



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
OFFICE OF THE GENERAL COUNSEL
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14th and Constitution Ave NW
Washington, DC 20230

JAN 29 2015

Via First Class Mail – Return Receipt Requested

Pamela F. Lafreniere, Esq.
13 R Hamilton Street
New Bedford, MA 02740

RE: Appeal of Written Warning (NE1400773)
Warrior Scalloping Corporation and Jarrod Carney

Dear Ms. Lafreniere:

This appeal concerns a written warning issued to Warrior Scalloping Corporation and Jarrod Carney, respectively the owner and operator of the F/V Chief & Clyde II (Respondents).¹ Respondents were issued a written warning for possessing more than 50 bushels of in-shell scallops when on the shoreward side of the Vessel Monitoring System (VMS) Demarcation Line in violation of 50 C.F.R. § 648.52(e) and the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A). For the reasons discussed below, I affirm the written warning.

I. Background

Key to this appeal is an understanding of the VMS Demarcation Line, which is defined by regulation as a continuous line that connects a series of 51 offshore coordinate points stretching from the coastal border of Maine and Canada to Cape Lookout, North Carolina.² A vessel is “shoreward” of the Demarcation Line, when it is between the Line and the shore. Conversely, the vessel is “seaward” of the Demarcation Line when the Line is between the vessel and the shore.³

¹ See Written Warning to Warrior Scalloping Corporation and Jarrod Carney, dated March 27, 2014 (“Written Warning”) and Respondents’ Appeal of Written Warning, dated October 8, 2014 (“Deputy General Counsel Appeal”); see also Respondents’ Appeal of Written Warning, dated May 5, 2014 (“Section Chief Appeal”) and Decision Affirming Written Warning from James Landon, Section Chief, dated September 9, 2014 (“Section Chief Decision”).

² See 50 C.F.R. § 648.10(a) (“The VMS Demarcation Line is defined by straight lines connecting the following coordinates in the order stated [in the following table].”). The coordinates listed in 50 C.F.R. § 648.10(a) are also known as “waypoints” or referenced by the “item” numbers set forth in the table provided in the regulation. For ease of reference and clarity, this decision letter uses the term “coordinate points” throughout.

³ The distinction between shoreward and seaward is also reflected in the visual depiction of the VMS Demarcation line, available online at http://www.greateratlantic.fisheries.noaa.gov/educational_resources/gis/data/shapefiles/VMS_Demarcation_Line/VMS_Demarcation_Line_MAP.jpg. A more detailed image depicting the VMS Demarcation Line in the area of Vineyard Sound is available online at <http://www.greateratlantic.fisheries.noaa.gov/nero/fishermen/charts/VMSDemarcLineNE.htm>.



One purpose of the VMS Demarcation Line is to serve as a boundary for the start and stop of a vessel's Days-at-Sea clock, as set forth in 50 C.F.R. § 648.10(e)(5)(iii). For the limited access Atlantic sea scallop fishery, as with certain other managed fisheries, a set number of Days-at-Sea are allocated to vessels permitted to harvest the resource. The allotted Days-at-Sea are set at a level to ensure that the actual catch of the resource does not exceed the annual catch limits established by fishery managers. The VMS Demarcation Line is also used as a boundary by the regulation that is at issue in this appeal – 50 C.F.R. § 648.52(e). Although both regulations – § 648.10(e)(5)(iii) and § 648.52(e) – reference the VMS Demarcation Line, they are separate and distinct provisions that operate independently of each other.

On October 11, 2013, a U.S. Coast Guard patrol visually observed Respondents' vessel transiting westbound through Vineyard Sound toward Quicks Hole Passage.⁴ During the course of this transit, it is alleged that the vessel crossed over the VMS Demarcation Line onto the shoreward side while in possession of more than 50 bushels of in-shell (unshucked) scallops. Respondents' vessel then continued north through Quicks Hole Passage and crossed back over the VMS Demarcation Line onto the seaward side. At this point, the Coast Guard patrol intercepted the vessel and conducted a fisheries boarding and inspection.⁵ During the inspection, the Coast Guard boarding party observed in-shell scallops totaling more than 50 bushels in volume piled on the deck and in various other areas of the vessel.⁶

