UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE

REPORT AND RECOMMENDATION OF THE SPECIAL MASTER CONCERNING APPLICATIONS FOR REVIEW OF NOAA ENFORCEMENT ACTION

April 2012

Hon. Charles B. Swartwood, III (ret.)
Special Master
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and

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Table of Contents

INTRODUCTION 4
Case 33: Willie Etheridge 20
Case 38: Terry Mulvey 27
Case 40: James G. Spalt 43
Case 60A: Tom Testaverde 72
Case 60B: Tom Testaverde 78
Case 73: Brian Roche 85
Case 94: Joshua Wentling 94
Case 98: Gary Genthner 100
Case 99: Dennis Sturgell 104
Case 102A: Karen Leigh Jayne Bell 118
Case 102B: Karen Leigh Jayne Bell 123
Case 127: Mike Hayden, Jr. 128
Case 132: William Fooks 130
Case 201: John Keller 138
Case 202: Jose Cordeiro 145
Case 203A: Daniel Bubb 150
Case 203B: Daniel Bubb 162
Case 205: Joseph Gilbert 170
Case 206: James Patterson, Jr. 177
Case 207: Allen W. Rencurrel 183
Case 208: Stephen Celeste 189
Case 209: Peter W. Taylor 201
Case 210: Stephen P. Welch 214
Case 212: E. Daniel Eilertsen 221
Case 214: Mark Bruce 226
Case 215: Paul Lemieux 234
Case 216: Todd Sutton 239
Case 217: John Fernandez III 247
Case 218: Jim Freeman 252

Case 219: Antonette Jones ... 256
Case 220: Lawrence P. Kavanagh ... 262
Case 222: William Norton ... 273
Case 223: Vito Ciaramitaro ... 284
Case 224: Daniel Fill ... 291
Case 225: Edward Ahearn ... 300
Case 226: Walter Allyn ... 312
Case 227: Mark Bichrest ... 317
Case 228: Andrew Lang ... 326
Case 229: Billie Lee ... 333
Case 230: William Reed ... 338
Case 231: J. Patrick Reese, Jr. ... 344
Case 232: Ronald Ringen ... 355
Case 233: Richard Walz ... 363
Case 234: Dennis Saluti and Thomas Reilly ... 371
Case 235A: Charles S. Dodge ... 399
Case 235B: Charles S. Dodge ... 408
Case 235C: Charles S. Dodge ... 414
Case 236: L. Paul Barbera, Jr. and Peter Barbera ... 421
Case 237: Carlos Rafael ... 430
Case 238: Malvin Kvilhaug and Sharon Thuestad ... 440
Case 239: Paul Weckesser ... 455
Case 240A: Edison Love and Michael Love ... 466
Case 240B: Edison Love and Michael Love ... 469
Case 241: Gaetano G. Brancaleone ... 479
Case 244: Donald Braddick ... 487
Case 245: David Aripotch ... 496
Case 246: Yvonne Peabody ... 503
Case 247: Leonardo Vitale ... 508
Case 248: William Grimm ... 513
Case 249: Alan Curtis ... 519
Case 250A: Clarke A. Reposa, Sr ... 526

Case 250B: David Barbera 537

Case 251: Stephen P. Jordan 550

> I authorize the Special Master to review applications from respondents who were issued a Notice of Violation and Assessment (NOVA) on account of a violation of the Magnuson-Stevens Act on or after March 17, 1994 that was settled or otherwise resolved before February 3, 2010, provided that:
>
> 1. The NOVA imposed a civil penalty that was paid as part of the disposition of the case;
>
> 2. The disposition of the NOVA did not include the issuance of a ruling or opinion by a federal district judge; and
>
> 3. The appeal of the NOVA is not currently pending before an Administrative Law Judge or the NOAA Administrator. Id.

Secretary Locke's office drafted a form Application which, according to his March 16, 2011 Decision Memorandum, was to include:

> The facts alleged in the application should include (but not be limited to) the date of the incident and the circumstances that gave rise to the NOVA and the procedural steps taken after the issuance of the NOVA and the results of those steps. Any available documentation regarding NOVA should be appended to the application as an exhibit. All factual allegations set forth in the application must be verified by a sworn affidavit or declaration from the applicant.
>
> Applications for review must set forth facts sufficient to establish from the face of the application that the case falls into one of the following categories, both of which were set forth in my September 23, 2010 Decisional Memorandum:
>
> 1. Cases in which GCEL attorneys charged excessive penalties in a manner that unfairly forced settlement; or
>
> 2. Cases in which conduct of the kind specifically enumerated in the IG's September 2010 Report prejudiced the outcome of the case. Id.

The following additional categories were enumerated in the OIG's September 2010 Report:

> 1. Broad and powerful enforcement authorities led to overzealous or abusive conduct;
>
> 2. Regulatory enforcement processes are arbitrary, untimely and lack transparencies; and

3. Unduly complicated, unclear, and confusing fishing regulations. OIG Final Report (Sept. 2010).

Most applications were filed by individual fishermen and in some instances, were incomplete, inartfully drafted and/or not properly verified. I did not reject any application for those reasons. As to the category of cases that lacked sufficient facts or documentation, I obtained relevant facts and documents from NOAA's files and, as to unverified applications, I subsequently sought and obtained affirmations signed under oath by the complainants verifying the substance of those applications.

ELIGIBILITY

I received and reviewed a total of eighty-four (84) requests for review of NOAA enforcement cases. Of those, eighteen (18) failed to qualify for review for the following reasons:

A. NOVA was/would be resolved by a federal district judge:

Case No. 51:	Martin Stillufsen
Case No. 88:	Harriet Didriksen
Case Nos. 243A, 243C, and 243F	: Gregory Duckworth
Case No. 254:	John Van Salisbury

B. Fishermen never completed and returned a tendered Application:

Case No. 68:	John O'Leary
Case No. 85:	Robert P. Jones
Case No. 110:	Brian Loftes
Case No. 131:	Randy Burke
Case No. 135:	Derrick Parks Hoy

C. Violation occurred either before March 17, 1994 or after February 3, 2010:

Case No. 204:	Gerald Peterson

Case No. 253:	Aaron Feener

D. No monetary penalty was paid:

Case No. 74:	Corrado Buccheri (2 cases)
Case Nos. 243B, 243D, and 243E:	Gregory Duckworth

E. Case was settled by an U.S. Attorney as part of a criminal investigation:

Case No. 78:	Dwight Eager

The following three (3) cases were withdrawn by the applicant:

Case No. 96:	Gary Sjostrum
Case Nos. 213A and 213B:	Bruce Fitzsimmons

This reduced the eligible Applications for Review to sixty-three (63). I have reviewed nine (9) Applications of a NOAA enforcement action in which no NOVA was issued. I have included these nine (9) cases in this Report because I wanted to investigate whether the Enforcement Attorney's threat of issuing a NOVA for an excessive penalty assessment unfairly forced settlement of those cases. I found that to have occurred in three (3) cases.

STANDARD OF REVIEW

In Secretary Locke's March 16, 2011 Decision Memorandum, he directed me, as Special Master, to conduct an investigation of the eligible Applications for Review by applying "the same standard of review set forth in my September 23 Decision Memorandum." Secretarial Decision Memorandum, p. 3 (Mar. 11, 2011). Pursuant to Secretary Locke's September 23, 2010 Decision Memorandum, I was instructed to determine whether conduct by NOAA personnel had unfairly affected the outcome of a particular case. Secretarial Decision Memorandum (Sept. 23, 2010). The standard of review is by clear and convincing evidence as to whether "NOAA personnel engaged in conduct that overstepped the bounds of propriety

and fairness expected of them, and had a material impact on the outcome of the case." Id.

Examples of such conduct may include:

a. Abuse of process, including vindictive prosecution or other prosecution in bad faith, and unreasonable delay that prejudices the defense of the case;

b. Abusive conduct that amounts to coercion, intimidation, or outrageous behavior; and

c. Presenting false or misleading evidence or other conduct that impacts the truth of the case presented. Id.

These examples are not the only types of conduct to be reviewed. As a result of my investigation, I have found conduct that does not exactly fit the above examples but which amounted to overzealous, arbitrary conduct by NOAA personnel which unfairly impacted the outcome of several of the reviewed cases.

In determining whether to recommend modification or remission of any penalty, I have been instructed by the Secretary to consider the following facts:

1. Seriousness of the conduct engaged in by any NOAA personnel;

2. The impact of that conduct on the outcome of the case;

3. The type and amount of the assessed penalty;

4. The factors enumerated in Section 308(a) of the Magnuson-Stevens Act and the regulations promulgated thereunder for determining assessed penalties; and

5. Other factors that the Special Master deems appropriate for determining the amount of the assessed penalty. Id.

After completing my investigation of each case, I have made a recommendation to Commerce Secretary John E. Bryson as to whether any penalties should be modified or remitted. Secretary Bryson has reserved for himself the ultimate authority and discretion to accept, reject or modify my recommendations concerning such reported cases. Pursuant to

Section 308(e) of the Magnuson-Stevens Fishery Conservation and Management Act, the Secretary has the authority to "compromise, modify, or remit, with or without conditions, any civil penalty which is subject to imposition or which has been imposed under this section." 16 U.S.C. § 1858 (2007) ("Magnuson-Stevens Act"). Clearly, this is an equitable process that ultimately results in the exercise of a discretionary power which Congress has granted to the Secretary of Commerce.

Several of the Enforcement Attorneys have argued that in the review process "basic tenets of judicial review should apply" and that review of Agency action must be based solely on the administrative record. Case 206: Response by EA Deirdre Casey, p. 2. Enforcement Attorney Charles Juliand echoes this assertion when he complains that this investigation involves "subjective determinations by a person or persons unfamiliar with the process who seem to rely more heavily on ex parte communications from interested parties than upon an analysis of substantive rights in light of established law and policy." Case 228: Response by EA Charles Juliand, pp. 1-2. I disagree with these assertions. This investigation does not involve judicial review. It is an investigation of complaints about an abuse of process. In order to investigate a complaint, it is necessary to interview the complainant. Additionally, all NOAA personnel involved in a case have been given ample opportunity to respond to an applicant's complaint. In some cases, those responses have been lengthy and are usually supported by referenced exhibits.

The Enforcement Attorneys further argue that complainants are bound by their settlement agreement and that those agreements cannot be set aside except for fraud or duress. Case 206: Response by Deirdre Casey, p. 2. EA Casey cites to civil case authority for this

proposition of contract law. However, this review is an equitable proceeding based on fundamental fairness and common sense and is not subject to either the rigid confines of judicial review or traditional concepts of common law. The best example of a similar Executive prerogative is the authority of the President to grant a pardon. It is a permitted discretionary action not subject to any particular or existing standard and not subject to review. Additionally, this review is part of an inquiry by the Secretary of Commerce concerning enforcement practices within NOAA. As such, it is an Executive Branch function not governed by principles applicable to Judicial Branch proceedings.

THE INVESTIGATION

After determining which applications were eligible for review, my assistants and I reviewed the materials filed by the complainants and created a case file for each complainant. Our next task was to review the NOAA files for each case, copy what we determined to be relevant to our investigation, and put those documents in the complainant's case file. I next interviewed the complainants and the witnesses (including, in some cases, spouses). Several complainants were represented by counsel who, in all such cases, were present for their clients' interviews. The lawyers were allowed to participate during the interview. In those cases, I have referenced relevant comments and/or arguments made by counsel.

The following is a list of the complainants interviewed, case number, date of interview, and where applicable, identity of their lawyers:

Person Interviewed	**Case Number**	**Date Interviewed**	**Legal Counsel**
1. Michael Hayden	127	August 31, 2011	None
2. Jim Freeman	218	September 7, 2011	None
3. Jose Cordeiro	202	September 8, 2011	Pamela Lafreniere,

			Esq.
4. Daniel Eilertsen	212	September 8, 2011	Pamela Lafreniere, Esq.
5. Paul Lemieux	215	September 8, 2011	Pamela Lafreniere, Esq.
6. Antonette Jones	219	September 8, 2011	Pamela Lafreniere, Esq.
7. Allen W. Rencurrel	207	September 13, 2011	Pamela Lafreniere, Esq.
8. Todd Sutton	216	September 13, 2011	Pamela Lafreniere, Esq.
9. Bruce Fitzsimmons	213A and 213B (withdrawn)	September 13, 2011	Pamela Lafreniere, Esq. (withdrawn)
10. James Patterson, Jr.	206	September 14, 2011	Robert Caron, Esq.
11. Stephen P. Jordan	251	September 14, 2011	None
12.			
13. William Fooks	132	September 16, 2011	None
14. Karen Leigh Jayne Bell	102A and 102B	September 20, 2011	None
15.			
16. Stephen Celeste	208	September 20, 2011	None
17. Mark Bruce	214	September 22, 2011	Pamela Lafreniere, Esq.
18. Lawrence P. Kavanagh	220	September 22, 2011	Pamela Lafreniere, Esq.
19. William Norton	222	September 22, 2011	Pamela Lafreniere, Esq.
20.			
22. Brian Mark Roche	73	September 23, 2011	None
23. Vito Ciaramitaro	223	September 27, 2011	Stephen Ouellette, Esq.
24. Vito Ciaramitaro II	223	September 27, 2011	Stephen Ouellette, Esq.
25. Daniel Fill	224	September 27, 2011	Stephen Ouellette, Esq.
26. Ronald Ringen	232	September 27, 2011	Stephen Ouellette, Esq.
27.			
28. Richard Walz	233	September 27, 2011	Stephen Ouellette, Esq.
29. Andrew Lang	228	September 30, 2011	Stephen Ouellette, Esq.
30.			

31. Billie Lee	229	September 30, 2011	Stephen Ouellette, Esq.
32. Donald Braddick	244	October 4, 2011	None
33.			
34. Paul Weckesser	239	October 13, 2011	John Markey, Jr., Esq.
35. Tom Testaverde	60A and 60B	November 3, 2011	Michael J. Faherty, Esq.
36. Leonardo Vitale	247	November 3, 2011	None
37.			
38. Joseph Gilbert	205	November 7, 2011	None
39. John Fernandez III	217	November 9, 2011	None
40. Gaetano Brancaleone	241	November 10, 2011	None
41. Peter W. Taylor	209	November 11, 2011	None
42. Charlie S. Dodge	235A; 235B; 235C	November 11, 2011	Nancy Zimmer, Esq.
43. Michael Love	240A and 240B	November 16, 2011	Pamela Lafreniere, Esq.
44. Edison Love	240A and 240B	November 16, 2011	Pamela Lafreniere, Esq.
45. William Grimm	248	November 16, 2011	None
46.			
47. David Aripotch	245	November 21, 2011	None
48.			
49. Gary Genthner	98	November 21, 2011	None
50. Yvonne Peabody	246	November 21, 2011	None
51. Malvin Kvilhaug	238	November 22, 2011	John Markey, Jr., Esq.
52.			
53. Sharon Thuestad	238	November 22, 2011	John Markey, Jr., Esq.
54.			
55. Alan Curtis	249	November 22, 2011	None
56.			
57. Pat McGrath	132		
58.		December 6, 2011	None
59.			
60. Edward Ahearn	225	December 8, 2011	Stephen Ouellette, Esq.
61. Walter Allyn	226	December 8, 2011	Stephen Ouellette, Esq.
62. William Reed	230	December 8, 2011	Stephen Ouellette, Esq.
63. Mark Bichrest	227	December 9, 2011	Stephen Ouellette, Esq.
64. J. Patrick Reese, Jr.	231	December 9, 2011	Stephen Ouellette,

			Esq.
65. Daniel Bubb	203A and 203B	December 13, 2011	Paul Muniz, Esq.
66. Terry Mulvey	38A	December 13, 2011	Leonard Bergersen, Esq.
67. L. Paul Barbera	236	December 14, 2011	Leonard Bergersen, Esq.
68. Peter Barbera	236	December 14, 2011	Leonard Bergersen, Esq.
69. David Barbera	250B	December 14, 2011	Leonard Bergersen, Esq.
70. [redacted]	[redacted]	[redacted]	[redacted]
71. Stephen P. Welch	210	December 19, 2011	None
72. Joshua Wentling	94	December 20, 2011	None
73. John Keller	201	December 20, 2011	None
74. Dennis Sturgell	99	December 28, 2011	Thane W. Tienson, Esq.
75. James G. Spalt	40	December 29, 2011	James Coyne King, Esq.
76. Dennis Saluti	234	January 10, 2011	Michael McHugh, Esq.
77. Thomas Reilly	234	January 10, 2011	Michael McHugh, Esq.
78. William Kettlewell, Esq.	234	January 10, 2011	None
79. Peter Spalt	40	January 12, 2011	None
80. Richard Cohen, Esq.	40	January 12, 2011	None

After reviewing documents and interviewing complainants, my assistants and I prepared a written summary of Provisional Findings of Fact for each case. Those provisional findings were then submitted to NOAA Special Agents and Enforcement Attorneys involved in each case for their review and response. I did not include with my preliminary findings copies or summaries of my recorded interviews of complainants/witnesses but did include what I found to be relevant information in connection with my investigation. These interviews contained some allegations I did not find credible or relevant and for that reason, did not include that information in my preliminary findings. The primary reason for not including copies or

summaries of the interviews was to prevent expanding the scope of the investigation and/or the NOAA personnel responses into matters that were irrelevant. However, as a result of the responses from NOAA personnel, some of my provisional findings were eliminated, modified or changed.

We received a Response from many Special Agents and a Response by or on behalf of all Enforcement Attorneys involved in each case except in Case 244 (Donald Braddick) where the EA had retired. However, I have not recommended relief in that case. All documents referred to in the Report, all Responses and attachments received from NOAA enforcement personnel and all interview summaries and recordings for each case have been saved in electronic form and are easily accessible for review in each case.

In order for anyone not familiar with the acronyms commonly known and used in the fishing industry, s(he) will need to know the meaning of each acronym referred to and not specifically identified in the text of this Report. Those acronyms are as follows:

AIW – Administrative Inspection Warrant
ALJ – Administrative Law Judge, assigned to the United States Coast Guard
ASAC – Assistant Special Agent in Charge
DAS – Days at Sea
DSAC – Deputy Special Agent in Charge
EA – Enforcement Attorney
EAR – Enforcement Action Report
ET – Enforcement Technician
FMC – Fisheries Management Council
F/V – Fishing Vessel
FVTR – Fishing Vessel Trip Report
GCEL – General Counsel for Enforcement and Litigation

GOM – Gulf of Maine

LOA – Letter of Authorization

MSA – Magnuson-Stevens Act

NLCA – Nantucket Lightship Closure Area

NMFS – National Marine Fisheries Service

NOAA – National Oceanic and Atmospheric Administration

NOVA – Notice of Violation and Assessment

NOPS – Notice of Permit Sanction

OIG – Office of Inspector General

OIR – Offense Investigation Report

OLE – Office of Law Enforcement

SA – Special Agent

SAC – Special Agent in Charge

USCG – United States Coast Guard

VMS – Vessel Monitoring System

FINDINGS OF FACT, DISCUSSION, AND RECOMMENDATION

I have divided the reporting of each case reviewed into three (3) sections: Findings of Fact, Discussion, and Recommendation. In the Findings of Fact section, I relate the facts relevant to the complaint. In the Discussion section, I discuss the complainant's reasons for seeking relief, NOAA's enforcement personnel's response to the complaint, and a summary of my conclusions as to the investigation of each case. Based on the findings and discussion, I have made a Recommendation to the Secretary as to whether relief should be granted and if so, the amount or form of such relief.

CREDIBILITY

I treated the investigation of each complaint as a quest for information in which I allowed each person interviewed to confirm or deny allegations of fact made by them and

others. As previously stated, I allowed NOAA Enforcement personnel to respond to the complainants' allegations of unfair enforcement action. Since this was not an adversarial proceeding in the classic sense, where each of the witnesses would be subject to direct and cross-examination before a finder of fact, there were many instances where I could not conclusively verify which version of certain conversations or events were more likely true than not true. However, in some cases, because of other corroborating testimonial or documentary evidence, I was able to make determinations of credibility. In those cases, I have made specific reference to the corroborating evidence that assisted me in making those determinations.

PENALTY ASSESSMENTS

I have been authorized to review complaints about NOAA enforcement action during the time period from March 17, 1994 to February 3, 2010. During that period of time, different NOAA penalty schedules were in effect. In reviewing penalty assessments/payments for each case, I have reviewed the NOAA penalty schedule assessment in effect at the time of the cited violation. I am aware that after the OIG's September 2010 Report, NOAA substantially revised its penalties and permit sanctions. NOAA Policy for Assessment of Penalties and Permit Sanctions (Mar. 16, 2011). The potential penalties provided in the most recently revised penalty schedule are substantially lower than those in effect during the period subject to my investigation. I have not applied the most recent penalty schedule as it would be unfair to NOAA, which assessed penalties in accordance with a higher penalty schedule, as well as to the fishermen/dealers who paid the higher penalties in other cases not reviewed by me as Special Master.

SEIZURES

The Magnuson-Stevens Act provides that the Secretary has the authority to "compromise, modify, or remit, with or without conditions, any civil penalty which is subject to imposition or which has been imposed under this section." 16 U.S.C. § 1858 (2007). (emphasis supplied). The Magnuson-Stevens Act is clear that only civil penalties can be remitted by the Secretary and that the statute does not provide for relief from seizures. However, in several cases included in this Report, civil penalties were paid from the sale proceeds of seized fish and/or scallops. Accordingly, I have included those cases in this Report because I seek to review the seizure but because there has been a penalty paid from the sale proceeds of the seizures.

NOAA ENFORCEMENT COMPLAINTS

My first Report concerning NOAA Enforcement Action was based on the OIG's investigation that detailed twenty-seven (27) complaints. Of those cases investigated, the OIG found that nineteen (19) were appropriate for further review and in that connection suggested in relevant part that "…NOAA and/or the Department…(a) create an independent process for equitable relief or resolution of past enforcement cases meeting appropriate eligibility criteria…" OIG Final Report (Sept. 2010). Former Secretary Locke appointed me as Special Master as a means of creating an independent process and I investigated a total of thirty (30) cases which were included in my first Report. Report and Recommendation of the Special Master Concerning NOAA Enforcement Action of Certain Designated Cases (Apr. 2011).

Following the issuance of the OIG's September 2010 report, Michael W. Carter, United States Attorney for the District of Montana, as Chair of the AGAC Environment Issues Working

Group, authored a letter dated November 24, 2010 to Dr. Jane Lubchenco, NOAA Administrator, in which he observed:

> To begin with, a close read of the Inspector General's reports makes clear that the issues that prompted the interest in reform are regional in nature, centered in New England – and there is no evidence in the reports of a nationwide enforcement problem. Indeed, of the 27 complaints addressed in detail in the IG's September 2010 report, 26 involved the New England fishery. The regional nature of the challenges was also apparent at the NOAA enforcement summit, which included representatives of the Department of Justice: fishing industry representatives from other regions did not appear to share the concerns voiced by some in New England.
> Letter from United States Attorney (D. Mont.) Michael W. Carter to NOAA Administrator Dr. Jane Lubchenco (Nov. 24, 2010).

Of the thirty (30) cases I investigated and which were included in my April 2011 Report, all but four (4) were either Northeast cases or were handled by an Enforcement Attorney assigned to the Northeast region. Of the sixty-three (63) cases included in this Report, all but seven (7) were handled by Northeast Enforcement Attorneys. Therefore, I conclude that approximately 90% of the complaints of unfair NOAA enforcement action are from the Northeast region. As to the eighteen (18) cases in which I have recommended some form of relief in this Report, all except one were handled by an Enforcement Attorney from the Northeast region.

HIGH ASSESSMENT / UNFAIR SETTLEMENT

In the Conclusion to my April 2011 Report, I noted a pattern by Enforcement Attorneys of assessing high monetary penalties in a manner that unfairly forced settlement. Report and Recommendation of the Special Master concerning NOAA Enforcement Action of Certain Designated Cases (Apr. 2011). I have seen that same pattern emerge in reviewing the cases

included in this Report and in some instances have recommended relief because of that procedure. The EAs argue that if the fishermen, vessel owners or fish dealers believed that the penalty assessment and/or proffered settlement was excessive, they had the option to appeal their cases to a Coast Guard ALJ. As pointed out in my previous Report and confirmed by every fisherman, vessel owner, fish dealer and lawyer interviewed for this Report, there was a universal perception that a Coast Guard ALJ, after hearing, would affirm both liability for the alleged violation and the originally assessed penalty. Therefore, every fisherman, vessel owner and fish dealer that was faced with an excessive penalty assessment was willing to accept a proffered settlement for a base amount, even if that amount was excessive because of the perceived likelihood that the original excessive assessment would be affirmed if appealed to a Coast Guard ALJ. This perception and the ability of NOAA Enforcement Attorneys to seize the catch and impose a substantial permit sanction gave EAs a substantial advantage in settlement negotiations and enabled them in certain cases to force unfair settlements.

I have recommended relief in several cases where an excessive penalty assessment led to an unfair settlement. However, there are also cases where I have found the penalty assessment to be excessive, but that the resulting settlement was fair. Therefore, the determining factor has been not the original assessment but rather the resulting settlement.

Case 33
SE 030086
F/V Blue Fin
Willie R. Etheridge, III, Owner
█████████, Operator

Fish dealer/vessel owner complains that he was targeted by NOAA enforcement personnel for past lawsuits challenging NOAA regulations and was coerced into settling for an excessive penalty.

Findings of Fact

Willie R. Etheridge, III is the owner/operator of Willie R. Etheridge Seafood Company, which is a fish dealership located in Wanchese, North Carolina. Mr. Etheridge's grandfather started the business in 1936, it was incorporated in 1979 and about that time, taken over by Mr. Etheridge. In the past, Mr. Etheridge has owned four (4) different fishing vessels, including the Blue Fin, a 65' long line vessel, which he acquired in 1992. Mr. Etheridge does not operate any of his vessels. █████████ has operated the Blue Fin from 1992 until 2005, when █ left after the last payment was made toward the settlement of this case.

In late March 2003, █████████ was the operator of the Blue Fin and had set out about twenty (20) miles of a long line and about every hook had a shark. █ conceded that █ landed what █ thought was the legal limit at Williams Smith Seafood Company in Beaufort, North Carolina, but nevertheless turned around, retrieved more sharks from the same line, came back to the Smith Seafood unloading dock and offloaded an additional 4,000 lbs. ███ ███ stated that it took █ three (3) hours to set the line and four (4) days to retrieve all the fish. On the last day, the sharks were beginning to rot so █████████ and █ crew hauled the final 2,000 lbs. from the remaining one mile line and headed back to Smith Seafood

to offload approximately 6,000 lbs. of shark on March 25, 2003. It was 5:30 pm when the Blue Fin arrived at Smith Seafood and offloaded 4,392 lbs. of shark carcasses and fins. After the fish house workers went home, [redacted] offloaded the remaining 2,513 lbs. of shark carcasses and fins. [redacted] anticipated that, when Smith Seafood workers returned the next morning, they would assume that the Blue Fin had left port to fish after the original offloading and returned with another day's catch. [redacted] justification for [redacted] actions was that if [redacted] did not remove all the sharks from the hooks, they would die in the cold water and rot. EA Duane R. Smith states that, although this argument may be superficially appealing, it overlooks the fact that [redacted] created this dilemma by apparently consistently setting more gear than necessary to catch the maximum limit he was allowed to land. Response by EA Duane Smith, p. 2. [1]

After an investigation by SA Barylsky, it was discovered that on several occasions, the Blue Fin had offloaded shark overages and on March 25, 2003, had possessed fins from twenty-two (22) dusky sharks, which are a prohibited species, and had landed shark fins without corresponding carcasses.

On May 23, 2003, EA Robin Jung issued a NOVA to [redacted] Etheridge and [redacted] charging them as follows:

Count 1: 3/25/03 – landed shark overage
Assessed penalty $10,000.

Count 2: 3/25/03 – possessed 22 dusky sharks
Assessed penalty $10,000.

[1] EA Robin Jung, who issued the NOVAs in this case, is no longer employed by NOAA. EA Duane R. Smith, after a review of the enforcement file, was tasked by GCEL to respond to my Provisional Findings of Fact in this case.

Count 3: 3/25/03 – failed to report required information to NOAA
Assessed penalty $1,500.

Count 4 & 5: 3/25/03 – landed shark fins without corresponding carcasses
Assessed penalty $7,500 each or $15,000.

Counts 6-10: 3/22/03, 3/19/03, 3/16/03, 3/15/03 and 3/14/03 – landed shark overages
Assessed penalty $7,500 each or $37,500.

Count 11: (NOVA only) On April 2, 2003, [redacted] made a false statement to an authorized officer
Assessed penalty $2,500.

Total assessed penalty: $76,500.

On this same date, EA Jung issued a NOPS providing for 150 day permit sanctions for the Blue Fin and [redacted] Etheridge and [redacted]

The NOVA was supported by substantial, credible evidence. First, NOAA had access to dealer and FVTR reports that revealed the overages; [redacted] was forthright and forthcoming in [redacted] admissions to violations; and the official observers on board the Blue Fin and a Florida Marine Biologist corroborated the dusky shark violations. However, [redacted] and Etheridge deny the failure to report (Count 3) and false statement (Count 11) violations involving the landing of dusky sharks. The alleged failure to report in Count 3 was the omission of the dusky sharks from [redacted] FVTR and the alleged false statement in Count 11 was that [redacted] denied that [redacted] had landed a prohibited species and that no prohibited species were included in the product seized by NOAA. Statement by [redacted] (Apr. 2, 2003). In a sworn statement, [redacted], an official observer, stated: "A third set haul back…landed 14 dusky sharks, all of which were dead – 11 were carcassed, 2 were cut as bait + one was discarded after the fins were removed. The captain, [redacted] explained

that to discard the dead duskies would only result in a waste, and fishing to replace them could result in more waste." Statement by [redacted] (Apr. 10, 2003).

Discussion

Prior to this NOVA, EA Jung had seized the Blue Fin catch and sold it back to Willie Etheridge Seafood for $16,846.50, which was deposited into NOAA's Asset Forfeiture Fund.

Mr. Etheridge states that when he first started shark fishing, there were few regulations. However, the government started to tighten restrictions around 1988-89, which prompted him and various other fishermen to file lawsuits against NOAA that were partially successful in challenging these regulations. The first lawsuit took approximately 2.5 years to secure a judgment and the second lawsuit took 3-4 years. Mr. Etheridge believes that there is a vendetta against those, including himself, [redacted] because all of them had funded these lawsuits. Mr. Etheridge believes this vendetta reaches beyond EA Jung and SA Barylsky to "higher ups" at NOAA. EA Smith suggests, to the contrary, that Mr. Etheridge was able to use his personal contacts to gain access to discuss his case with the head of NMFS OLE (Dale Jones), the Assistant General Counsel for Enforcement and Litigation (Michele Kuruc), and the Director of the National Marine Fisheries Services (William Hogarth) and to negotiate with them a favorable settlement agreement which was then left to EA Jung and Mr. Etheridge's lawyer to finalize. This personal access to the highest levels of the Agency goes beyond what is normally afforded to Respondents and seems directly contrary to a claim that "higher ups" at NOAA had a "vendetta" against Mr. Etheridge. Response by EA Duane Smith, p. 3.

[REDACTED] admitted the shark landing overages, but pointed out that several hundred pounds equals two (2) to three (3) sharks, making it very difficult to estimate the exact weight of a catch. He maintains that these are unintentional landings. However, EA Smith states that it is not the weight of the sharks that matters. It is the weight of the shark carcasses as landed that matters. When sharks were processed on the vessel in 2003, they would have had the head, tail, fins, and entrails removed. The remaining carcass is called a "log" and usually weighs somewhere between 23 and 36 lbs. It is these logs that are weighed and which cannot exceed 4,000 lbs. per trip. [REDACTED] is aware of the average weight of [REDACTED] carcasses, having argued in a subsequent case that the fact that [REDACTED] cuts his logs even smaller than average is one factor which causes his fin-to-carcass ratios to exceed the 5% mandated by Congress. Using an average weight of 30 lbs. per carcass, landing an additional 400 lbs. of shark carcasses equates to landing 13.33 extra sharks, not the 2-3 extra sharks as alleged by [REDACTED] Id. [REDACTED] feels that NOAA could have simply informed [REDACTED] that [REDACTED] practice of landing a several hundred lbs. overage per catch was a problem and [REDACTED] would have changed [REDACTED] practice. However, according to [REDACTED], NOAA allowed them to maintain this practice until they pieced together enough violations to "ruin us." [REDACTED] stated that [REDACTED] never tried to hide any sharks but that it's difficult to estimate 4,000 lbs. of sharks in bad weather.

Mr. Etheridge said that he did not hire a lawyer until after he had reached an agreement to settle this case with Bill Hogarth and Dale Jones. In late July 2003, Mr. Etheridge and [REDACTED] hired Washington, DC lawyer, David F. Frulla, who was actively involved in negotiating the terms and conditions of a settlement agreement. On August 4, 2003, Mr. Etheridge settled

this case by having Counts 3, 4 and 5 of the NOVA and Counts 4 and 5 of the NOPS dismissed; and payment of a $45,000 penalty over time, which was paid on January 10, 2005. Additionally, he agreed to forfeit the previously seized catch of $16,864.50 and accept the 150 day permit sanction for the Blue Fin, [redacted] and Mr. Etheridge. The balance of the assessed penalty of $31,500 was waived.

Mr. Etheridge states that he settled the case because his mother was in failing health and she urged him to settle. However, as an additional incentive for settlement, he testified that he was assured by Mr. Hogarth that NOAA would not pursue any charges from the past because Mr. Etheridge believed that NOAA could have written him up for 40-50 other instances of what he considered to be relatively small shark landing overages.

Mr. Etheridge believes that NOAA tried to use the NOPS to get a higher penalty. He believes that NOAA understands that without a valid permit, a fisherman/fish dealer cannot operate his business. However, EA Smith argues that, with the assistance of counsel, Mr. Etheridge and [redacted] were able to negotiate a reduction in their penalty by over 40%, dismissal of three (3) counts, the ability to pay the penalty over time at a very low interest rate, and the elimination of all permit sanctions. Response by EA Duane Smith, p. 2.

From my review of this case, I cannot find by clear and convincing evidence that Mr. Etheridge and [redacted] were targeted by NOAA enforcement personnel or that NOAA charged an excessive penalty in a manner that unfairly forced settlement. Additionally, it is clear that [redacted] initially intended to hide the shark overages by splitting his last trip on March 25, that he had a pattern of landing overages as charged in counts 6 through 10, and that he was not forthcoming about landing dusky sharks. Considering the number and

seriousness of these violations, I find that Mr. Etheridge, [redacted] and their lawyer negotiated a fair and reasonable settlement, especially since they were successful in eliminating all permit sanctions.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 38

NE 000103 FM/V
NE 042005 FM/V
NE 052004 FM/V
F/V Tiger Jo
Porridge Hill, Inc., Owner
Terence John Mulvey, Operator

Fisherman complains that he is the victim of selective prosecution and harassment by two (2) NOAA OLE Special Agents.[1]

Findings of Fact

Terence John Mulvey is a commercial fisherman who began fishing for cod on a party charter boat out of Pt. Judith, Rhode Island, with his father, prior to graduating from high school. His two (2) brothers are fishermen. In 1975, after graduating from high school, Mr. Mulvey bought a lobster boat, the Tiger Jo, a 20' skiff, and fished with her until 1978 when his brother purchased a 40' vessel, the Stormy Elizabeth. Mr. Mulvey began operating the Stormy Elizabeth while his brother operated a larger fishing vessel. Mr. Mulvey fished for lobsters with this vessel until 1982 when his brother sold her and purchased a 45' fiberglass vessel, the Stormy Elizabeth II, which Mr. Mulvey operated until 1986. From 1986 until 1988, Mr. Mulvey fished on the dragger Miss Betina, owned by Fallet Fisheries in Wakefield, Rhode Island. Then

[1] Mr. Mulvey's case was originally included with the cases referred to me by the OIG which were the subject of my April 2011 Report. Because of scheduling problems involving Mr. Mulvey, his lawyer, and me, I was unable to interview Mr. Mulvey within a reasonable time prior to submitting my first report. However, with the consent of Mr. Mulvey's lawyer, I agreed to have Mr. Mulvey's case reviewed as part of this investigation. Special Master Report and Recommendation, p. 193 (Apr. 2011). Consequently, Mr. Mulvey did not file an Application for Review and his case was reviewed in accordance with Secretary Locke's September 23, 2010 Secretarial Decision Memorandum and the parameters outlined in the introduction of my first report.

for a year, Mr. Mulvey worked as a cook on the drift netter Luke & Sarah. In 1989, he began operating the 92' Donna Maria, a stern trawler with one large trawl.

