



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

OFFICE OF THE GENERAL COUNSEL
Oceans and Coasts Section
1305 East-West Highway
SSMC4, Room 6111
Silver Spring, Maryland 20910

Via First-Class Mail – Return Receipt Requested

James P. Walsh, Esquire
Davis Wright Tremaine, LLP
505 Montgomery Street
San Francisco, California 94111-6533



RE: In the Matter of Jessie's Ilwaco Fish Company
Case No. NW0803474
Appeal of Written Warning

Dear Mr. Walsh:

This appeal concerns a written warning issued to Jessie's Ilwaco Fish Company (Respondent). Specifically, Respondent was cited for failing to sort fish received from a Pacific whiting shoreside vessel prior to first weighing the fish after offloading, a violation of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. § 1857(1)(A), and applicable regulations, 50 C.F.R. §§ 660.306(f)(6)(ii) and 660.370(h)(6)(iii) (2008). For the reasons discussed below, I vacate the written warning.

I. Background

Respondent is a commercial fish dealer and holder of a Pacific Coast Groundfish Exempted Fishing Permit which authorizes the company to act as a first receiver and establishes a monitoring program for bycatch.¹ Regulations implementing the Magnuson-Stevens Act make it unlawful for a Pacific whiting first receiver to "[f]ail to sort fish received from a Pacific whiting shoreside vessel prior to first weighing after offloading."²

On August 11, 2008, during a routine inspection, a state enforcement officer discovered yellowtail rockfish that Respondent had failed to sort from totes filled with widow rockfish before weighing.³ The officer sorted and removed 322 pounds of yellowtail rockfish from the totes, and Respondent corrected the fish tickets to reflect the appropriate species and weights.⁴

¹ Pacific Coast Groundfish Exempted Fishing Permit #08-WFR-09 (June 6, 2008), as amended.

² 50 C.F.R. § 660.306(f)(6)(ii) (2008).

³ See generally, Offense Investigation Report ("OIR") filed by Special Agent Mickey A. Adkins (Dec. 24, 2008).

⁴ *Id.* at 5.



The state enforcement officer seized the yellowtail rockfish and later donated it to a local food bank.⁵

The state referred the matter to NOAA, and on January 28, 2013, NOAA's Office of General Counsel, Enforcement Section, Northwest Region, issued Respondent a written warning for "fail[ing] to sort fish received from a Pacific Whiting shoreside vessel prior to first weighing after offloading" in violation of its permit and applicable regulations.⁶

II. Legal Framework

NOAA's procedural regulations provide that a respondent who receives a written warning from Agency counsel may appeal to the NOAA Deputy General Counsel, who may, in her or his discretion, affirm, vacate, or modify the written warning.⁷ In this case, the authority to review and decide the appeal has been delegated to me, the Acting Chief of the Oceans and Coasts Section of NOAA General Counsel.⁸

III. Discussion

In the current case, after discovering 322 pounds of improperly sorted yellowtail rockfish, state officials seized the fish and subsequently donated the fish to a local food bank. There is no indication in the record that NOAA procedures for handling forfeiture were followed.⁹ Considerations of forfeiture typically are not mitigating with respect to other proposed penalties.¹⁰ Nevertheless, based on the unique circumstances in this case, including the procedural irregularities of the forfeiture, the length of time since it occurred, and the technical nature of the violation, I am vacating the written warning.

⁵ *Id.* at Att. 2 (General Report, Officer Brett Hopkins).

⁶ Letter to Jessie's Ilwaco Fish Co. from Niel B. Moeller re: NOAA Case No. NW0803474 (January 28, 2013) (Written Warning).

⁷ 15 C.F.R. §904.403(b), (c).

⁸ Memorandum from Lois Schiffer, NOAA General Counsel, to Jeff Dillen, Acting Chief, Oceans and Coasts Section (May 21, 2013).

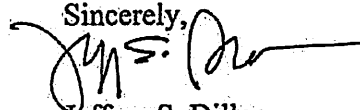
⁹ Consideration of specific issues related to forfeiture have been referred to the Chief the Enforcement Section of NOAA General Counsel for appropriate action. Letter to James P. Walsh from Jeffrey S. Dillen, re: NOAA Case No. NW0803474 (May 24, 2013).

¹⁰ See, e.g., *In the matter of Bartholemew O. Niquet and Thomas C. Niquet*, No. SE1100310, slip op. at 12 (NOAA May 4, 2012) (available at http://www.gc.noaa.gov/documents/2012/2012_ALJ_Niquet_ocr.pdf), 2012 WL 3012675 at *7 (rejecting respondents' argument that the seizure of respondents' catch provided a basis for mitigating the proposed civil penalty).

IV. Conclusion

The written warning is vacated.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.S. Dillen', with a long horizontal flourish extending to the right.

Jeffrey S. Dillen
Acting Section Chief

cc: Niel Moeller, Attorney-Advisor
Enforcement Section, NOAA Office of the General Counsel