The lead Coast Guard boarding officer informed the vessel operator, Mr. Carney, that the vessel had crossed the VMS Demarcation Line onto the shoreward side by coming through Quicks Hole via Vineyard Sound.⁷ Mr. Carney disagreed with the boarding officer, maintaining that the vessel was "outside" the VMS Demarcation Line because it had not yet reached Wilbur Point.⁸ The boarding officer contacted the Operations Petty Officer and Coast Guard Sector South Eastern New England to confirm his understanding of the VMS Demarcation Line. After receiving confirmation and following continued discussions with Mr. Carney, the boarding

⁴ See Signed Statement of U.S. Coast Guard Boarding Officer Michael Luongo, dated October 24, 2014, at 1 ("Luongo Report") and Signed Statement of U.S. Coast Guard Boarding Officer Robert H. Decker, dated October 14, 2014, at 1 ("Decker Report") (Attachments 4 and 5 to the Section Chief Appeal; Attachment 2 to the Deputy General Counsel Appeal).

⁵ See Luongo Report, at 1; Decker Report, at 1.

⁶ See Luongo Report, at 3 ("I counted 55 bushels of in-shell scallops in the shuck shack as well as two full dredge bags and a deck full approximately 6 foot high of in-shell scallops."); Decker Report, at 1 ("I observed that the crew of the F/V were shucking and had approximately 65 bushels of un-shucked sea scallops, as well as 2 dredge's full of un-shucked sea scallops and the aft part of the deck having approximately 02 (8'x8') piles of in-shell sea scallops."). Mr. Carney also admitted to the boarding party that "well over" 50 bushels of in-shell scallops were on board the vessel at the time of boarding. See Luongo Report, at 2.

⁷ See Luongo Report, at 2. The boarding officer determined that Respondents' vessel crossed over the VMS Demarcation Line onto the shoreward side near the eastern Vineyard Sound waypoint (41°30'N 70°33'W). See 50 C.F.R. § 648.10(a).

⁸ *Id.* Wilbur Point is identified as point 29 in the VMS Demarcation Line regulation (41°35.2'N 70°51.2'W) and is located north of Quicks Hole on Sconticut Neck, a peninsula that is part of the Massachusetts mainland. 50 C.F.R. § 648.10(a).

officer issued an Enforcement Action Report⁹ and referred the matter to an agent of NOAA's Office of Law Enforcement. After reviewing the facts of the case, the NOAA agent issued Respondents a written warning.

II. Legal Framework

NOAA regulations set forth a two-part administrative appeal process for written warnings issued by OLE agents and other "authorized officers."¹⁰ As part of this process, written warning recipients first appeal to the Assistant General Counsel for Enforcement and Litigation (a position recently retitled as Section Chief for the Enforcement Section) and may appeal the Section Chief's decision to the NOAA Deputy General Counsel.¹¹ The Deputy General Counsel's determination constitutes final agency action for judicial review purposes.¹²

Respondents timely filed an initial appeal with the Section Chief for the Enforcement Section.¹³ The Section Chief reviewed the appeal and issued a decision affirming the written warning.¹⁴ Respondents filed a timely appeal of the Section Chief Decision.¹⁵ It is this second appeal that is the subject of this decision letter.

Respondents are charged with the violation of 50 C.F.R. § 648.52(e), which provides in its entirety:

Owners or operators of vessels issued limited access permits fishing in or transiting the area south of 42°20' N. lat. at any time during a trip are prohibited from fishing for, possessing, or landing per trip more than 50 [bushels] (17.6 hl) of in-shell scallops shoreward of the VMS Demarcation Line, unless when fishing under the state waters exemption specified under § 648.54.

As noted in the preamble of the final rule published by NOAA that adopts the original version of the regulation, various policy concerns underlie the restrictions set forth by 50 C.F.R. § 648.52(e). One policy concern relates to the Days-at-Sea allotment estimates made by fishery managers. These estimates assume that the majority of shucking will be done by the vessel's crew – which is limited by regulation to seven persons – while the Days-at-Sea clock is running. Because the starting and stopping of the Days-at-Sea clock is linked to the crossing of the VMS Demarcation Line, the restrictions set forth in 50 C.F.R. § 648.52(e) ensure that shucking of all but a relatively limited number of scallops occurs as assumed by the managers (i.e., by the crew

⁹ During these continued discussions, Mr. Carney stated that his actions were "normal practice throughout the entire fishing fleet" and "if transiting Vineyard Sound is illegal then I am guilty." Luongo Report, at 3; *see also* Decker Report at 2.