Mr. Mulvey is president and sole stockholder of Porridge Hill, Inc., which in 1992 purchased the 51.2' Tiger Jo, originally a gillnet fishing vessel. In 2005, Mr. Mulvey changed the Tiger Jo to a dragger, and since 2005 has done surf clamming, scalloping, and dragging. On September 26, 2006, Porridge Hill, Inc. sold the Tiger Jo and her permits to of New Jersey for $110,000. Mr. Mulvey is not related to and did not know prior to the sale. later told Mr. Mulvey that had no intent to keep the vessel and only wanted the permits. stated that if Mr. Mulvey watched the Tiger Jo for a month at the dock to make sure that she does not sink, would come back and sell her to Mr. Mulvey for $1. In November 2006, sold the vessel back to Porridge Hill, Inc. for $1 without the permit, which had been transferred to another of vessels. The Tiger Jo is moored in Pt. Judith. From November 2006 to the present, Mr. Mulvey has been operating exclusively in state waters for surf clams, codfish, monkfish and skate. Mr. Mulvey chose not to renew his federal permit after June 30, 2010 when his permit suspension expired because he says that he fears that NOAA will come after him.

NE 000103 FM/V

On May 17, 2000, NOAA received complaints from three (3) sources, dealers and vessel owners from Point Judith, Rhode Island, that the Tiger Jo was fishing for monkfish in federal waters without possessing a valid federal permit. A review of the permit files revealed that the Tiger Jo did not have a federal permit for the year 2000. Dealer weigh outs showed that the vessel was landing regulated species requiring a federal permit.

On June 19, 2000, the USCG boarded the Tiger Jo and issued a two (2) count EAR charging Mr. Mulvey with possessing monkfish and American lobster in federal waters without a valid federal permit. Offense Investigation Report by USCG Boarding Officer p. 2 (June 19, 2000). Mr. Mulvey does not deny that he possessed monkfish and American lobsters. Special Master Interview with Terence Mulvey (Dec. 14, 2011).

On June 20, 2000, USCG Lieutenant reviewed a videotaped recording of the boarding. Supplemental Offense Investigation Report by USCG Lieutenant p. 3 (June 26, 2000). determined that the Tiger Jo did not stop in spite of repeated signaling using blue law enforcement lights, a siren, a loudhailer and bullhorn and several radio calls on Channel 16; that the Tiger Jo made a course change toward her home port; and that, with a person on deck, the Tiger Jo turned into the wake created by the Coast Guard cutter. Id. issued an additional EAR charging Mr. Mulvey with failing to allow an authorized officer to board the vessel. Id. I was provided with a copy of this video, which confirms Lt. conclusion.

Mr. Mulvey explains that he was stopped and boarded by the USCG in the 1-mile EEZ area between the state waters off of Pt. Judith and Block Island, Rhode Island. Special Master Interview with Terence Mulvey (Dec. 14, 2011). Mr. Mulvey claims that he had been fishing in the Block Island state waters and was steaming back to port when he was boarded. Id. The only way to get from the state waters surrounding Block Island to the coastal state waters off of Pt. Judith is by crossing the EEZ.[2] SA McCarron points out that this is the only instance of the

[2] Mr. Mulvey claims that he had a letter from the Coast Guard in Boston saying that he could cross the federal waters to and from state fishing grounds around Block Island, but at some point either SA Flanagan or SA McCarron had taken the letter from Mr. Mulvey and he has never seen it since. Id. SA

twelve (12) violations later charged in a NOVA that involved a violation near Block Island. Response by SA Christopher McCarron, p. 1. According to him, the other eleven (11) violations occurred south of Block Island, Rhode Island and Long Island, New York where he was charged with fishing without a permit in what were uncontestably federal waters. Id.

Mr. Mulvey denies that he was trying to run away from the Coast Guard. Special Master Interview with Terence Mulvey (Dec. 14, 2011). Mr. Mulvey claims that he was asleep, that [REDACTED] was on watch at the helm, and that the radio was tuned to channel 13. Id. According to Mr. Mulvey, [REDACTED] did not hear the approaching USCG vessel as the wheelhouse and the steering station is literally on top of the vessel's Detroit diesel engine, which is very noisy, nor did [REDACTED] see the Coast Guard Cutter approach on the port side, stern quarter because of a blind spot. Id. Mr. Mulvey claims that [REDACTED] saw the Coast Guard vessel when she was midship and woke Mr. Mulvey. Id. Mr. Mulvey realized what was going on and stopped the vessel immediately (she had been steaming at 9 knots). Id.

On June 20, 2000, upon the vessel's return in Pt. Judith, SAs McCarron and Flanagan interviewed Mr. Mulvey. Mr. Mulvey claims he was very tired because, when the NOAA SAs showed up at 6 am, he had been up the whole night (over 30 hours at that time) and he simply wanted to go home. EA MacDonald's notes confirm that, on January 13, 2003, Mr. Mulvey's lawyer, Leonard L. Bergersen, Esq., told EA MacDonald that Mr. Mulvey "w/d say anything to end conversation" with the agents because he had been up for twenty-eight (28) hours. EA J.

McCarron denies having taken such a letter from Mr. Mulvey. Response by SA Christopher McCarron, p. 1. SA Flanagan denies Mr. Mulvey's complaints filed in this Application for Review. Response by SA Kevin Flanagan, p. 2. EA MacDonald is not aware of the existence of the alleged letter. Response by EA J. Mitch MacDonald, p. 3.

Mitch MacDonald Notes (Jan. 13, 2002, should read 2003). Mr. Mulvey explains that NOAA agents kept him until he provided a written statement. Special Master Interview with Terence Mulvey (Dec. 14, 2011). They had the headlights of their 1972 Bronco directed at a picnic table for Mr. Mulvey to write a statement. This was the only way the SAs were going to let him go. Id. Mr. Mulvey told the SAs that [redacted] had been operating the Tiger Jo when the Coast Guard boarded her on June 19, 2000, but in fact, [redacted] had been behind the wheel. At a later time, Mr. Mulvey corrected his statement about [redacted] being the operator.

SAs Flanagan and McCarron deny that they prevented Mr. Mulvey from leaving at any time on this date and similarly deny that they forced Mr. Mulvey to provide a written statement. Response by SA Kevin Flanagan, p. 2; Response by SA Christopher McCarron, p. 2. Additionally, SA McCarron points out that sunrise was at 5:11 am on June 20, 2000. Given Mr. Mulvey's contention that the events took place at or after 6 am, his accusation about the use of headlights is not credible. Id.

EA MacDonald notes that Messrs. Mulvey and Bergersen did not raise this issue during SAs McCarron and D'Amato's November 30, 2000 interview of Mr. Mulvey where Mr. Bergersen was present or during the settlement negotiations.[3] Id.

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[3] According to Mr. Bergersen, who was present during a subsequent interview of Mr. Mulvey, SA McCarron was overly aggressive under the circumstances and failed to respond to cautionary advisement from Mr. Bergersen with respect to SA McCarron's lines of questioning, his attitude and his demeanor. Statement of Counsel during Special Master Interview with Terence Mulvey (Dec. 14, 2011). Mr. Bergersen states that SA McCarron showed outright hostility and called Mr. Mulvey a liar to his face. Id. He further states that SA McCarron asked why Mr. Bergersen "would represent a scumbag like Mr. Mulvey, in pretty much those words." Id. SA McCarron responds that he treats people how he would like to be treated, and that when responses to his questions are contrary to the facts, he would present the facts to the person being interviewed for clarification. Response by SA Christopher McCarron, p. 2.

On November 4, 2002, EA MacDonald issued a five (5) count NOVA to Mr. Mulvey, Porridge Hill, Inc. and [redacted] and assessed a total penalty of $145,000. In count one, he charged Mr. Mulvey and Porridge Hill, Inc. with fishing for monkfish without a valid federal permit on twelve (12) occasions between May 1, 2000 and June 24, 2000 and assessed a $100,000 penalty. In count 2, he charged them with possessing American lobster on board without a valid federal permit on June 19, 2000 and assessed a $5,000 penalty. In count 3, he charged Mr. Mulvey, Porridge Hill, Inc. and [redacted] with failure to immediately stop the Tiger Jo when approached by the USCG and failure to respond to repeated attempts for contact via radio, loudhailer, and flashing light signal on June 19, 2000 and assessed a $25,000 penalty. Count 4 was dismissed (withdrawn) by EA MacDonald. In count 5, he charged Mr. Mulvey, Porridge Hill, Inc. and [redacted] with making a false statement concerning the identity of the Tiger Jo's operator to SAs McCarron and Flanagan on June 19, 2000 and assessed a $15,000 penalty.

He denies having engaged Mr. Bergersen with personal comments about a client and insists that he would never do so. Id.

SA Flanagan states that he was present during this interview and that he did not witness any attitude or hostility by SA McCarron toward Mr. Mulvey, nor did he hear anything that would remotely resemble a question why Mr. Bergersen "would represent a scumbag like Mr. Mulvey." Response by SA Kevin Flanagan, p. 2. EA MacDonald states that this was not a custodial interview and that, if SA McCarron was acting inappropriately, Mr. Bergersen would presumably have stopped the interview and he and Mr. Mulvey would have left. Response by EA J. Mitch MacDonald, p. 6. EA MacDonald expects that if SA McCarron had acted as claimed, Mr. Bergersen would have objected to SA McCarron's later involvement with the retrieval of Mr. Mulvey's alleged illegal gear from federal waters, discussed infra. Id.; Letter from Leonard Bergersen, Esq. to EA J. Mitch MacDonald (Jan. 24, 2004, should read 2005). I need not resolve this issue of fact because it is not relevant to the subsequent NOVA and settlement.

Accompanying this NOVA was a NOPS, suspending the vessel's monkfish permit for 120 days and Mr. Mulvey's and [redacted] operator permits for 90 days.

In April 2003, the parties reached a settlement. Mr. Mulvey and Porridge Hill, Inc. agreed to pay a $55,000 civil penalty in accordance with a payment schedule and to serve a 75-day vessel and operator permit sanction from February 1, 2004 until April 15, 2004. Count 2 was reduced to a written warning. Mr. Mulvey and Porridge Hill, Inc. further agreed to install a VMS unit on the Tiger Jo and to comply with all VMS related regulations. [redacted] settled [redacted] NOVA separately and agreed to pay $1,200 and serve a three (3) month operator sanction. Mr. Mulvey paid [redacted] penalty.

When Mr. Mulvey signed the settlement agreement with NOAA in April 2003, the monthly payments were based on his earnings. Special Master Interview with Terence Mulvey (Dec. 14, 2011). In 2004, NOAA reduced the monkfish possession limit from 4,000 lbs. to 1,826 lbs. and lowered the allowable DAS to twenty-eight (28). Id. As a result, Mr. Mulvey no longer had the income stream necessary to make the NOAA payments and fell behind. Id. According to Mr. Mulvey, he contacted EA MacDonald to request a reduction in the monthly payments by one half, but EA McDonald denied the request. Id. EA MacDonald does not recall speaking directly with Mr. Mulvey and thinks that it is more likely that he spoke with Mr. Bergersen about this issue. Response by EA J. Mitch MacDonald, p. 8.

On January 20, 2004, Mr. Bergersen sent a letter to EA MacDonald proposing a permit sanction modification by deferring the start date by thirty (30) days to March 2, 2004 for a forty-five (45) day sanction and the remaining thirty (30) day sanction from August 8, 2004 through September 6, 2004. Letter from Leonard Bergersen, Esq. to EA J. Mitch MacDonald

(Jan. 20, 2004). Mr. Bergersen wrote that, with this permit sanction modification, Mr. Mulvey's "ability to pay should be maintained, absent a further period of prolonged inclement weather or other serious adverse event affecting the vessel's ability to fish." Id. On January 21, 2004, EA MacDonald agreed to Mr. Bergersen's proposed modification of the permit sanction. Letter from EA J. Mitch MacDonald to Leonard Bergersen, Esq. (Jan. 21, 2004).

Subsequently, on January 6, 2005, EA MacDonald issued Mr. Mulvey a NOPS, suspending his permits for non-payment of civil penalties in connection with case No. 000103 until the originally assessed penalty of $145,000, less payments already made of $15,891.72, for a balance of $129,108.28, was paid in full. On January 24, 2005, Mr. Bergersen sent a letter to EA MacDonald, stating that he understood that Mr. Mulvey must remit $11,914.89 to NOAA to cure his default under the earlier settlement agreement and that Mr. Mulvey does not have the money, but that a relative had agreed to lend him the money to cure the default. Letter from Leonard Bergersen, Esq. to EA J. Mitch MacDonald (Jan. 24, 2004, should read 2005). He requested that Mr. Mulvey be permitted to cure the default and that the present (January 6, 2005) permit sanctions be rescinded, pending submission of full financial information. Id. EA MacDonald cooperated with Mr. Bergersen in finding a mutually beneficial solution. Letter from EA J. Mitch MacDonald to Leonard Bergersen, Esq. (Jan. 25, 2005). EA MacDonald proposed implementing a "pay-as-you-go" system, where Mr. Mulvey's permit sanction would be lifted until the next payment is due and so on until the penalty was paid. Id. If he failed to make a payment, the permit sanction would automatically go into effect.

NE 042005 FM/V

On February 10, 2004, SA McCarron learned that the Tiger Jo had exceeded her 2003 DAS allocation by 19.39 DAS and investigated the matter. He contacted Paiva's Shellfish, Inc. and Deep Sea Fish and uncovered numerous instances where monkfish landings exceeded the possession limit. SA McCarron called Mr. Mulvey to inform him that he had gone over his multispecies DAS allocation for 2003 and that there were missing FVTRs for the Tiger Jo as the last FVTR on file was dated February 26, 2003, almost a year earlier. Mr. Mulvey told SA McCarron that he had the FVTRs at his house. Mr. Mulvey stated he thought that SA McCarron was contacting him because a scalloper, Resolute, was destroying his gear at that very moment, but SA McCarron responded that he was not calling about that and asked Mr. Mulvey why he was fishing. Special Master Interview with Terence Mulvey (Dec. 14, 2011). Mr. Mulvey responded that he had received a call-in number. Id. SA McCarron told Mr. Mulvey that he had used up his allocated multispecies days at sea. Id. Mr. Mulvey was surprised and asked by how many days he was over. Id. SA McCarron answered thirty-two (32). Id. Mr. Mulvey became very upset and asked SA McCarron why he was calling him now and not when Mr. Mulvey was two (2) days over the DAS limit. Id. SA McCarron's response was that Mr. Mulvey should throw all of his fish overboard and get to the dock because he was in trouble. Id. Mr. Mulvey asked what about the scalloper destroying his gear, to which SA McCarron replied it was not his concern. Id. As instructed, Mr. Mulvey discarded the fish and returned to port. Id. SA McCarron later suspended his investigation into the DAS matter after it was discovered that the NMFS permit office made a clerical error.

According to Mr. Mulvey, he had eighteen (18) lines of gear in the water in February 2004, but he ended up losing twelve (12) strings of gear worth $4,000 per string for a total of $48,000 because he had to wait for SA McCarron to give him permission to retrieve his gear as part of the resolution of his case. Id. He asserts that this was a real hardship because gillnetting is only as good as the gear. Id.

On January 18, 2005, EA MacDonald wrote a letter to Mr. Bergersen including a draft permit sanction modification to allow Mr. Mulvey to retrieve his gear. Letter from EA J. Mitch MacDonald to Leonard Bergersen, Esq. (Jan. 18, 2005). He also gave Mr. Mulvey more time than requested to retrieve his gear because, in his last interview, Mr. Mulvey had indicated to SA McCarron that he still had twelve (12) strings of gear in federal waters. Id. According to EA MacDonald, he and Mr. Bergersen engaged in settlement discussions during the period from January through June 2005, but Mr. Bergersen did not raise this damage claim. Response by EA J. Mitch MacDonald, pp. 9-10. Messrs. Mulvey and Bergersen did not raise the damage claim once during the pendency of this case. Response by EA J. Mitch MacDonald, pp. 9-10; Response by SA Christopher McCarron, p. 2.

On February 18, 2004, NMFS received a number of FVTRs for Tiger Jo.

On April 1, 2004, SA McCarron issued Mr. Mulvey and Porridge Hill, Inc. separate EARs, charging them in eight (8) counts with failure to submit timely vessel trip reports and fourteen (14) counts of exceeding the monkfish trip possession limit.

On June 18, 2004, EA MacDonald issued to Mr. Mulvey and Porridge Hill, Inc. a four (4) count NOVA and assessed total penalties of $380,000. In count 1, he charged Mr. Mulvey and Porridge Hill, Inc. with failure to timely submit a hundred (100) FVTRs over an eight (8) month

period in 2003 and 2004 and assessed a $100,000 penalty. In count 2, he charged them with failure to submit FVTRs for seven (7) fishing trips and a false report for two (2) trips in 2003 and 2004 and assessed a $40,000 penalty. In count 3, he charged them with exceeding the monkfish possession limits and landing restrictions in 2003 and 2004 and assessed a $120,000 penalty. In count 4, he charged them with exceeding the monkfish possession limits and landing restrictions in 2003 and assessed a $120,000 penalty. Mr. Mulvey's landings of illegal monkfish overages began in May 2003, a month after he settled charges of fishing for monkfish without a federal permit, failing to stop for a Coast Guard cutter and making false statements to an authorized officer. Accompanying the NOVA was a NOPS, suspending Mr. Mulvey's operator permit for three (3) years.

NE 052004 FM/V

On January 5, 2005, Rhode Island EPOs [redacted] and Sergeant [redacted] boarded the Tiger Jo. Upon being asked, Mr. Mulvey replied that he was on a day trip. Narrative for RI DEM/Division of Law Enforcement Sergeant [redacted]. Additionally, Mr. Mulvey stated that "1,880 lbs. [of monkfish] is the limit and [that he has] the limit." Id. The state officers discovered monkfish overages consisting of "2,943 lbs. of whole monkfish, 218 lbs. of monkfish tails and 249 lbs. of monkfish livers." Id. The fish were seized and sold for $4,529.30 to Deep Sea Fish of Rhode Island, Inc. ("Deep Sea") as the highest bidder.

On January 6, 2005, SA McCarron contacted Mr. Mulvey concerning the overages. Mr. Mulvey explained that his intention had been to remain at sea for over twenty-four (24) hours, but he had decided to return to port out of concern for his crew's safety because of bad weather and fuel trouble. Mr. Mulvey said that he did not call NOAA or the RI Department of

Environmental Management because he did not have phone service. Offense Investigation Report by SA Christopher McCarron, p. 6 (Feb. 1, 2005). Mr. Mulvey said that he did not send a VMS message to NMFS because he did not know how to do that. Id. Mr. Mulvey claimed he tried to tell the RI officers about his engine problems, but they did not listen. Id. Mr. Mulvey told SA McCarron that the SA should contact Mr. Mulvey's lawyer, Mr. Bergersen. Id. At a later time, Mr. Mulvey stated that past negative experience with state and federal law enforcement discouraged him from reaching out to law enforcement. Id. at 10. He also did not contact the USCG because the USCG would have conducted a safety inspection which he likened to a proctology exam. Id.

On January 7, 2005, SA McCarron obtained the landings from Deep Sea and discovered that Mr. Mulvey had two (2) additional landings/overages (November 4, 2004 and November 30, 2004).

On January 14, 2005, SAs McCarron and Flanagan and Sergeant [redacted] interviewed Mr. Mulvey in Mr. Bergersen's presence concerning the fuel problem which necessitated Mr. Mulvey's early return to port.[4] The issue involved how the engine drew fuel from the two (2) 500 gallon tanks aboard the Tiger Jo. Special Master Interview with Terence Mulvey (Dec. 14, 2011). In my interview of Mr. Mulvey, he explained that the Tiger Jo's draw and returns were put inboard, two (2) inches off the bottom of the tank, which created a dead fuel situation where 200 gallons of fuel could remain in each tank, but could not be accessed. Id. According to Mr. Mulvey, he would 'literally' be out of fuel even though he had 200 gallons of fuel in each

[4] Mr. Mulvey claims that either at the January 14, 2005 interview or at another interview in this case SAs Flanagan and McCarron were so disrespectful to Mr. Mulvey that he was almost in tears, had to leave the room and returned after a walk outside. Special Master Interview with Terence Mulvey (Dec. 14, 2011).

tank. Id. SA McCarron states that it does not make sense for Mr. Mulvey to plan on staying out for twenty-four (24) hours but to then return after eleven (11) hours because of low/dead fuel. Response by SA Christopher McCarron, p. 2. In SA McCarron's experience, most vessel captains are well aware what they need for fuel when they embark on a fishing trip. Id. In his investigative report, SA McCarron states that, during the January 14, 2005 interview, Mr. Mulvey explained that roughly 15% and 25% respectively of his two (2) 500 gallon tanks (each holding 27 inches) consisted of unusable fuel. Offense Investigation Report by SA Christopher McCarron, pp. 10-11 (Feb. 1, 2005). This equals about 200 gallons of fuel in total, not for each tank. During this interview, Mr. Mulvey estimated that he had approximately 280 gallons of fuel in his tanks before his trip began (6 inches and 9 inches in the 27 inch tanks, for a total of 15 inches out of 54 inches; 15 inches/54 inches=.28; 1,000 gallons x .28 = 280 gallons). Id. This leaves about 80 gallons of usable fuel. Mr. Mulvey stated that the Tiger Jo burned approximately 150 gallons of fuel per day. Id. Based on Mr. Mulvey's numbers, he would not have had enough fuel to stay out the entire day as was his stated intention.

On February 24, 2005, EA MacDonald issued Mr. Mulvey and Porridge Hill, Inc. a three (3) count NOPS, permanently suspending the vessel and operator permits. In count 1, he charged them with failing to comply with the monkfish possession limits and landing restrictions on November 4, 2004. In count 2, he charged them with failing to comply with the monkfish possession limits and landing restrictions on November 30, 2004. In count 3, he charged them with failing to comply with the monkfish possession limits and landing restrictions on January 5, 2005.

Settlement

The parties reached a global settlement of all three (3) cases in June 2005. Mr. Mulvey and Porridge Hill, Inc. admitted that they owed a substantial debt to NOAA for the year 2000 violations charged in case No. NE 000103. Mr. Mulvey and Porridge Hill, Inc. agreed to pay a civil penalty of $40,124.74 for all three (3) cases, $4,529.30 of which was a forfeiture from the seized catch in case No. 052004; agreed to list the Tiger Jo for sale with the Athearn Marine Agency, Inc. by July 15, 2005; and agreed to sell the vessel and/or her permits by December 31, 2005. An extension for such sale could be granted (not later than June 30, 2006) in the event that there was no acceptable offer or an offer of at least $150,000 for the permit and/or vessel. After a sale and after all of Porridge Hill's debts including the penalty were paid, Mr. Mulvey and Porridge Hill could receive $25,000 from the sale, but anything in excess of $25,000 had to be turned over to NOAA. Under the agreement, Mr. Mulvey's operator's permit was suspended until June 30, 2010. Mr. Mulvey sold the Tiger Jo for $110,000 and used the proceeds to pay the NOAA penalty and some corporate debts.

Discussion

Mr. Mulvey believes that NOAA targeted him and that NOAA set out to destroy his standing in the community. He believes that NOAA has been a lot more lenient with other fishermen, but never showed him any leniency. He claims selective prosecution by SAs Flanagan and McCarron. However, EA MacDonald points out that there is no evidence of selective prosecution. Response by EA J. Mitch MacDonald, p. 15. Neither SA McCarron nor SA Flanagan initiated the investigations. Id. In the first case (NE 000103), SAs McCarron and Flanagan conducted an investigation after the Coast Guard boarded the Tiger Jo. Id. The

second case (NE 042005) was initiated by the OLE office in Gloucester when OLE contacted SA McCarron and informed him that the Tiger Jo had exceeded her 2003 multispecies DAS. Id. The last case (NE 052004) was initiated by RI Department of Environmental Management Officers and SA McCarron was assigned to follow up with the investigation. Id. EA MacDonald states that on Mr. Bergersen's January 20, 2004 letter, referenced supra, he noted that SA McCarron agreed to the modification of the permit sanction due to bad weather, which is clearly inconsistent with Mr. Mulvey's belief that SA McCarron or NOAA was prejudiced against him and treating him unfairly. Id. at 14.

With respect to Mr. Mulvey's second case, he explains that he was late with the reports, but followed the process that every other fisherman did, which was to wait until the end of the year and then file the reports. He believes that he was the first one charged with late FVTRs. However, EA MacDonald points out that [redacted] of F/V Finest Kind, whose case was reviewed in my first Report, was charged in 2001 for late reporting in 2000, but that unlike Mr. Mulvey, he did not have a prior enforcement history at the time. Response by EA J. Mitch MacDonald, p. 15.

EA MacDonald points out that at the time of the penalty assessments against Porridge Hill, Inc. and Mr. Mulvey, there was overfishing of monkfish. Response by EA J. Mitch MacDonald, p. 17. The first case (NE 000103) involved a charge for fishing for monkfish without a valid federal permit. Id. EA MacDonald points out that one (1) month after the settlement of the first case, Mr. Mulvey and the Tiger Jo began exceeding their monkfish possession limits (second case: NE 042005). Id. Both sets of violations resulted in Mr. Mulvey and the Tiger Jo catching more monkfish than they were allowed to catch. Id. EA MacDonald states that Mr.

Mulvey and the Tiger Jo fished how they wanted, when they wanted, with little to no regard for federal law. Id. He argues that Mr. Mulvey's delaying tactics in responding to the Coast Guard cutter, which had utilized a radio with a loudhailer and flashing blue lights, were consistent with trying to get into state waters before being boarded. Id. Finally, EA MacDonald points out that accurate and actual reporting of fish landings to NMFS is crucial to effective fisheries management and to the preservation of fishery resources. Id.

Under the circumstances of this case, I do not find that the penalty paid by Mr. Mulvey was excessive or that there was overzealous or abusive conduct resulting from broad and powerful enforcement authorities that led to a "forced settlement." First, apart from Mr. Mulvey's unsubstantiated speculation, there is no evidence that Mr. Mulvey was targeted by SAs McCarron and Flanagan. Second, in the first case (NE 000103), a DVD recording clearly shows that the Tiger Jo failed to stop until after the Coast Guard cutter had followed and completely circled her. Third, EA MacDonald worked with Mr. Bergersen to grant Mr. Mulvey an extension of time to collect his gear in case two (NE 042005). Fourth, EA MacDonald worked with Mr. Mulvey's lawyer to fashion a realistic and fair resolution of Mr. Mulvey's several cases. Fifth, I agree with EA MacDonald that accurate reporting of fish landings is essential to the effective management of fisheries and preservation of resources. Under the circumstances, I do not recommend any relief in this case.

Recommendation

I recommend that the Secretary take no further action in connection with this case.

Case 40

Hudson Corporation (NE950012FM/V)
F/V Gatherer

Atlantic Spray Corporation (NE050010FM/V)
F/V Atlantic

Corsair Corporation (NE950011FM/V)
F/V Corsair

Sakonnet Corporation (NE950013FM/V)
F/V Mohawk

South Channel Corp. (NE050014FM/V)
F/V Osprey

Cape Spray Fisheries, Inc. (NE950015FM/V)

James G. Spalt, Co-Principal

Former dealer/co-owner of several vessels complains that he was forced into an unfair settlement after a Coast Guard ALJ issued an adverse decision against his corporations. Complainant claims that NOAA enforcement attorneys took away his economic ability to mount an effective appeal after NOAA seized a large scallop inventory and denied him an opportunity to work in the fishing industry while his appeal was pending. Complainant settled the case for $1.5 million, was forced to sell his scallop vessels, had his federal dealer, vessel and operator permits revoked, and forfeited $543,092.10 from the proceeds of the scallop seizure.

Findings of Fact

James G. Spalt is a thirty (30) year resident of Barnstable, Massachusetts. Since 1998, he was in the construction business building single family homes around Cape Cod. After the construction business declined around 2008, he has worked as manager of a small offshore oil

supply business in Louisiana. Mr. Spalt had been in the fishing business since 1972, working first as a deckhand on board a lobster boat before gradually building and owning several scallop vessels. Mr. Spalt's fishing career was effectively terminated by NOAA in 1998.

In 1984, Mr. Spalt purchased two (2) steel scallop vessels, including the 100' Hudson, which was renamed Corsair in 1989. He also contracted to build the Atlantic and the Gatherer in 1986 and 1987 respectively. Subsequent vessels in which Mr. Spalt had an ownership interest included the Mohawk, which he built in 1992; the Osprey, which he purchased in 1994; the Tropico, which he purchased in 1995; and the Harvester, which he bought in 1995. The Harvester did not have any corresponding federal or state fishing permits. Aside from the Tropico and the Harvester, which Mr. Spalt owned in his individual capacity, each vessel was owned under separate corporations. Cape Oceanic Corporation was one of Mr. Spalt's original corporations and owned his first vessel. After he sold his first vessel, the Corporation was converted into a management company for all the vessels and paid their bills. On the advice of former legal counsel, Leonard Rose, each vessel also had a bareboat charter agreement with Mid Atlantic Corporation. Mr. Spalt and his brother, Peter Spalt, had a 50% ownership interest each in Mid Atlantic Corporation. They also had ownership interests in the other vessel corporations. In the matter of Atlantic Spray et al., 1997 WL 1402870 *7-8 (N.O.A.A.) (hereinafter "Initial Decision"). As of 1994, twelve (12) captains worked for the various Spalt vessel corporations. The Spalt brothers hired and trained the captains, directed them as to where and when to fish, called into DAS on their behalf, and controlled other aspects of their employment. Id. at 7.

At all times relevant to this complaint, Peter Spalt was responsible for calling into what he described as an increasingly complex DAS Notification System. Peter Spalt said that he delegated this responsibility to the captains because he could not handle the requirements. Special Master Interview with Peter Spalt (Jan. 12, 2012). By the time Peter Spalt delegated this responsibility to the captains, the Spalt brothers had realized that they were in violation of certain DAS call-in requirements. Special Master Interview with James Spalt (December 29, 2012).

A list of the various corporations and their corresponding vessels is provided below:

Corporation	**Vessel**
Hudson Corporation	F/V Gatherer
South Channel Corp.	F/V Osprey
Atlantic Spray Corp.	F/V Atlantic
Corsair Corporation	F/V Corsair
Sakonnet Corporation	F/V Mohawk

In 1986, James and Peter Spalt[1] founded and incorporated Cape Spray Fisheries, a vertically integrated fish company located in Hyannis, Massachusetts that received, packaged and sold primarily sea scallops, monkfish and shrimp. It also had an offloading facility in Fall River, Massachusetts. The company pioneered frozen-at-sea products and employed approximately 60-70 people. Cape Spray Fisheries: National Marine Fisheries Service Problem. James Spalt was the principal, co-owner, director and 60% shareholder of Cape Spray Fisheries. Peter Spalt was also a director and a 40% shareholder. Initial Decision, p. 8. From March 1, 1994 to February 28, 1995, Cape Spray Fisheries had approximately $4.2 million dollars in sales.

[1] Peter Spalt submitted for my review a separate application, solely challenging NOAA's refusal to grant him a federal operator permit after the 1998 Settlement Agreement. However, I have determined that Peter's Spalt's case is outside the scope of my authority. See infra, FN12.

Spalt Cases: A Brief Overview. The company concentrated primarily in offloading the five (5) scallop vessels under the Spalts' management and control. Special Master Interview with James Spalt (Dec. 29, 2011).

In the fall of 1994, SA Kevin Flanagan initiated an investigation into Cape Spray Fisheries and the other vessel corporations under the Spalts' ownership, and uncovered widespread violations of the newly promulgated Amendment IV to the Atlantic Sea Scallop Fishery Management Plan and Amendment V to the Northeast Multispecies Fishery Management Plan. The regulations became effective on March 1, 1994.[2] On February 3, 1995, several NOAA

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[2] ALJ Fitzpatrick provided a comprehensive background on the Northeast Multispecies Fishery Management Plan and the Atlantic Sea Scallop Fishery Management Plan:

"In order to prevent the collapse of the Northeast Multispecies Fishery and the Atlantic Sea Scallop Fishery, the Northeast Fishery Management Council passed the Northeast Multispecies Fishery Management Plan and the Atlantic Sea Scallop Fishery Management Plan. Both have been in effect for a number of years. The regulations at issue in this proceeding, are the Amendments to the Management Plans known as Amendment IV to the Atlantic Sea Scallop Fishery Management Plan, and Amendment V to the Northeast Multispecies Fishery Management Plan. Both of these management plans combined so called "effort control" with crew limitations and gear restrictions in an attempt to reduce the direct impact of the fisherman on the fisheries in question.

Amendment IV to the scallop management plan was prepared by the NFMS in consultation with the Mid-Atlantic and South Atlantic Fishery management Councils and, after initial approval on November 5, 1993, became effective on March 1, 1994 (Agency Ex. 2(A). This Amendment created a sea scallop year which began on March 1, 1994 and ended on February 28, 1995. As a requirement under this plan, all scallop vessel owners, ***7** operators and dealers were to hold a Federal scallop permit as specified in 50 CFR Parts 650.4, 650.5 and 650.6. A Federal Sea Scallop Limited Access Permit would allow the holder to fish in the "Days at Sea Program" established under the plan. In doing so, the plan provided that each vessel granted permission to participate in the Scallop Days at Sea program would be allocated a certain number of Days at Sea depending upon either the 1990 history or their history from 1985-1990 depending upon which history they chose. 50 CFR 650.24. Vessels participating in the Days at Sea program were allowed to land as many sea scallops as they caught on a particular trip provided the vessel had designated the trip as a sea scallop trip.

In order to track the number of days a fishing vessel is utilizing under the Days at Sea program, the

permit holder is required to notify the National Marine Fisheries Service, (hereinafter "NMFS"), telephonically by calling the Agent, Protocol Communications, when the vessel leaves port. Later, when the vessel returns, it is required to call out and indicate the time and date when the passage is terminated. Thus, the number of days during which a vessel is actually engaged in fishing can be determined by review of that data. During the period March 1, 1994 through February 28, 1995, the total number of days allocated to each vessel participating in the program was two hundred four (204). Fractional portions of the days were added together in order to total a 24-hour period.

In addition to making such calls, the regulations require the vessel owner to select one of three fisheries, Scallops, Northeast Multispecies, or "Other". The type of fishery into which the permit holder declares is critical since unlimited poundage of the species targeted can be landed and sold, yet the by-catch for fisheries not declared into is limited. For example, if the permit holder declares that scallops are targeted, the poundage of multispecies which may be caught as a by-catch is 500 pounds.

Not only do the regulations require vessel permit holders to call into the Days Sea Program, the regulations created extensive reporting requirements on behalf of the owner of the vessel and the dealer. Under 50 CFR Part 650.7(a), dealers are required to submit reports on a weekly basis providing the Regional Director with information regarding the nature and amount of scallops purchased. Vessel owners are also required to submit reports called Fishing Vessel Log Reports and are governed by the provisions of 50 CFR part 650.7(b). Fishing Vessel Log Reports are required to be submitted to NMFS at the end of each reporting month and maintained on board the vessel for one year. Each of the reports required to be filed must be accurate and timely. False statements on any of these reports are explicitly prohibited. 50 CFR part 650.9(c) (12). Further, a fishing vessel may not participate in the Atlantic Sea Scallop Days at Sea program with more than the specified number of persons on board the vessel unless authorized by the Regional ***8** Director. 50 CFR Part 650.9(b)(16). The specified maximum number of persons allowed on board any vessel participating in the Atlantic Sea Scallop fishery during the 1994-1995 fishing year was seven. 50 CFR Part 650.21.

Amendment V to the Northeast Multispecies Plan was promulgated with the intention of eliminating overfishing of the primary multispecies stocks through incremental effort-reduction, mesh-size increase, and expanding spawning area closures. Similar to the Atlantic Sea Scallop fishery, the Multispecies Fishery Management Plan also required vessel owners, operators and dealers to hold Federal Fisheries Permits. Further, it also required owners and dealers to file accurate and timely reports to NMFS. See 50 CFR Part 651. A Day at Sea program was also created for the Multispecies Fishery. (Id.) The primary difference between the Days at Sea program under Amendments V and IV is the amount of by-catch allowed. While Amendment IV provides that vessels declared into the Scallop Fishery may possess no more than 500 pounds of multispecies by-catch, the poundage of scallops possessed as by-catch under Amendment V is limited to 400 pounds of sea scallops. 50 CFR Part 651. Amendment V did, however, created a unique requirement for vessels which utilize scallop dredges to fish for multispecies. Vessels which utilized scallop dredges are not allowed to possess more than 500 pounds of multispecies regardless of whether or not the vessel declared into the multispecies fishery. Thus, there is a strong

Special Agents, including SA Flanagan, executed an administrative search warrant at the Cape Spray Fisheries facility and seized voluminous amounts of documents. Affidavit of SA Kevin Flanagan, p. 3. A subsequent investigation revealed approximately 800 documented violations, not all of which were charged, involving Cape Spray Fisheries and the scallop vessels managed by the Spalts. Spalt Case: A Brief Overview. Mr. Spalt claimed that they were not "violators by nature." Furthermore, he asserted that he had a good relationship with NOAA SAs and provided them with whatever information they requested. Special Master Interview with James Spalt (Dec. 29, 2011).

