and Timothy Daggett, F/V JENNIFER K
Case No. NE 0802672
Appeal of Written Warning

Dear Mr. Ouellette:

This appeal concerns a written warning issued to Yvonne Dobre and Timothy Daggett, respectively the owner and operator of the F/V JENNIFER K. On August 20, 2012, the Enforcement Section for the Office of General Counsel issued a written warning to both Respondents relative to gillnet fishing conducted under a Northeast Multispecies permit within the Gulf of Maine in April 2008. Specifically, Respondents were cited with: (1) fishing within an offshore closed area without pingers in violation of the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361 et seq.; and (2) fishing without proper tags on gillnets in violation of the Magnuson Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. § 1801 et seq. Respondents have timely appealed.

I. Background

According to the Northeast Vessel Monitoring System (VMS), the F/V JENNIFER K began a limited access multispecies trip to Western Area 4 as a trip gillnet vessel on April 26, 2008.¹ The positions of the vessel were reported approximately every 60 minutes. According to the VMS report, the vessel entered the Harbor Porpoise Offshore Closure Area (OCA) at 4:52 a.m. on April 26, 2008 and remained in the area for just over four days, departing the OCA at 8:30 a.m. on April 30, 2008.

At approximately 4:30 p.m. on April 30, 2008, the vessel was boarded by a boarding team from the U.S. Coast Guard Cutter BAINBRIDGE ISLAND. At that time, the vessel was not engaged in fishing and was outside of the OCA, but had on board approximately 2800 lbs of cod, 1200 lbs of Pollock, 750 lbs of white hake, 50 lbs of redfish, 8 lobsters, and 50 lbs of monkfish tail, for a total estimated catch value of \$7,000-\$8,000. The boarding team conducted a full inspection of the gillnets on the vessel and found no pingers (an acoustic deterrent device)

¹ Memorandum re: F/V JENNIFER K, #10802672, prepared by Linda R. Galvin, VMS Specialist, dated July 22, 2008.



or identification tags.² The Coast Guard ultimately issued Enforcement Action Reports to both the owner and operator of the vessel. On August 20, 2012, the Enforcement Section of the NOAA Office of the General Counsel served a written warning to both the owner and operator based upon those Enforcement Action Reports, M75260 and M75266.

On October 18, 2012, Respondents appealed and requested a copy of the investigation report. In response to Respondents' request, I sent a copy of the case package prepared by the NOAA Office of Law Enforcement Respondents' counsel on December 28, 2012, and provided an opportunity for Respondents to submit any additional arguments in support of their appeal by January 18, 2013. Respondents did not submit any additional arguments.

II. Legal Framework

The National Oceanic and Atmospheric Administration's (NOAA's) procedural regulations provide that a respondent who receives a written warning from Agency counsel may appeal to the NOAA Deputy General Counsel. On appeal, the Deputy General Counsel may, in her discretion, affirm, vacate, or modify the written warning. The Deputy General Counsel's determination constitutes final agency action.³

III. Discussion

A. Count I

The first alleged violation concerns regulations issued under the MMPA that require the use of pingers on gillnet gear within an offshore closed area. The regulations implementing the Harbor Porpoise Take Reduction Plan for the Gulf of Maine establish a number of closure areas where gillnet fishing is prohibited during certain times of the year, unless pingers are attached to the gillnets.⁴ The closure areas include the OCA described above, where gillnet fishing is prohibited from November 1 through May 31 each year, except with the use of pingers.⁵

On appeal, Respondents assert that "[a]t the time of the boarding the vessel was not in an area requiring pingers," and therefore concludes that the vessel was not in violation of the applicable regulation. There is no dispute that the Coast Guard boarding occurred outside the OCA.

There is no doubt, however, that the vessel engaged in fishing within the OCA without pingers prior to the boarding. When initially confronted with the violation, the master denied

² See Offense Investigation Report filed by Michael E. Winiarski, dated April 30, 2008.

³ 15 C.F.R. § 904.403.

⁴ See 50 C.F.R. § 229.33 (2007). Because Title 50 of the Code of Federal Regulations is not updated until October 1 of each year, see <http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>, this decision cites to the 2007 version of the C.F.R.

⁵ 50 C.F.R. § 229.33(a)(5) (2007).

fishing in the OCA.⁶ However, both VMS and the Coast Guard's plotter confirmed the vessel's presence within the OCA.⁷ When confronted with his actual coordinates, the master admitted fishing without pingers in the OCA, preparing a written statement to that effect. He explained that he was unaware that he was within the OCA, as he ordinarily sets his gear just outside of the OCA.⁸

B. Count II

The second alleged violation is based on the MSA implementing regulation found at 50 C.F.R. § 648.14(a)(41) (2007), which states that "it is unlawful for any person to ... [f]ail to comply with the gear-marking requirements of § 648.84." Section 648.84(a) provides:

Bottom-tending fixed gear, including, but not limited to, gillnets and longlines designed for, capable of, or fishing for NE multispecies or monkfish, must have the name of the owner or vessel or the official number of that vessel permanently affixed to any buoys, gillnets, longlines, or other appropriate gear so that the name of the owner or vessel or the official number of the vessel is visible on the surface of the water.

A series of photos taken by the boarding officer show the F/V JENNIFER K's gillnets without tags, and statements by boarding team members indicate that they conducted a full inspection of the gillnets but did not find "tags." On appeal, Respondents do not deny the absence of tags. Rather, they argue that the tagging requirement did not apply to them. Specifically, they argue that the tagging requirement does not apply to vessels in the trip gillnet category.