¹⁰ *See* 15 C.F.R. § 904.403(a), (b); *see also* 15 C.F.R. § 904.2 (defining "authorized officers").

¹¹ *See* 15 C.F.R. § 904.403(a), (b).

¹² *See* 15 C.F.R. § 904.403 (b), (c).

¹³ *See* Section Chief Appeal.

¹⁴ *See* Section Chief Decision.

¹⁵ *See* Deputy General Counsel Appeal.

and during time counted as Days-at-Sea) and prevents the improper “banking” of Days-at-Sea time by fishery participants.¹⁶

Other policy concerns – unrelated to the running of the Days-at-Sea clock – also underlie 50 C.F.R. § 648.52(e). As noted in the published final rule, one additional concern involves the prevention of possible contamination of inshore habitats caused by any large-scale discard of scallop viscera.¹⁷ Additional policy concerns include the benefits to the overall fishery of shucking soon after harvest and close to scallop fishing grounds.¹⁸

III. Discussion

Respondents do not contest the relevant facts as described in the two Coast Guard boarding officer reports, including the various statements attributed to Mr. Carney, and concede that more than 50 bushels of in-shell scallops were on board their vessel as it transited across Vineyard Sound.¹⁹ Respondents argue, however, that: (1) the vessel was not “shoreward” of the VMS Demarcation Line because one of the coordinate points for that line (Wilbur Point) is closer to the mainland shore than the coordinate point in Vineyard Sound, where the vessel crossed over the Demarcation Line onto the shoreward side; and (2) the vessel did not transit in the area shoreward of the Demarcation Line for an amount of time that ordinarily would have triggered a stopping of the vessel’s Days-at-Sea clock. Respondents also contend that the Coast Guard boarding officer implicitly “admitted” that no violation occurred by allowing the crew to continue the shucking of scallops seaward of the Demarcation Line.

Based on the plain language of 50 C.F.R. § 648.52(e), Respondents’ arguments are unconvincing. As noted above, the VMS Demarcation Line is not simply a collection of single coordinate points; rather, it is defined by a series of straight lines connecting those points.²⁰ When viewed together, these lines have a clear seaward and shoreward side. Accordingly, while it is true that Vineyard Sound is seaward of Wilbur Point, the segment of the VMS Demarcation Line formed by connecting the one coordinate point in Vineyard Sound with the coordinate points that proceed and follow delineates a segment of the VMS Demarcation Line between the sea and shore. After crossing over this segment, Respondents’ vessel was then shoreward of that Line.

¹⁶ See 66 Fed. Reg. 24052, 24053 (May 11, 2001) (“Without this restriction, vessels could avoid the limitations of the seven-man crew and [Days-at-Sea] restrictions by bringing in-shell scallops shoreward of the VMS demarcation line and shucking inside the line. Because [Days-at-Sea] stop accruing once a vessel is inside the VMS demarcation line, vessels are able to bank this saved time for future trips.”). See also 50 C.F.R. § 648.51(c) (setting forth crew size limit).

¹⁷ See 66 Fed. Reg. at 24053 (“This measure also may have the incidental benefit of helping to prevent possible contamination of inshore habitats caused by any large discards of scallop viscera as a result of shucking near shore.”).

¹⁸ Northeast Region Bulletin, dated July 1, 2013 (Attachment 1 to the Section Chief Appeal) (“When vessels violate [50 C.F.R. § 648.52(e)] it has several unfortunate results Some discarded live scallops survive for future harvest if discarded on or close to scallop fishing grounds. Scallops that remain on deck longer and that are discarded in areas where sea scallops cannot live will provide no benefit for future harvest.”).

¹⁹ The course and timing of this transit are confirmed as well by the Boattracks data submitted by Respondents. See Deputy General Counsel Appeal, at 3.

²⁰ 50 C.F.R. § 648.10(a).