At the end of an extensive investigation, on April 1, 1996, EA J. Mitch MacDonald and EA Charles Juliand issued six (6) separate NOVAs to the above corporations and vessels, as well as to Cape Spray Fisheries, Inc., totaling $4.325 million dollars in civil penalties. The NOVAs alleged hundreds of documented violations in 1994 and 1995, including falsifying FVTRs and dealer reports, failing to submit the same, violating the DAS call-in provision by intentionally calling in late to gain fishing hours, wrongfully declaring into a management plan, landing multispecies and scallops overages, offloading fish at an unpermitted dealer, fishing without a valid permit, exceeding DAS allocations, and fishing with excess crewmembers onboard.[3] See

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disincentive to use such equipment in this fishery." Interim Action Order, pp. 6-9.

[3] Peter Spalt had actually opposed the DAS call-in requirement when he was a member of the New England Fisheries Management Council. He felt that the requirement that all vessels call into the system prior to leaving the dock discriminated against those "farther up the river." He maintains, however, that he did not intentionally fail to call into the DAS notification system to gain more DAS. Special Master Interview with Peter Spalt (Jan. 12, 2012).

Further, Mr. Spalt argued that they never employed excess crewmen on board. Specifically, he stated that some men may have left before the end of a fifteen (15) day trip because the vessel did not catch enough scallops. As a result, the captain had to take on more men to fill the gaps. At the conclusion of

Penalty Assessments. These were the first substantial enforcement actions against the Spalts. Indeed, this case was the first operation found to include wide-scale, systemic, enterprise-wide violations of the Magnuson Stevens Act. Response by EA J. Mitch MacDonald, p. 19.

EAs MacDonald and Juliand also assessed penalties against Cape Spray Fisheries, in particular, for failing to possess a valid dealer permit for scallops and multispecies in 1994-1995. In this regard, Mr. Spalt stated that, at all times relevant to this complaint, Cape Spray Fisheries possessed a valid state dealer permit. According to Mr. Spalt, until March 1994, Cape Spray Fisheries was not required to have a federal dealer permit. Mr. Spalt insisted that this was a clear oversight on their part, particularly because Cape Spray was reporting all of their offloads to NMFS. As a result, Mr. Spalt suggested that NMFS should have known that Cape Spray did not have a federal dealer permit and should have notified the company. Special Master Interview with James Spalt (Dec. 29, 2011). NOAA did not, and does not have, a duty to notify a dealer if it does not have a valid permit. Further, as EA MacDonald points out, Cape Spray Fisheries was charged with, among other charges, false reports that did not report all of their purchased amounts to NOAA. Response by EA J. Mitch MacDonald, p. 5. Cape Spray ultimately applied for a federal multispecies and scallops permit on February 17, 1995 shortly after the AIW execution. Initial Decision, p. 15.

A summary list of the NOVAs and assessed penalties is as follows:

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the trip, there were 9-10 men on the payroll because of the overlap, but Mr. Spalt insisted that he never had more than the seven (7) men onboard at one time. Special Master Interview with James Spalt (Dec. 29, 2011).

Corporations	Vessels	Assessed Penalty/Counts
1. Cape Spray Fisheries, Inc.	N/A	$646,000 (25 counts)
2. Hudson Corporation	F/V Gatherer	$722,000 (34 counts)
3. South Channel Corp.	F/V Osprey	$358,000 (19 counts)
4. Atlantic Spray Corp.	F/V Atlantic	$1,019,000 (46 counts)
5. Corsair Corporation	F/V Corsair	$783,000 (41 counts)
6. Sakonnet Corporation	F/V Mohawk	$806,000 (34 counts)

In addition to the penalty assessment, EAs MacDonald and Juliand issued NOPS that sought permanent vessel permit revocations for each of the five (5) vessels involved and permanent dealer permit revocation for Cape Spray Fisheries. NOVAs were also issued to the captains who operated the above vessels as follows:

Captain	Assessed Penalty/Permit Sanction
	$192,000
	$130,000
	$207,500 + 5 year NOPS
	$32,500
	$57,500
	$42,500
	$205,000
	$137,500 & 3 year NOPS
	$152,500 & 3 year NOPS
	$145,000
	$142,500
	$32,500

Cape Spray Fisheries hired the firm of Kearney & Silverman and Leonard Rose, Esq. for legal representation. An ALJ hearing was requested on April 17, 1996. Special Master Interview with James Spalt (Dec. 29, 2011). On April 26, 1996, NOAA GCEL filed a motion for an Interim Action to prevent Cape Spray Fisheries from operating as a dealer until a final Agency decision in the case. The Interim Action motion also sought to prevent the fishing vessels Atlantic,

Corsair, Gatherer, Mohawk and Osprey from operating in the Exclusive Economic Zone during this time.

A hearing on the motion was held before ALJ Peter Fitzpatrick between May 28, 1996 and June 4, 1996. NOAA presented ten (10) witnesses and 119 exhibits and Respondents presented two (2) witnesses and twenty-four (24) exhibits. At the conclusion of the hearing, ALJ Fitzpatrick determined that an Interim Action Order was necessary to protect marine resources and that the violations committed by the vessels and by Cape Spray Fisheries were willful. As such, there was probable cause[4] that Cape Spray Fisheries and the five (5) fishing vessel corporations were in violation of the Magnuson Stevens Act.

On August 8, 1996, ALJ Fitzpatrick issued the following Interim Action Order:

> IT IS ORDERED that the Federal Fishing Vessel Permits issued by the National Marine Fisheries Service to Atlantic Spray Corporation, Corsair Corporation, Hudson Corporation, Sakonnet Corporation, and South Channel Corporation, for the vessels: ATLANTIC, CORSAIR, GATHERER, MOHAWK, and OSPREY; and the Federal Dealer Permit issued to Cape Spray Fisheries, Inc., are hereby SUSPENDED until the final Agency decision in these cases is issued;
>
> IT IS FURTHER ORDERED that these Orders shall become effective at 0001 hours on August 15, 1996. Thereafter, these five vessels are prohibited from fishing in the Exclusive Economic Zone for any federally regulated species including scallops and multispecies.
>
> IT IS FURTHER ORDERED that Cape Spray Fisheries, Inc., is prohibited from purchasing, processing, marketing or selling any Federally regulated species including scallops and multispecies during the period of this suspension effective 0001 hours on August 15, 1996.

[4] "The standard of proof for the Interim Action is probable cause, which is lower than the preponderance of the evidence standard applied in ALJ hearings." 1996 WL 1352603 *20 (NOAA).

> IT IS FURTHER ORDERED that violations of these Orders will subject the vessel, its owners, and officers, to severe penalties under the Magnuson Act, including, civil and criminal penalties and forfeiture of the vessels.
> Interim Action Order, pp. 27-28.

James Coyne King, Esq., Mr. Spalt's counsel in connection with this Application for Review, questions the legitimacy of the Interim Order. He notes that the investigation into Cape Spray Fisheries started in 1994, and the motion for an Interim Action Order was filed in May 1996. Given the passage of time, he questions why it was necessary to seek the extraordinary relief of an interim action. Further, he argues that the "remedies do not seem to be those subject to preliminary relief." Special Master Interview with James Spalt (Dec. 29, 2011). However, this argument was raised, and rejected, at the interim action hearing. Interim Action Order, p. 21 ("Respondents argue that…the protection provided to marine resources by the interim suspension of the permit (sic) would be negligible at best…these extensive violations, if proven, could vitiate any management plan designed to protect the natural resources. Such large scale violations inflict substantial harm upon these fisheries.").

After the Interim Action Order, EA Juliand offered to settle the case for $2.5 million. According to Mr. Spalt, no one at the time had ever paid such a substantial penalty. However, he had confidence in his lawyer, Leonard Rose, who advised Mr. Spalt that they would eventually prevail. Special Master Interview with James Spalt (Dec. 29, 2011). According to EA MacDonald, there were extensive settlement discussions in these cases involving varying compromise amounts, including discussions of terms that would have allowed Mr. Spalt to continue fishing, albeit in a more limited capacity than prior to the NOVA being issued or the

interim sanction. Messrs. Spalt and Rose chose not to settle and instead, proceeded to hearings. Response by EA J. Mitch MacDonald, p. 8.

On August 13, 1996, Cape Spray Fisheries and the five (5) vessel corporations filed for Chapter 11 bankruptcy protection. Subsequently, on August 28, 1996, following the legal advice of Mr. Rose, Liberty Food Corporation was incorporated. According to Mr. Spalt, he incorporated Liberty Food in order to make a living to support his large family, which included Mr. Spalt's seven (7) children. Affidavit of James Spalt, p. 3 (May 11, 2011). Kristen Spalt, James Spalt's wife, was listed as the president, secretary and treasurer of Liberty Food, as well as the sole shareholder. Mrs. Spalt claims that in 1996 she had the knowledge and experience to operate Liberty Foods. Affidavit of Kristen Spalt (May 4, 2011).[5] The company was capitalized by a $50,000 inheritance received by Mrs. Spalt. It also borrowed $100,000 from J.P Trust, which was owned by James and Peter Spalt. J.P. Trust owned, and continues to own, the building that Cape Spray Fisheries occupied. Liberty Food listed its principal place of business at the same Hyannis, Massachusetts address where Cape Spray Fisheries was located. In fact, Liberty Food used the same equipment, telephone number, facsimile number and employees as Cape Spray Fisheries. Decision of Emergency Hearing Order, p. 3. Mr. Spalt was under the impression that the Liberty Food operation was legitimate based on legal advice from his counsel and because the company was only purchasing product from dealers. Further, he noted that it was easier to hire his former Cape Spray employees, rather than laying them off,

[5] During Kristen Spalt's testimony, it was apparent to ALJ Fitzpatrick that Mrs. Spalt was not aware of the business operations surrounding Liberty Food Corp., which led him to conclude that Liberty Food was an extension of James Spalt's activities. Decision of Emergency Hearing Order, p. 7.

because they were already familiar with the business. Special Master Interview with James Spalt (Dec. 29, 2011).

On August 15, 1996, a random inspection of the Cape Spray facility conducted by NOAA SAs revealed that Cape Spray had in its possession 112,000 lbs of frozen-at-sea sea scallops which, according to NOAA, was in violation of the Interim Action Order. Affidavit of SA Kevin Flanagan, p. 4. On several occasions in August 1996, Liberty Food was documented to have processed, packaged and sold sea scallops in violation of the Interim Action Order. Furthermore, on September 1, 1996, the F/V Tropico was involved in a scallop transaction with Liberty Food. Decision of Emergency Hearing Order, pp. 3-4.[6] Corsair Corporation, wholly controlled by James Spalt, owned the Tropico, which was not subject to the Interim Action Order. Mr. Spalt alleged that, when the Interim Action Order was issued, he called EA Juliand to inquire about the Tropico which was out at sea. EA Juliand allegedly informed Mr. Spalt that the Tropico had to offload at a dealer other than Cape Spray Fisheries, and she did so on September 1, 1996. Special Master Interview with James Spalt (Dec. 29, 2011). Liberty Food then purportedly purchased the scallops from that dealer. However, the dealer primarily marketed lobster and fish and was neither equipped to store frozen-at-sea scallops nor did it have the necessary funds to pay for the scallops until it received funds from Mr. Spalt. Decision of Emergency Hearing Order, p.3. Further, the price paid by the dealer was commensurate with that paid for merely offloading scallops from a fishing vessel rather than a purchase of offloaded scallops by a dealer. Id.

[6] I should note that Peter Spalt was not involved in, and was opposed to, the landings made by the Tropico. In fact, he wrote a concerned letter to Mr. Rose dated October 9, 1996, questioning whether the Tropico was in violation of the Interim Action Order. Letter from Peter Spalt to Leonard Rose, Esq. (Oct. 9, 1996).

On September 12, 1996, SA George Bell was denied entrance into the Cape Spray facility for an inspection, which prompted SAs Louis Jachimczyk, George Bell, and Kevin Flanagan to enter the facility the next day to enforce the Interim Action Order. Affidavit of SA Kevin Flanagan, p. 9 (Dec. 6, 1996). Upon entering the facility, the Agents noticed several employees working on a large metal table covered with scallops. They also noticed several empty boxes with the label, "Cape Spray Fisheries, Inc." The boxes all had a small label affixed to each of them that read, "Distributed by: Liberty Food Corporation." Id.

A discussion ensued between James Spalt and the SAs. Mr. Rose was contacted and he informed the SAs that Liberty Food Corporation was packaging the scallops and that the SAs were there illegally. SA Flanagan and Bell contacted EAs J. Mitch MacDonald and Charles Juliand, who instructed the SAs to issue an EAR to James Spalt and to the other employees for obstructing an investigation. Id. at 10. Eventually, the SAs were allowed to inspect the premises and discovered thousands of pounds of packaged sea scallops in freezers with the same "Cape Spray Fisheries" logos and small "Distributed by: Liberty Food Corporation" stickers affixed to the sides of the boxes. Id. at 13. It was during this inspection that the SAs seized 3,285 lbs. of "Cape Spray Fisheries" sea scallops from the facility. Id.

The inspection prompted an emergency hearing before ALJ Fitzpatrick on October 2, 1996 concerning whether Cape Spray Fisheries and James Spalt violated the Interim Action Order. ALJ Fitzpatrick concluded that Liberty Food Corporation operated as Cape Spray Fisheries' alter ego for the sole purpose of circumventing the Interim Action Order. He would later issue a formal decision on December 19, 1996. In the interim, ALJ Fitzpatrick issued the following Order on October 4, 1996:

1. Agency's Emergency Motion for a Finding of Fact that Cape Spray Fisheries, Inc. has purchased, processed, sold, and marketed Atlantic Sea Scallops in violation of the Interim Action Order is GRANTED.

2. Agency's additional Motion to Extend the Interim Action Order to prohibit James G. Spalt and the employees and/or agents of Cape Spray Fisheries, Inc. from selling, marketing, purchasing or processing Atlantic Sea Scallops in commercial transactions is GRANTED.

Accordingly, it is further ORDERED that:

1. James G. Spalt, Peter Spalt, and any of the employees and/or agents of Cape Spray Fisheries are prohibited from selling, marketing, purchasing, possessing or processing Federally regulated Atlantic Sea Scallops for commercial purposes.

2. Any commercial transactions conducted by Liberty Seafoods, Inc., any successor in interest, or any other corporation which utilizes the equipment, facilities, buildings, packaging, logos, employees, intellectual property or any of the vehicles of James G. Spalt, Peter Spalt or any of the corporations in which they have an interest, will be considered a violation by Cape Spray Fisheries of the Interim Action Order.

3. The Agency is authorized to take appropriate enforcement action to ensure that this Order is not circumvented again. Such action may include the seizure of any and all instrumentalities of Cape Spray Fisheries and Jim and/or Peter Spalt and/or the criminal prosecution of the alleged offenders.
   Order on Emergency Hearing (Oct. 4, 1996).

On October 4, 1996, NOAA SAs seized 105,759 lbs. of Atlantic Sea Scallops from the Cape Spray facility pursuant to the Emergency Order. Affidavit of SA Kevin Flanagan, p. 14 (Dec. 6, 2006). Richard Cohen, Cape Spray Fisheries et al.'s bankruptcy counsel, was present during the seizure. He stated that the SAs ignored his attempt to inform them that the frozen sea scallops were subject to the automatic stay from the U.S. Bankruptcy Court and that NOAA had no right to seize the product. Special Master Interview with Richard Cohen (Jan. 12, 2012).

However, pursuant to 11 U.S.C. §§ 362(b)(4),[7] it would appear that NOAA, as a government unit, had the authority to enforce the Emergency Action Order by seizing the scallops. Response by EA J. Mitch MacDonald, p. 12.

On October 31, 1996, the Chapter 11 proceedings for Cape Spray Fisheries and the corresponding vessel corporations were dismissed without any finding by the Bankruptcy Court that NOAA violated the automatic stay. On December 6, 1996, after the bankruptcy case had been dismissed and the automatic stay dissolved, the United States Attorney's Office filed an action in United States District Court for the forfeiture of approximately 3,285 lbs. and 105,759 lbs. of Atlantic Sea Scallops, which NOAA had previously seized on September 13, 1996 and October 4, 1996 respectively. On December 16, 1996, the property seized was sold for $551,586.25. Mr. Spalt claimed that the scallops were worth more than $1 million dollars, but the seizure adversely affected the value of the scallops.[8] Special Master Interview with James Spalt (December 29, 2011). The sale of the scallops was approved by a U.S. District Court Judge on December 24, 1996. See U.S. v. Approximately 105,759 Pounds Of Atlantic Sea Scallops, Or

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[7] **(b)** The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, **does not operate as a stay**—

> (4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or **proceeding by a governmental unit** or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power (emphasis added);

[8] The scallop bidding process involved eighteen (18) potential buyers with six (6) of the eighteen (18) placing bids for the scallops. See Attachment B to United States' Response in Opposition to Claimants' Motion to Vacate Order Approving Sale and the Table of Exhibits.

The Fair Market Value Thereof And Approximately 3,285 Pounds of Atlantic Sea Scallops, Or The Fair Market Value Thereof, Civil Action #96-12469-DPW (D. Mass.).

A hearing on the merits by ALJ Fitzpatrick was held November 4-6, 1996. On April 2, 1997, ALJ Fitzpatrick issued an Initial Decision. Mr. Spalt's testimony was very limited and Peter Spalt did not testify at Mr. Rose's insistence. In his decision, ALJ Fitzpatrick wrote that "[b]y far this is the largest fisheries fraud case brought under the Magnuson Act since its enactment in 1976" and that the Spalts "pervasively violated the fishery management plans…" Initial Decision, p. 2. He found that the allegations in the NOVAs against Cape Spray Fisheries, Hudson Corporation (Gatherer), South Channel Corporation (Osprey), Atlantic Spray Corporation (Atlantic), Corsair Corporation (Corsair), and Sakonnet Corporation (Mohawk) were substantiated. As such, the violations warranted the imposition of significant penalties, including personal liability for both James and Peter Spalt. In that connection, ALJ Fitzpatrick wrote: "[F]ailure to pierce these corporations would allow James and Peter Spalt to continue forming these sham entities for the purposes of violating the law with personal impunity, which I find legally intolerable."[9] Initial Decision, p. 25. He upheld NOAA's penalty assessment and permit sanctions. ALJ Fitzpatrick reasoned:

> I recognize that the imposition of high civil penalties and the permanent revocation of the five fishing vessel licenses will have a substantial impact upon

[9] ALJ Fitzpatrick cited two (2) primary reasons for piercing the corporate veil and finding individual liability against the Spalts. First, Mr. Rose's failure to adhere to the Court's discovery orders created an adverse inference against the Spalts pursuant to 15 CFR Part 904.240(f). The adverse inference drawn was that the Spalts "exercised intimate control over all the multi-layered corporations in this case." Second, ALJ Fitzpatrick applied federal law and concluded that the Magnuson Act did not place great emphasis on the corporate form because the legislative intent of the Act was to "protect a vital national resource from being illegally exploited by unscrupulous individuals." Initial Decision, p. 24.

> the families, crew and employees of Cape Spray Fisheries. It is unfortunate that in order to compensate for the damage done by two individuals, so many must suffer the consequences. In light of this, the penalty assessment reached has been seriously considered and is not entered lightly. Id. at 29.

In total, ALJ Fitzpatrick upheld a combined civil penalty of $4,325,000, revoked Cape Spray Fisheries, Inc.'s dealer permits, and revoked all federal fishing permits on the five (5) vessels involved.[10] Cape Spray Fisheries et al. appealed the decision to the NOAA Administrator, who upheld the ALJ's decision. Cape Spray Fisheries, et al. then appealed this case to the United States District Court. James Spalt et al. v. United States (Civil Action No. 96-12176). In connection with the Initial Decision, Mr. Rose filed two (2) related complaints in the United States District Court on August 7, 1997: Liberty Food Corp., et al. v. Fitzpatrick (Civil Action No. 97-cv-11784-DPW) and Liberty Food Corp., et al. v. Juliand, et al. (Civil Action No. 97-cv-11785-DPW). The complaints alleged that ALJ Fitzpatrick and EA Juliand et al. violated the Fourth, Fifth, and Ninth Amendments of the United States Constitution of Liberty Food Corporation, Cape Spray Fisheries, and James, Kristen, and Peter Spalt. The complaint challenged NOAA's seizure of the 105,759 lbs. and 3,285 lbs. of Atlantic sea scallops pursuant to the Emergency Hearing Order.

[10] As a side note, Kristen Spalt was the sole owner and director of Albatross Corporation, which was the registered owner of the latent permit for F/V Cape Star. Further, James Spalt was the owner and director of Dutchman Corporation, which was the registered owner of the latent permits for the Harvey Gamage, Explorer and Rodman Swift IV. However, Albatross Corporation and Dutchman Corporation were both denied their permit renewal applications in 1996 because the two (2) corporations shared common shareholders and directors with Cape Spray Fisheries, et al. In a subsequent but related case, ALJ Fitzpatrick upheld the latent permit denials. In the matter of: Albatross Corporation, Dutchman Corporation, 1997 WL 1402881 (N.O.A.A.). Mr. Rose appealed the decision to the United States District Court. The case was subsequently dismissed with prejudice after the 1998 Settlement Agreement. See infra.

Sometime in mid-1997, James Coyne King, Esq. was engaged as counsel for the Spalts and Cape Spray Fisheries, Inc. et. al. in order to "consolidate proceeding [and] to bring some semblance of order to all the matters and to begin discussions concerning a comprehensive settlement." Application for Review, p. 5. Mr. King met with EAs MacDonald and Juliand on July 3, 1997 and two (2) other days in Gloucester in order to explore settlement options. Mr. King thought the meetings were productive and could lead to an amicable resolution. See Letter from James C. King, Esq. to EAs Charles Juliand and J. Mitch MacDonald (July 10, 1997). However, EAs MacDonald and Juliand thought differently. They wrote:

> As we discussed today, there will be no further settlement discussions. Our view of the settlement discussions is starkly different from yours. We spent three days talking and couldn't agree on anything. Letter from EAs Mitch MacDonald and Charles Juliand to James C. King, Esq. (July 10, 1997).

Later, EAs MacDonald and Juliand wrote:

> We will only engage in settlement discussions with you after you send us a signed settlement agreement (you may modify our last offer) that forfeits to the NOAA the Respondents' entire interest, right, and title in the seized proceeds and forward to us the financial information you referenced in your August 5, 1997 [letter]. Thank you. Letter from EAs J. Mitch MacDonald and Charles Juliand to James C. King, Esq. (Aug. 6, 1997).

Mr. King attempted to negotiate further on his clients' behalf but NOAA refused to continue those discussions. Mr. King then proceeded to negotiate with the United States Attorney's Office, in particular with Assistant United States Attorney (AUSA) John Capin, who worked with Mr. King on behalf of NOAA during the fall of 1997 to attempt to settle the case.[11]

[11] At the request of EA MacDonald, I sent a copy of my Provisional Findings of Fact to AUSA Capin for his comments on February 29, 2012. On March 12, 2012, AUSA Capin contacted me by telephone and informed me that he has no suggested comments concerning my Provisional Findings of Fact.

On November 24, 1997, Mr. King entered appearances to represent the Spalts in Liberty Food Corp., et al. v. Peter A. Fitzpatrick and Liberty Food Corp., et al. v. Charles Juliand, et al. and subsequently filed Notices of Voluntary Dismissal in both cases. Meanwhile, Attorney Rose, citing conflicts of interest between his representation and Mr. King's representation, filed a motion to withdraw as counsel. Motion of Claimants' Counsel for Leave to Withdraw on Grounds of Conflict of Interest (December 22, 1997). That motion was allowed.

On January 30, 1998, the United States Attorney's Office, acting as an agent of the Department of Commerce and NOAA, along with the Spalts', on behalf of all their related corporations, signed two (2) Settlement Agreements to resolve all pending issues and cases. In the first Settlement Agreement, the Spalts agreed that Atlantic Spray Corporation and Hudson Corporation would surrender all of their federal vessel permits and would sell the Atlantic and the Gatherer. Further, the parties stipulated to the dismissal of James Spalt et al. v. United States with prejudice. Settlement Agreement (1).

In the second Settlement Agreement, the Spalts agreed to surrender, forfeit and relinquish any right, title and interest in the proceeds for the sale of 105,759 lbs. and 3,285 lbs. of seized Atlantic sea scallops, which was the subject matter of Civil Action No. 96-12469 DPW (See supra, p. 15), agreed to sign and file a Stipulation of Settlement concerning that case and assented to a Motion for Judgment of Forfeiture in that case. Stipulation of Settlement. They also agreed to cease all federal and state fishing permits on all their corporations and vessels, including the latent permits owned by Albatross Corporation and Dutchman Corporation. The Spalts also relinquished their federal operator permits and must cease commercial fishing entirely in state and federal waters (except for the Tropico and, if the Tropico was unable to

fish, then the Harvester, but only in state waters). However, they agreed to sell the Tropico within two (2) years of the Agreement. The Spalts also agreed to sell the Osprey, Mohawk and Corsair along with valid permits over a period of time (designed to provide an opportunity to obtain maximum value) in order to pay the Settlement amount of $1.5 million for both agreements.[12] Settlement Agreement (2).

[12] Notably, the Agreement reads, in relevant part:

> On or before January 30, 2000, the Spalts shall cease to fish commercially in state-regulated or unregulated fisheries with the F/V Tropico and shall not thereafter participate directly or indirectly or have any interest in any commercial fishery, state or federal, regulated or unregulated, without the written consent of NOAA and its Office of NOAA General Counsel. Nothing in this paragraph or in this Agreement shall require NOAA to give such written consent or preclude the Spalts from requesting such consent.

Thirty (30) months after signing the Settlement Agreement, the Spalts requested to re-enter the federal fisheries. However, NOAA declined to grant the Spalts a federal operator's permit. The Spalts later sought relief in the United States District Court concerning the above provision. In the end, the Court held that NOAA's denial of the Spalts' fishing permit applications did not violate the terms of the Settlement Agreement. Spalt et. al. v. United States of America, 2002 WL 1465769 (D. Mass.). Peter Spalt continued to re-apply for a federal operator's permit every year since 2002. In or around 2007, Peter Spalt was granted a federal operator's permit by the NMFS Permit Office without expressed written consent by NOAA General Counsel. In turn, he telephoned EA MacDonald to thank him for the opportunity to fish again. Peter Spalt alleged that EA MacDonald threatened to send two federal agents to his house to repossess the permit. Special Master Interview with Peter Spalt (Jan. 12, 2012). Peter Spalt rectified this issue by returning the operator permit to NMFS. In a March 13, 2007 letter to Peter Spalt, EA MacDonald wrote:

> …you agreed on page 10 of your settlement agreement with the Agency to not have any interest in any commercial fishery "without the written consent of NOAA and its Office of NOAA General Counsel." You have sought this consent repeatedly in the past from this regional office, the highest levels of the Office of General Counsel, and at the highest level in the NMFS. Your requests have been denied, and I have been told consent will not be given.

Mr. King negotiated the settlement with the intention that the Spalts could one day return to fishing. He would never have advised his clients to settle, nor would his clients have settled if that were not the

On February 2, 1998, a United States District Court Judge issued a Judgment and Order of Forfeiture on 105,759 lbs. and 3,285 lbs. of seized scallops, totaling $543,092.10. Judgment and Order of Forfeiture (Feb. 2, 1998).

Discussion

Mr. Spalt claims he lost a total of $9 million from this case: $1.5 million cash penalty, $543,092.10 in the forced sale of his scallop inventory, $3 million dollars for the revocation of his six (6) latent fishing permits ($500,000 each); $3 million for the failure to reissue said permits; and $1 million for the cancellation of his federal dealer permit. He seeks the return of $7 million, the reactivation of his latent fishing permits and an additional $6 million in opportunity costs for not having the latent permits for the last six (6) years since 2005. Application for Review, pp. 9-10.

Mr. King alleges that EAs Juliand and MacDonald's conduct throughout settlement discussions was broad, arbitrary, and constituted an abuse of regulatory power because they forced the Spalts into a settlement dictated purely by their terms. According to Mr. King, "every step was taken, in seizing the inventory and vessels and actions after the seizures, to make certain that Mr. Spalt suffered the worst possible harm and incurred the most possible costs." Application for Review, p. 4.

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case. Mr. King noted that if the Spalts are effectively barred from fishing for life, the right to apply for a fishing permit pursuant to the Settlement Agreement was and is illusory. Special Master Interview with James Spalt (Dec. 29, 2011).

In their Application for Review, the Spalt's have requested, *inter alia*, that I review whether NOAA's denial of their fishing permits was justified. However, pursuant to Secretary Locke's March 16, 2011 Secretarial Memorandum, it is beyond my authority to revisit this issue because a United States District Court Judge has rendered a decision on the matter. Spalt et al. v. U.S., 2002 WL 1465769 (D. Mass).

Mr. Spalt argues that the captains involved in this case paid nominal monetary penalties, were allowed to pick the days to serve their respective operator permit sanctions, and were allowed to reenter the fisheries after a certain period of time. The relatively light penalties and permit sanctions the captains received from NOAA compared to the related Cape Spray Fisheries penalties leads Mr. Spalt to suspect that NOAA was "after" him in order to reach his company's assets. Special Master Interview with James Spalt (Dec. 29, 2011).

Mr. Spalt is also critical of the lack of compliance education for the newly promulgated regulations in 1994. The lack of education available, Mr. Spalt asserts, undermined NOAA's mission of environmental conservation. Further, Mr. King suggests that, since the penalty schedule today is roughly 40% of the penalty schedule in 1995, the penalties then were excessive. Mr. Spalt asserts that Cape Spray Fisheries and related corporations were the first to receive such significant penalties. Special Master Interview with James Spalt (Dec. 29, 2011). The significant penalties ended his and his brother's ability to make a living for his seven (7) children and Peter Spalt's five (5) children. Mr. Spalt said that he could not believe that the rules change would be so substantial that they could "wipe out" his successful business completely. Id.

In response, EA MacDonald argues, first, that the present case falls outside of my authority as Special Master because a United States District Court has issued a decision on the issue. Spalt et al. v. U.S., 2002 WL 1465769 (D. Mass.). Under the Secretarial Decision Memorandum dated March 16, 2011, NOAA law enforcement cases that have been decided by a federal court are ineligible for my review. However, I have previously determined that the decision in Spalt et. al. v. U.S., 2002 WL 1465769 (D. Mass.) turned on the issue of the Spalt's

indefinite permit sanction only, and not the civil monetary penalty. See Letter from Special Master to James C. King, Esq. (July 11, 2011). Therefore, I have authority to review the merits of this case as it pertains to the civil penalty assessment and settlement.

Next, EA MacDonald responds that 1) the penalty assessment against Mr. Spalt and his related corporations was supported by substantial evidence; was within the statutory guidelines concerning penalties; and was reasonably related to the Spalts culpability in this case; and 2) NOAA did not force a settlement upon the Spalts. In support of his penalty assessment argument, EA MacDonald states that the civil penalties were assessed in good faith, and were reasonably related to the nature, circumstances, extent, and gravity of the violations and the respondents' culpability and prior enforcement history.

Further, EA MacDonald argues that the Spalts' culpability was significantly higher than that of the vessel operators, thus justifying the difference in penalty assessments. By comparison, the operators collectively had four (4) permits revoked, a total of fifty seven (57) months of operator permit sanctions, and $34,700 in total compromised penalties. As an owner of the enterprise and leader of the illegal activities, Mr. Spalt committed more violations overall and a wider variety of violations than did the operators. Initial Decision, p. 29 ("Indeed, there were numerous violations of the Magnuson Act by the Spalts which did not include any actions on the part of the captains. These included the call in violations, failing to get proper permits, selling the catch to a non-permitted dealer, and disregard of the Days at Sea program.").

According to EA MacDonald, the Spalt brothers also had a different level of culpability than the operators who were acting under their orders. ("The captains testified that James or

Peter Spalt instructed them on how to falsely fill out the fishing vessel trip reports, never refused to accept an oversized catch and pressured the captains to engage in legal (sic) activity or lose their jobs." Initial Decision, p. 28.) None of the captains owned their own businesses, and they had a lesser financial ability to pay than did the Spalts. See Interim Action Order, pp. 22-26; see also Initial Decision, p. 1 (stating "[i]nstead of factually rebutting the allegations made by the Agency, Respondents attempted to blame the individual captains of the vessels, claiming no responsibility as owners of said vessels upon which thirteen separate captains committed identical offenses… . None of the companies…were owned or operated by any person other than James or Peter Spalt. James and Peter Spalt managed virtually every aspect of each of these companies."); see also Initial Decision, p. 29 (stating "[i]n light of the extent of the violations which occurred here, and James Spalts (sic) central role in supervising and directing the filing of fraudulent reports to the National Marine Fisheries Service, Respondents' claim that the applications were accidentally misplaced is not believable."). Last, EA MacDonald asserts that none of the operators were involved in violating the Interim Action sanctions. Response by EA J. Mitch MacDonald, p. 17.

With respect to the forced settlement issue, EA MacDonald argues that Mr. King's negotiations with AUSA Capin, over NOAA's objections, are evidence that NOAA did not force a settlement in this matter. At times it appeared that settlement was imminent, only to have the discussions break down when considering the details. EA MacDonald states that there finally came a point during the negotiations with Mr. King when NOAA considered the negotiations fruitless and over. According to EA MacDonald, NOAA was ready to proceed to the District Court hearing in these matters and was not interested in forcing a settlement. The settlement

agreement entered into by the parties is evidence that further negotiations occurred and were not forced. Id. at 15.

Finally, EA MacDonald responds that Mr. Spalt does not complain that the civil penalty was excessive, but that the seizure of scallops from his facility forced him to settle. However, the U.S. Attorney's Office filed suit against these proceeds, the U.S. District Court approved the sale of scallops and eventually, with the agreement of the parties, the U.S. District Court entered judgment that approved the forfeiture of the proceeds from the sale of the scallops. Id. at 21.

Under the Secretarial Decision Memorandum of March 16, 2011, I am permitted to review cases that exhibit conduct specifically enumerated in the OIG September 2010 Report, including "broad and powerful enforcement authorit[y] [that] led to overzealous or abusive conduct." In this case, Messrs. Spalt and King complain that the entire enforcement action, including the seizure and sale of scallop inventory, and settlement negotiation process with EAs MacDonald and Juliand, amounted to broad and powerful enforcement authority. Such authority, they claim, forced settlement on terms dictated by EAs Juliand and MacDonald.

Based on an evaluation of the totality of the circumstances and evidence in this case, I cannot find by clear and convincing evidence that NOAA exercised broad and powerful enforcement authority that prejudiced the outcome, in any respect, or unfairly forced a settlement.

First, an ALJ made substantial findings of fact concerning the liability of Cape Spray Fisheries, the Spalts and their related corporations. I cannot disturb these findings of fact because, unlike the ALJ, I do not have access to all the testimony, witnesses, and exhibits

presented during the hearing. As such, I cannot consider Mr. Spalt's arguments concerning his and his brother's lack of culpability with respect to the newly implemented scallop and multispecies regulations that were in effect at the time. Further, I cannot consider Mr. Spalt's argument that the lack of compliance education contributed to the numerous violations in this case. Although the ALJ found that some violations involved Cape Spray's failure to possess a federal dealer permit, which I find to be inadvertent because there was no economic benefit to not having a dealer permit, many more violations involved intentional acts by the Spalt brothers, including directing captains to falsify FVTRs and intentionally filing false dealer reports. Such intentional acts cannot be justified by ignorance of the regulations. Nor does Mr. Spalt challenge the penalty assessments other than a broad assertion that NOAA assessed maximum penalties for each alleged violation. In fact, EA MacDonald has pointed out that there were approximately 800 total violations, not all of which were charged. This necessarily undermines Mr. Spalt's challenge of the penalty assessment. My review of this case, therefore, is relegated to the fairness of the settlement negotiation process after the ALJ made adverse findings against the Spalts and their related corporations.

Second, I note that NOAA brought a proper Interim Action against Cape Spray Fisheries, et al., and, upon Mr. Rose's legal advice, Mr. Spalt violated the Interim Action Order by forming Liberty Food Corporation and continuing the prohibited business. Mr. Spalt claims that he believed his lawyer at the time when he assured him of the legality of forming a new corporation to continue in business. However, a reasonably prudent person would have understood the potential ramifications of forming a new corporation to avoid the ALJ's Interim Action Order. In fact, Mr. Spalt's own brother understood the significance of the Interim Action

Order and even objected to the Tropico fishing, which may be construed as a violation of that Order. See Letter from Peter Spalt to Leonard Rose, Esq. (Oct. 9, 1996).

