



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

OFFICE OF THE GENERAL COUNSEL

MAR 13 2015

Via First Class Mail – Return Receipt Requested

Mr. Mark Alcorn, Attorney at Law
Alcorn Law Corporation
1000 Q Street, Suite 120
Sacramento, CA 95811

RE: Sargeant's Wholesale Biologicals
Case No. SW1400124B
Appeal of Written Warning

Dear Mr. Alcorn:

This appeal concerns a written warning issued to Sargeant's Wholesale Biologicals (Respondent), a California company that procures and provides biological specimens to colleges and universities for educational purposes.¹ Respondent was issued a written warning for receiving, without holding a valid first receiver site license, an Individual Fishing Quota (IFQ) landing of approximately 15,750 pounds of dogfish from a vessel that harvested the catch while fishing under the Shorebased IFQ Program. As described in the written warning, Respondent's actions violate NOAA regulations, 50 C.F.R. § 660.112(b)(2)(i), 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

From January 9 to January 12, 2014, Giuseppe Pennisi II, owner and operator of the F/V Pioneer, was out on a multiday fishing trip trawling in the shallows off the Northern California coast.² Mr. Pennisi started catching dogfish and contacted Mr. Michael Sargeant via satellite telephone, to ask if Respondent would like to purchase the catch.³ Mr. Sargeant responded

¹ See Written Warning to Sargeant Wholesale Biologicals, dated November 13, 2014 (Case No. SW1400124B) (Written Warning).

² See Memorandum of Interview with Giuseppe Pennisi held on January 16, 2014, at 2-3 (Fisherman Interview) (Attachment 14 to the Investigation Report filed by NOAA Office of Law Enforcement Special Agent Nicholas Call (Investigation Report)); *see also* Trawl Log Schematic (Attachment 17 to Investigation Report). Along with a narrative drafted by Special Agent Call that summarizes the case, the Investigation Report also compiles various other documents as attachments. These attachments include a series of memoranda memorializing interviews held with witnesses, landing receipts associated with the sale of the dogfish catch, and other documents related to the harvest and offload of the catch.

³ See Fisherman Interview, at 2-3; Memorandum of Interview with Danielle Zitomer held on January 14, 2014, at 1-2 (Attachment 6 to the Investigation Report) (Fishery Observer Interview).



affirmatively, and Mr. Pennisi proceeded to harvest approximately 25,000 pounds of dogfish. The F/V Pioneer's storage holds were filled with other catch, so a significant portion of the harvested dogfish (approximately 16,000 pounds) needed to be stored directly on the deck of the vessel. These deck-stored dogfish began to degrade rapidly, relative, at least, to fish stored in the vessel's holds.⁴

On Sunday, January 12, 2014, the F/V Pioneer arrived at Pier 45 in San Francisco for an expected offload by Caito Fisheries of the dogfish catch, along with the other fish species harvested during the trip.⁵ Caito Fisheries had offloaded dogfish for at least one prior sale transfer between the Mr. Pennisi and Respondent, but for reasons unknown, Caito Fisheries refused in this instance to offload the dogfish catch (although the company did offload the non-dogfish portions of the catch).⁶ It appears that Mr. Sargeant was in direct communication with Caito Fisheries and Mr. Pennisi and tried to broker a resolution to the impasse, but his efforts were to no avail.⁷ Following Caito Fisheries' refusal, the record shows that over 15,000 pounds of dogfish were offloaded instead directly to Respondent's delivery truck.⁸ Respondent's delivery truck, however, lacked sufficient capacity to transport all 25,000 pounds of dogfish, necessitating a second offload the next day.⁹

On Monday, January 13, 2014, the F/V Pioneer offloaded the remaining dogfish catch, over 9000 pounds, at a second offload facility nearby on Pier 45, operated by Mr. Larry Collins. Mr. Collins had previously held a valid first receiver site license, but the license had expired at the time of the offload.¹⁰

In November 2014, the Enforcement Section for the NOAA Office of the General Counsel issued a Notice of Violation and Assessment of Administrative Penalty of \$2000 to Mr. Pennisi for landing "[o]n or about January 12-13, 2014, . . . approximately 24,750 lbs. of groundfish to

⁴ See Fisherman Interview, at 2-4.

⁵ See Fisherman Interview, at 3-4; Fishery Observer Interview, at 1-2; and Memorandum of Interview with Michael Sargeant held on January 15 and 16, 2014, at 3 (Attachment 12 to the Investigation Report) (Sargeant Interview).

⁶ See Memorandum of Interview with Michael Gutierrez and Anthony Caito held on January 15, 2014, at 1-3 (Attachment 7 to the Investigation Report) (Caito Fisheries Interview); Sargeant Interview, at 3; Fisherman Interview, at 2-3; *see generally*, Appeal Letter.

⁷ See Fisherman Interview, at 3.