Once a vessel crosses over the VMS Demarcation Line onto the shoreward side with more than 50 bushels of in-shell scallops on board, 50 C.F.R. § 648.52(e) provides no delay to the trigger of liability. There is no requirement in the regulation that the vessel be shoreward of the VMS Demarcation Line for any minimum amount of time or that the Days-at-Sea clock be stopped. Rather, the plain language of 50 C.F.R. § 648.52(e) states that a vessel is “at any time” prohibited from – among other things – possessing more than 50 bushels of in-shell scallops shoreward of the VMS Demarcation Line.

Respondents present a regional bulletin issued by the National Marine Fisheries Service and argue that the bulletin modifies 50 C.F.R. § 648.52(e) to require the stopping of the Days-at-Sea clock referenced in 50 C.F.R. § 648.10(e)(5)(iii) before triggering liability.²¹ The bulletin contains no indication of a modification to 50 C.F.R. § 648.52(e). Instead, the bulletin highlights the policy importance of ensuring that the majority of scallop shucking be done on the seaward side of the VMS Demarcation Line, while the Days-at-Sea clock is running under 50 C.F.R. § 648.10(e)(5)(iii).²² The bulletin also describes the other policy considerations related to 50 C.F.R. § 648.52(e) that are independent of the running of the Days-at-Sea clock, including the prevention of contamination of inshore habitats and the benefits to future harvest when shucking is done close to the fishing grounds and as soon as possible after harvest.²³ Contrary to Respondents’ argument, the bulletin does not impose a minimum amount of time for triggering the prohibition in 50 C.F.R. § 648.52(e), but instead provides a reason as to why the prohibition applies “at any time” once a vessel crosses over the Demarcation Line onto the shoreward side. Accordingly, under the plain language of the regulation, Respondents were in violation as soon as their vessel crossed over the VMS Demarcation Line to the shoreward side with more than 50 bushels of in-shell scallops on board, irrespective of whether the vessel’s Days-at-Sea clock was running or the amount of time spent transiting on the shoreward side of the Line.²⁴

Finally, the fact that the Coast Guard boarding officers temporally halted and then permitted the continued shucking of scallops does not change the analysis of whether 50 C.F.R. § 648.52(e) was violated. There are no allegations that the scallops on board the vessel were unlawfully harvested. Moreover, at the time of the boarding, the vessel was back on the seaward side of the VMS Demarcation Line and no longer in active violation of 50 C.F.R. § 648.52(e). The boarding took an extended period of time to complete due, at least in part, to other issues uncovered during the inspection related to the immigration status of two crewmembers.²⁵ Rather

²¹ See Deputy General Counsel Appeal, at 2; see also Northeast Region Bulletin, dated July 1, 2013 (Attachment 1 to the Section Chief Appeal).

²² Northeast Region Bulletin, at 1.

²³ *Id.*

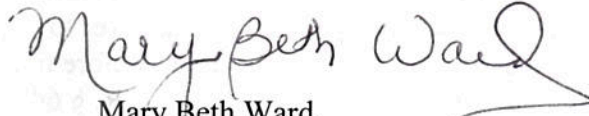
²⁴ Respondents similarly err in their reliance on an email from a NMFS employee advising that program tracking the Days-at-Sea clock under 50 C.F.R. § 648.10(e)(5)(iii) does not stop the clock until a vessel is shoreward of the VMS Demarcation line for four or more hours or is in the process of returning to port. See Deputy General Counsel Appeal, at 2. Again, for the reasons discussed above, that the agency may track the start and stop of the Days-at-Sea clock in this manner for purposes of 50 C.F.R. § 648.10(e)(5)(iii) has no bearing on the separate requirement that the VMS Demarcation line not be crossed with more than 50 bushels of unshucked scallops on board under 50 C.F.R. § 648.52(e).

²⁵ See Luongo Report, at 3.

than ordering the idling of operations during this entire time, it appears the boarding officer exercised appropriate discretion by allowing the crew to continue work. The boarding officer's decision to allow crew to continue shucking the scallops neither undermines nor contradicts a finding that Respondents violated the regulatory prohibition as charged in the written warning.

Based on the foregoing, I affirm the written warning.

Sincerely,

A handwritten signature in cursive script that reads "Mary Beth Ward". The signature is written in dark ink and has a long, sweeping tail that extends to the right.

Mary Beth Ward
Deputy General Counsel

cc: James Landon, Section Chief