As a result, the creation of Liberty Foods spawned an Emergency Action Order against Cape Spray Fisheries, which permitted NOAA to "take appropriate enforcement action to ensure that this Order is not circumvented again. Such action may include the seizure of any and all instrumentalities of Cape Spray Fisheries and Jim and/or Peter Spalt and/or the criminal prosecution of the alleged offenders." Decision of Emergency Hearing Order, p. 9. Despite Mr. Cohen's claim that the seizure violated the automatic stay imposed by the United States Bankruptcy Court, I agree that the seizure was appropriate under 11 U.S.C. §§ 362(b)(4). A U.S. District Court judge has also approved the validity of the seizure, sale and forfeiture of the proceeds of the sale. There is no evidence to suggest that NOAA exerted overbroad enforcement authority in seizing the 105,759 lbs. of scallops, nor is there evidence to suggest that NOAA intentionally seized the scallops as a means to force settlement. Rather, NOAA reacted to an intentional decision by Mr. Spalt and his legal counsel to form Liberty Foods in order to circumvent the Interim Action Order.

Third, an ALJ found against Cape Spray Fisheries, the Spalts, and their related corporations on each of the violations outlined in the six (6) NOVAs. The violations charged were substantial because of the size and scope of Cape Spray Fisheries' operations. The ALJ upheld the $4.325 million dollar combined civil penalties against the various Spalt corporations, as well as upholding dealer, vessel, and operator permit sanctions.

The subsequent settlement negotiations by Mr. King were held against this case history. When Mr. King took over settlement negotiations from Attorney Rose, the Spalts collectively

faced a $4.325 million civil penalty judgment and permanent dealer and vessel sanctions. Settlement negotiations between NOAA and Mr. King could, at best, be characterized as fractured. At one point, EAs MacDonald and Juliand refused, in writing, to continue negotiations with Mr. King until Mr. Spalt forfeited the proceeds from the scallop seizure. At this point, AUSA Capin had to intervene and negotiate a settlement with Mr. King, who, as an able and experienced lawyer, was able to reduce the penalty from $4.325 million to $1.5 million. The $1.5 million penalty is significantly below the $2.5 million offer of settlement made by EA Juliand prior to the ALJ entering judgment against the Spalts.

Based on the facts of this case, there is no evidence to support Mr. King's claim that the settlement process was unfair, since the end result was a settlement well below the ALJ's decision upholding the original assessment of $4.325 million.

I note, however, that the Spalts agreed to the settlement with the expectation that they would someday be allowed to return to fishing after several years. I find this assertion credible. Despite the language in the Settlement Agreement, see supra, FN12, I find that NOAA, from the beginning, never intended to allow the Spalts to return to fishing in any capacity. The Spalts were not aware of that fact when they signed the Settlement Agreement. See Letter from EA J. Mitch MacDonald to Peter Spalt (Mar. 13, 2007). In fact, Mr. King stated that he would never have recommended settlement if the intent was to permanently remove the Spalts from fishing. Judge Stearns, in Spalt et. al. v. U.S., 2002 WL 1465769 (D. Mass.), upheld NOAA's discretion to continually deny an operator's permit to the Spalts. However, it has been over fourteen (14) years since the Spalt brothers were removed entirely from the fishing industry. The Spalt brothers have paid a substantial penalty, both financially and emotionally, for the

violations. It may now be appropriate to review the Spalts' requests to reenter the fishing industry as permitted vessel operators. This is a suggestion and not a recommendation.

Recommendation

I recommend that the Secretary take no action concerning this Application for Review.

Case 60A
NE 960055 FM/V
F/V Midnight Sun
Thomas P. Testaverde, Operator
Lisa T. Corp., Owner

Corporate vessel owner complains about an excessive penalty in a case involving negligent mending of a net resulting in an improperly attached finfish excluder device.

Findings of Fact

Thomas P. Testaverde is a 4th generation commercial fisherman who lives in Gloucester, Massachusetts. He has been fishing since he was eight (8) years old and his son is also a fisherman. Captain Testaverde has two (2) brothers who are captains and another brother, at some point, worked for NMFS. In June of 1979, Captain Testaverde, through Lisa T. Corp., bought the fishing vessel Sea Fox. Shareholders of the Lisa T. Corp. were Captain Testaverde, his father, his father-in-law, his mother-in-law, and his wife. The Sea Fox was a thirty (30) year old, wooden, fifty-seven (57) foot, eastern rig vessel. Captain Testaverde fished with his father for a year or two on the Sea Fox, and then became operator of the vessel. He was captain of the Sea Fox until sometime in 1990 when he began operating the White Dove, a ninety (90) foot fishing vessel. He operated the White Dove out of Gloucester for 1.5 to 2 years until she was sold. The Lisa T. Corp. sold the Sea Fox in 1992. In 1992, Captain Testaverde, through the Lisa T. Corp., purchased fishing vessel Wendy II and renamed her Midnight Sun. Captain Testaverde, his father, his father-in-law, his mother-in-law, and his wife remained shareholders of the Lisa T. Corp. at that time. The Midnight Sun is a seventy (70) foot steel trawler, used as both a day and trip boat. In 2008, the Lisa T. Corp. sold the Midnight Sun and purchased a vessel that was renamed Midnight Sun. Currently, Captain Testaverde's wife, Rosanne

Testaverde, is the sole stockholder of the Lisa T. Corp. Captain Testaverde was operator of both the first and second Midnight Sun.

On February 21, 1996, the Midnight Sun was fishing for shrimp in Ipswich Bay, Massachusetts. The Coast Guard hailed the Midnight Sun, asked a few questions, and left. Due to bad weather, the other fishing vessels in the area returned to port, but Captain Testaverde decided to continue fishing. The Coast Guard returned and at 4 pm they boarded the Midnight Sun. Captain Testaverde was asked to haul back. However, he could not get the winch engine started. This had happened to the vessel previously because of leaking injectors. The fuel went into one of the cylinders and caused a hydraulic lock. Attempts to fix the problem, which even included an examination by a USCG engineer, were unsuccessful. Finally around 10 pm, the vessel's mechanic responded to prior calls and the problem was fixed. The crew hauled back. When the cod end was emptied there were legal sized cod, lobster and other miscellaneous ground fish that should not have made it through the grate. Inspection of the grate revealed that it was improperly rigged. USCG Officer [redacted] asked how the grate was tied into the net. The Midnight Sun's engineer looked at it and noticed that there was a problem with how the finfish excluder device was attached. The engineer explained that during the previous haul back a rock had ripped the corners of the net, damaging it. The engineer had made an honest mistake in mending the net.

On February 21, 1996, Officer [redacted] issued an EAR to Captain Testaverde for improper use of a fish excluder device.

On December 31, 1996, EA Juliand issued a NOVA, in which he charged the Lisa T. Corp. and Captain Testaverde with one (1) count of fishing for shrimp with an improperly installed

finfish excluder device. He assessed a $35,000 civil monetary penalty. Accompanying the NOVA was a NOPS, suspending the operator's permit for six (6) months and a second NOPS, suspending the vessel's permit for sixty (60) of its available DAS.

Captain Testaverde engaged the services of legal counsel J. Michael Faherty, Esq. and requested a hearing before an ALJ. While the case was pending, Captain Testaverde was not allowed to participate in an experimental fisheries program. Captain Testaverde had 25 years of whiting fishing experience (perhaps the most among Gloucester fishermen) and this was the only area open for whiting fishing. He was one of the first people using innovative fishing technologies in Massachusetts, but the pending case with NOAA prevented him from obtaining a permit to fish in state waters within the three (3) mile limit.

The parties reached a settlement in November 1997. Captain Testaverde and the Lisa T. Corp. admitted the violation alleged in the NOVA and agreed to pay a compromise civil penalty of $18,912.50 (which consisted of $17,600 plus 5% interest) at $500 per month for seventeen (17) consecutive months with a final payment of $10,412.50. Captain Testaverde agreed to serve a sixty (60) day operator sanction in six (6) ten (10) day blocks and the Lisa T. Corp. agreed to serve a twenty (20) DAS vessel permit sanction.

Captain Testaverde made a post-settlement appeal to NOAA's General Counsel. In response, on January 7, 1998, Michele Kuruc sent a letter to Captain Testaverde's lawyer, Mr. Faherty. She wrote that, given the circumstances of the case, the permit sanctions would be removed and the scheduled monthly payments would be reduced from $500 to $400, but that the interest rate of 5% would remain in effect and that the final amount of $10,412.50 would

remain unchanged. She explained that the modification was based on unique facts and that this case will not be deemed precedent in other cases.

On July 19, 1999, NOAA Collections Attorney sent a letter to Mr. Faherty, confirming that payments would be made pursuant to the new payment schedule: $400 a month from July 15, 1999 to October 15, 1999 and a final payment of $8,812.50. Lisa T. Corp.'s final payment check of $8,812.50 reflects that it was "paid under protest." Check No. 2016 (Nov. 11, 1999).[1]

Discussion

The question presented in this case is whether the assessment and sanctions, taken together, resulted in an excessive penalty that unfairly forced settlement. Captain Testaverde states that he was compelled to settle the case because he could not afford to continue the appeal process and risk the potential result of having to pay the originally assessed penalty of $35,000 and serve a six (6) month operator sanction and a sixty (60) day vessel permit sanction. Though the originally assessed vessel permit sanction was for sixty (60) days, in actuality, the vessel would be tied up for six (6) months while Captain Testaverde served his sanction. EA Juliand responds that Captain Testaverde was not compelled to settle his case because of his ability to request a hearing before an ALJ. Response by EA Charles Juliand, p. 6. That is a typical response from EA Juliand who knows full well that, faced with a maximum penalty, a fisherman who is offered a settlement for a lesser amount is hard pressed not to settle for that lesser amount because of the perceived likelihood of the original, maximum penalty being affirmed by

[1] I am unable to resolve why the final payment was $8,812.50 instead of $10,412.50. I can only conclude that before Captain Testaverde made a final payment of $8,812.50, he had made four (4) monthly payments of $400 for a total of $1,600.

an ALJ. EA Juliand denies that this is the case, but I find that this is indeed the perception of every fisherman, dealer and lawyer I interviewed during this year and a half investigation.

EA Juliand argues that there are serious questions about whether an "honest mistake" was made in mending the net. Response by EA Charles Juliand, p. 4. He states that the required escape opening had been covered entirely by orange netting sewn in by the crew and the grate was left to swing open, like a gate, within the net. Id. This "mending" rendered the gate useless and sent all groundfish that entered the mouth of the net into the codend along with the shrimp, instead of swimming out to freedom. Id. EA Juliand claims that a person legitimately mending the net would not methodically disable an escapement device and that, as a result of the improper mending, the Midnight Sun was effectively fishing for both groundfish and shrimp with a net mesh that was much smaller than that allowed for groundfishing alone. Id. I find Captain Testaverde's testimony on the subject to be credible, and am not persuaded by EA Juliand's suspicion that Captain Testaverde or anyone on his behalf intentionally mended the net mesh to catch more fish.

EA Juliand assessed the maximum penalty of $35,000 for the offense in accordance with the penalty schedule then in effect when the violation occurred. Penalty Schedule (1991). The minimum penalty for this offense was $20,000. Id. Captain Testaverde settled his case for less ($18,912.50) than the minimum penalty ($20,000) provided in the then applicable penalty schedule. Id. Therefore, I conclude that this case was fairly resolved.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 60B
NE 030117 FM/V
F/V Midnight Sun
Lisa T. Corp., Owner
Thomas P. Testaverde, Operator

Corporate vessel owner complains about an excessive penalty in a case involving a misunderstanding of the regulations and the Small Entity Compliance Guide.

Findings of Fact

Thomas P. Testaverde is a 4th generation commercial fisherman who lives in Gloucester, Massachusetts. He has been fishing since he was eight (8) years old and his son is also a fisherman. Mr. Testaverde has two (2) brothers who are captains and another brother, at some point, worked for NMFS. In June of 1979, Mr. Testaverde, through Lisa T. Corp., bought the fishing vessel Sea Fox. Shareholders of the Lisa T. Corp. were Mr. Testaverde, his father, his father-in-law, his mother-in-law, and his wife. The Sea Fox was a thirty (30) year old, wooden, fifty-seven (57) foot, eastern rig vessel. Mr. Testaverde fished with his father for a year or two on the Sea Fox, and then became operator of the vessel. He was captain of the Sea Fox until sometime in 1990 when he began operating the White Dove, a ninety (90) foot fishing vessel. He operated the White Dove out of Gloucester for 1.5 to 2 years until she was sold. The Lisa T. Corp. sold the Sea Fox in 1992. In 1992, Mr. Testaverde, through the Lisa T. Corp., purchased fishing vessel Wendy II and renamed her Midnight Sun. Mr. Testaverde, his father, his father-in-law, his mother-in-law, and his wife remained shareholders of the Lisa T. Corp. at that time. The Midnight Sun is a seventy (70) foot steel trawler, used as both a day and trip boat. In 2008, the Lisa T. Corp. sold the Midnight Sun and purchased a vessel that was renamed Midnight Sun.

Currently, Mr. Testaverde's wife, Rosanne Testaverde, is the sole stockholder of the Lisa T. Corp. Mr. Testaverde was operator of both the first and second Midnight Sun.

On March 25, 2003, the Midnight Sun offloaded 5,806 lbs. of mixed ground fish, of which 1,905 lbs. was codfish (worth $2,082.30) at Pigeon Cove Whole Foods Market Wharf in Gloucester. Mr. Testaverde then called out of the DAS clock. Calculated as of that time, the duration of the trip was eighty-five (85) hours and four (4) minutes. After the offload, the Midnight Sun moved to Fisherman's Wharf, located about 600 yards from the Whole Foods Wharf. She was moored there and remained there for several days and did not engage in fishing activities. Later that day, NOAA SAs Daniel D'Ambruoso and Frank Italia seized the proceeds from the catch totaling $6,446.37 because Mr. Testaverde had called out of the DAS Notification System too early.

On March 26, 2003, SA D'Ambruoso interviewed Mr. Testaverde. In substance, Mr. Testaverde stated that he had an eighth grade education, but he could read, and he read some of the permit holder letters sent to him. He further explained that on the basis of a conversation with a "lady" from NMFS, he understood that he could land 500 lbs. of cod per day, or part of a day and that when he came back during part of a fishing day, he could call out of the DAS system but could not return to fishing until 24 hours later. Mr. Testaverde stated that, according to the Small Entity Compliance Guide, he had an "or" option. Mr. Testaverde reached his conclusion from the following example: "a vessel that has been called into the DAS program for 25 hr, at the time of landing, may land only up to 4,000 lb…, of cod, provided the vessel does not call out of the DAS program or leave port until 48 hr have elapsed from the beginning of the trip" (emphasis supplied). Finally, Mr. Testaverde claimed that, on the

morning of March 26, 2003, Douglas Christel, an employee in the NMFS Sustainable Fisheries Division, had told him that he could land the amount of cod he landed for the DAS attributed to this trip. At the conclusion of the interview, Mr. Testaverde declined to provide a written statement.

On March 26, 2003, SA D'Ambruoso interviewed Mr. Christel regarding his conversation with Mr. Testaverde. According to Mr. Christel's copy of the interview, he spoke with Mr. Testaverde three (3) times on March 26, 2003. Copy of Interview with NMFS Policy Analyst Douglas Christel (Mar. 26, 2003). In the first conversation, Mr. Testaverde called Mr. Christel and presented a hypothetical in which someone left the dock at 12:00 one day and returned 25 hours later, at 13:00 the next day with 1,000 lbs. of cod (the possession limit was 500 lbs. per DAS) and asked whether it was legal. Id. Mr. Christel's response was that it was fine as long as the person did not call back into the DAS system until 13:01 hours on the second day. Id. Mr. Testaverde further asked whether it was legal to sail at 21:50 on March 21st, land 1,900 lbs. of cod at 10:54 pm on the 25th, and call out of the DAS system. Id. Mr. Christel told Mr. Testaverde that he would read the regulations and call him back. Id. In a subsequent conversation, Mr. Christel explained that, since almost 2,000 lbs. of cod had been landed, a person would not be able to return to fishing until four (4) days had elapsed since the person first called into the DAS system. Mr. Christel did not explain anything about calling out of the DAS system. Id. Mr. Testaverde pointed out to Mr. Christel that there was confusing wording in one of the paragraphs in the Small Entity Compliance Guide and offered a different interpretation. Id. Mr. Christel stated that he had to review this information and the conversation ended. Id. Mr. Christel then reviewed the information and concluded that the

second to last sentence of the paragraph Mr. Testaverde had referred to could be misinterpreted. Id. He also realized that he had failed to inform Mr. Testaverde about calling out of the DAS system until after the remainder of the 24 hours had elapsed in the example. Id. Mr. Christel called Mr. Testaverde and left him a message, concerning the second hypothetical and the Small Entity Compliance Guide. Id. Mr. Testaverde called Mr. Christel back, who told him that he should have stayed in the DAS system until 21:50 hours. Id. Mr. Testaverde still thought that the second to last sentence in the paragraph, mentioned above, could be misinterpreted, to which Mr. Christel responded that "[this] sentence containing the word "or" seemed to offer an "either/or" option for the possession limit regulations. Id. Taking only this sentence into consideration, [Mr. Christel] stated that, 'yes, this could be misinterpreted' and that [he] would look into it to determine if this potential misinterpretation 'should be addressed'." Id.

On April 11, 2003, SA D'Ambruoso issued Mr. Testaverde and the Lisa T. Corp. separate one count EARs for calling out of the DAS program too early.

On June 5, 2003, EA J. Mitch MacDonald issued a NOVA to the Lisa T. Corp. and Thomas P. Testaverde. In the NOVA, EA MacDonald charged the respondents with exceeding the codfish possession limits by landing 1,905 lbs. of codfish and calling out of the DAS system after 85 hours when the vessel was required to remain in the DAS system for 96 hours. EA MacDonald assessed a $5,000 penalty.

J. Michael Faherty, Esq. requested a hearing before an ALJ on behalf of Mr. Testaverde. In the PPIP, Mr. Faherty argued that Mr. Testaverde had complied with the regulations and the Small Entity Compliance Guide. The regulation and the Small Entity Compliance Guide used the

word "and" to require that a vessel not call out of the DAS system and not leave the dock until the additional 24 hour period block had elapsed. The regulation and the Small Entity Compliance Guide used the disjunctive "or" in an example that immediately follows the sentence using the word "and" (the regulation includes the example in a parenthetical that is part of the same sentence): "a vessel that has been called into the DAS program for 25 hr, at the time of landing, may land only up to 4,000 lb…, of cod, provided the vessel does not call out of the DAS program or leave port until 48 hr have elapsed from the beginning of the trip" (emphasis supplied). Because of the disjunctive used in the example, Mr. Faherty argued that Mr. Testaverde was not in violation of this regulation.

In September of 2003, the parties settled this case. Mr. Testaverde and the Lisa T. Corp. admitted the facts alleged in the NOVA and agreed to pay a compromise civil penalty of $4,000 which was paid from the sale of the seized fish of $6,446.37. In addition, they agreed to a two (2) DAS vessel sanction for the Midnight Sun and that the matter would be considered as a warning in NOAA's consideration of any future penalty assessment for an alleged violation. On November 12, 2003, NOAA issued a check to Mr. Testaverde for $2,446.37, representing the balance from the sale of the seized fish.

Discussion

It is Mr. Testaverde's position that there was no violation and the penalty was excessive. Mr. Testaverde settled his case because according to him: 'It only goes worse from there, you had to settle.' Special Master Interview with Thomas Testaverde (Nov. 3, 2011). According to Mr. Faherty, this case was about to go to trial. Id. Along with his client, Mr. Faherty had been trying to get in touch with Douglas Christel and a woman from NOAA, but suddenly they were

unavailable. Id. Mr. Faherty would have had to subpoena them at a hearing. Id. EA MacDonald points to the Agency's regulations that authorize the issuance of subpoenas for the attendance and testimony of witnesses at hearings, states that there is no record of Mr. Faherty filing an application for one, and observes that Mr. Christel was listed as a witness for the Agency. Response by EA J. Mitch MacDonald, p. 6. EA MacDonald states that a subpoena would therefore have been unnecessary for Mr. Christel, and that he expects that he would not have objected to a subpoena for either Mr. Christel or the unidentified NOAA employee. Id.

EA MacDonald argues that the penalty in this case is not excessive because it was assessed at the low end of the range for a first-time DAS call-in violation and was consistent with a similar case decided in 2002 ($5,000 civil penalty). Id.; See In re Peter M. Fadden, 2002 WL 414181 (Feb. 21, 2002). The respondents in that case also argued that they had misunderstood a portion of a permit holder letter, but the ALJ responded that "selective reliance on only a very small portion of one of the Agency's publication is wholly unreasonable." Id. at 7. EA MacDonald argues that in Mr. Testaverde's case:

> The regulation and the permit holder letter clearly stated that one must not call out and must stay tied to the dock. Although one could interpret the "or" in the subsequent example to provide a choice of calling out later or tying up to the dock, that is only reasonable if one reads that portion in isolation and ignores the prior text. That reading is unreasonable when the paragraph is read as a whole and the two sentences are read together. It is particularly unreasonable where the example is a parenthetical of the same sentence, as it is in the regulatory text. Response by EA J. Mitch MacDonald, p. 8.

The intent behind this penalty was to deter others from calling out of the DAS program before they are supposed to in order to save on DAS. Id. at 9. EA MacDonald also tried to account for Mr. Testaverde's inability to identify who at NOAA had supposedly agreed with his

interpretation before the date of the violation. Id. At the same time, EA MacDonald attempted to incorporate into the assessment and the settlement the possibility that Mr. Testaverde's selective reading was a good faith effort to comply with the DAS regulations. Id. The settlement represented the value of the codfish ($2,082.30) and, for deterrence purposes, an additional amount ($1,917.70) roughly equal to the value of the codfish. Id. NOAA returned $2,446.37 from the sale of the seized catch to Mr. Testaverde.

Based on the facts of this case and the In re Peter M. Fadden case, I find the original assessment and eventual settlement of this case to be fair and reasonable.

Recommendation

I recommend that the Secretary take no further action in connection with this Application for Review.

Case 73

NE 042042 FM/V; NE 052002 FM/V; NE 052003 FM/V; NE 052026 FM/V; NE 052001FM/V
F/V Gulf Voyager; Regina's Pride; Heckler; High Flyer
Brian Mark Roche, Owner/Operator

Vessel owner complains about the excessive penalty imposed on his vessels for exceeding the monkfish possession limits and for failing to submit timely FVTRs for his three (3) vessels.

Findings of Fact

Brian Mark Roche of Kingston, Massachusetts has been a full-time fisherman since 1978. He is a gillnetter who fishes primarily for monkfish, cod, and haddock out of New Bedford and Sandwich, Massachusetts. Mr. Roche owns and operates five (5) vessels that he has acquired over the years: Gulf Voyager, Regina's Pride, Heckler, High Flyer and Injustice. Each vessel possesses a federal fishing permit with the exception of the Injustice, which is currently being outfitted to be operated exclusively in state waters. For the most part, Mr. Roche operates these vessels individually because in the past, he has had trouble hiring reliable captains. However, he currently employs a single trustworthy mate who helps him run his vessels. At all times relevant to this complaint, Mr. Roche owned these vessels individually. He currently owns them through corporate entities.

Around June 25, 2004, SA Joseph D'Amato was conducting a review of NMFS records when he discovered some discrepancies with landing information for the Regina's Pride. This led him to conduct a more thorough investigation. SA D'Amato attempted to contact Mr. Roche, his lawyer Stephen Ouellette, Esq. and [redacted] an occasional vessel operator for the Regina's Pride and the Gulf Voyager, to conduct interviews concerning landing

discrepancies. He was unsuccessful in speaking to any of those individuals in person. On January 3, 2005, after approximately two (2) months of failed attempts at meetings, SA D'Amato mailed an EAR to Mr. Roche based exclusively on his review of the records. Offense Investigation Report by SA Joseph D'Amato, p. 27 (Feb. 1, 2005).

As a result of the investigation, EA MacDonald issued three (3) separate NOVAs and NOPS to Mr. Roche on March 25, 2005, alleging violations committed by the Regina's Pride, Gulf Voyager, and High Flyer. A fourth vessel, the Heckler, was issued an EAR in April 2005 for unlawfully landing a shark and for failing to fill out and submit FVTRs. However, the alleged Heckler violation(s) did not result in a NOVA.[1] The Regina's Pride received a nine (9) count NOVA. The counts alleged are as follows:

Counts 1-3: The Regina's Pride landed 10,968 lbs, 11,972 lbs., and 11,552 lbs. on June 13, 18, and 24, 2004 respectively. Because Mr. Roche did not possess a monkfish Northern Exemption Letter, he was limited to a 166 lbs. daily limit. Each count had a $15,000 penalty assessment;

Counts 4-5: The Regina's Pride failed to submit timely logbooks for twenty two (22) total months between 2003 and 2004. The assessed penalty for each count was $50,000.

Counts 6-8: The Regina's Pride failed to call into the DAS notification program on various dates in 2003 resulting in three (3) counts with a $15,000 assessed penalty for each count;

[1] The Heckler investigation report was forwarded to the Office of General Counsel in June 2005, well after the NOVAs and NOPS were issued to Mr. Roche for the Regina's Pride, Gulf Voyager, and High Flyer. During the review of this investigation case file for the Heckler, Mr. Roche's attorney and NOAA were engaged in settlement discussions for the other three (3) cases. Instead of issuing a NOVA or NOPS for the Heckler violations, NOAA resolved the potential charges by means of the settlement agreement entered into between NOAA and Mr. Roche. Response by EA J. Mitch MacDonald, p. 1-2.

Count 9: Finally, the Regina's Pride sold shark meat and fins to Agger Fish Corp. on August 23, 2003 without a valid shark permit, with an assessed penalty of $10,000.

The nine (9) counts against the Regina's Pride totaled $200,000. Further, EA MacDonald issued a NOPS for a one (1) year vessel permit sanction against the Regina's Pride and the same against Mr. Roche as operator.

EA MacDonald also concurrently issued a separate NOVA and NOPS for the High Flyer. He assessed a $50,000 penalty against the High Flyer for one (1) count of failing to file timely FVTRs for nine (9) consecutive months between May 2004 and January 2005. The NOPS assessed a four (4) month vessel and operator's permit sanction.

Lastly, EA MacDonald issued a three (3) count NOVA against the Gulf Voyager on March 25, 2005 as follows:

Count 1: The Gulf Voyager exceeded its monkfish possession limit on May 10, 2004 by landing 12,312 lbs, when it was limited to only 1,826 lbs ($15,000 assessed penalty);

Count 2: The Gulf Voyager exceeded its monkfish possession limit on May 13, 2004 by landing 5,222 lbs of monkfish when it was limited to only 1,826 lbs ($15,000 assessed penalty); and

Count 3: The Gulf Voyager, for eight (8) consecutive months between June 2004 and January 2005, failed to comply in accurately and timely filing FVTRs ($50,000 assessed penalty).

EA MacDonald assessed an $80,000 total penalty and a six (6) month vessel and operator permit sanction for the alleged Gulf Voyager violations. Thus, the Regina's Pride, High Flyer and Gulf Voyager were assessed penalties totaling $330,000 with attendant vessel and operator permit sanctions.

Mr. Roche has admitted his difficulties in complying with the reporting requirements, which resulted in the numerous late FVTR filings for his various vessels. In fact, NOAA has notified Mr. Roche in the past concerning the late filings for mandatory vessel trip reports. Important Compliance Notice (Feb. 4, 2003). He reasons, though, that his busy schedule in managing five (5) vessels contributed to the late filings. Mr. Roche opines that even today, on occasion, he continues to have problems with timely submissions of FVTRs. Special Master Interview with Brian Roche (Sept. 23, 2011).

Mr. Roche states that he should not be penalized for not having on file a Northern Exemption Letter, which would have provided him with an unlimited landing limit for monkfish. Mr. Roche was not aware that he needed an exemption letter to fish in the Northern Fishery Management Area. Mr. Roche did not apply for a monkfish exemption letter until June 26, 2005, and only after he was notified of his violations. Without the letter, Mr. Roche was limited to landing 166 lbs. daily because he was authorized to fish only in the Southern Fishery Management Area. Offense Investigation Report by SA Joseph D'Amato, p. 9 (Feb. 1, 2005). He also argues that he did not have time to fish in the Southern Fishery Management Area and then travel to the Northern Fishery Management area to land his catch. That was the reason he fished primarily in the North and landed monkfish according to the Northern Fishery Management Area limits. Further, Mr. Roche states that he fished in the North because, during the summer months, the fish migrate to the Northern Fishery Management Area. The fish that remain in the South during the warmer months, according to Mr. Roche, were primarily "junk fish." See Application for Review, p. 5.

With regard to the Regina's Pride, Mr. Roche contends that he routinely notified the DAS program before and after each fishing trip. Any mix-up with the call-in or out dates, he notes, can be attributable to human error. On at least one (1) occasion, he attributed the DAS issues to his former captain, [redacted] who now works for Mr. Roche's brother-in-law. According to Mr. Roche, [redacted] failed to call out of the DAS program at the conclusion of a particular trip. The end result was that Mr. Roche lost approximately ten (10) DAS that he could not recover. Special Master Interview with Brian Roche (Sept. 23, 2011).

Finally, Mr. Roche sold shark meats and fins, caught by the Regina's Pride, to Agger Fish Corp. because he believed that he previously possessed a permit to land sharks. He alleges that he sent in the permit application, but it was later returned to him. Mr. Roche did not have time to return the permit application because he was contemporaneously dealing with his father's cancer treatments and his subsequent passing. As a result, he did not have a permit for the shark landings. Nonetheless, Mr. Roche had recorded the landings in his log books and FVTRs, which he argues is evidence that he was not trying to conceal the shark landings. Id.

Mr. Roche settled all three (3) NOVAs and the Heckler case on November 18, 2005 because he feared losing everything. He states that the threat of hundreds of thousands of dollars in fines and the potential increase if he brought the case to a hearing, coupled with the possible loss of his fishing permits, intimidated him. Furthermore, his lawyer advised him that he would likely lose if he challenged the case before an ALJ. Id.

EA MacDonald ultimately reduced the original $330,000 penalty assessment to $40,000 for the Gulf Voyager, High Flyer, Regina's Pride and Heckler cases based, in part, on Mr. Roche's inability to pay. According to the Settlement Agreement, Mr. Roche agreed to a revocation of

the High Flyer's DAS until either the beginning of the 2006-2007 fishing year or until NOAA received full payment of the compromised settlement, whichever was longer. According to Mr. Roche, the vessel remained tied up for five (5) years. The Regina's Pride's DAS notification violations were reduced to written warnings.

Mr. Roche reluctantly settled through competent counsel. He has paid the full $40,000 settlement plus interest and he has served the vessel operator permit sanction.

Discussion

Mr. Roche argues that GCEL's $330,000 penalty was excessive which unfairly forced settlement upon him. He wrote:

> …then they intimidated me with hundreds of thousands of dollars in fines and had the Fuel Company, ice houses, and banks and fish buyers all thinking that I was all done and had no more permits or any way of making a living, if I fought the case and a [sic] loss of my permits. This would have meant I would lose my house and everything I worked for my whole life. So there was no other option but to make a reduced settlement rather than taking a chance and losing everything. Application for Review, p. 7.

In response, EA MacDonald writes that Mr. Roche was a second-time violator[2] and the penalty assessment was within the guidelines in effect at the time:

Violation Type	1st time violation range	2nd time violation range
Fail to comply with reporting requirements or fish without a permit	$5k-$80k and/or up to 90 days permit sanctions	$10k to statutory maximum and/or up to 1 year permit sanctions
Exceed possession limits	$5k-$50k and/or up to 90 days permit sanctions	$15k-$60k and/or up to 1 year permit sanctions
DAS violations	$5k-$80k and/or up to 90 days permit sanctions	$10k to statutory maximum and/or up to 1 year permit sanctions

Response by EA J. Mitch MacDonald, p. 5.

The Regina's Pride violations included three (3) overages, 22 months of not submitting reports as required, involving dozens of reports, three (3) DAS violations, and landing and selling shark without a permit. The Gulf Voyager violations involved two (2) overages and eight (8) months of not submitting numerous reports as required. The High Flyer violations involved nine (9) months of not submitting multiple reports as required. According to EA MacDonald, the overage violations were charged at the lower end of the range for a first-time violator and the low end of the range for a second-time violator.[3] The failures to report were charged at the lower end of the ranges for first- and second-time violators, and in some instances even

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[2] See Roche v. Evans, 249 F.Supp.2d 47 (D. Mass. 2003) (upholding ALJ finding of liability against Mr. Roche for entering a closed area with un-stowed gear, resulting in a $35,000 assessed penalty, which the ALJ reduced to $20,000).

[3] EA MacDonald further writes that the individual reports that were not submitted were consolidated and charged by month rather than by individual report. The initial assessments averaged between approximately $4.2k to $6.3k per month, which is much less than on a per report basis. Response by EA J. Mitch MacDonald, p. 5.

below the low-end of those ranges. Also, as EA MacDonald notes, the individual reports that were not submitted were consolidated and charged by month rather than by individual report. Finally, the DAS violations were assessed at the lower end of the range for a first-time and a second-time violator. Id. at 5.

The Secretarial Decision Memorandum, dated March 16, 2011, determined cases eligible for my review, including cases in which GCEL charged an excessive penalty that unfairly forced settlement. I conclude that under the circumstances of this case, a $330,000 penalty assessment was excessive. Common sense dictates that $330,000, assessed against anyone, let alone a commercial fisherman, would cause severe economic hardship, if enforced against that person. This is particularly the case because Mr. Roche has not demonstrated a willful intent in this case to violate NOAA regulations. Rather, it is clear from my interview with him that he was, and still is, overwhelmed with NOAA reporting and DAS call in requirements, especially because he was simultaneously operating five (5) vessels. Furthermore, the overages Mr. Roche landed on the Regina's Pride and Gulf Voyager appear to be nothing more than a paperwork violation. Indeed, had he possessed a Northern Exemption Letter, which he was free to obtain at no cost (Mr. Roche obtained a Northern Exemption Letter shortly after he received the NOVAs), none of those landings would have constituted overages. As such, the bulk of Mr. Roche's violations can be attributed to technical violations.

However, I next need to determine whether an excessive assessment forced Mr. Roche into an unfair settlement. I find that the ultimate settlement was fair. Although many of the violations were technical in nature, Mr. Roche settled these three (3) cases, including a fourth case involving the Heckler, for $40,000. As EA MacDonald points out, the Regina's Pride did not

submit a single FVTR, as required, for twenty two (22) months, the Gulf Voyager for eight (8) months, and the High Flyer for nine (9) months. This was despite the fact that Mr. Roche received letters in February 2003, January 2004, and January 2005 concerning his reporting non-compliance. Even if I were to disregard the technical violations against Mr. Roche, the 39 total months of non-submission of FVTRs, after receiving adequate notice, as well as one instance of selling shark without a valid permit, justify the $40,000 penalty. Indeed, EA MacDonald notes that he took many of the mitigating factors into account, including the technical nature of the violations, Mr. Roche's lack of intent, and willingness to comply with FVTR requirements after the NOVAs, as factors that ultimately led him to reduce the total penalty substantially. In light of the ongoing nature of the violation, Mr. Roche's prior notifications about his need for compliance, and EA MacDonald's consideration of numerous mitigating factors, I find that the $40,000 settlement was fair and that it was not coerced as a result of an excessive assessment. The evidence is clear that EA MacDonald quickly backed off the $330,000 penalty assessment to reach a fair resolution in this case.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 94

NE 0700297; NE 0702303; NE 0704234; NE 0704374

F/V Retriever

The Retriever Seafood, Inc., Owner

Joshua A. Wentling, Officer, Shareholder

[redacted] Operator

[redacted] Operator

Officer/director/shareholder of corporate owner of fishing vessel complained that his individual operator's permit was suspended for violations charged against the vessel and her operators. [1]

Findings of Fact

Joshua A. Wentling was the sole officer/director/shareholder of Retriever Seafood, Inc., which owned the fishing vessel, Retriever. Mr. Wentling lives in Lanexa, Virginia, which is on Chesapeake Bay, is a third generation fisherman, started fishing with his father on weekends and vacations when he was 12 years old, became a full time fisherman in 1991 when he was eighteen (18) years old and is currently a mate on a recreational fishing vessel. In 1992, Mr. Wentling purchased the Sun Bird, a 42' federally permitted gillnet vessel, which was moored in New Jersey and primarily caught blue fish and bass. Mr. Wentling sold the Sea Bird in 1994-1995 when he and his father built the 54' Instigator, which had a federal multispecies permit. In 1998-1999, Mr. Wentling and his father built a second Instigator, which was a 57' fiberglass composite vessel owned by Instigator Sport Fishing, Inc. and operated by his father. In 2004, Mr. Wentling, with a partner, purchased the 60' steel hulled Retriever, which they used to fish

[1] This complaint was referred to me by the OIG.

for scallops and swordfish. This vessel was owned by Retriever Seafood, Inc. and at some point, Mr. Wentling bought out his partner.