Respondents are correct. The gear-marking requirement cited in the Enforcement Action Reports and written warning, 50 C.F.R. § 648.84, is separate and distinct from any requirement to use tags. The regulations specifying tagging requirements and other gear restrictions for the Northeast Multispecies fishery are found at 50 C.F.R. § 648.80. Prior to 2005, these regulations limited the number of nets that could be deployed by a trip gillnet vessel fishing in various areas, and explicitly stated that tags were required. For the Gulf of Maine Regulated Mesh Area, the regulations applicable to a Trip gillnet vessel in 2004 provided:

(2) Number of nets. A Trip gillnet vessel fishing under a [Northeast] multispecies [Day-at-Sea] and fishing in the [Gulf of Maine] Regulated Mesh Area may not fish with, haul, possess, or deploy more than 150 gillnets, except as provided in § 648.92(b)(8)(i). Vessels may fish any combination of roundfish and flatfish gillnets up to 150 nets, and may stow nets in excess of 150.

⁶ See Offense Investigation Report filed by Michael E. Winiarski, dated April 30, 2008.

⁷ See *id.* and Memorandum re: F/V JENNIFER K, #10802672, prepared by Linda R. Galvin, VMS Specialist, dated July 22, 2008.

⁸ See Supplemental Boarding Report for Vessel NH8620BN, dated April 30, 2008, Statement of Tim C. Daggett.

(4) Tags. Roundfish or flatfish nets must be tagged with one tag per net, secured to every other bridle of every net within a string of nets.

50 C.F.R. § 648.80(a)(3)(iv)(A)(2) & (4) (2004). In 2005, however, the New England Fishery Management Council approved Framework Adjustment 40B to the Northeast Multispecies Fishery Management Plan (FMP). One of the included measures removed the limit on the number of nets that could be carried by Trip gillnet vessels fishing in any regulated mesh area. The Council explained:

Trip gillnet vessel fishing effort is controlled through the use of [days-at-sea] and the physical ability of the vessels to carry nets. The net limit is an additional restriction on effort that is unnecessary. In order to enforce the net limitation adopted by Amendment 13, trip gillnet vessel operators must use net tags on their nets. Trip gillnet vessels often change their target species while at sea from groundfish to monkfish. Since they are provided a limited number of net tags, this means they must change the net tags while at sea. This is difficult to do. Removing the net restriction will remove the requirement for the net tags and will make it easier for these vessels to target a mix of species on a trip, rather than focus on groundfish.⁹

Similarly, in its proposed rule to implement this portion of Framework Adjustment 40B, NOAA Fisheries explained:

The proposed action would remove the limit on the number of nets that could be carried onboard by Trip gillnet vessels, because this measure is now considered unnecessary. ... [T]his action would also remove the tagging requirements for Trip gillnet vessels.¹⁰

The final rule deleted the requirements at 50 C.F.R. § 648.80(a)(3)(iv)(A)(2) & (4) (2004) with respect to the net limits and associated gillnet tagging requirements for Trip gillnet vessels.¹¹ Hence, the 2007 regulations applicable to trip gillnet vessels in the Gulf of Maine contained restrictions on mesh and net size, but no limit on the number of nets that could be carried by trip gillnet vessels and no requirements for tags.¹²

With respect to the separate gear-marking requirement at 50 C.F.R. § 648.84, there is insufficient evidence to demonstrate that this requirement was not satisfied. Although gear-marking requirements may be complied with through the use of tags, it is possible to comply with this requirement in some other way. For example, a fisherman could brand the buoy attached to the gillnets or engrave the “high flyer” (the radar reflector attached to the buoy) with

⁹ Framework Adjustment 40B to the Northeast Multispecies Fishery Management Plan, prepared by the New England Fishery Management Council (implemented June 1, 2005), at 46.

¹⁰ 70 Fed. Reg. 15803, 15806 (Mar. 29, 2005).

¹¹ See 70 Fed. Reg. 31323, 31340 (June 1, 2005).

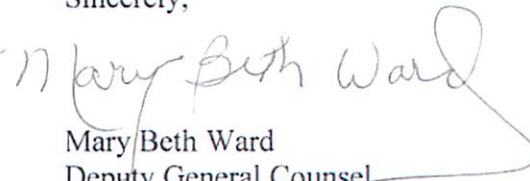
¹² See 50 C.F.R. § 648.80(a)(3)(iv)(A)(1) & (2) (2007).

the name of the owner or vessel or the official number of the vessel to satisfy this requirement. The evidence contained in the case package prepared by NOAA's Office of Law Enforcement only demonstrates that the nets lacked tags; the evidence does not demonstrate that the nets were examined for other means that could have been used to mark the gear as required by 50 C.F.R. 648.84 and found lacking. Therefore, there is insufficient evidence to show that a violation of the gear-marking requirements contained in 50 C.F.R. § 648.84 occurred.

IV. Conclusion

Based on the foregoing, I affirm Count I of the written warning. With respect to Count II, however, the violation described in the Enforcement Action Reports and in the Written Warning is "fishing without proper tags on gillnets," but tags are not required for Trip gillnet vessels and there is insufficient evidence to demonstrate that the gear-marking required by the regulation cited was violated. I therefore modify the written warning by vacating the warning with respect to Count II. This portion of the warning may not be used as a basis for dealing more severely with any subsequent violation.

Sincerely,


Mary Beth Ward
Deputy General Counsel

cc: Frank Sprtel, Attorney-Advisor
Enforcement Section
NOAA Office of the General Counsel