⁸ See Fisherman Interview at 3-5; Fishery Observer Interview at 2; Caito Fisheries Interview at 1-2; Sargeant Interview at 3. A written landing receipt also identifies one of two sales of the dogfish catch in the amount of 15,203 pounds. *See* California Department of Fish and Game Landing Receipt No. 260326 ("Landing Receipt") (Investigation Report Attachments 13 and 15).

⁹ See Sargeant Interview, at 3 ("Sargeant confirmed that he offloaded dogsharks from the F/V Pioneer on Sunday, January 12th, 2014. . . . Sargeant further explained that he sent a truck down to boat [sic] to receive the dogsharks, but the truck could carry [sic] the capacity of the fish that [the fisherman] had on his boat. Sargeant stated the next day he sent down another truck to receive the rest of the load.")

¹⁰ Memorandum of Interview with Larry Collins held on January 15, 2014, at 1-2 (Attachment 9 to the Investigation Report). The written landing receipt referred to in footnote 8 above identifies the other sale of the dogfish catch in the amount of 9,388 pounds. *See* Landing Receipt.

two fish dealers that did not hold an Individual Fishing Quota first receiver site licenses [sic] at the time of the landing.” The Enforcement Section then issued two additional written warnings. The first written warning was issued to Respondent for receiving “on or about January 12, 2014, . . . approximately 15,750 lbs. of dogfish . . . when your company did not hold an IFQ first receiver site license.” The second written warning was issued to Mr. Collins for receiving “on or about January 13, 2014, . . . approximately 9,000 lbs. of dogfish . . . when you did not hold an IFQ first receiver site license.”¹¹

II. Legal Framework

NOAA’s procedural regulations provide a respondent who receives a written warning from NOAA Agency counsel the opportunity to appeal to the NOAA Deputy General Counsel. On appeal, the Deputy General Counsel may affirm, vacate, or modify the written warning. The Deputy General Counsel’s determination constitutes final agency action for judicial review purposes.¹²

Respondent is charged with violation of 50 C.F.R. § 660.112(b)(2)(i), which provides as follows:

It is unlawful for any person or vessel to . . . [r]eceive, purchase, or take custody, control, or possession of an IFQ landing from a vessel that harvested the catch while fishing under the Shorebased IFQ Program without a valid first receiver site license.

III. Discussion

Respondent does not directly contest the violation as charged in the written warning. Rather, Respondent maintains exigent circumstances surrounding the offload, including the Sunday arrival of F/V Pioneer to port and the unexpected refusal by Caito Fisheries to accept delivery of the dogfish catch, make a written warning an unduly severe penalty. Respondent also contends that it had no knowledge of the first receiver site license requirements set forth in 50 C.F.R. § 660.112(b)(2)(i) and generally assumed that the second offload facility held all necessary licenses. Moreover, Respondent asserts that had it known of the licensing requirement and the failure of Mr. Collins and the alternative offload facility to hold a valid first receiver site license, Respondent would have been forced to refuse delivery to remain compliant with the regulations, which would have led to the waste of the dogfish catch. In lieu of the written warning, Respondent offers to certify in writing that it will revise its practices to verify that any facility from which it may receive future deliveries holds a valid and current first receiver site license.

¹¹ See Notice of Violation and Penalty Assessment to Guiseppe Pennisi II dated November 13, 2014 (Case No. SW1400124A); Written Warning to Sargeant Wholesale Biologicals; Written Warning to Larry Collins dated November 20, 2014 (Case No. SW1400124C). As noted above, a written landing receipt documenting the sale of the dogfish catch to Respondent identifies the two amounts as 15,203 pounds and 9,388 pounds. See Landing Receipt. While the amounts on the landing receipt differ from the approximate amounts included in the written warnings, those differences are not significant, and further not material to the specific violation charged.


¹² 15 C.F.R. § 904.403(b), (c).

Respondent's appeal letter, however, mistakenly focuses on the delivery to Mr. Collins on January 13, 2014. The written warning issued to the Respondent is directed to Respondent's receiving of the first offload of dogfish directly onto its delivery truck on January 12, 2014. Respondent was not charged with, and the written warning Respondent received is not based on, the second offload of dogfish at Mr. Collins' facility on January 13.

Regardless, even if Respondent's arguments were considered in relation to the first offload on January 12, they are not persuasive. First, Respondent bears some responsibility for the need to offload promptly the dogfish stored directly on the deck of the F/V Pioneer. Mr. Pennisi was harvesting the dogfish largely at Respondent's request, and the need for a quick offload was driven at least in part by Respondent's requirement for high quality specimens. Second, lack of awareness of regulatory requirements is not a defense to a violation, especially for an entity such as Respondent that regularly purchases fish species for commercial purposes. Finally, while it is appreciated that Respondent has offered to provide written certification that it will change its verification practices going forward, a formal written warning provides greater assurances that Respondent will adhere to these practices and is an appropriate enforcement response in light of the circumstances of this case.

Based on the foregoing, I affirm the written warning.

Sincerely,


Mary Beth Ward
Deputy General Counsel

cc: Paul A. Ortiz, Enforcement Attorney
Enforcement Section, NOAA Office of the General Counsel