This case involves four (4) separate NOVAs/NOPS which were issued by EA Deirdre Casey on April 1, 2008 and resulted in a global settlement of all four (4) cases on January 19, 2010. The following is a summary of each of these cases.

NE 0700297

On January 22, 2007, the Retriever was boarded by the USCG 400 yards inside the Elephant Trunk Closed Area ("ETCA"). After the boarding, it was discovered that the Retriever was fishing with an undersized twine top, which measured 9.5" instead of the required 10". The Retriever was being operated by [REDACTED] who argued that [REDACTED] was allowed to fish within a 300 yard buffer inside the closed area. VMS confirmed that the Retriever was between .02 to .34 nautical miles inside the closed area on 23 separate occasions. At the time that the Retriever was boarded, Mr. Wentling was hunting deer in Illinois. He had purchased the twine top four (4) months prior to the boarding at Sea Gear in Cape May, New Jersey. On January 22, 2007, SA James MacDonald issued [REDACTED] an EAR for fishing inside a closed area and fishing with an undersized twine top. The catch was abandoned by Mr. Wentling and [REDACTED] and sold for $2,478.00 which was paid to NOAA. On April 1, 2008, EA Deirdre Casey issued a NOVA to [REDACTED] and Retriever Seafood, Inc. for fishing in a closed area and assessed a $15,000 penalty. EA Casey did not charge the operator or owner with the undersized twine top. Additionally, [REDACTED] received a NOPS for a 30 day operator's permit sanction. Mr. Wentling fired [REDACTED] shortly after the violation.

NE 0702303

On July 11, 2007, the Retriever, while being operated by [redacted] was detected one (1) mile inside the ETCA. The Retriever was boarded at Ocean City, Maryland when she landed to offload her catch. Mr. Wentling was present during the offload. SA Steven Niemi discovered more scallops than were reported by [redacted] on [redacted] FVTR, that [redacted] repeatedly lied to SA Niemi about the amount of scallops on board, that [redacted] failed to report other species landed as by-catch, and that [redacted] had an overage of scallops on board. [redacted] and Mr. Wentling told Corporal [redacted] of the Maryland Natural Resource Police that the Retriever broke down and then crossed the line into the closed area but VMS confirmed that the Retriever's speed in the closed area was 3.9 knots, which was consistent with fishing. Id. The entire catch was abandoned by Mr. Wentling and [redacted] and sold for $3,017.80 which was paid to NOAA. On April 1, 2008, EA Casey issued a NOVA to [redacted] and Retriever Seafood, Inc. charging them in Count 1 with fishing in a closed area for which she assessed a penalty of $20,000; in Count 2 with landing an overage of scallops for which she assessed a penalty of $10,000; and in Count 3 with interfering with an investigation for which she assessed a penalty of $10,000 for a total penalty of $40,000. Additionally, EA Casey issued a NOPS to Retriever Seafood, Inc. (owner) proposing a 60 day permit sanction. She issued a NOPS to [redacted] proposing an 18-month operator permit sanction. Mr. Wentling continued to employ [redacted]

NE 0704234

On October 23, 2007, the Retriever, while being operated by [redacted], was detected six (6) miles inside the Delmarva closed area. When the Retriever returned to port, she was boarded and [redacted] explained that [redacted] had fallen asleep at the wheel which was

the reason the vessel was in the closed area. The catch had been sold but SA Niemi was able to seize the proceeds of $1,637.50 for the sale of 300 lbs. of scallops. When the violation occurred, Mr. Wentling was again in Illinois. On April 1, 2008, EA Casey issued a NOVA to and Retriever Seafood, Inc., charging both with fishing approximately 5.8 nautical miles inside a closed area, and assessed a $20,000 penalty. On the same date, EA Casey issued a NOPS to Retriever Seafood Inc. proposing a 45-day vessel permit sanction and to proposing a 75-day operator permit sanction. This was the Retriever's third violation involving entering and/or fishing in a closed area in a ten month period. Mr. Wentling continued to employ

NE 0704374

On November 9, 2007, the Retriever was detected approximately .59 nautical miles inside the ETCA closed area. When the Retriever was boarded upon her return to port, the operator, , stated that let a new crew member operate the vessel while slept and noticed when awoke that was inside the closed area. returned to port with 158 lbs. of scallops which were seized by SA Niemi and sold for $1,185.00. fired the negligent crew member. On April 1, 2008, EA Casey issued a NOVA to and Retriever Seafood, Inc. for fishing in a closed area and assessed a $25,000 penalty for this offense. On the same date, EA Casey also issued a NOPS to Retriever Seafood, Inc. for a 75 day vessel permit sanction and to for a seven (7) month operator permit sanction. Mr. Wentling did not fire even after this fourth (4th) offense.

On January 19, 2010, Mr. Wentling, individually and as a corporate officer of Retriever Seafood, Inc. signed a Settlement Agreement for all four (4) cases. The settlement did not

involve [redacted] or [redacted] In the Settlement Agreement, Mr. Wentling admitted the violations charged in all four (4) cases, agreed to pay a compromise civil penalty of $20,000 to be paid from the proceeds of a then pending sale of the Retriever, and agreed to exchange an eight month sanction on his individual operator's permit for no vessel permit sanction so that he could sell the Retriever. EA Casey states in her Response that the $20,000 compromised penalty was agreed to after Mr. Wentling raised Retriever Seafood's ability to pay the original, assessed penalties.

Discussion

Mr. Wentling complains that he was forced to sell the Retriever to pay the civil penalty of $20,000 and that as part of the settlement, he was forced to accept an eight (8) month operator's permit sanction as an individual for his corporate violation. As to Mr. Wentling's first complaint, I am aware from a notation dated March 28, 2008, made by EA Casey on a memorandum dated July 11, 2007 (case no. 0700297), that Mr. Wentling had listed the Retriever for sale approximately two (2) years prior to the Settlement Agreement being signed. The notation stated that Mr. Wentling had informed EA Casey that he had a buyer for the Retriever, and then later, informed her that the sale fell through. EA Casey and Mr. Wentling discussed settlement over an eighteen month period and, during this period, he told her that he could not make a living because of the changes in the regulations and that he was looking to get out of the fishery business, saying "sooner out the better." Response by EA Deirdre Casey, p. 5. As to Mr. Wentling's second complaint, it is clear from NOAA's Retriever case file that Mr. Wentling voluntarily chose to avoid a vessel sanction in order to sell the Retriever and trade it for sanction time on his operator permit. Id. at 9. Additionally, it is clear that the civil penalty

was paid by Retriever Seafood, Inc. and not Mr. Wentling, individually, since the penalty was paid from the sale of the corporate owner's fishing vessel. After the first offense, Mr. Wentling fired [redacted] but for some unexplained reason, never fired [redacted] after [redacted] first, second, or third violations. Under the circumstances of this case, and the numerous negligent, if not intentional violations committed by Mr. Wentling's captains, I find that a settlement of $20,000 to be fair and reasonable.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 98
NE 030268
F/V Lisa Marie
Gary Genthner, Owner/Operator

Fisherman complains that he was coerced into paying an excessive penalty.

Findings of Fact

Gary Genthner has been a lobster fisherman since 1972. He lives in Bristol, Maine and since 1998, he has owned the 34' fishing vessel, Lisa Marie, which is moored in Round Pond off of Bristol.

During the week of August 10, 2003, Maine Marine Patrol (MMP) Officers hauled lobster traps belonging to Mr. Genthner. These officers found twenty (20) banded, berried female lobsters in Mr. Genthner's traps and discovered that the escape vents on all of the ninety-two (92) traps hauled were obstructed. On August 19, 2003, MMP Officers pulled alongside Mr. Genthner's lobster boat and told him that they had inspected his traps and found the berried female lobsters and his obstructed trap escape vents. The traps with berried lobsters contained no other lobsters and fresh bait. The MMP Officers opined to Mr. Genthner that he was keeping illegal berried female lobsters in his traps until the eggs released and he could sell those lobsters in the normal course of his business. Mr. Genthner admitted that he had hauled berried lobsters but asserted that he "liked to watch them" before releasing them back to sea. State of Maine Bureau of Marine Patrol Report by MPO [REDACTED] (Aug. 19, 2003).

As to the obstructed release vents, Mr. Genthner stated "that it was the way he'd always done them" and that MMP Spec. [REDACTED] had told him that his release vent was fine. Id. One of the MMP officers checked with Spec. [REDACTED] who denied he ever told Mr.

Genthner that "his obstructed vents were o.k." Id. During my interview of Mr. Genthner, he said he was mistaken. It was not MMP Spec. [redacted] that had approved his escape vents but rather MMP Officer [redacted] who later quit [redacted] job as a MMP Officer. The officers charged Mr. Genthner with having ten (10) traps with obstructed vents and retaining egg bearing lobsters. This latter charge was referred to NMFS and assigned to SA James MacDonald for investigation. Mr. Genthner paid a penalty to the State of Maine of approximately $500 for the obstructed vent violation.

SA MacDonald conducted an investigation which confirmed the MMP Officers' findings, including a Report from the Chief Lobster Biologist for the Maine Department of Marine Resources, that the eggs examined on the lobsters seized from Mr. Genthner's traps would take less than three (3) weeks to release. Incident Report by Specialist [redacted] Dept. of Marine Resources (Sept. 5, 2003).

The case was subsequently assigned to EA Charles R. Juliand for further action. On July 14, 2004, Mr. Juliand issued a NOVA to Mr. Genthner charging him in Count 1 with deploying 92 lobster traps with blocked escape vents, and in Count 2 with possessing twenty (20) berried female lobsters. Mr. Juliand assessed a $42,500 penalty for Count 1 and a $20,000 penalty for Count 2 for a total penalty of $62,500 together with a vessel and operator permit sanction of 81 days.

Mr. Genthner hired counsel and on December 28, 2004, Mr. Genthner (through counsel) signed a Settlement Agreement which provided for a compromised penalty of $32,500 to be paid in two (2) installments of $16,000 on or before January 15, 2005 and a final payment of

$16,637.50 (interest included) due on November 15, 2005 together with a vessel and operator permit sanction of 45 days commencing December 24, 2004.

Discussion

Mr. Genthner stated that he settled because he was concerned that if he appealed, an ALJ would impose the originally assessed penalty of $62,500 and further, after he paid the lawyers to challenge the case, he would have paid the equivalent of the assessed penalty even if he won and the assessed penalty was reduced. Mr. Genthner noted in the Commercial Fisheries News that no other fisherman received assessments for the same offenses charged against Mr. Genthner and that other lobstermen had the same type of vents. EA Juliand disputes this assertion as a result of checking NOAA's records. Response by EA Charles Juliand, p. 4.

It is undisputed that Mr. Genthner committed the violation for which he was charged and the only question presented is whether he was coerced into paying an excessive penalty. Unlike many of the other fishermen cases I have reviewed, Mr. Genthner committed intentional acts in retaining berried female lobsters and maintaining traps with blocked escape vents. Mr. Genthner was fined $500 by the State of Maine and assessed a $62,500 penalty by NOAA for these same violations.

In reviewing this case, I cannot find any justification for an assessed penalty of $62,500 to an individual Maine lobsterman whose only prior violation resulted in a warning. Offense Investigation Report by SA James M. MacDonald (Dec. 9, 2003). Simply stated, the assessment was excessive and was the primary reason Mr. Genthner settled his case for $32,500 instead of

risking a $62,500 penalty on appeal. However, because of the intentional nature of Mr. Genthner's violations, I find that the settlement of $32,500 was fair and reasonable.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 99

NW 0703795 FM/V
F/V Seasick II
Seasick II, Inc., Owner
Dennis Lee Sturgell, Operator

Fisherman vessel owner complains about being charged an excessive penalty in a case where a third party failed to obtain confirmation that NOAA OLE was receiving the vessel's VMS data prior to the vessel's fishing trip.

Findings of Fact

Dennis Lee Sturgell lives in Hammond, Oregon and has been a commercial fisherman for forty-five (45) years. He started fishing full time in 1970 when he bought his first fishing vessel. Mr. Sturgell primarily fishes for crab, black cod and some halibut. He has had an interest in at least five (5) vessels in the past. Mr. Sturgell was a stockholder of Seasick II, Inc., which purchased the F/V Seasick II around 1996 and owned her until 2008. Mr. Sturgell operated that vessel. Mr. Sturgell is also a stockholder of Fierce Contender, Inc., which owns the F/V Fierce Leader, a 63' vessel, built in 2006 and used for crab and black cod fishing. Fierce Contender, Inc. also owned the F/V Royal Quarry from about twenty (20) years ago until about four (4) years ago when she ran on the rocks. Through corporate entities, Mr. Sturgell owned F/V Pacific Prospector for about nineteen (19) years until it was sold around 2005, the F/V Bold Contender, which was built in 1980 and sank five (5) years ago, and the F/V Fierce Contender until it was sold in 1992. All vessels were docked in Warrenton, Oregon.

On September 12, 2007, Mr. Sturgell contacted [redacted] of Jensen Communications, Inc. ("Jensen") of Warrenton, Oregon and asked that the VMS unit aboard the Seasick II be activated because the crew planned on fishing for black cod early Saturday, September 15. The VMS unit had been transferred from the Pacific Prospector to the

Seasick II earlier in 2007, but had not yet been activated. On September 12, 2007, Jensen faxed NOAA a VMS installation and certification report even though the unit had not yet been activated. On September 14, 2007, Jensen activated the unit. At around 4 pm on September 14, 2007, Mr. Sturgell told that he hoped to leave to go fishing late that evening or shortly after midnight. At that time, it appeared to Jensen that the unit was working properly because the two (2) lights, amber and green, were lit up. This meant that the VMS unit service provider, Skymate, located in Virginia, was receiving transmission signals. called OLE to confirm notification that Mr. Sturgell planned on going fishing that night and to confirm OLE's receipt of the unit's activation notification. OLE told that it had probably received the activation notification, but could not locate it and asked for a resubmission. resent the facsimile. Because it was after normal working hours on Friday afternoon, September 14, and it would take an additional four (4) hours for the unit to initialize with Skymate, the VMS service provider, Jensen did not contact Skymate to verify that the unit was operating properly and failed to inform Mr. Sturgell of that fact. As of September 14, 2007, OLE had not issued a confirmation that the VMS unit was transmitting. Additionally, OLE had not received a declaration of gear type to report a change from the previous declaration for crab and lobster gear for the Seasick II to a limited entry permit longline gear for black cod.

According to Mr. Sturgell, told him: "you are good to go" fishing. Special Master Interview with Dennis Sturgell (Dec. 28, 2011). Believing that the Seasick II was in compliance with the VMS regulations, Mr. Sturgell embarked on a fishing trip early Saturday morning, September 15, 2007.

On Sunday, September 16, 2007, Seasick II landed 18,505 lbs. of fish at Pacific Coast Seafoods in Warrenton, Oregon, which were sold for $39,401.14. There was no VMS position data transmitted to OLE for this trip. On Monday, September 17, 2007, Seasick II landed 16,116 lbs. of fish at Pacific Coast Seafoods, which were sold for $33,496.81. There was no VMS data transmitted to OLE for this trip.

According to a Memorandum of Interview of [redacted] of Jensen, and [redacted] of Jensen, they contacted Skymate on Monday morning, September 17, 2007 to check the operational status of the VMS unit and learned that it was not reporting. Memorandum of Interview by Acting ASAC Karl Hellberg, p. 3 (Oct. 30, 2007). [redacted] then called Mr. Sturgell, who had returned to port, and told him to stop fishing and remove the transceiver because the transmission had failed. Id. [redacted] contacted SA Hellberg because he was concerned that Mr. Sturgell was commercial fishing while in violation of Federal fisheries regulations. Offense Investigation Report by Acting ASAC Karl Hellberg, p. 14 (Oct. 23, 2007). According to Mr. Sturgell, upon returning from fishing on September 17, 2007, he received a voicemail message from NMFS, informing him that the VMS unit was not working. Special Master Interview with Dennis Sturgell (Dec. 28, 2011). Mr. Sturgell called Jensen, shared the substance of the voicemail message from NMFS and was told that Jensen would check out the unit. Id. Jensen was unsuccessful at repairing the device. At that point, the transceiver was removed and a refurbished unit was re-installed in a procedure called "hot swap." NMFS received an activation report at 4:30 pm (PST) on September 17, but did not provide a confirmation report. The installation was completed around 4 pm (PST) on September 17, but it took an additional 3-4 hours for the unit to register with Skymate. [redacted]

[REDACTED] informed Mr. Sturgell that "… it was probably safe [to go fishing] but he couldn't confirm for sure." Written Statement by [REDACTED] (Oct. 30, 2007). Both Mr. Sturgell and EA Moeller interpret this statement differently. Mr. Sturgell thought it meant that "[he was] good to go" fishing. Special Master Interview with Dennis Sturgell (Dec. 28, 2011). EA Moeller argues that Mr. McDonley's statement appears to contradict Mr. Sturgell's understanding of what was said. Response by EA Niel Moeller, p. 9. However, I need not resolve this factual dispute since this count 3 was withdrawn during the administrative appeal and before settlement.

On September 17, 2007, at 5:37 pm, OLE received a declaration update for the Seasick II made by [REDACTED] on behalf of Mr. Sturgell. The update notified OLE that the Seasick II would be fishing with limited entry permit longline gear, thus cancelling the previous declaration of November 3, 2005 for commercial crab fishing.

On September 18, 2007, OLE received the first VMS position for the Seasick II at 8:18 am (PST). On September 20, 2007, the Seasick II landed 26,212 lbs. of fish at Pacific Coast Seafoods.

SA Hellberg interviewed [REDACTED] via telephone on September 17, 2007. He interviewed [REDACTED] and [REDACTED] in person on October 30, 2007, and obtained a written statement from [REDACTED] on that date.

On November 8, 2007 at 12:46 pm, SA Hellberg interviewed Mr. Sturgell via telephone. Mr. Sturgell did not remember when the VMS unit was activated, but he remembered that the lights on the face of the unit were on during the first couple of black cod trips. Mr. Sturgell further remembered that at some point, he had received a message from a woman he did not

recognize, informing him that a VMS unit was not working. He had then called ████████ of Jensen who had told him everything had been fixed. Upon being asked if he had his commercial fishing logbooks, Mr. Sturgell said that he was looking at them, that he had made two (2) separate trips on September 13, 2007 to set a total of five (5) strings of longline gear, and that he retrieved gear on September 15 and 16 and harvested black cod from those strings.

On November 11, 2007, a warden from the California Department of Fish and Game seized Mr. Sturgell's commercial fishing logbook at SA Hellberg's request. The logbook contained coded proprietary information usable only by Mr. Sturgell.

On January 3, 2008, SA Hellberg issued Mr. Sturgell an EAR.

On August 4, 2008, SA Hellberg interviewed Joseph Albert, VMS Program Manager, via telephone concerning the activation and confirmation process for a VMS unit and the non-reporting issue involving the Seasick II. VMS unit activation involves a "technical" and a "regulatory" component. On the "technical" side, a vessel owner installs a VMS unit on the vessel, opens an account with a communication service provider (Skymate) and purchases a service plan. The service provider (Skymate) then notifies OLE, through email, of the activation and shares specific technical information for the VMS unit. According to Mr. Albert, on the "regulatory" side, a vessel must submit to OLE a VMS installation and activation report at least 72 hours prior to leaving port and must obtain confirmation that OLE is receiving the VMS transmissions before participating in a fishery that requires VMS. Under the regulations, a vessel owner or operator must "activate the mobile transceiver unit, submit an activation report, and receive confirmation from NMFS OLE that the VMS transmissions are being received

before participating in a fishery requiring the VMS." Response by EA Niel Moeller, p. 12; 50 C.F.R. §660.312(d)(2).

According to Mr. Albert's written statement to SA Hellberg following the interview, OLE was not receiving position reports for Seasick II from 4:26 pm local time (PST) on September 17, 2007 until 7:19 am local time (PST) on September 18, 2007, but Skymate, the service provider, was receiving the position reports. OLE began receiving position reports at 8:18 am (PST) on September 18, 2007. On September 18, 2007, [redacted] sent Jennifer L. Williams at OLE an email that: "we did not receive notification of the change until late last evening (I received a call at home from one of my afterhours coverage associates). Given that, today would have been the first opportunity we would have had to make the exchange in the system and send you the forms." Because of this delayed notification, OLE did not receive position reports earlier than 8:18 am (PST) on September 18, 2007.

On August 12, 2008, EA Moeller issued a four (4) count NOVA to Dennis Sturgell and Seasick II, Inc. (collectively "Respondents") for a total penalty of $116,897.95. In count one, he charged the Respondents with fishing and landing 18,505 lbs. of groundfish on September 16, 2007 while failing to operate the vessel's VMS unit continuously for 24 hours a day and after failing to receive confirmation from OLE that the VMS transmissions were being received. He assessed a $59,401.14 penalty which equaled the value of the catch offloaded on September 16, 2007 ($39,401.14) plus $20,000 which was at the lower end of the second violation range for monetary penalty. EA Moeller alleges that this was a second violation by Mr. Sturgell. In count two, he charged the respondents with fishing and landing 16,116 lbs. of groundfish on September 17, 2007 while failing to operate the vessel's VMS unit continuously for 24 hours a

day and after failing to receive confirmation from OLE that the VMS transmissions were being received and assessed a $43,496.81 civil penalty which equaled the value of the catch offloaded on September 17, 2007 ($33,496.81) plus $10,000 which was at the lower end of the second violation range for an assessed penalty. In count three, he charged the respondents with operating the vessel in federal and state waters on September 18, 2007 without operating the vessel's VMS unit continuously for 24 hours a day and after failing to receive confirmation from OLE that the VMS transmissions were being received and assessed a $10,000 civil penalty, at the low end of a second violation range. In count four, he charged the Respondents with failure to cancel the current declaration for fishing with Dungeness crab trap or pot gear and failure to file a new one for fishing with limited entry fixed gear on September 16, 2007 and assessed $4,000 civil penalty which was at the high end of the penalty range for a second offense. The total assessed penalty was $116,897.95.

According to Mr. Sturgell, EA Moeller told Mr. Sturgell's counsel that he knew it was not Mr. Sturgell's fault, but that he would be charged and he could then recoup his losses from Jensen. OIG Interview with Dennis Sturgell (Oct. 14, 2009). Mr. Sturgell initially engaged Harold A. Snow, Esq., but later obtained a different lawyer, Thane W. Tienson, Esq., to represent him in this matter. Mr. Tienson contacted EA Moeller and told him that it was Jensen's fault. EA Moeller responded that NOAA knew Mr. Sturgell had done nothing wrong, but that NOAA was going to fine him anyway and that Mr. Sturgell can sue Jensen who had a lot of money.[1] EA Moeller's position was that NOAA wanted to set an example. He kept repeating that these

[1] Mr. Sturgell has sued Jensen, which led to a disputed settlement of $15,000. Mr. Sturgell currently has an action against Jensen pending in small claims court to collect on his understanding of the settlement.

were strict liability issues, that Mr. Sturgell had to ensure compliance and that, while culpability can be considered by a judge, Mr. Sturgell was still guilty and Jensen did not have the underlying obligation to comply with the regulations. EA Moeller does not remember ever speaking directly with Mr. Sturgell concerning this case and concludes that these are second-hand accounts of conversations he had had with Mr. Sturgell's lawyers. Response by EA Niel Moeller, p. 11. Throughout the case, Mr. Sturgell's position on counts one to three was that Jensen was at fault. Id. According to EA Moeller, his notes reflect that in September 2008, he explained to Mr. Snow (first lawyer) that the regulations make it clear that it is the vessel's responsibility to confirm that OLE was receiving the VMS signals, that Mr. Sturgell may have a claim for contribution against Jensen and/or Skymate, but that was for the parties to negotiate, and that from the government's perspective, Mr. Sturgell was the "primarily liable party." Id. Although his notes do not reflect it, EA Moeller believes that he made similar statements to Mr. Tienson. Id. EA Moeller denies telling Mr. Sturgell's lawyers that Mr. Sturgell was not at fault and similarly denies urging his lawyers to pursue a claim against Jensen and asserting that Jensen "had a lot of money." Id.

Upon review of the investigative materials provided by NMFS, it became evident that, at least in part, the alleged violations were the result of an unexplained delay on the part of NMFS's Office in Silver Spring, Maryland and the OLE office in Seattle, Washington and a failure by NMFS to provide its "tracking data" which would confirm that the VMS transmissions from the Seasick II were received by the Agency on Monday, September 17, 2007, thus contradicting the allegations contained in the NOVA. Mr. Tienson filed a motion for additional discovery to obtain the tracking data. This motion was granted by ALJ McKenna. NOAA amended the NOVA

and withdrew the allegations related to violations occurring on September 17, 2007 (count three of the NOVA), which reduced the overall assessed penalty from $116,897.95 to $106,897.95.

On the eve of the ALJ hearing scheduled in this case, NOAA reduced its settlement offer from $95,000 to $50,000. Mr. Tienson advised Mr. Sturgell to settle because of the additional cost Mr. Sturgell and Seasick II, Inc. would incur in preparing for and attending an ALJ hearing in Seattle (Mr. Sturgell lives on the Oregon coast) and because the applicable regulatory requirements impose strict liability. Subsequently, the parties reached a settlement. Mr. Sturgell and Seasick II, Inc. agreed to pay $50,000 with $10,000 due on or before September 15, 2009 and the remaining $40,000, together with $100 in interest, due on December 31, 2009. Of the remaining $66,897.95 of the $116,897.95 assessed in the NOVA, $10,000 had been previously withdrawn (count three), $31,897.95 would be discharged upon the timely payment of $50,000 plus interest and the remaining $25,000 would be suspended for a period of five (5) years and would be discharged provided that no fishery violation is committed by Respondents for a period of five (5) years from the effective date of the Settlement Agreement. Mr. Sturgell paid $10,000 on September 14, 2009 and $40,000 on January 26, 2010.

Discussion

Mr. Sturgell explains that the VMS unit malfunctioned as a result of several months of inactivity. The activation of the unit caused the wiring harness in the system to overheat which, in turn, caused the battery of the unit to slowly drain power. This was unknown to Jensen or Mr. Sturgell at the time because they thought the system was working before Mr. Sturgell went fishing on September 15, 2007.

Mr. Sturgell states that the penalty in this case was disproportionate to the gravity of the offense and he points out that he incurred significant additional costs in obtaining tracking data from the Agency that eventually led to the withdrawal of one of the charges. Mr. Sturgell settled his case on the eve of trial in order to avoid the anticipated high cost of defense. Mr. Sturgell complains that he was forced to settle due to the excessive penalty assessed and that he felt there was a likelihood that the ALJ would affirm the original assessment of $116,897.95, less $10,000 withdrawn under count three. At the time, Mr. Tienson was concerned that given the strict liability standard, there was a significant risk involved in trying the case and so informed Mr. Sturgell. To Mr. Tienson, the settlement felt and still feels like blackmail, particularly given that Mr. Sturgell was not fishing out of area and was doing nothing illegal other than fishing without NMFS in Seattle receiving the notification of his position. Secondly, the only reason this became a problem was because NMFS was closed for the weekend and could not receive notification during that time. This would not occur now because NMFS is operational for 24/7. Thirdly, Mr. Sturgell had historically delegated the VMS related work to Jensen and Jensen had always assumed full responsibility for Mr. Sturgell's VMS system. However, in this case, not only did Jensen assume full responsibility for activating Mr. Sturgell's VMS system, but its employees told Mr. Sturgell he was "good to go" fishing when in fact Jensen had failed to follow through with confirmation that the system had been successfully activated. Mr. Tienson believes that Mr. Sturgell was an easy target for NOAA to assess an excessive penalty because Mr. Sturgell is a successful fisherman and had the ability to pay an excessive penalty.

SA Hellberg argues that there was no urgency for Mr. Sturgell to go out fishing on Friday September 14, 2007 because there were seven (7) weeks remaining in the seven (7) month fishing season and points out that the regulations place the responsibility for VMS requirements on the vessel owner, not on third parties. Response by Acting ASAC Karl Hellberg, p. 2.

EA Moeller argues that, as the vessel owner and operator, Mr. Sturgell must bear the consequences of his actions and that Mr. Sturgell's decision to rely on Jensen Communications to install and activate a VMS unit does not excuse him from being ultimately responsible for ensuring compliance with the groundfish regulations. Response by EA Niel Moeller, p. 12. According to EA Moeller, the assessed penalty and the resulting settlement were appropriate and fair. Id. at 13. He considered that Seasick II, Inc. had no prior violations and that Mr. Sturgell had one (1) prior violation and assessed the penalties within the applicable penalty schedule for a second offense. EA Moeller assessed a substantial penalty in count one because "the VMS requirements are essential to enforcing the groundfish conservation areas;" they were "well publicized in advance of the effective date of their implementation;" "have been in effect since January 1, 2004, long before the violation in September 2007;" the evidence pointed to fishing without VMS coverage; and "the respondents landed a substantial quantity of groundfish in conjunction with the violation." Response by EA Niel Moeller, pp. 6-7. In count one, EA Moeller considered as mitigating factors the fact that Mr. Sturgell had hired a professional installer, Jensen, and that the power light was on, giving the impression that the unit was functioning normally. Id. The penalty schedule for a second violation was from $10,000 to $50,000 plus the fair market value of the catch. Penalty Schedule, pp. 3-4 (Oct. 1,

2005). EA Moeller assessed a $20,000 penalty in addition to the value of the catch for a total penalty of $59,401.14. In count two, the value of the groundfish landed was $33,496.81 and it was added to a base penalty of $10,000, as there was only one day of fishing, for a total of $43,496.81. Id. at 8. EA Moeller's reasons for the amount of the assessed penalty in count two were the same as his reasons in count one. Id. Count three was assessed at $10,000 but was later withdrawn. Id. In count four, EA Moeller assessed a penalty of $4,000 (the penalty schedule provided a range of $800 to $5,000) because "compliance with the declaration reporting requirement is important … for purposes of monitoring and enforcing groundfish conservation areas;" these areas were created to aid in the rebuilding of the overfished West Coast groundfish species, a "high resource management and enforcement priority for NOAA;" and "failure to timely update a vessel's gear declaration makes it more difficult for NMFS OLE to identify whether a vessel is fishing illegally" in a groundfish conservation area, which impedes NOAA's "ability to enforce these critical areas in furtherance of rebuilding depleted groundfish stock." Id. at 10.

Under the circumstances of this case, I agree with Messrs. Sturgell and Tienson that the penalty assessed and the penalty paid are excessive. While I agree that Mr. Sturgell is ultimately responsible for compliance with the VMS regulations and that he must suffer the consequences, there are circumstances in this case that warrant a reduction of the penalty with respect to counts one and two. On Wednesday, September 12, 2007, Mr. Sturgell alerted ███ ████████ that he planned to go fishing on the following Friday (September 14) or Saturday (September 15) and wanted the VMS unit on board the Seasick II activated. On that date, ███ ████████ or someone else from Jensen faxed NOAA a VMS installation and activation report.

On September 14, 2007, someone from Jensen activated this unit and it appeared from the lights that the unit was working. That afternoon, [redacted] told Mr. Sturgell that he was "good to go" fishing. It would be difficult for Mr. Sturgell to understand anything other than that he was in compliance and that it was reasonable to rely on assurances from his long time electronics provider that he could go fishing. Even after it was discovered that the VMS unit was not operating properly and had been replaced, Mr. Sturgell was again told he could go fishing. I find that Jensen was negligent in not following its usual policy in activating VMS units and OLE added to the confusion by not being able to confirm receipt of the unit's activation notification initially sent by Jensen and thereafter, by closing Friday afternoon (September 14, 2007) for the weekend.

I find that this case fits into the category of cases where an EA assessed an excessive penalty as a means for forcing settlement. The assessed penalty was in excess of $100,000. Mr. Sturgell settled this case for approximately one-half (1/2) of that amount because he was convinced that, if he continued with the hearing before an ALJ, he would be found liable because of strict liability and then ordered by the ALJ to pay the originally assessed penalty of $106,897.95 (count 3 for $10,000 had been withdrawn). I find that the focus of the penalty should be the value of the fish caught on the trips which are the subject of counts one and two and not penalties over and above that value which was $72,897.95. A fair resolution of this case would be to penalize the fisherman for an unintentional strict liability violation, caused in part by third parties (Jensen and NOAA), by paying as a penalty the value of one-half (1/2) of the catch or $36,448.97. Since, Mr. Sturgell has already paid $50,000 in this case, I find that he

is entitled to a return of $13,551.03 or $13,550.00 as the difference between a fair penalty and the amount previously paid as a penalty.

Recommendation

I recommend that the Secretary remit the sum of $13,550.00, jointly to Seasick II, Inc. and Dennis L. Sturgell.

Case 102A
SE 0702524 FM/V
F/V Rachel J. Belle
Rachel J. Belle, Inc., Owner
[REDACTED], Operator

Vessel owner and operator complain about the excessive penalty imposed by NOAA for an inadvertent incursion into a closed area.

Findings of Fact

Karen Leigh Jayne Bell is a fourth generation fisherman who works for A.P. Bell Fish Company, Inc. ("A.P. Bell") located in Cortez, Florida. A.P. Bell, which was started in 1940 by Ms. Bell's grandfather, is a wholesale fish dealer that processes and packs primarily grouper, stone crab, shrimp, mullet and skate. Her father and two (2) uncles are the current officers of A.P. Bell. All of A.P. Bell's shareholders are family members. The company currently owns twelve (12) fishing vessels, but only five (5) are in operation. Each vessel is owned by a subsidiary corporation, including the fishing vessel Rachel J. Bell, which is owned by Rachel J. Bell, Inc. Ms. Bell owns an adjacent restaurant, Starfish Company, and handles the day-to-day operations for A.P. Bell. She was a member of the Gulf of Mexico Fishery Management Council from 1999 to 2006.

[REDACTED] was Captain of the Rachel J. Belle in 2007. [REDACTED] has been in the fishing industry for forty (40) years since he was fifteen (15) years old. [REDACTED] had not been charged with a violation until this present complaint. [REDACTED] is an independent contractor of A.P. Bell and splits the proceeds of [REDACTED] catch with the company. Between July 14, 2007 and July 25, 2007, [REDACTED] was on a fishing trip aboard the Rachel J. Belle. Sometime during those dates, the Rachel J. Belle was fishing within the Pulley Ridge Habitat Area of Particular Concern

(HAPC), an area that is closed to commercial fishing.[1] admitted to making nine (9) bottom longline sets inside the Pulley Ridge HAPC. Each set included 1,200 hooks and a line 7 miles in length.

On July 25, 2007, SA Emanuel Antonaras and SA James Kejonen went to A.P. Bell to meet at the end of fishing trip after SA Antonaras was contacted by a VMS technician, who detected the Rachel J. Belle's incursion into the closed area via VMS.

During the ensuing conversation, SA Antonaras allowed to compare the VMS printout from NOAA to own printout of the course he had taken with the Rachel J. Belle. Based on the comparison, admitted to being inside the closed area, but explained that did not have the proper coordinates for the Pulley Ridge HAPC. Specifically, five (5) points marked the Pulley Ridge HAPC. However, inadvertently omitted a single point, resulting in him fishing in a part of the closed area. Further, noted that was adjacent to a USCG cutter during time in the closed area. The USCG cutter did not inform that was in a closed area despite its proximity to the Rachel J. Belle. The USCG Cutter, Diligence, was engaged in a National Security Mission at the time and the crew had a vague recollection of the Rachel J. Belle in the HAPC closed area. The cutter would not have diverted its attention to the Rachel J. Belle because it was pursuing a higher priority mission. Response by SA Emanuel Antonaras.

[1] "The Pulley Ridge HAPC was established January 23, 2006 and restricted fishing activities within the HAPC (including prohibiting the use of bottom longline gear) to protect essential fish habitat (EFH)…" Fishing activities such as the use of longlines and anchoring can damage coral reefs. Longlines, particularly during retrieval, can snag corals, thus breaking or upending them… Therefore, limiting these activities is necessary to protect this important habitat." Response by EA Cynthia Fenyk, p. 1.

SA Antonaras did not seize the catch from the Rachel J. Belle, valued at $12,252.55, because of [redacted] cooperation, acceptance of responsibility and the fact that it was an inadvertent incursion. The decision not to seize the catch allowed [redacted] to use the proceeds to pay for the costs associated with the trip, including wages, equipment, fuel and ice. The case was assigned to EA Cynthia S. Fenyk of the NOAA Southeast Division. On September 10, 2008, EA Fenyk issued a NOVA to Rachel J. Belle, Inc., owner of the Rachel J. Belle, and [redacted], the captain/operator, jointly and severally. She charged the Rachel J. Belle with one (1) count of fishing in the closed Pulley Ridge HAPC, assessed a $30,000 civil penalty and imposed a thirty (30) day vessel permit sanction.

Ms. Bell, on behalf of Rachel J. Belle, Inc., and [redacted] elected to challenge this NOVA in administrative court without counsel. While a hearing was pending, the parties engaged in settlement discussions, during which EA Fenyk learned that [redacted] and [redacted] had declared bankruptcy before in 1993. It also became apparent that [redacted] had suffered two (2) heart attacks, the most recent in December 2007, and doctors had diagnosed [redacted] with coronary artery disease and severe depression. [redacted] also informed EA Fenyk that despite the joint and several liability imposed on [redacted] and Rachel J. Belle, Inc., [redacted] and [redacted] family would ultimately bear the financial responsibility for the penalty because the vessel owners would inevitably recover the full amount from [redacted] through various means, including income deduction. [redacted]

[redacted] adverse health history and [redacted] cooperation during the entire investigation were significant factors that EA Fenyk considered in requesting a substantial reduction in the settlement amount from Charles Green, Assistant General Counsel for NOAA.

EA Fenyk considered reducing the $30,000 assessment to between $8,000 and $10,000, plus a probation period in lieu of a sanction. [redacted] Ultimately, EA Fenyk reduced the penalty assessment to $8,000. The parties signed the settlement agreement on July 7, 2009. Notably, EA Fenyk did not impose a vessel permit sanction on the Rachel J. Belle. A.P. Bell paid the entire penalty on behalf of [redacted] and [redacted] was to repay A.P. Bell in installments. [redacted] submitted financial verification forms in order to demonstrate an inability to pay. Meanwhile, Rachel J. Belle, Inc. failed to complete and return the financial forms to NOAA, which resulted in an inference that it had the ability to pay. Response by EA Cynthia Fenyk, p. 3.

Discussion

Ms. Bell and [redacted] both argue that EA Fenyk assessed an excessive penalty as leverage in order to force settlement. Ms. Bell also feels that there is disparate treatment among NOAA penalties. She comments that she shares NOAA's goals in ensuring that the Gulf of Mexico is healthy with sufficient stock of fish to replenish what is caught. However, Ms. Bell does not believe that an unintentional incursion into a closed area should have warranted the assessed or agreed to penalty in this case. To the contrary, EA Fenyk points out that she took many factors into consideration in assessing, and ultimately, lowering the penalty assessment to $8,000. These factors included, among others, (1) gravity of the violation; (2) harm to the resource; (3) condition/value of resource; (4) whether fish were seized; (5) economic benefit derived from the violation; (6) degree of cooperation; and (7) acceptance of responsibility. Response by EA Cynthia Fenyk, pp. 2-3. EA Fenyk further noted that she seriously considered

"[REDACTED] physical and emotional health, along with [REDACTED] assertion that [REDACTED] would ultimately be the person responsible for paying the penalty, [which] was the predominant reason the undersigned sought supervisory approval for a very significant reduction in the penalty." Id. at 3.

The facts are not disputed in this case. [REDACTED] was fishing in the Pulley Ridge HPAC, albeit inadvertently, and threatened the coral reef system as a result. SA Antonaras understood that it was a mistake and chose not to seize the catch in order to allow [REDACTED] [REDACTED] to offset the cost of the trip. Further, I find no evidence that EA Fenyk intentionally assessed a high penalty in order to coerce settlement. Rather, EA Fenyk considered numerous factors in assessing a $30,000 penalty, including [REDACTED] state of mind, cooperation, and acceptance of responsibility. Notably, she sought supervisory approval to lower the penalty to $8,000 based on [REDACTED] personal circumstances. Finally, she allowed the Rachel J. Belle an opportunity to continue fishing without any vessel permit sanction. In light of these facts, I find that an $8,000 settlement is fair and reasonable under the circumstances.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 102B

SE 0704618 FM/V

F/V Lisa M. Belle

Karen Leigh Jayne Bell, A.P. Bell Fish Company (owner)

[REDACTED] (operator)

Vessel owner complains about the excessive penalty levied against her company for the Captain's violation. She does not believe the Captain's actions should be imputed to the parent company.

Findings of Fact

Karen Leigh Jayne Bell is a fourth generation fishermen who works for A.P. Bell Fish Company, Inc. ("A.P. Bell") located in Cortez, Florida. A.P. Bell, which was started in 1940 by Ms. Bell's grandfather, is a wholesale fish dealer that processes and packs primarily grouper, stone crab, shrimp, mullet and skate. Her father and two (2) uncles are the current officers of A.P. Bell. All of A.P. Bell's shareholders are family members. The company currently owns twelve (12) fishing vessels, but only five (5) are in operation. Each vessel is owned by a subsidiary corporation, including the fishing vessel Lisa M. Belle, which is owned by Lisa M. Belle, Inc. Ms. Bell owns an adjacent restaurant, Starfish Company, and handles the day-to-day operations for A.P. Bell. She was a member of the Gulf of Mexico Fishery Management Council from 1999 to 2006.

On December 12, 2007, [REDACTED] and [REDACTED] crew were aboard the Lisa M. Belle. [REDACTED] worked as an independent contractor for A.P. Bell. Sometime that day, the USCG boarded the vessel to ensure compliance with various regulations. During the boarding procedure, Petty Officer [REDACTED] discovered that [REDACTED] and [REDACTED]

crew possessed 710 gangions with grouper meat used as bait in violation of 50 CFR §622.7 (J). Grouper is a species of fish that has trip and minimum size limits, and must be maintained intact through offloading ashore. [redacted] and [redacted] crew were having a productive fishing excursion and simply ran out of bait. As a result, [redacted] decided to use the grouper meat to supplement as bait. Officer [redacted] also discovered that the Lisa M. Belle did not have turtle mitigation gear on board. At all times during this investigation, the captain and [redacted] crew were cooperative. Nonetheless, Officer [redacted] directed the Lisa M. Belle to return to port.

NOAA SA Emanuel Antonaras met the Lisa M. Belle crew at the dock on December 13, 2007. During the meeting, SA Antonaras interviewed the Captain and [redacted] three (3) crew members. The Captain, along with his crew members, acknowledged that they used grouper as bait on at least one (1) of their lines. [redacted] also admitted to SA Antonaras that [redacted] did not have turtle mitigation gear onboard. Sea turtles are particularly vulnerable to lethal takes by longline gear. Response by EA Cynthia Fenyk, p. 1.

The case was assigned to EA Cynthia Fenyk and she issued a joint and several NOVA against Lisa M. Belle, Inc. and [redacted] on March 31, 2008 and assessed a $30,000 total penalty: a $25,000 penalty for failure to maintain a fish intact through offloading ashore, and a $5,000 penalty for failure to have turtle conservation measures in place.

EA Fenyk offered a $22,500 compromised settlement, which the parties agreed to on June 5, 2008. The settlement agreement also included a thirty (30) day vessel permit sanction. The language of the settlement agreement called for an immediate reinstatement of the original $30,000 penalty, plus interest, in the event of default. Ms. Bell notes that she agreed to

the settlement without counsel, in large part, because [redacted] assured her that [redacted] could pay the penalty.

Several months later, on August 27, 2008, SA Fenyk sent Lisa M. Belle, Inc. a revised settlement agreement whereby SA Fenyk amended the sanction schedule to allow the Lisa M. Belle to serve a thirty (30) day vessel permit sanction over four (4) periods. A.P. Bell Fish Company, on behalf of Lisa M. Belle, Inc., made the first seven (7) out of eighteen (18) payments. Although [redacted] assured Ms. Bell that [redacted] could pay the penalty, [redacted] ultimately quit his position and left the state. According to Ms. Bell, A.P. Fish Company made the first seven (7) payments of over $1,000 per month. However, a historically poor mullet season and an ice-machine malfunction at the company prompted A.P. Bell to miss the remaining penalty payments. The non-payment triggered the full $30,000 plus interest penalty assessment in accordance with the settlement agreement. The Lisa M. Belle served her permit sanction.

Discussion

Ms. Bell primarily complains that the Captain's actions should not be imputed to Lisa M. Belle, Inc. Also, she questions why there is no uniformity in the penalty assessments. Finally, she argues that the $30,000 assessed penalty was because other vessels received much lower penalties for essentially the same violation of using reef fish as bait.

EA Fenyk notes that the original penalty assessment of $30,000 was within the Southeast region penalty schedule ($500-$50,000 and 0-45 days permit sanction). The broad penalty range allowed for application of the facts and circumstances that may be unique to any given case. As such, the application of aggravating/mitigating factors may result in disparate

penalty assessments for similar violations. After assessing all the relevant factors, including the gravity of the violation, harm to the resource, value of the resource and whether fish were seized, EA Fenyk assessed what she thought to be an appropriate penalty. Response by EA Cynthia Fenyk, p. 2.

I do not find the penalty was excessive, nor was the settlement unfair. First, there is no dispute as to the facts of this case. Second, it would appear that Ms. Bell, on behalf of Lisa M. Belle, Inc. and A.P Bell Fish Company, agreed to settle this case because [REDACTED] was aware that what [REDACTED] did was wrong and that [REDACTED] was willing to pay the compromised settlement of $22,500 over time. Without this promise, Ms. Bell would have likely tried to negotiate a further penalty reduction. In my experience, the compromised civil penalty is a starting point and further reduction is usually warranted. Unfortunately for Ms. Bell, [REDACTED] quit before the full penalty was repaid to NOAA. If indeed A.P. Bell Fish Co., on behalf of Lisa M. Belle, Inc., is having financial difficulty repaying the remainder of the assessed penalty, I suggest that Ms. Bell make a good-faith effort to negotiate a revised payment schedule with NOAA. EA Fenyk has previously renegotiated with Ms. Bell, after considering certain economic factors, by granting the Lisa M. Belle an opportunity to serve non-consecutive permit sanctions. Finally, I note that SA Antonaras did not seize the catch, which allowed Lisa M. Belle, Inc. to pay for the cost of the trip. [REDACTED] consciously disregarded the regulations that implicated conservation measures and Lisa M. Belle, Inc. is liable based on the established legal doctrine of respondeat superior. Although [REDACTED] was a contractor, [REDACTED] was acting within the scope of his employment onboard a corporate-owned vessel. After considering all the factors

of this case, I find that EA Fenyk assessed an appropriate penalty and Ms. Bell was not unfairly coerced into settling this case.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 127

NE 050072

F/V Integrity

Michael David Hayden, Jr. (Owner/Operator)

Fisherman complains first, that NOAA should have notified him of the closed area when it issued him a scallop permit and second, that the EA forced him to settle his case on threat that if he appealed, he would likely lose and the ALJ could assess a penalty up to $130,000.

Findings of Fact

Michael David Hayden, Jr. ("Mr. Hayden") is thirty-nine (39) years old and has been a commercial fisherman for twenty (20) years. In 2004, he assisted in the building of the fishing vessel, Integrity, which, since that date, he has owned and operated as a day boat with both state and federal fishing permits. Fishing is Mr. Hayden's only occupation.

On June 6, 2005, Mr. Hayden, as owner/operator of the fishing vessel Integrity, was boarded by the Coast Guard approximately fifty-six (56) nautical miles southeast of Cape May, N.J. while fishing for scallops in a closed area. Mr. Hayden admits to fishing in a closed area, but states that he had no notice that the area was closed and that NOAA should have notified him of closed areas when it issued him a scalloping permit. Mr. Hayden was issued an EAR for the violation.

On February 8, 2006, Mr. Hayden received a one (1) count NOVA charging him with fishing in a closed area for which he was assessed a penalty of $5,000. On February 21, 2006, Mr. Hayden settled his case upon payment of $2,700.

Discussion

Mr. Hayden states that he was forced to settle because EA J. Mitch MacDonald told him that if he went to court, NOAA wins 98% of the time and if he lost, his fine could be as high as $130,000. In response, EA MacDonald states that it was not his general practice to discuss, nor does he remember discussing, NOAA's "win" rate with Mr. Hayden. However, EA MacDonald, in his response, states that "[i]t was my general practice to say that NOAA settles a high percentage of its cases, and I generally recall using 98% or thereabouts as an approximate settlement rate." Response by EA J. Mitch MacDonald, p. 2. Additionally, EA MacDonald states that he did not assess a $130,000 penalty in this case nor would he have advocated for such a penalty at a hearing. I find EA MacDonald's recollection of this conversation to be credible.

Mr. Hayden admitted to fishing in a closed area. Although it is not a defense to this violation that Mr. Hayden did not know he was fishing in a closed area, EA MacDonald took that fact into consideration and the fact that Mr. Hayden had not received actual notice of the closed area. EA MacDonald reduced the minimum penalty of $5,000 for a first time violator to $2,700. I do not find that EA MacDonald unfairly forced Mr. Hayden to settle this case by threat or coercion if he appealed to an ALJ. Consequently, I find that this case was settled for a fair and reasonable penalty.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 132

NE 0603036 FM/V

F/V Bud Lin

Bud Lin, Inc., Owner

William Fooks, Principal/Operator

Fisherman complains about an excessive $150,000 assessed penalty he received for failing to transmit vessel monitoring system signals to NMFS on two (2) separate occasions. The case was settled for $10,000.

Findings of Fact

William Albert Fooks resides in Berlin, Maryland and has been a commercial fisherman for approximately forty (40) years. He started working part-time for his father when he was fourteen (14) or fifteen (15) and became a full-time fisherman immediately after his high school graduation in 1970. Mr. Fooks has worked on various scalloping and clamming vessels in the past. In 2005, Mr. Fooks and his wife, through the corporate entity, Bud Lin, Inc., purchased the Bud Lin, which is a general category scalloping vessel. The Bud Lin hailed out of Ocean City, Maryland, but Mr. Fooks sold the federal scalloping permit on the Bud Lin recently. He is awaiting the sale of the vessel itself. Currently, Mr. Fooks is a deckhand on the surf clamming vessel, Betty C.

Between July and December 2006, NMFS records show that the Bud Lin lost VMS contact at least twenty-five (25) times, many of which occurred near or around the Elephant Trunk Closed Area ("ETCA"). Offense Investigation Report by SA Steven Niemi, pp. 9-10 (Feb. 22, 2007). Mr. Fooks is surprised that the number is not higher because he asserts that he had

problems with the VMS system since its inception in 2005.[1] Mr. Fooks, at one point, claims that he had purchased three (3) VMS systems over the course of six (6) months. Martek, a marine electronics company located in Ocean City, Maryland, installed the VMS systems for Mr. Fooks. Mr. Fooks testified that he had called both Martek and Skymate, the manufacturer of his VMS unit, numerous times to resolve various technical issues, including, but not limited to, signal problems. Further, Mr. Fooks attributed the data breaks generally to a faulty USB serial port adapter that his Skymate unit required. Special Master Interview with William Fooks (Sept. 16, 2011). His counsel, Stephen Ouellette, argues that the use of a USB serial port adapter is problematic for the VMS unit because it often times creates a loose connection between the VMS unit and the onboard computer. Special Master Interview with Stephen Ouellette, Esq. (Sept. 27, 2011).

According to NMFS VMS Specialist Linda Galvin, between July 19, 2006 at 6:28 am EDT and July 20, 2006 at 10:54 am EDT, the Bud Lin experienced a 1 day, 4 hour, and 26 minute VMS data break. The data break was significant because the Bud Lin was approximately 8.5 miles from the Elephant Trunk Closed Area when she allegedly stopped reporting. Memorandum from VMS Specialist Linda Galvin (Dec. 8, 2006). Ms. Galvin wrote to the manufacturer of the VMS unit, Skymate, to ascertain whether the system was functioning between those dates and

[1] Mr. Fooks strongly urged me to contact [redacted] at Skymate, concerning the problems he had experienced with his VMS unit. He has spoken with [redacted] extensively in the past about the VMS problems. In fact, Mr. Fooks said that he practically had [redacted] on his speed dial. I contacted [redacted] by telephone to confirm the extent of Mr. Fooks' dealings with him. I was in contact with [redacted] at Skymate, who informed me it had no telephone records to and from Skymate as far back as 2006. Although I cannot confirm that Mr. Fooks called Skymate for this specific VMS related problem, I find his testimony credible that he has contacted Skymate in the past concerning VMS issues.

[redacted] confirmed the data break for that time period. Letter from Skymate CEO John Tandler to VMS Specialist Linda Galvin (Aug. 4, 2006).

The VMS system on the Bud Lin experienced another major data break of 1 day, 8 hours and 42 minutes between December 5, 2006 at 8:16 am EST and December 6, 2006 at 4:58 EST. Memorandum from VMS Specialist Linda Galvin (Dec. 20, 2006). Ms. Galvin requested a health check from Skymate and [redacted] of Skymate confirmed that between December 5 and December 6, 2006, there was no significant outage affecting the VMS system. Letter from Skymate [redacted] to VMS Specialist Linda Galvin (Dec. 18, 2006). [redacted] wrote:

> There were several significant gaps in the reporting data during the period. No reports were received between 18:19 on December 4th and 7:22 on December 5, when a START signal was received, indicating that the system was powered on at that time. Two more STARTs were received over [the] next four hours, indicating an instability in the power supply to the unit. At 14:53 on Dec 5th, a GB alert was received, which indicates that the GPS receiver was blocked from seeing GPS satellites. Most significantly no reports were received for the 28-hour period between 17:28[2] on Dec 5th and 21:24[3] on the 6th...The gaps in the reporting appear to be related to instability with the power supply to the unit, and with blockage of the GPS antenna. Id.

Mr. Fooks testified that, on that day, a wave came through a sliding window of the Bud Lin on her starboard side and disabled his computer. Mr. Fooks was aware that his laptop computer malfunctioned as a result of the wave, but testified that he was not aware that the malfunction affected the VMS system until he returned to port. Special Master Interview with William Fooks (Sept. 16, 2011). Mr. Fooks continued to fish until the evening when he landed his catch at Southern Connection Seafood in Crisfield, Maryland. SA Steve Niemi responded to

[2] 12:28 pm EST.

[3] 4:24 pm EST.

a call from NOAA Enforcement Technician Melissa Aulson concerning the Bud Lin's VMS outage that day and proceeded to seize the 400 lbs. of Atlantic sea scallops the Bud Lin landed at Southern Connection Seafood. SA Niemi called Mr. Fooks the next day and explained why he seized his catch. During this conversation, Mr. Fooks told SA Niemi what had happened. Offense Investigation Report by SA Steven Niemi, p. 5 (Feb. 22, 2007).

SA Niemi wrote in his OIR that, during their first telephone conversation, he had asked Mr. Fooks to bring his damaged laptop, as well as any receipts concerning a loaner computer, to their future meeting. Id. at 6. Mr. Fooks disputes that SA Niemi asked to see his damaged laptop during their initial telephone conversation. According to Mr. Fooks, he and his wife tried several times to contact SA Niemi afterwards to schedule a meeting with SA Niemi because they needed the proceeds from the seizure to pay various bills. Special Master Interview with William Fooks (Sept. 16, 2011).

On December 12, 2006, Mr. Fooks met SA Niemi and Maryland Department of Natural Resources Sergeant [redacted] at SA Niemi's office. Mr. Fooks claims that it was at this meeting that SA Niemi first requested to see his disabled laptop and/or documentation concerning his laptop repairs. Id. SA Niemi wrote in his OIR that he asked Mr. Fooks again at this meeting to bring his damaged laptop and/or receipts, to which Mr. Fooks brought neither. Offense Investigation Report by SA Steven Niemi, p. 7 (Feb. 22, 2007). SA Niemi notes that Mr. Fooks lives in the same small town as the NOAA office, was aware that SA Niemi was looking for the receipts related to Mr. Fooks computer repair, and Mr. Fooks did not provide the receipts. SA Niemi also points out that he asked for the receipts twice, and could not speculate why he never received copies of them. Response by SA Steven Niemi.

However, Mr. Fooks provided me with a copy of the receipt that he received on December 8, 2006 from Martek Company that performed repairs on Mr. Fooks' Dell laptop. Letter from Martek [redacted] (Dec. 8, 2006). At the same time, [redacted] provided Mr. Fooks with a replacement laptop on December 8, 2006, which he returned on January 5, 2007. Because his original laptop was under repair, Mr. Fooks was unable to provide SA Niemi with the damaged laptop when they met on December 12, 2006. Special Master Interview with William Fooks (Sept. 16, 2011).

Mr. Fooks eventually abandoned the 400 lbs. of scallops from the Bud Lin worth approximately $2,800. Offense Investigation Report by SA Steven Niemi, p. 8 (Feb. 22, 2007). I cannot determine why Mr. Fooks did not provide SA Niemi with his computer repair receipts while the case was being investigated. However, I find Mr. Fooks' testimony credible concerning how his VMS unit was disabled and he provided corroborating evidence concerning his laptop repair.

On February 23, 2007, SA Niemi issued an EAR to Mr. Fooks for two (2) counts of VMS violations that took place between July 19-20, 2006 and December 5-6, 2006. On July 28, 2008, EA Charles Juliand sent a two (2) count NOVA to Mr. Fooks, alleging:

Count 1: Failure to transmit a VMS signal at least twice per hour from December 5, 2006 at 13:16 GMT (8:16 EDT) through December 6, 2006 at 21:58 GMT (16:58 EDT); and

Count 2: Failure to transmit a VMS signal at least twice per hour from July 19, 2006 at 10:28 GMT (06:28 EDT) through July 20, 2006 at 14:54 GMT (10:54 EDT).

EA Juliand assessed a $75,000 penalty for each count for a total of $150,000.

Mr. Fooks hired Stephen Ouellette to represent him in contesting these allegations. Mr. Ouellette requested a hearing and the case was assigned to an ALJ. Settlement discussions were ongoing while the hearing was pending. According to Mr. Ouellette, NOAA's penalty assessment was presumed to be reasonable while he was litigating this case. This presumption has since been eliminated. As a result of the presumption, Mr. Ouellette states that his best argument before an ALJ was his client's inability t pay the assessed penalty. Objectively, Mr. Fooks was in violation by virtue of the fact that his VMS unit was not working properly.[4] Special Master Interview with Stephen Ouellette, Esq. (Sept. 27, 2011). In response, EA Juliand claims that Mr. Ouellette can make any argument he wanted and that the ALJ's role was to make a determination based on the evidence. Response by EA Charles Juliand, p. 7.

The parties signed the Settlement Agreement on March 10, 2009 for $10,000. Mr. Fooks paid $10,000, in part, by borrowing money from his friends and relatives. Mr. Ouellette, who negotiated exclusively with EA Juliand, was satisfied with the settlement given the circumstances of this case and a potential penalty of $150,000.

To date, this has been Mr. Fooks' only NOAA violation.

[4] In an email from EA Juliand to Mr. Ouellette, he writes: "…I have to show that the overall system was working at the times charged and that [Fooks] failed to keep his VMS working during those times, as required by the regs. I can do that." Email from EA Charles Juliand to Stephen Ouellette, Esq. (Mar. 4, 2009).

Discussion

Mr. Fooks makes the argument that the penalty assessed against him was excessive in this case. In response, EA Juliand writes that he would have made clear to an ALJ that the NOVA charges were but a small part of a larger pattern of VMS non-reporting.[5] He further argues that the subsequent settlement of the case was reasonable considering the relevant circumstances. Response by EA Charles Juliand, p. 7.

The Secretarial Decision Memorandum of March 16, 2011, empowers me to review cases in which a GCEL attorney charged an excessive penalty in a manner that unfairly forced settlement. In this case, EA Juliand charged $150,000 for two (2) counts of failing to abide by VMS reporting requirements. Fundamental fairness and common sense dictates that this penalty was unreasonable and excessive. EA Juliand's argument that the settlement amount was reasonable is unpersuasive. The mitigating circumstances in this case and the lack of evidence as to intentional tampering, suggests a more appropriate penalty would be even lower than the $10,000 settlement amount.

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[5] I note that during settlement discussions, Mr. Ouellette wrote to EA Juliand:

> Let me know what the last offer was on Fooks. I think this [Asst. General Counsel Richard Mannix's report on VMS reliability] complicates the Agency's position about the gaps in VMS data, which is relevant to this case.

In response, EA Juliand wrote:

> "Also, the "gaps" that occurred around the violation date(s) were caused by your client turning off his VMS. **What was going on at other times is not especially relevant**." (emphasis added). Email from EA Charles Juliand to Stephen Ouellette, Esq. (Mar. 4, 2009).

With respect to the December 5-6, 2006 violation, Mr. Fooks had a reasonable explanation. His laptop computer was disabled because of a wave while on the fishing trip. Though I cannot resolve why he did not provide SA Niemi with the requisite receipts, he did provide those receipts to me, which corroborate his version of the facts. Under the NOAA penalty schedule that existed at the time, minor VMS issues warranted a written warning where appropriate. Penalty Schedule (May 2002). The facts of this violation suggest that a written warning is appropriate in this instance.

With respect to the July 19-20, 2006 violation, I do not have sufficient evidence to determine the reasons underlying the VMS outage. Though Mr. Fooks attributed the VMS outage to a faulty USB cable, I cannot determine whether it was the cable that caused the outage during that particular time period. I found no credible evidence in this case that would support a finding that Mr. Fooks intentionally disabled his VMS unit. In fact, as a result of my interview with Mr. Fooks, I am convinced that he did not disable his VMS unit. However, the fact remains that Mr. Fooks' VMS unit was malfunctioning during the time charged. In light of this fact, I find that a $5,000 penalty is reasonable in this case.

Recommendation

I recommend that the Secretary remit $5,000 to Bud Lin, Inc. in connection with this Application for Review.

Case 201

F/V Keller's Pride and Night Stalker
NE 043058 FM/V and NE 043086 FM/V
Keller's Pride, Inc., Owner
John T. Keller, Owner/Keller's Pride Operator

Former vessel owner complains that Northeast GCEL refused to renegotiate his penalty after he lost his fishing vessels and his truck in bankruptcy. He argues that a $105,000 settlement was excessive for a first time violation. Complainant admitted to being involved in an illegal scheme to land large quantities of scallop overages. His federal permit has been revoked and he claims that since he cannot fish in federal waters, he is unable to pay his penalty.

Findings of Fact

John T. Keller lives in Brunswick, Georgia and is a third generation fisherman with a ninth grade education who started fishing in 1986. He currently fishes for shrimp in Georgia state waters aboard the 49' God's Grace, a shrimp vessel owned by his parents. Mr. Keller currently lives with his parents because he cannot afford to rent an apartment. He was the sole shareholder and owner of Keller's Pride, Inc., a fish dealership located in Mappsville, Virginia. Keller's Pride, Inc. was the registered owner of two (2) federal general-class permitted scallop vessels: Keller's Pride and Night Stalker. At all times relevant to this complaint, [redacted] and Mr. Keller interchanged as operators of the Keller's Pride and the Night Stalker, which were each permitted 400 lbs. of scallops per trip.

Mr. Keller started scalloping in Chincoteague, Virginia in the beginning of 2004 after shrimp became scarce in Georgia. Between April and May 2004, the Keller's Pride was moored

at the dock and did not make any fishing trips. According to NOAA's investigative reports, the Night Stalker made various scallop trips and landed an excess of the scallop possession limit during this period. NOAA alleged that [redacted], who operated the Night Stalker, sold legal quantities of scallops to Chincoteague Fisheries, a fish dealer, before selling the excess to Southern Connection Seafood in Crisfield, Maryland. On several occasions, [redacted] attributed landings to the Keller's Pride despite the fact that the Keller's Pride remained moored at the dock. Mr. Keller denies that he ever attributed fish from the Night Stalker to the Keller's Pride. This claim is disputed. In fact, EA J. Mitch MacDonald notes that Mr. Keller's claim is questionable in light of the documented investigation conducted by NOAA SAs.[1] I am inclined to agree. In an interview with NOAA Agents, [redacted] acknowledged that [redacted] "broke the law" and that someone by the name of "Tom" told [redacted] that Southern Connection would buy anything they brought and would not create records. Keller's Pride Offense Investigation Report by SA Steven Niemi, p. 75 (Dec. 10, 2004).

Between May and August 2004, the Keller's Pride and the Gold Nugget II, another scallop vessel, were landing large quantities of scallops in Chincoteague, Virginia. The Night

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[1] EA MacDonald writes that Mr. Keller's denial is questionable at best given the evidence in the Night Stalker case file (Investigation Report and Supplement Investigation Report -- NE043086FM/V) and Mr. Keller's admissions. First, Mr. Keller signed a vessel trip report #10521310 received by the NMFS on February 3, 2005, on which he states the Keller's Pride did not fish in April 2004. A Southern Connection Seafood purchase order recorded purchasing 379.8 pounds of scallops from the Keller's Pride on April 1, 2004. On April 11, 2004, a Southern Connection Seafood purchase order recorded purchasing 651.5 pounds of scallops from the Keller's Pride. Again on April 17, 2004, a Southern Connection Seafood purchase order records a purchase of scallops from the Keller's Pride. This time, it was 413 pounds. All of these purchase records included the name of John Keller. It is important to note that Agent Niemi's surveillance showed that Mr. Keller used his pickup truck to assist in the illegal offloads. Last, when Mr. Keller settled case NE043086FM/V, he admitted to landing all of these scallops on the Night Stalker as charged in the NOVA and NOPS. Response by EA J. Mitch MacDonald, p. 2.

Stalker did not fish during this period. Pursuant to tips from several local fishermen, SA Steve Niemi observed and recorded various illegal landings between July and August 2004. The scheme, later dubbed "Operation Day Tripper" by law enforcement officials, involved the vessels landing large quantities of scallops, selling the legal limit to Chincoteague Fisheries before trucking the rest of the scallops to Southern Connection Seafood, where they would be sold, and submitting false records to the government indicating that only the legal amount was landed and sold.

On August 25, 2004, NOAA SAs converged on the various targets of the investigation and seized numerous documents pertaining to the landings. On August 31, 2004, SA Niemi interviewed, among others, [REDACTED] Keller and [REDACTED] Both admitted to landing overages and Mr. Keller made several false statements concerning landing the scallop overages. Keller's Pride Offense Investigation Report by SA Steven Niemi, pp. 75-76 (Dec. 10, 2004).

On December 15, 2004, SA Niemi issued an EAR to Mr. Keller, [REDACTED] and others involved in Operation Day Tripper. Mr. Keller communicated with EA J. Mitch MacDonald before a NOVA was issued. In an undated handwritten letter addressed to EA MacDonald, Mr. Keller wrote the following in relevant part:

> "I know I was wrong. I had a Capt. on the boat that would not lesson [sic] to me. I told [REDACTED] to stop bringing over 400#, [b]ut [REDACTED] would not stop…We know that we did wrong, but I am asking you for mercy…On August 26, 2004, I fired [REDACTED] and I John T. Keller have been working the F/V Keller's Pride…If you do not take my [f]ederal permit, I can pay a reasonable fine and keep my business…I am not trying to get out of it, I am just ask[sic] you Mr. MacDonald to be reasonable in my [c]ase." Undated Handwritten letter.

During my interview of Mr. Keller, he reiterated the admission that "it was a stupid thing to do." Special Master Interview with John Keller (Dec. 20, 2011). On January 30, 2006, EA

MacDonald issued a NOVA/NOPS to Keller's Pride, Inc. and [REDACTED] Keller and [REDACTED] individually, charging thirty-four (34) counts of illegally landing scallop overages by the Keller's Pride between May and August 2004. The NOVA included various counts for falsifying FVTRs or failing to submit FVTRs in order to hide overages. EA MacDonald assessed $10,000 per count for a total of $340,000. Mr. Keller and Keller's Pride, Inc. were jointly responsible for the $20,000 assessed in Counts 3 and 4, and Mr. Keller, Keller's Pride, Inc. and [REDACTED] were jointly and severally responsible for $320,000 assessed in the remaining counts. EA MacDonald also imposed a two (2) year operator and vessel permit sanction on the Keller's Pride. Mr. Keller did not hire an attorney to contest the charges because he could not afford one.

Sometime later, EA MacDonald issued an additional NOVA/NOPS to the Night Stalker and Captain O'Neal, assessing a $120,000 penalty.

Negotiations between the parties ensued and, for a period of time, were unsuccessful. An ALJ issued an Order on March 21, 2006 in connection with Mr. Keller's administrative appeal, which prompted EA MacDonald to file pleadings in the case. At some point prior to the NOVA being issued, EA MacDonald asked Mr. Keller what he thought to be a reasonable civil penalty. Mr. Keller responded in an undated handwritten letter:

> I would think a resanable [sic] [f]ine would be 40,000 dollars. I would sell either [boat] but give them away I will not…I could survive with one boat if I (John T. Keller) were operating it but if someone else was getting that 12% I do not know. Undated Handwritten Letter.

On May 3, 2006, [REDACTED] individually agreed to pay a $1,500 penalty and to serve a five (5) year operator permit sanction. Subsequently, on August 18, 2006, Mr. Keller and Keller's Pride, Inc. settled both cases involving the Night Stalker and Keller's Pride. Mr. Keller

agreed to pay a compromise civil penalty of $105,000 in installments. Mr. Keller also agreed to serve five (5) years of six (6) month operator permit sanctions from February 15 to August 14 in each year 2007-2011. Furthermore, he agreed that the Night Stalker would serve two (2) month vessel permit sanctions from February 15 to April 14th in those years. Finally, the Keller's Pride would serve two (2) month vessel permit sanctions from April 15 to June 14 from 2007 to 2016.

[REDACTED] signed a modified Settlement Agreement on September 20, 2006. In the Agreement, [REDACTED] agreed to serve an operator permit sanction from April 1 to September 30, in each year from 2007 to 2016, and agreed [REDACTED] would not engage in fishing in any capacity during that period. However, [REDACTED] would be allowed to fish from October 1 to March 30 during those years.

Mr. Keller made a $25,000 initial payment to NOAA, followed by $2,000 monthly payments after he signed the Settlement Agreement. Sometime later, he negotiated with EA MacDonald to lower his monthly payments to $500 because of the high price of fuel. He ceased all payments to NOAA in January 2008 around the same time he declared bankruptcy.

On September 5, 2008, EA MacDonald issued a NOPS to Mr. Keller, effectively suspending his federal operator and vessel permits for non-payment of penalties. On September 11, 2008, a United States Bankruptcy Judge discharged Mr. Keller pursuant to a Chapter 7 bankruptcy proceeding. Notably, the Chapter 7 bankruptcy did not discharge Mr. Keller's debt to NOAA. However, he lost both of his vessels as a result of the bankruptcy. Mr. Keller declared bankruptcy because he personally guaranteed the loans that he used to purchase Keller's Pride and Night Stalker and his bank refused to renegotiate the terms of his

payments. As such, the bank repossessed both vessels. Id. Further, Mr. Keller claims that he called EA MacDonald in an attempt to lower his monthly payments from $500 to $250 per month, but EA MacDonald allegedly refused and told him to "get a job at McDonald's" and to "get out of fishing." EA MacDonald denies these allegations, noting that Mr. Keller may have suggested to him that McDonald's was one of his few options. I cannot resolve this issue of fact, but it is not germane to the disposition of this case.

Mr. Keller was involved in another documented violation between 2006 and 2007 concerning several alleged closed area incursions.

Discussion

Mr. Keller argues that the $105,000 settlement was excessive because it was his first offense. His federal fishing permits are currently revoked. According to Mr. Keller, he has $64,000 remaining on his $105,000 penalty assessment.[2] Mr. Keller is 45 years old, and he stated that it would take him the rest of his life to repay the penalty even at $250 per month. Mr. Keller claims he cannot do that because fishing is all that he knows. Special Master Interview with John Keller (Dec. 20, 2011).

EA MacDonald responds that Mr. Keller's violations were extensive, intentional, and involved a highly organized conspiracy between different vessel owners, operators, and a fish

[2] NOAA confirmed that as of December 6, 2011, Mr. Keller has paid a total of $42,226.67 with a remaining balance of $66,400.

dealer. Also, Mr. Keller actively participated in the illegal offloads on numerous occasions, and submitted or maintained false records in an attempt to cover up the illegal landings. Response by EA J. Mitch MacDonald, p. 6.

I agree. Mr. Keller's actions are inexcusable. He knowingly and willingly participated in this conspiracy to land excess scallops during a sustained period of time and attempted to cover up his actions by falsifying documents. Furthermore, as EA MacDonald notes, the compromised settlement amount was equal to the total value of the illegal trips (23,683 lbs. landed on seventeen (17) occasions was worth approximately $105,672.10). Therefore, given the blatant disregard for the regulations and the severe conservation implications, EA MacDonald's assessment and compromise settlement was fair and wholly justified.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 202
NE 062016
F/V Diane Marie
Sea Rover Fishing, Inc., Owner
[redacted], Operator
Jorge "George" Cordeiro, Vessel Manager

Manager of fishing business complains that the penalty assessed and paid was excessive and not consistent with other penalties paid for the same or similar offenses.

Findings of Fact

In 2006, Jorge "George" Cordeiro was employed by Sea Rover Fishing, Inc. as the vessel manager for the fishing vessel, Diane Marie, and has been appointed by the corporation as its agent for the filing of this Application for Review.[1] Mr. Cordeiro has extensive experience as a fisherman from 1977 to 1997, as part owner of four (4) fishing vessels and as a manager of those vessels and three (3) additional vessels. As a fishing vessel manager, Mr. Cordeiro is responsible for making sure that a vessel is ready to go fishing on time by fixing whatever needs to be fixed.

On March 6, 2006, SA Shawn Eusebio, while monitoring VMS activities, discovered that the Diane Marie was conducting fishing operations (scalloping) inside the Nantucket Lightship Essential Fish Habitat ("NLCA"). [redacted], captain of the vessel, was contacted and informed [redacted] was fishing in a closed area. [redacted] told SA Eusebio that [redacted] was unaware that the NLCA was closed, and stated further that any incursion into a closed area was unknowing. A

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[1] EA Casey has challenged Mr. Cordeiro's standing to file this Application for Review as a vessel manager who had not paid any penalty in connection with this case. Response by EA Casey, p. 1. I have received a corporate vote of the officers of Sea Rover Fishing, Inc. appointing Mr. Cordeiro as its agent in connection with this Application and authorizing him to "do all things necessary" to pursue the Application. Minutes of Special Meeting of the Officers of Sea Rover Fishing, Inc. (Nov. 28, 2011).

subsequent review of VMS files confirmed that, in five (5) plus days of scalloping, the Diane Marie fished outside the closed area for one (1) day and, on multiple occasions during a four (4) day period, fished within the closed area. Later that day, SA Todd Nickerson informed the Diane Marie's manager, Mr. Cordeiro, that the vessel had been seen fishing in a closed area. Mr. Cordeiro ordered the vessel back to port. The catch was seized and sold for $113,021.85. On March 17, 2006, SA Eusebio issued an EAR to the Captain and owner of the Diane Marie charging them with fishing for and possessing scallops in the NLCA.

On July 13, 2006, EA Deirdre Casey issued a NOVA containing one (1) count for fishing in a closed area and assessed a civil penalty of $32,000.

On December 19, 2006, Mr. Cordeiro, on behalf of Sea Rover Fishing, Inc., signed a Settlement Agreement and agreed to pay a $19,000 penalty, which was deducted from the seized proceeds, forfeit $61,000 of the $113,021.85 proceeds and accept return of the balance of $33,021.85 from the seized proceeds.

Discussion

Mr. Cordeiro balks at the penalty. First, Mr. Cordeiro argues that the regulation was not clear that the NLCA was closed to scallopers, that a Coast Guard vessel had passed by the Diane Marie while fishing in the closed area without any acknowledgement that the Diane Marie was illegally fishing, that NOAA should have alerted the Diane Marie when it first entered the closed area because the VMS system clearly showed the incursions, that the entire catch should not have been seized because the Diane Marie only fished on and off in the closed area for four (4) out of the five (5) days fishing, that the Captain was unaware the area was closed to scallopers,

that this was a first offense for the Diane Marie,[2] that the Captain and the owner's manager were very accommodating and co-operative in connection with the investigation, and that the assessed penalty was disproportionate to other penalties assessed/settled with other fishermen for similar offenses. Examples of these other settlements were provided to EA Casey. Mr. Cordeiro's counsel cites settlements involving the fishing vessel Tropico, where the penalty was $32,797.45 which was paid from the total seized proceeds of $49,201.10 and $16,403.65 returned to the vessel owner, and the fishing vessel Quincy II, which was assessed a $17,000 penalty and paid only $8,000 in a settlement. EA Casey responds that the cited cases are easily distinguishable. For example, in the Tropico case, the vessel fished in a "rotational closed area" and not, as the Diane Marie, in an essential fish habitat closed area. Additionally, the Tropico forfeited a portion of the proceeds from its seized catch in an amount of $32,797.45 which was proportional to the amount of time the vessel fished in the closed area. In both cases, approximately one third of the seized proceeds was returned to the vessel based on the amount of time the vessel fished in the closed area. The Diane Marie was in the closed area longer and the catch was larger than that of the Tropico. In the case of the Quincy II, she forfeited the entire catch worth $8,149.50 and paid a $17,600 civil penalty. Response by EA Deirdre Casey, p. 7. The Quincy II settlement was not unlike the settlement of this case. In discussing settlement with counsel in this case, EA Casey stated in an email in relevant part that:

[2] EA Casey states that there was a prior violation but that it was resolved by a period of probation during which the offense could count as a prior violation. Response by EA Deirdre Casey, p. 7. That probation period had expired and therefore, the prior offense could not be considered a prior violation for the purposes of assessing a penalty in this case.

> This is what I am thinking. They fished for 2-3 days in the EFH. The majority of the fishing occurred in the EFH. From the VMS track lines, it is clear there was some fishing outside the EFH. We seized $113,021. I would be willing to take 2/3 of the trip (the 10/20s) as illegal catch – approximately $86,000. They would get back $27,000 but they need to pay a penalty. Based on their cooperation & candor, I truly believe this was a mistake. I would assess the penalty at the low end of the range, despite the fact that they fished for so long in the area. Response by EA Deirdre Casey, p. 8.

I find that the NLCA had been a designated area of essential fish habitat (EFH) for two (2) years prior to this violation, that the closed area was clearly defined in the regulations by co-ordinates and charts and that [REDACTED] knew or should have known [REDACTED] was fishing in that closed area. I am not persuaded that the fact that a Coast Guard vessel did not stop the Diane Marie from fishing in the NLCA is a viable defense to the incursion. Additionally, there is no law that imposes a duty on NOAA to warn [REDACTED] of [REDACTED] incursion into a closed area. In fact, SA Eusebio did not notice the incursion until March 6, 1996, when he immediately informed [REDACTED] of the incursion. Mr. Cordeiro and [REDACTED] were accommodating and co-operative in connection with the investigation and that fact is relevant to the assessment of a penalty. However, in reviewing the settlement in this case, it is important to note that [REDACTED] was fishing in the closed area most of four (4) days in a five (5) day trip and as a settlement, was able to both pay a penalty from the seized catch and retain the value of approximately 30% of the seized catch. Considering the penalties paid in two (2) somewhat comparable cases, I do not find the settlement in this case to be disproportionate to those cited cases. Therefore, considering the total circumstances of this case, I do not find that the penalty assessed and paid to be excessive and inconsistent with other penalties paid for the same or similar offenses.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 203A

NE 990332 A

Danny's Fishco, Inc.

Daniel A. Bubb, President

Stockholder, officer and director of a former fish dealer complains about NOAA putting the dealer out of business instead of allowing him to correct a paperwork problem.

Findings of Fact

Daniel Adrian Bubb lives in St. James, New York and Gloucester, Massachusetts. He was the president of Danny's Fishco, Inc. ("Danny's Fishco"), which was a Highly Migratory Species (HMS) dealer in St. James, New York. Danny's Fishco was incorporated in New York in July 1996. Mr. Bubb was the sole stockholder, officer, and director and his wife helped with the paperwork. At some point, he formed DFC International, Inc. ("DFC International"), a Massachusetts corporation. DFC International continued to do business as a fish dealer until 2007. Mr. Bubb is currently the captain of a vessel for about 5% of the year. He is monkfishing and has a thirty (30) day a year permit. He first got involved in the fish business by starting Danny's Fishco which bought fish from fishing vessels and from the Fulton Fish Market and sold yellow fin tuna primarily to restaurants. Mr. Bubb states that Danny's Fishco's purchases from the Fulton Fish Market involved dealer to dealer transactions for which there were no reporting requirements to NOAA. Special Master Interview with Daniel Bubb (Dec. 13, 2011). According to Mr. Bubb, the same was true when vessels offloaded at one of the facilities on the White Cap Fish Dock in Islip where Danny's Fishco purchased fish from the buyers handling the offload from fishing vessels. Id. Prior to his involvement in the fish business, Mr. Bubb served in the US

army from 1986 to 1989. Later, he worked in construction and then as a manager at a medical firm.

NE 990332 A

F/V Dakota, F/V Provider II, F/V Whitewater, and F/V Whitewater II submitted a number of weigh out slips to Andy Bertolino in the Fisheries Statistics Office (FSO) in Miami, Florida, which reflected sales to Danny's Fishco. Supplemental Investigative Report by SA Sara Block (Sept. 16, 2003). Danny's Fishco had not reported these purchases to NMFS. The FSO informed OLE that Danny's Fishco was not timely filing dealer reports. Unsigned Offense Investigation Report by SA Sara Block, p. 15 (May 27, 2003). Erik Braun of the New York FSO provided a memo dated January 6, 2000, outlining the numerous dates on which he and other employees at the Sustainable Fisheries Office had communicated with Mr. Bubb either over the telephone or by fax between July 13, 1998 and November 1999 about his dealer reporting obligations and the need for receiving dealer reports from Danny's Fishco. Id. An investigation of Danny's Fishco revealed that, as of May 27, 2003, the dealer had failed to timely submit forty-four (44) dealer reports for purchases in 1998 and 1999 which represented hundreds of thousands of pounds of shark, tuna and swordfish. Mr. Bubb denies the allegation that he failed to timely submit forty-four (44) dealer reports because he paid overhead fees to the two (2) docks where offloading took place to cover paperwork requirements. Special Master Interview with Daniel Bubb (Dec. 13, 2011). However, Mr. Bubb directly paid the vessels for the fish.

For the 1998 and 1999 fishing years (from June 1, 1998 through May 31, 2000), Danny's Fishco did not have a shark permit, but purchased shark from October 1998 through February 2000. Mr. Bubb was mistakenly under the impression that the shark permit was part of the

HMS permit. According to Mr. Bubb, Danny's Fishco was not a shark dealer as shark was strictly a bycatch. Id. Danny's Fishco first added shark to its dealer permit for the 2000 fishing year. Danny's Fishco did not renew its Atlantic tuna dealer permit for the 1999 fishing year (June 1, 1999 to May 31, 2000), but purchased tuna during that period. As a young businessman, Mr. Bubb was unaware that his permit had expired. Mr. Bubb thought that, as in the past, it was a multi-year permit. Id. Danny's Fishco did not reapply for an Atlantic tuna permit until April 24, 2000 after SAs contacted Mr. Bubb on April 3, 2000.

On April 3, 2000, SAs seized dealer records of Danny's Fishco's settlement sheets and vessels' weigh out sheets. Danny's Fishco's records revealed that from August 22, 1998 through May 29, 1999, the dealer had paid $14,250.35 for 17,114 lbs. of shark and from June 22, 1999 through February 25, 2000, the dealer had paid $15,198.05 for 10,036 lbs. of shark. Unsigned Offense Investigation Report by SA Sara Block, pp. 17-18 (May 27, 2003). These purchases were not reported to NOAA. Additionally, during the period that Danny's Fishco made these shark purchases, it did not have a shark permit. The records further revealed that from June 7, 1999 through February 25, 2000, Danny's Fishco paid $1,205,373.38 for 355,951 lbs. of Atlantic tuna. Id. at 19. The investigation revealed that Danny's Fishco failed to report eleven (11) purchases of Atlantic blue fin tuna during 1999 and did not have a tuna permit during the period of these purchases. Id. at 24.

On May 25, 2000, SA Block, together with New York Department of Environmental Conservation Officer [REDACTED], observed 8,721 lbs. of fish, including a 371 lbs. blue fin tuna being offloaded from Whitewater II operated by [REDACTED] and owned by White Water Fish Corporation. [REDACTED] was the principal of the corporation. To meet a 2%

bycatch requirement, the catch should have weighed 18,550 lbs. to allow the vessel to land the blue fin tuna. On EA Juliand's instruction, SA Block seized the 371 lbs. blue fin tuna and ordered Mr. Bubb to sell the tuna and make the check payable to NMFS instead of Whitewater II. Unsigned Offense Investigation Report by SA Sara Block, pp. 35-36, 39 (May 27, 2003). On May 31, June 12, and June 21, SA Block contacted Mr. Bubb requesting payment for the seized blue fin tuna. On June 23, 2000, Mr. Bubb mailed a payment in the amount of $742.00, but no associated paperwork. SA Block requested paperwork from Clearwater Seafood because according to what Mr. Bubb had previously told her, she understood that Clearwater Seafood had purchased the blue fin tuna. Id. at 36.

On August 30, 2000, SAs Block and James Cassin interviewed about the blue fin tuna seizure from the Whitewater II. Id. told the SAs that Bubb and had told that NOAA was to receive half of the value and that they would fight any additional fines. Id. On September 12, 2000, SA Block telephoned owner of Clearwater Seafood. Id. had no record of purchasing a blue fin tuna from Danny's Fishco or Mr. Bubb with a landing date of May 25, 2000. Id. According to SA Block, on October 17, 2000, she called Mr. Bubb at home and he told her that he had never said that he had sold the blue fin tuna to Clearwater Seafood and that the blue fin tuna had been sold to Lockwood & Winant, a dealer in Fulton Fish Market. Id. at 37. According to Mr. Bubb, SA Block had been unable to reach him, had gone to Fulton Fish Market, had asked every fish dealer about the blue fin tuna and had discovered the identity of the buyer. Special Master Interview with Daniel Bubb (Dec. 13, 2011).

On November 30, 2000, Lockwood & Winant, Inc. provided copies of an invoice and a check payable to Whitewater dated May 26, 2000. Unsigned Offense Investigation Report by SA Sara Block, p. 37 (May 27, 2003). A 371 lbs. blue fin tuna had been purchased at $3.50 per pound for a total of $1,298.50. Id. This invoice shows a difference of $1.50 per pound from what Mr. Bubb had paid to NOAA. Id. SA Block's review of Danny's Fishco records revealed that $1.50 per pound was not a reasonable and customary charge for freight and handling because the fee actually ranged from 5% to 7% of the value of the fish. According to Mr. Bubb, the excess money was not profit for Danny's Fishco, but represented expenses of sale including a $150 tuna box, $100 trucking charge to sell to the customer in New York and a quarter per pound over the dock charge of $92.75. Special Master Interview with Daniel Bubb (Dec. 13, 2011). By Mr. Bubb's accounting, he did not profit even half a percent. Id. However, as EA MacDonald points out, Mr. Bubb reported that he sold the blue fin tuna for $2.00 per pound ($742 total) as opposed to the actual price received of $3.50 per pound ($1,298.50 total). Response by EA J. Mitch MacDonald, p. 4. Additionally, EA MacDonald points out that the total amount of these charges ($342.75) was less than the price per pound that Mr. Bubb subtracted from the amount he received from the sale of the fish. Id.

On October 11, 2001, SA Block interviewed [REDACTED] who stated that on May 25, 2000, Mr. Bubb had told [REDACTED] that he would receive $2.00 per pound for the blue fin tuna. When [REDACTED] saw paperwork from Lockwood & Winant, [REDACTED] learned that the blue fin tuna had sold for $3.50 per pound and asked Mr. Bubb if they would get in trouble with NMFS for this discrepancy. Mr. Bubb's response was that it would not hurt to make a profit and that he was due money for shipping and handling.

On a number of occasions, SA Block, over the telephone, in person and through a certified letter returned unclaimed, requested that Mr. Bubb provide copies of Danny's Fishco's tuna records. As of May 27, 2003, Mr. Bubb had not provided information as required by the regulations. However, Mr. Bubb insists that the fish dock was reporting the landings to NOAA. Special Master Interview with Daniel Bubb (Dec. 13, 2011). EA MacDonald points out that if this was the case, NMFS would not have been looking for reports from Mr. Bubb. Response by EA J. Mitch MacDonald, p. 5. According to Mr. Bubb, if a vessel offloaded fish, Mr. Bubb would pack and grade the fish, but he did not handle the paperwork. Special Master Interview with Daniel Bubb (Dec. 13, 2011). According to Mr. Bubb, the owners of White Cap in Islip, Long Island bought the fish directly from the vessels and reported the landings and he simply handled the fish as a middle man. Id. However, Danny's Fishco's receipts were made out directly to vessels, not White Cap. Response by EA J. Mitch MacDonald, p. 5. EA MacDonald states that, while there are some tallies that include a reference to Danny's Fishco along with a notation of White Cap (probably as the landing site), there is no example of White Cap being specified as the buyer or Danny's Fishco being identified as the broker. Id.

On May 27, 2003, SA Block issued a separate seventeen (17) count EAR to Mr. Bubb and Danny's Fishco, Inc. In count one, she charged them with failure to timely file dealer trip reports from July 1999 to December 1999. In count two, she charged them with purchasing shark without a federal dealer permit from August 1998 to May 1999. In count three, she charged them with purchasing shark without a dealer permit from June 1999 to February 2000. In count four, she charged them with purchasing tuna without a dealer permit from June 1999 to February 2000. In counts five through fifteen, she charged them with failure to report

Atlantic blue fin tuna purchases. In count sixteen, she charged them with interference with a seizure on May 25, 2000. In count seventeen, she charged them with failure to produce records for inspection from April 1999 to July 1999.

On September 17, 2003, EA MacDonald issued Danny's Fishco, Inc. and Mr. Bubb a five (5) count NOVA and assessed a penalty of $270,000. In count one (corresponding to partial charges in EAR counts 2, 3, and 4), EA MacDonald charged them with purchasing shark and tuna for commercial purposes without federal shark or tuna permits and assessed a $20,000 civil penalty. In count two (corresponding to partial charges from EAR count 1 and full charges from EAR counts 12 and 13), he charged them with failure to report fish purchases from F/V Provider II on November 27, 1999, from F/V Whitewater II on November 27, 1999, from F/V Whitewater on November 28, 1999, and from F/V Dakota on November 30, 1999. EA MacDonald assessed a $60,000 civil penalty on this count. In count three (corresponding to EAR counts 14 and 15), he charged them with failure to report fish purchases from Dakota on December 19, 1999 and December 22, 1999 and assessed a $30,000 civil penalty. In count four (corresponding to EAR count 16), he charged them with interference with an authorized officer's conducting a seizure and investigation by delaying payment to NOAA fisheries and ultimately keeping a portion of the proceeds from the sale of a seized Atlantic bluefin tuna and assessed a $60,000 civil penalty. In count five (corresponding to EAR count 17), he charged them with interfering, obstructing, delaying, or preventing an officer's inspection by failing to comply with the request to provide tuna records and assessed a $100,000 civil penalty. The NOVA further stated that EAR count 1 for failure to report shark and Atlantic blue fin tuna purchases from vessels on June 29, 1999 through October 29, 1999, EAR counts 2, 3 and 4 for shark purchases without a dealer

permit on August 22, 1998, and shark or tuna purchases from October 7, 1998 through November 30, 1999 and EAR counts 5-11 for failure to submit reports of Atlantic blue fin tuna purchases on a number of dates in 1999 were all reduced to a written warning.

An accompanying NOPS suspended the dealer permit for one (1) year and four (4) months.

NE 033078 FM/V

Mr. Bubb does not complain about this case, but I include it because it became part of a global settlement.

On December 1, 2003, SA Richard Gamba received a telephone call from ASAC Scott Doyle informing him that the fish dealer DFC International had not submitted biweekly tuna reports since July 2003. That same day, SA Gamba went to an address in St. James, New York indicated on the dealer permit and spoke with Evelyn Bubb, whose name was listed on the permit as the contact person for DFC International. She explained that the business was her husband's and that she had no knowledge of any records of tuna or biweekly reports located on the premises. On December 1, 2003, Mr. Bubb called SA Gamba and asked that the agent not speak with his wife. He stated that he had submitted all tuna landing cards and that NOAA had the bi-weekly reports. Sometime later that day, Stephen M. Ouellette, Esq., counsel for DFC International, telephoned SA Gamba asking how the paperwork issue could be corrected. SA Gamba went back to speak with Evelyn Bubb, who explained that the business is her husband's and that the agent should speak with her lawyer since she has nothing to do with the business.

On December 2, 2003, Mr. Ouellette called SA Gamba again and asked him not to bother Ms. Bubb, but to deal directly with Mr. Bubb.

On December 3, 2003, Mark Murray-Brown, Team Leader of the Highly Migratory Species Division, contacted the OLE office in New York and explained that the office had received the fish landing cards from DFC International, but not the bi-weekly reports.

SAs Patrick Flynn and Daniel D'Ambruoso went to the DFC International facility in Gloucester to retrieve the bi-weekly reports. However, the facility looked vacant with no lights on, no furniture inside and no people around. As a result, no documents were obtained for review.

On December 29, 2003, an EAR was issued to Evelyn Bubb, as the contact person for DFC International, for failure to comply with weekly reporting requirements.

On December 30, 2003, SA Gamba received a notice from the NOAA Permit Office that DFC International's permit would not be renewed due to failure to meet the reporting requirements.

On August 6, 2004, EA MacDonald issued a NOVA to Mr. Bubb and DFC International. In it, EA MacDonald charged them with two (2) counts of MSA violations and assessed a $60,000 monetary penalty for each, for a total of $120,000. In count one, he alleged failure to submit bi-weekly reports on August 10 and 25, 2003, September 10 and 25, 2003, October 10 and 25, 2003, and November 10 and 25, 2003. In count two, he alleged failure to maintain reports and records at the place of business on December 1, 2003. Accompanying the NOVA was a NOPS suspending the dealer's permit for 120 days.

Stephen M. Ouellette, Esq. represented Mr. Bubb with respect to case Nos. NE 990332 A and NE 033078. On February 4, 2005, Mr. Bubb settled both cases with NOAA. He signed a settlement agreement on behalf of DFC International, Inc., Danny's Fishco, Inc. and himself.

The respondents agreed to pay a compromise civil penalty of $60,000 (plus 1% simple interest) under a payment plan. The last payment was a balloon payment of $43,000 and, if the respondents could not make it, they were required to provide NOAA with written notice to that effect at least twenty (20) days before payment was due, followed by financial disclosures to NOAA within thirty (30) days after the payment due date in order to seek an extension or modification of the agreement. Additionally, $30,000 was suspended contingent upon the respondents' establishing a central location for record retention for inspection and developing a procedure to ensure transmission of required records to NMFS. This would take place at the dealer's currently licensed location and an individual would be named as a contact person. This person would provide all the records required by NOAA. If the plan is not satisfactory to NOAA and an alternate suitable plan is not presented within thirty (30) days, then the suspended $30,000 became due on the last day under the payment plan agreed to on the date of settlement.

On February 17, 2006, EA MacDonald sent a NOPS to DFC International and Daniel A. Bubb suspending their permit as a result of nonpayment of the settlement amount. At that time, Mr. Bubb did not have any permits other than possibly an operator's permit. DFC International had a tuna permit. After receiving the letter, Mr. Bubb went to speak with EA MacDonald because he could not then afford a lawyer. Mr. Bubb told EA MacDonald that he had no money and asked EA MacDonald what can be done. EA MacDonald proposed a payment schedule modification. In November of 2008, Messrs. Bubb and MacDonald signed a modified payment schedule for $43,042.83 and interest of $593.01, for a total of $43,635.84. As of December 13, 2011, NOAA's records show an outstanding balance of $43,335.84.

Discussion

Mr. Bubb complains that NOAA wanted to force him out of business instead of allowing him to correct a paperwork problem (missing reports). The evidence is clear that he was given ample opportunity to do so as evidenced by Erik Braun's memo dated January 6, 2000. Response by SA Sara Block, p. 9. Further, EA MacDonald points out that the settlement agreement was entered into after Mr. Bubb presented financial information to the Agency and his ability to pay was taken into account in reaching an agreement which provided for conditions under which the payments could be modified. Response by EA J. Mitch MacDonald, p. 10. In fact, the payments were modified to avoid putting Mr. Bubb out of business. Id.

According to Paul Muniz, Esq., counsel for Mr. Bubb in this appeal, there was no harm to the resource by the alleged reporting violations. However, EA MacDonald responds that the Magnuson-Stevens Act states that "[t]he collection of reliable data is essential to the effective conservation, management, and scientific understanding of the fishery resources of the United States." Response by EA J. Mitch MacDonald, p. 13; 16 U.S.C. §1801(a)(8). Mr. Bubb thinks that perhaps he did not understand the reporting requirements and the government did not give him a chance to show him how it is done. Special Master Interview with Daniel Bubb (Dec. 13, 2011). The evidence supports a contrary conclusion. Response by SA Sara Block, p. 9.

With respect to the sale of the blue fin tuna, EA MacDonald states that reducing the price per pound to hide a profit was improper and is consistent with [redacted] concern about the discrepancy which [redacted] noted to SA Block. Response by EA J. Mitch MacDonald, p. 4.

Under the circumstances of this case, I find that a civil penalty of $60,000, with a subsequent modification of payments to $43,042.83 plus interest of $593.01, is not excessive.

First, NMFS employees gave Mr. Bubb ample opportunity to comply with the dealer reporting requirements before turning to OLE for assistance. Second, Mr. Bubb was not forthright with government personnel concerning the sale of the blue fin tuna. Third, EA MacDonald considered Mr. Bubb's ability to pay in reaching a settlement that was well below the initially assessed civil penalty.

It appears from my interview of Mr. Bubb that he may not have the financial ability to pay the penalty balance of $43,042.83 plus interest to NOAA. As stated by EA MacDonald, he has asked Mr. Bubb more than once since the modification of the payment plan to submit financial disclosure information that would allow NOAA to further consider Mr. Bubb's situation. Response by EA J. Mitch MacDonald, p. 10. To EA MacDonald's knowledge, no such information has been submitted. Id. I find that Mr. Bubb's best chance for relief is to present the requested financial documents to NOAA in an effort to have it consider a further modification of his penalty. However, it is up to Mr. Bubb to initiate the review process by providing the requested financial documents.

Recommendation

I recommend that the Secretary take no further action in connection with this Application for Review.

Case 203B
NE 0803873 FM/V
F/V Mary B
Tina Marie Fishing Ventures, LLC, Owner
[redacted] Operator

Principal of former corporate owner of fishing vessel complains of an excessive penalty resulting from a mistake at sea when the butcher cut off the lower jaws of swordfish. He further complains that the government did not follow proper procedure in the sale of seized fish when it obtained only one (1) bid instead of the typical three (3) bids.

Findings of Fact

Daniel Adrian Bubb lives in St. James, New York and in Gloucester, Massachusetts. Aside from his involvement with the fish dealers Danny Fishco, Inc. and DFC International, Inc. as previously outlined in case 203A, Mr. Bubb was the principal of Tina Marie Fishing Ventures, LLC ("Tina Marie"). Tina Marie was formed in 2002, stopped doing business around 2007, and was strictly a fishing vessels owner. In 2002, Tina Marie purchased its first vessel, the F/V Belinda B. Presently, Belinda B Fisheries, Inc. owns the vessel and Mr. Bubb's mother is the sole stockholder. The Belinda B is a 35' Atkinson Novi, a 1986 gillnet vessel that presently fishes out of and is moored in Montauk, New York. Mr. Bubb is currently the captain of the Belinda B and fishes primarily for monkfish for about 5% of the year because the vessel only has a thirty (30) day a year permit. In 2006, Tina Marie bought F/V Mary B, a forty-five inch (45') swordfish and tuna long line vessel. In 2006, it also bought F/V Mellissa Sue, a 40' gillnet vessel, which sank in February 2007 at the dock in Gloucester. The Mellissa Sue had been a replacement vessel for F/V Hollywood, a 40' Novi, which Tina Marie had bought in 2004 and which sunk in 2006, sixty (60) miles off of Gloucester. Prior to his involvement in the fish business, Mr. Bubb served in

the US army from 1986 to 1989. Later, he worked in construction and then as a manager at a medical firm.

NE 0803873 FM/V

On September 17, 2008, the New Bedford OLE received two (2) anonymous phone calls alleging that the Mary B was on her way to port with undersized swordfish on board. Swordfish must weigh at least thirty-three (33) lbs. or meet one of two (2) length measurements. SA Shawn Eusebio reviewed relevant regulations and spoke with Brad McHale, Fishery Management Specialist ("FMS"), Highly Migratory Species ("HMS"), about measuring dressed swordfish. They are measured from the shortest distance of the bony "collar" known as the cleithrum along the contour of the body to the anterior portion (front) of the caudal keel using a flat, flexible tape measure. This 'CK' measurement, cleithrum to caudal keel, must be at least twenty-nine inches (29'') for the swordfish to be of legal size. Alternatively, the lower jaw to fork length (LJFL) must be at least forty-seven inches (47''). However, this measurement only applies to fish landed whole, not dressed fish that had been gilled, gutted, beheaded or definned.

SA Joseph D'Amato was assigned to investigate the case and SAs Eusebio and Kelly Kirkwood were assigned to assist him with the dockside boarding. SA D'Amato requested additional dockside presence from MEP Officer [redacted]. At 3 pm (EDT), SA D'Amato boarded the Mary B at the Fleet Fisheries, Inc. offloading facility. SAs Eusebio and Kirkwood observed the offload. All of the fish had been dressed at sea. Mr. Bubb told SA Eusebio that the dressed swordfish had to be at least twenty-nine inches (29'') in length measured from the lower jaw and that the crew had measured the swordfish at sea in that manner.

SA Eusebio informed SA D'Amato, who had remained on board the vessel, that undersized swordfish were being weighed and measured inside the facility. SA D'Amato went into the facility and observed SA Kirkwood measure the swordfish. SA D'Amato began weighing each fish on a digital scale. SA Eusebio and Mr. Bubb discussed the proper way to measure the swordfish. Mr. Bubb insisted that his captain and crew had measured the fish correctly, but based on Mr. Bubb's description of how the fish had been measured, SA Eusebio knew otherwise, and confirmed his understanding with Agency personnel. Supplemental Investigation Report by SA Shawn Eusebio, pp. 5-6 (Oct. 17, 2008). SA Eusebio informed Mr. Bubb that a dressed swordfish is considered legal if it either weighs at least thirty-three (33) lbs. or is at least twenty-nine inches (29'') long (CK measurement).

SA D'Amato contacted EA MacDonald to apprise him of the situation and inform him that he would be seizing the catch pending resolution of the case. After the offload, Mr. Bubb asked to speak with SA D'Amato in private. They went into one of the offices and Mr. Bubb said: "I am so f…, I need this money." Offense Investigation Report by SA Joseph D'Amato, p. 4 (Oct. 15, 2008). He explained that the crew needed this money as they had not received a paycheck in nearly two (2) months. Id. Mr. Bubb added that he had to borrow money from his mother and from Fleet Fisheries so that the vessel could go out fishing. Id. He explained that swordfish prices would be dropping after 'today' and wanted his money before 'tomorrow.' Id. He added that NOAA had already fined him $175,000 for paperwork mistakes and that another violation would put him out of business. Id.

On September 18, 2008, at 9 am, SAs D'Amato and Eusebio went back to Fleet Fisheries and met with , a representative of the business. According to had

spoken with [redacted] the captain of the Mary B, just prior to her departure for the fishing trip in question. [redacted] had told [redacted] that the weight limit for swordfish was thirty-three (33) lbs. or a minimum length of twenty-nine inches (29''), which could be measured from the lower jaw to the keel of the fish. Letter from [redacted] Representative, Fleet Fisheries, Inc. to SA Joseph D'Amato (Sept. 22, 2008). [redacted] informed [redacted] that, if small fish met the length requirement, they would need to be landed with the lower jaw intact so that the measurements could be verified upon landing. Id. [redacted] offered [redacted] a written description of the size limit and measurements, but [redacted] did not come to Fleet Fisheries for a copy. Id. [redacted] added that [redacted] might have given [redacted] incorrect information.

The SAs then weighed the catch. During that time, Mr. Bubb called [redacted] cell phone. After a brief conversation, [redacted] tried to transfer the phone to SA D'Amato, but SA D'Amato stated that he would speak with Mr. Bubb at another time. About half an hour later, Mr. Ouellette called [redacted] cell phone and asked to speak with SA D'Amato. SA D'Amato said that he could not speak to Mr. Ouellette at that moment. Following this, the swordfish were weighed disclosing forty-one (41) undersized swordfish, each of which weighed less than thirty-three (33) lbs. and measured less than twenty-nine inches (29''). In other words, the swordfish were undersized utilizing both criteria for dressed swordfish.

[redacted] informed SA D'Amato that it would take a few days to sell the legal size fish because the price of swordfish was dropping.

SA D'Amato visited the Veterans Transition House (VTH) in New Bedford, a facility that feeds homeless people, and made arrangements for the undersized swordfish to be picked up at Fleet Fisheries by a representative of VTH. On September 19, 2008, SAs D'Amato and

Eusebio obtained a donation letter from Fleet Fisheries to the VTH for the undersized fish. They then went to the VTH and made arrangements to receive a letter on September 22, 2008 stating that the fish had been received. SA D'Amato telephoned Mr. Bubb to inform him that the undersized fish had been donated. Mr. Bubb was upset that they were not sold for profit, but SA D'Amato explained that NOAA could not place undersized fish into commerce. On September 22, 2008, SA D'Amato obtained a letter from VTH confirming that it received the donated swordfish fillets.

On September 23, 2008, SA D'Amato picked up the seizure check in the amount of $20,930.93 from the sale of the legal swordfish.

On September 24, 2008, SA D'Amato issued separate EARs to Tina Marie Fishing Ventures, L.L.C. and [redacted], charging them in one count with landing undersized swordfish.

On November 14, 2008, EA MacDonald issued a Notice of Seizure and Proposed Forfeiture to Tina Marie Fisheries Ventures and [redacted], which was published in the Standard Times of New Bedford on November 25, December 2 and December 9, 2008. On November 18, 2008, Mr. Ouellette emailed to NOAA a consent to delay forfeiture proceedings signed by Mr. Bubb on behalf of Tina Marie Fisheries Ventures.

Mr. Bubb could not afford legal counsel and was not represented in the resolution of this case. He negotiated directly with EA MacDonald. He told EA MacDonald that he was officially broke, said that in August 2008, his wife received a notice that the marital residence would be foreclosed for failure to pay the mortgage, and asked what NOAA could do to give him some relief. EA MacDonald offered to remit a portion of the seizure money to Mr. Bubb.

On or about December 9, 2008, EA MacDonald agreed in principle with Mr. Bubb to settle the case for the return of a portion of the proceeds to Mr. Bubb. Consistent with the settlement in principle, on December 10, 2008, EA MacDonald hand-delivered to Mr. Bubb a NOVA to Tina Marie Fishing Ventures, L.L.C. and [redacted]. In the NOVA, he charged them in one count with landing forty-one (41) undersized Atlantic swordfish on September 17, 2008 and assessed a $15,000 civil penalty. Attached to the NOVA was a settlement agreement that incorporated the terms to which Mr. Bubb and [redacted] had agreed in principle on December 9, 2008. On December 10, 2008, the parties signed the settlement agreement. The respondents admitted the violations and agreed to pay $10,930.93 from the seized proceeds of $20,930.93 as a penalty and forfeit any interest in the 1,019 lbs. of undersized swordfish donated to VTH. The sum of $10,000 was returned to Mr. Bubb.

<u>Discussion</u>

Mr. Bubb disputes that his captain landed undersized swordfish. According to him, the SAs and the fish manager did not know how to measure swordfish, the butcher on the vessel was twenty (20) years old and it was his first swordfish trip, and this was [redacted] first swordfish trip in ten (10) years. Mr. Bubb insists that while out fishing, the 'butcher' made a mistake and cut off the lower jaws and tails of the fish. Mr. Bubb is vehement that the fish would have been legal had the "20-year old kid" not cut the jaws off. However, as EA MacDonald points out, the SAs checked the measurement requirements and measured the fish in compliance with the legal standards. <u>Response by EA J. Mitch MacDonald, p. 6</u>. I find that the swordfish weights and measurements were accurate and resulted in the cited violations.

Mr. Bubb's complaint is that NOAA did not obtain bids from three (3) prospective buyers as is customary in the sale of seized fish resulting in the fish being sold well below their value. EA MacDonald responds that Mr. Bubb did not raise this issue during settlement negotiations. Response by EA J. Mitch MacDonald, p. 6. Rather he raised it around May 2010 in connection with a claim that the Inspector General wanted Mr. Bubb and EA MacDonald to work out an agreement and that the Inspector General had told him that he would get all of his money back if he would write a statement of complaint. Id. According to Mr. Bubb, the value of the trip was $50,000-$60,000, but NOAA sold the catch for about $20,930.93. Mr. Bubb told EA MacDonald in a telephone conversation that the fish were worth $50,000. Id. at 7. EA MacDonald's understanding is that, at the time of the sale of the fish, Mr. Bubb wanted them to be sold sooner rather than later because the market was becoming soft. Id. Prior to the Mary B's landing of the trip, Mr. Bubb had pre-arranged the sale to [redacted] who eventually sold the fish for NOAA. Id.

In assessing the penalty in this case, EA MacDonald considered that the minimum size standards had been in place since 1999, that Mr. Bubb had prior enforcement history, and that Mr. Brady had acted recklessly by not accepting any written guidelines from [redacted] and by recklessly or intentionally allowing or instructing the lower jaws to be cut off before the swordfish were landed. Response by EA J. Mitch MacDonald, p. 9. The assessment and the settlement were equivalent to a portion of the value of the seized catch. Id.

I find that the settlement amount was a little more than 50% of the value of the catch, was fair, was intended to remove any potential remuneration that Mr. Bubb and [redacted] would have received from the sale of undersized fish and was reasonable to deter respondents

and others from similar violations in the future. Under the circumstances of this case, I find that a civil penalty of $10,930.93 was fair and reasonable.

Recommendation

I recommend that the Secretary take no further action in connection with this Application for Review.

Case 205

NE 042045 FM/V

F/V Rainmaker

Empire Scallop, LLC, Owner

[REDACTED], Operator

Fisherman complains about an excessive penalty in a case involving an inadvertent entry into the Elephant Trunk Closed Area.

Findings of Fact

Joseph J. Gilbert ("Mr. Gilbert") is a fisherman, onshore engineer and seafood dealer with his principal office in Milford, Connecticut. Mr. Gilbert handles all aspects of operating fishing vessels: operating them, maintenance and repair, training of operators, and arrangement of sales. He first became involved as a fisherman in 1982. Mr. Gilbert has an interest in seven (7) vessels that are owned by limited liability companies. These vessels are moored in Stonington, Connecticut. He engages independent contractors as operators, trains them in the specifics of running his vessels, has them work as mates under his supervision and then allows them to operate his vessels. Mr. Gilbert purchased the fishing vessel Rainmaker in 2002 and sold her in 2008. Empire Scallop, LLC, of which Mr. Gilbert is a principal, owned the fishing vessel Rainmaker, a converted 68' shrimp-style low-boat, rigged as a stern, single dredge scalloper. [REDACTED] worked as captain of the Rainmaker for the period 2002 to 2005. [REDACTED] now works on Mr. Gilbert's vessels as a crewman.

On July 29, 2004, the Rainmaker embarked on a fishing trip. On July 30, 2004, she began fishing in the Hudson Canyon. On August 4, 2004, the Rainmaker was positioned inside the Elephant Trunk Closed Area ("ETCA"), which partially overlapped with the Hudson Canyon area. The Rainmaker remained there for eight (8) hours and twenty-four (24) minutes. NMFS

attempted to send emails, but the VMS unit was only functioning intermittently and was not positioning the vessel or receiving messages. EA Charles R. Juliand instructed SA Christopher B. McCarron to order the vessel back to port, but the vessel did not receive the order. SA McCarron contacted Mr. Gilbert to apprise him of the situation. Mr. Gilbert was unable to contact ██████ by cell phone because ██████ was out of cell phone range, but at some point, when the VMS was working, the Rainmaker received NOAA's emails.

On August 5, 2004, the Rainmaker returned to port. The VMS unit was not functioning at that time. On instruction of EA Juliand, NOAA agents seized her catch of 7,089 lbs. of Atlantic sea scallops and sold it for $35,953.90.

On August 5, 2004, following an interview by SA McCarron and Connecticut Department of Environmental Protection (DEP) Officer ██████, Mr. Gilbert provided SA McCarron with a written statement concerning this incident. He explained that ██████ was an alternate operator for the Rainmaker and that the incursion in the ETCA was an innocent mistake. Written Statement by Joseph Gilbert (Aug. 5, 2004). Mr. Gilbert stated that he provided his operators a full set of charts for the appropriate fishing areas, three (3) independent positioning systems and two (2) computer navigation programs along with the current license, permits and copies of applicable regulations. Id. Mr. Gilbert wrote that the VMS unit's erratic operation was a new occurrence. Id. In the past, there had been a "no signal" light, and the unit either corrected itself or was fixed by unplugging the unit and plugging it back in. Id.

On August 5, 2004, following an interview by SA McCarron and Officer ██████ ███ ████ provided SA McCarron with a written statement. ██ wrote that ██ was not fully aware that the boundaries of the closed area had changed and thought that the ones on ██ computer

were correct. Written Statement by [redacted] (Aug. 5, 2004). [redacted] explained that there was no tracking by VMS due to the vessel positioning unit's malfunctioning. Id. There were also problems with the computer's power which led to all tracks of the trip being erased. Id. In conversations with NOAA, [redacted] and Gilbert explained that the VMS unit had not been tampered with, and that it was working intermittently. Special Master Interview with Joseph Gilbert (Nov. 7, 2011). They argued that, if the Rainmaker was intentionally in the closed area, the VMS unit would have been disabled, and no messages would have been received over it. Id.

On August 5, 2004, SA McCarron issued separate EARs to Empire Scallop, LLC and [redacted] for the Rainmaker's entry in a closed area.

Mr. Gilbert states that SA McCarron acted professionally throughout the whole matter, but another agent, present during the offloading, did nothing but scream at [redacted] It was an intimidating, confusing situation because the captain and the crew could not understand why they were being treated so unprofessionally. Special Master Interview with Joseph Gilbert (Nov. 7, 2011). To SA McCarron's knowledge, there was no other NOAA special agent present during any interaction with the Rainmaker's owner or captain. Response by SA Christopher McCarron. Additionally, SA McCarron is prepared to testify that no other enforcement personnel accompanying him that day screamed at anyone. Response by EA Charles Juliand, p. 5.

SA McCarron advised Mr. Gilbert to contact EA Juliand to discuss his case. Mr. Gilbert followed that advice and contacted EA Juliand. Mr. Gilbert was encouraged to write a letter stating his case. In that letter, Mr. Gilbert did not deny that the Rainmaker was in the ETCA, but

he believed that it was an honest mistake. Email from Joseph Gilbert to EA Charles Juliand (Aug. 24, 2004). He maintained that only that portion of the seized scallops that were harvested in the closed area should constitute the penalty for this violation. Id. In this letter, he wrote that, on August 4, 2004, the Rainmaker was on its fifth day of fishing in the Hudson Canyon access area. Id. The operator, [REDACTED] did not understand that the ETCA overlapped with a part of the Hudson Canyon and entered it unintentionally. Id. The VMS unit was functioning and NMFS tracked the vessel's progress into the closed area. Id. At some point, the unit began to position the vessel intermittently so that there would be no signal for several hours and then the vessel would be positioned once again. Id. During that period, SA McCarron contacted Mr. Gilbert and a number of emails and calls were sent to the vessel, but no contact was made because of the malfunctioning VMS unit. Id. Eventually, the Captain received all of the messages when the VMS unit was working and immediately returned to port. Id. When the vessel arrived at the dock, the VMS unit was not working. Id. The dockside electronics service man and a technician from Boatracs determined that the dome antennae had "gone bad," and at some point it was replaced. Id. To Mr. Gilbert's knowledge, the VMS has been functioning since then.

On August 24, 2004, Linda Galvin from NMFS received a letter from Boatracs explaining that "questionable signal characteristics might include a failing antenna, faulty cabling, faulty cable connectors, corrosions at the cable connector/antenna junction, etc." These could affect the signal only intermittently and in line with the fluctuations in signaling strengths and the period gaps in positions in this case. Letter by Boatracs Network Operations Manager [REDACTED] to NMFS VMS Specialist Linda Galvin (Aug. 20, 2004).

On September 27, 2004, the parties reached settlement prior to EA Juliand issuing a NOVA. Mr. Gilbert signed the Settlement Agreement on behalf of Empire Scallop, LLC , [redacted] signed it on [redacted] own behalf, and EA Juliand signed on behalf of NOAA. The respondents admitted the violation alleged in the EARs and agreed to forfeit $10,000 from the proceeds of the sale of the seized scallops.

On October 25, 2004, NOAA sent Empire Scallop, LLC a check for $25,953.90, which was the balance from the sale of the seized scallops less the $10,000 penalty paid to NOAA.

Discussion

Mr. Gilbert believed that the entry in the closed area was an innocent mistake on [redacted] part and that [redacted] either did not read the regulations or failed to understand how the closure of the Elephant Trunk area had affected the Hudson Canyon access area.[1] Written Statement by Joseph Gilbert (Aug. 5, 2004). In my interview of Mr. Gilbert, he maintained this position and explained that a portion of the Hudson Canyon had been closed shortly before the trip in question and was made a part of the Elephant Trunk Closed Area. Special Master Interview with Joseph Gilbert (Nov. 7, 2011). The closure was a result of confusing regulations and permit holder letters that [redacted] either did not read or did not understand. Id. Mr. Gilbert provided [redacted] with the letter and had a brief discussion with [redacted] about it before the Rainmaker left port. On [redacted] prior trip, [redacted] had fished in the portion of the Hudson Canyon that was closed on a subsequent trip. Id. There was only about

[1] EA Juliand's notes indicate that [redacted] admitted [redacted] did not read the regulations and SA McCarron's investigative report reveals that [redacted] had glanced at the June 18, 2004 permit holder letter, but must have misunderstood the boundaries of the closed area. Response by EA Charles Juliand, p. 4.

a week or two between the two (2) trips. Id. ██████ remembered that there were some scallops in the area in question and went there to harvest them. Id.

It is Mr. Gilbert's position that the penalty in this case should have been limited to $6,112.16. This amount was calculated by Mr. Gilbert as follows: 116 bags of scallops out a total of 140 bags landed equaled 24 bags offloaded in the closed area or 17% of the amount paid for the total trip of $35,953.90. This would equal $6,112.16 as the value of the scallops harvested on the fifth day of fishing in the closed area. According to Mr. Gilbert, there should be no additional punishment for deterrence purposes because the August 4, 2004 entry in the ETCA was accidental, not intentional. Mr. Gilbert further argues that, in addition to the civil penalty of $10,000, there was an additional punishment because the balance of the trip had been prematurely terminated. The vessel had to return early from the trip and the vessel, captain and crew suffered because they could have stayed and harvested another 11,000 lbs. of scallops.

EA Juliand argues that seizure of only the amount taken from a closed area is not sufficient to deter fishermen from intentionally fishing in those areas. Response by EA Charles Juliand, p. 6. EA Juliand argues that partial seizures would encourage, not discourage, fishermen to fish in closed areas and that everyone charged with closed area incursions would use the defense of an unintentional mistake. Id. He points out that NOAA has been lenient with Mr. Gilbert and has settled this case for only a portion of the seized catch (28%). Id. Finally, EA Juliand suggests that the termination of the trip benefited ██████ and ██ crew, because otherwise they would have worked longer just to have the catch seized from them upon their return to port. Id.

Mr. Gilbert does not challenge NOAA's finding that the Rainmaker was fishing in a closed area, but argues that under the circumstances of this case the penalty should have been limited to the value of the harvested catch from the closed area ($6,112.16). Based on the facts of this case, I find that the settlement, which was limited to a partial seizure of the catch ($10,000), is fair and reasonable and not excessive.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 206

NE 010275 FM/V

F/V Sea Suess

James D. Patterson, Owner/Operator

Vessel owner complains that he was threatened with enormous penalties that forced him into settling for an unreasonable settlement.

Findings of Fact

James D. Patterson of Riverside, Rhode Island has been a commercial fisherman for approximately fifty (50) years. He started as a part-time fisherman and then became a full-time fisherman in 1988. Mr. Patterson is the owner of the fishing vessel Sea Suess, which is a 45' wooden dragger that catches primarily fluke, scup and other similar species. Mr. Patterson fishes alone ninety (90) percent of the time. He currently possesses a Rhode Island State fishing permit. In the past, he had a federal multispecies fishing permit. Mr. Patterson's home port is Bristol, Rhode Island.

In 1999, Mr. Patterson would offload his catch in Bristol and transport the catch by truck to Point Trap Retail, a fish dealer in Tiverton, Rhode Island. Mr. Patterson would make several tows in his vessel and then would sell his entire catch to Point Trap Retail. On various dates in September and October 1999, Mr. Patterson estimated that he probably sold overages to Point Trap Retail ranging from 20 to 80 lbs. When NOAA Special Agents were investigating Point Trap Retail for allegedly concealing overages, the Sea Suess was among the vessels identified as landing overages. Indeed, Mr. Patterson and several other vessel owners were involved in a scheme with Point Trap Retail to launder summer flounder overages. Dealer personnel created "dummy slips" to hide the overages. Response by SA Christopher McCarron.

SA Christopher McCarron spoke to Mr. Patterson on December 7, 2001 and Mr. Patterson readily admitted to landing multispecies overages at Point Trap Retail, and provided written statements to that effect. James Patterson Witness Statements (Dec. 6, 2001). According to SA McCarron, the Sea Suess failed to report a total of approximately 654 lbs of summer flounder, valued at $1,048.25, on ten (10) different dates in August and September 1999. He had submitted FVTRs to NMFS that underreported summer flounder landings in order to conceal the overages.

As a result of this investigation, the State of Rhode Island charged Mr. Patterson criminally, along with two (2) other defendants, for multiple counts of possessing summer flounder overages in violation of the Rhode Island Department of Environmental Management Regulations. The State also charged the defendants for failing to notify law enforcement prior to offloading the overages. Attorney Robert Caron represented Mr. Patterson and his co-defendants in this case.

On November 20, 2002, Rhode Island Superior Court Judge Melanie Wilk Thunberg granted a motion to dismiss in favor of Mr. Patterson and his co-defendants on all counts. In her ruling, Judge Thunberg declared the Department of Environmental Management Regulations to be unconstitutional because the summer flounder daily landing limit changed eight (8) times without proper notice, which violated the Administrative Procedures Act and the defendants' due process rights. Judge Thunberg also declared the regulation requiring fishermen to notify authorities if they landed overages to be unconstitutional because it violated the defendants' privilege against self incrimination. See State of Rhode Island v. Jim Patterson et al., RI Sup. Ct., N3-2002-0362 (Nov. 20, 2002).

Subsequent to the state court ruling, EA Deirdre Casey issued a NOVA to Mr. Patterson and the Sea Suess on April 21, 2003. EA Casey charged Mr. Patterson with two (2) counts:

Count 1: Submitting false FVTRs to NMFS on September 17, 1999 that underreported the amount of summer flounder actually landed; and

Count 2: Submitting false FVTRs to NMFS on October 20, 1999 that underreported the amount of summer flounder actually landed.

EA Casey assessed a $9,000 penalty for each count, totaling $18,000, with a proposed compromised settlement of $16,000. According to EA Casey, Mr. Patterson's penalty was mitigated, in part, because of his candor and cooperation. Response by EA Deirdre Casey, p. 6.

Mr. Caron also represented Mr. Patterson in the NOAA proceedings and he requested a hearing before an ALJ. Meanwhile, Mr. Caron engaged in settlement discussions with EA Casey. Mr. Patterson initially offered to relinquish his federal fishing permit in lieu of a monetary penalty. He explained that he did not fish in federal waters because the Sea Suess is physically incapable of fishing too far offshore. The only reason he held onto the federal permit was because he thought it would be more valuable over time. However, Mr. Patterson believed that an inheritance received by his wife, which was disclosed to EA Casey, precluded this option from materializing. Special Master Interview with James Patterson (Sept. 14, 2011). EA Casey could not substantiate this claim, nor am I able to verify it.

Furthermore, EA Casey moved to consolidate Mr. Patterson's case with those of several other fishermen prior to the hearing. Mr. Caron opposed the consolidation because of the difference in degree of culpability between his client and the other parties. ALJ Fitzpatrick ultimately granted a motion to consolidate the cases. As a result, Mr. Caron felt that it was necessary to settle his client's case because he felt that the consolidation was prejudicial to his

client and because he was not confident he would prevail before an ALJ. In response, EA Casey points out that Mr. Patterson had previously admitted to filing false FVTRs, which would have made it difficult for Mr. Patterson to prevail at the hearing. Response by EA Deirdre Casey, p. 7.

On September 24, 2004, Mr. Patterson settled his case with EA Casey for $12,000 to be paid over eighteen (18) months. Mr. Patterson voluntarily relinquished his federal operator and vessel permit sometime ago. He stopped doing business with Point Trap Retail immediately after this incident.

Discussion

Mr. Patterson argues he was coerced into settling because the assessed penalty was excessive. He notes that he made approximately a $500 profit selling summer flounder overages in 1999. Mr. Caron also believes that Mr. Patterson's penalty was excessive and should be reduced because Mr. Patterson was candid about his violation and cooperated with the authorities during their investigation. Further, Mr. Patterson is a small time fisherman who makes a marginal living fishing in state waters. Special Master Interview with James Patterson (Sept. 14, 2011). Mr. Caron notes that the Rhode Island state authorities offered to settle the criminal case for a fine of $50 per offense for a total of $500. Mr. Caron previously offered to settle and resolve the NOAA case for $5,000 on behalf of Mr. Patterson. Letter from Robert J. Caron, Esq. to EA Deirdre Casey (Aug. 4, 2004).

In response, EA Casey points out that the charges in this case relate to Mr. Patterson's intentional false reports. The false reports, according to EA Casey, were predicated upon a plan to avoid detection of a violation of state law. "The gravity, therefore[,] is not measured by the number of pounds falsely reported but the overall threat to the reporting regime and

enforcement thereof." Furthermore, she notes that NOAA's interest is in accurate reporting, particularly for quota species such as summer flounder. Finally, she indicates that the state of Rhode Island's landing regulations bear no relationship to the federal reporting requirement. As such, the "invalidation of the state law did not change Mr. Patterson's liability or culpability on the federal charges of filing false FVTR charges." Response by EA Deirdre Casey, pp. 4-5.

The facts are not disputed and Mr. Patterson has admitted to knowingly landing overages and falsifying FVTRs in order to avoid detection. Further, as EA Casey points out, a Rhode Island state court's decision overturning a state landing limit has no bearing on the federal charges of falsifying FVTRs to hide summer flounder landing overages. Whereas the Rhode Island criminal case dealt with the landing limits, the present case involves intentionally falsifying FVTRs, which is primarily a federal enforcement tool. Furthermore, Mr. Patterson's argument that he was coerced into settling this case because of the excessive penalty, is not persuasive. Mr. Patterson admitted to the violations and his admission would have likely resulted in an ALJ upholding the violation and the assessed penalty of $18,000 if the case proceeded to a hearing. It is more likely that Mr. Patterson, through advice of counsel, settled this case for a lesser amount in order to avoid a likely finding of liability.

As such, the remaining issues are whether the $18,000 penalty assessment was excessive, and whether the $12,000 settlement was unfair in light of the undisputed facts of this case. EA Casey has pointed out that she considered Mr. Patterson's candor and cooperation in reducing the assessed penalty from $18,000 to $12,000 for what was essentially ten (10) false FVTRs. Mr. Patterson would have likely continued to land overages and falsify FVTRs had government agents not uncovered this widespread scheme. I find that the $12,000

penalty, which was paid over an eighteen (18) month period, took into consideration Mr. Patterson's cooperation and candor, sufficiently punished Mr. Patterson for the various intentional violations, and provided Mr. Patterson with an incentive to comply with federal law. I understand that $12,000 is a large sum of money for someone like Mr. Patterson who is not engaged in large volume fishing. I further understand that Mr. Patterson was incapable of fishing in federal waters because of the condition of his fishing vessel. However, he did possess a federal vessel permit and should be held to the applicable reporting requirements. Given the intentional nature of these violations and the numerous attempts to avoid detection by falsifying the FVTRs, I find that the $12,000 penalty payment, over time, is justified. I find further that EA Casey's penalty assessment was not excessive, and did not coerce an unfair settlement.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 207
NE 0601646
F/V Sea Fox
Maud Platt, Inc., Owner
[redacted] Operator

Fishing vessel owner complains about the excessive penalty relative to other fishing vessels with comparable violations and seizure of the vessel's entire scallop catch after Special Agents discovered that she was 549 lbs. over the 18,000 lbs. landing limit.

Findings of Fact

Maud Platt, Inc. is the owner of the fishing vessel, Sea Fox. Allen Warren Rencurrel and his wife, Lori, each own 50% of the common stock of Maud Platt, Inc. Additionally, Mr. Rencurrel was a 50% stockholder with other individuals owning the remaining 50% of the common stock of AB Sea Fisheries, Inc. which owned, at all times relevant to this review, the fishing vessel Miss Holly. Mr. Rencurrel is a first generation fisherman.

Mr. Rencurrel started scalloping when he was in high school in 1976-1978, did some scalloping and sword fishing in his early 20's in 1981-1982, and for the next 10 to 12 years, did quahogging in Narragansett Bay. At age 32, Mr. Rencurrel went to work surf clamming on the 50+' fishing vessel, Maude Platt. After one of the owners died, Mr. Rencurrel bought the Maude Platt which he fished until he sold her to buy the 61' fishing vessel Sea Fox in 2004. The Sea Fox had a limited access fishing permit which allows her to fish in a large number of federal fisheries. Response by EA Charles Juliand, p. 3. [redacted] was the operator of the Maude Platt for a year before she was sold and continued to work for Mr. Rencurrel until 2010 as operator of the Sea Fox.

While analyzing a fishing trip by the Sea Fox on July 27, 2006, SA Todd Nickerson noticed that the Sea Fox spent a lengthy time on July 20, 2006 in the same area (approximately one (1) day) before transitioning to the Nantucket Lightship Closed Area (NLCA), where she was permitted to scallop and where she made a high volume of tows. When the Sea Fox returned to New Bedford to offload her catch, SAs Christopher McCarron and Nickerson boarded the vessel and identified themselves to the captain, [REDACTED] and to the owner, Allen Rencurrel, who had boarded the Sea Fox just prior to the SAs. [REDACTED] stated that [REDACTED] had 341 bags of scallops weighing between fifty-one (51) to fifty-two (52) lbs. for a total from 17,391 to 17,732 lbs. The Sea Fox's trip limit was 18,000 lbs. The SAs told [REDACTED] that they would monitor the offload of scallops. SA McCarron and Mr. Rencurrel stayed on shore conducting a tally of the scallops offloaded and SA Nickerson positioned himself at a place onboard where he could view the fish hold.

[REDACTED] engaged SA Nickerson in conversation by speculating what would happen if the Sea Fox offloaded more than 18,000 lbs. of scallops. At some point during the offload, SA Nickerson viewed what he concluded to be suspicious activity in the fish hold. When [REDACTED] acknowledged that they had offloaded 341 bags of scallops for a total weight of 17,889 lbs., SA Nickerson asked [REDACTED] to confirm that there were no more bags on board the vessel or in the hold. [REDACTED] responded in the negative. When challenged by SA Nickerson, the captain had the crew retrieve six (6) bags of scallops hidden in the ice. The captain apologized, saying [REDACTED] was afraid [REDACTED] was going to exceed [REDACTED] limit and had the crew hide the six (6) bags.

Mr. Rencurrel was not on board during this exchange between the captain and SA Nickerson as he was on shore conducting the offload tally. However, at some point, Mr. Rencurrel became aware that something was amiss between [REDACTED] and SA Nickerson and instructed [REDACTED] "to stop playing around and get all the bags on the scale." Special Master Interview with Allen Rencurrel (Sept. 13, 2011). Mr. Rencurrel saw SA Nickerson point to the fish hold. It was at that time that SA Nickerson asked the captain again if there were any more bags of scallops. Offense Investigation Report by SA Todd Nickerson, p. 4 (July 28, 2006). [REDACTED] said no more bags. Id. SA Nickerson then entered the hold, dug under the ice and located another ten (10) bags of scallops. Id. at 6. The catch now totaled 18,549 lbs., was seized by the SAs and was sold for $111,294.00. Id. at 7. On July 28, 2006, an EAR was issued to [REDACTED] for exceeding scallop possession limits and for interference with an investigation (hiding product). On that same date, Mr. Rencurrel, as an individual, received an EAR for exceeding scallop possession limits. Mr. Rencurrel is not and was not, individually the owner of the Sea Fox, but EA Juliand points out that Mr. Rencurrel had earlier identified himself as the owner of the Sea Fox. Response by EA Charles Juliand, p. 5. This case was settled before the issuance of a NOVA.

Prior to the settlement, there was a meeting in Gloucester sometime between January 3 and 16, 2007 involving Mr. Rencurrel, his lawyer, Pamela F. Lafreniere, Esq., and EA Juliand. Mr. Rencurrel explained to EA Juliand the unusual circumstances of this trip. Bad weather was approaching and Mr. Rencurrel instructed [REDACTED] to get off the dock and get out of the three (3) mile limit so that the Sea Fox could fish in the NLCA. In order to do that, the Sea Fox would have to avoid the bad weather by hiding behind Nantucket where the water was

warm and shallow. The Sea Fox remained in that position for approximately one (1) day which caused the ice to melt and the scallops to soak up extra weight. EA Juliand challenges this assertion because the Sea Fox had not fished during its stay north of Nantucket Island and therefore could not have had scallops on ice during that time. Id. at 6. Mr. Rencurrel said to me in his interview that EA Juliand stated that, if Mr. Rencurrel took the case to court, it would cost a lot more than Mr. Juliand's suggested penalty. Special Master Interview with Allen Rencurrel (Sept. 13, 2011). EA Juliand denies that he made this statement but states: "I may very well have said, as was my practice, that the ALJ wouldn't be limited by the NOVA amount, should one be issued, and could assess a penalty anywhere from zero to the statutory maximum." Response by EA Charles Juliand, p. 6. Whatever was actually said, Mr. Rencurrel got scared and decided to settle before a NOVA was issued.

The Settlement Agreement is interesting. First, it correctly recites Maude Platt, Inc. as the Respondent but AB Fisheries, Inc. was the signatory to the Agreement. EA Juliand dismisses this as a harmless "cut and paste" error. Id. However, in reviewing EA Juliand's other cases, he is not inclined to overlook similar unintentional mistakes by fishermen. Mr. Rencurrel was required to sign individually, as the Agreement provided that he could not have more than a 25% ownership interest in any scallop vessel other than the Sea Fox for a period of five (5) years. Mr. Rencurrel was neither the owner nor the operator of the Sea Fox but was a 50% stockholder, president and a director of Maude Platt, Inc. The Agreement further provided for payment of a $25,000 penalty, forfeiture of the $111,294 seized catch proceeds and included a nine (9) DAS vessel permit sanction during the fishing year commencing March 1, 2007. Despite receiving an EAR, [redacted] was never charged for any violation even though [redacted] was the

person responsible for both the overage and the interference charges. EA Juliand attributes this to a NOAA staff error. Id.

Discussion

Ms. Lafreniere argues that the penalty was excessive in that Maude Platt, Inc. lost the entire catch of $111,294, paid a substantial penalty and lost nine (9) DAS. A comparable case, in which the fishing vessel Jena Lee had a 348 lbs. overage of scallops, was settled for approximately one-half (1/2) of the seized proceeds of $114,335.60. EA Juliand distinguishes the settlement of this case from the Jenna Lee case: Maude Platt, Inc. had a least one (1) prior offense in 2003 for fishing for sea scallops without a federal permit; the Sea Fox landed a larger overage; and the captain tried to conceal the overage by hiding the scallops and lying to the SAs.

This case resembles several other cases I have reviewed that involve intentional, illegal acts by captains of fishing vessels which are, by law, attributable to the vessel owners.

This is a case where [redacted] knew [redacted] had a scallop overage, hid the overage before arriving in port and then lied several times to the SA who was monitoring the Sea Fox's offload. This is a serious example of a captain interfering with an investigation and making not one, but several, false statements to enforcement personnel. The fact that the corporate owner had at least one prior violation was an aggravating factor in assessing the penalty. The problem with this and other similar cases is that the corporate owner was not onboard at the time of the intentional, illegal acts by the captain, had no control over the captain but suffered the consequences.

At the time the catch was seized, there was a NOAA enforcement policy that, in the case of an overage in excess of 200 lbs., the entire catch should be seized. Memo for Northeast Directives Manual by Former SAC Andrew Cohen (Jan. 24, 2005). That was what happened in this case where the overage was 549 lbs. This was the real loss suffered by the owner, Maud Platt, Inc. However, the forfeiture, vessel sanction of nine (9) DAS and the $25,000 penalty were a reasonable resolution of the violations of landing an overage, interfering with an investigation (hiding product) and twice lying to a NOAA SA.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 208

NE 0601190 FM/V

F/V Miss AM

Stephen Celeste, Owner/Operator

Lobsterman complains that the penalties levied against him were excessive and that he did not deliberately disobey orders by New Jersey Conservation Officers.

Findings of Fact

Stephen S. Celeste, Jr. has been a commercial lobsterman since 1991. At the age of 26, Mr. Celeste purchased his first lobster vessel. In 1996, he purchased the Miss AM, a 54' lobster vessel that he owns and operates in his individual capacity. Mr. Celeste's home port has always been Neptune, New Jersey and he typically lands his catch at two (2) nearby New Jersey wholesalers.

On the morning of June 16, 2006, Mr. Celeste and his deck mate, [REDACTED] were on board the Miss AM hauling lobster traps in the Exclusive Economic Zone fifteen (15) nautical miles off the coast of Belmar, New Jersey in an area referred to as the "mud hole." The mud hole is a heavily fished area. Because of the elevated level of competition to set lobster gear in the mud hole, many conflicts have erupted between lobster fishermen, escalating in some instances to shootings and boat burnings. Accordingly, it is an area of great enforcement concern. Salisbury v. U.S., 2008 WL 5423487 (E.D. Pa.); Response by EA Deirdre Casey, p. 1. At approximately 8:00am, three (3) New Jersey Division of Fish and Wildlife Conservation Officers--[REDACTED], [REDACTED] and [REDACTED]--approached the Miss AM in an unmarked patrol vessel. See Patrol Vessel Photograph. The Conservation Officers (COs) are deputized NOAA federal agents who were dressed in identifiable uniforms. Both NOAA Office of Law Enforcement SAs and the NJ COs had received complaints that lobster fishermen were fishing in

that area with traps that did not have the required 2006 trap tags.[1] Offense Investigation Report by SA Jeffrey Ray, p. 6 (June 30, 2006).

The COs observed that Mr. Celeste and [redacted] were in the process of hauling lobster traps and approached the Miss AM at a high rate of speed in order to conduct a boarding. Investigative Report by CO Clint Dravis (June 30, 2006). When the vessel was approximately 200 yards from the Miss AM, the COs turned on their blue patrol light and came within ten (10) yards of the Miss AM. As the patrol vessel approached, CO [redacted] identified [redacted] and the other COs as law enforcement officers and instructed the crew on the Miss AM not to dump anything overboard. Id. Mr. Celeste saw the patrol vessel, claimed that he did not see the illuminated blue light, but had a good idea that he was going to be boarded. Tr. 265. However, at one point, he told CO [redacted] that he did see the blue navigation light. Investigative Report by CO [redacted], p. 3 (June 19, 2006). Mr. Celeste also claimed he did not hear CO [redacted]

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[1] As EA Casey explains, "The lobster fishery regulatory regime uses trap tags as a primary management measure for effort control. Each permit holder is allocated a certain number of traps he/she can fish and a corresponding number of trap tags (plus an additional allowance for lost tags/traps) marked with the area in which the vessel may fish. 50 C.F.R §§ 697.4 (d), 697.19. This differs from other fisheries which regulate the number of pounds a permit holder may land. The Agency and the Atlantic Coastal States Commission rely on trap tags- which must be affixed to a lobster trap as a way to enforce the trap allocation and area designation. 64 FR 2711 and Tr. 41-42. Traps found without tags validly affixed may be being fished in excess of a vessel's allocation. Tr. 44-45, 54-55. Untagged traps fished the way Mr. Celeste fished, without a surface buoys or highflyers to mark the position of a trawl pose even greater enforcement challenges because the gear is undetectable to the naked eye- or law enforcement on patrol. Tr. 262-263. In addition, the area where Mr. Celeste was fishing is notorious for gear conflicts resulting in stolen traps, destroyed traps and stolen lobster. See Salisbury v. U.S., 2008 WL 5423487 (E.D. Pa. Dec. 30, 2008); In The Matter Of: John Van Salisbury, 2007 WL 1810142 (NOAA) (For the last 15 years, NOAA Fisheries and the New Jersey Division of Fish and Wildlife received and documented numerous complaints concerning violence, threats of violence, destruction of property, threats of lobster trap destruction, lobster trap theft and theft of lobsters from traps located in the "mud hole area." The loss of traps, as well as the corresponding theft of lobsters from those traps, caused the lobstermen to suffer economic loss)." Response by EA Deirdre Casey, pp. 3-4.

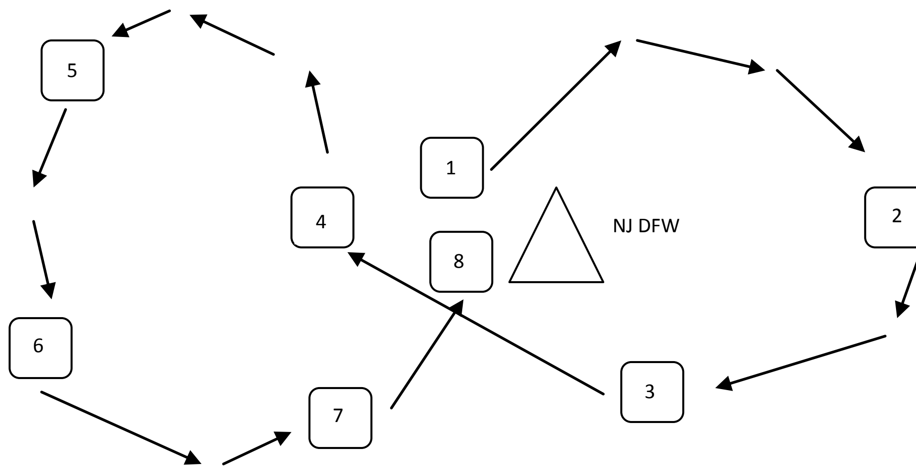
commands from the patrol boat, but assumed that he said not to throw anything overboard. Tr. 226. Mr. Celeste lost hearing in his left ear after a car accident when he was 11 years old. Furthermore, the Miss AM has a 700 horsepower diesel engine on board. As a result, Mr. Celeste could not hear anything that was said by the COs. Special Master Interview with Stephen Celeste (Sept. 21, 2011); Tr. 226. Meanwhile, [redacted] explained that [redacted] had indicated that [redacted] could not hear the officers by gesturing with [redacted] hand to [redacted] ear. However, Officer [redacted] could apparently hear [redacted] reply from their vessel. Investigative Report by CO [redacted] (June 30, 2006).

After this exchange, the COs observed [redacted] walk away from the patrol vessel and towards Mr. Celeste where [redacted] had a brief conversation with him. At the time, Mr. Celeste had a lobster pot in front of him resting on the gunnel with the line through the hauler. Id. Mr. Celeste then pushed the pot into the water and disengaged the line from the hauler. The lobster trap was connected by a line to another trap onboard. Mr. Celeste spaces lobster traps approximately 100 feet apart on a line consisting of twenty-four (24) traps. Once Mr. Celeste released the first trap, the second one would follow and eventually be pulled down into the water. Special Master Interview with Stephen Celeste (Sept. 21, 2011).

Mr. Celeste admitted that he intentionally dropped the lobster trap in his hand because he was "having too many things going on in [his] life." Id. He informed CO [redacted] sometime during the boarding that he was recently separated from his wife. Investigative Report by CO [redacted] (June 30, 2006). Mr. Celeste further explained that he knew the traps were not tagged, he did not want to get caught, and that he planned on tagging the traps after the COs left. Offense Investigation Report by SA Ray, p. 21 (June 30, 2006); See also Tr. 266.

After Mr. Celeste dropped the lobster pot, CO [redacted] yelled in a loud and commanding voice, "What are you doing, do not throw anything overboard!" Investigative Report by CO [redacted] (June 2006). Mr. Celeste then walked over to the throttle and put the boat in gear, moving forward and away from the COs patrol vessel. Investigative Report by CO [redacted] (June 30, 2006). Thereafter, the second lobster trap was pulled into the water by either the momentum of the Miss AM moving forward, or the weight of the first jettisoned trap pulling on the line. Officer [redacted] maneuvered the patrol vessel quickly to retrieve the line floating in the water prior to it sinking. CO [redacted] secured the line to the vessel's port cleat, effectively anchoring the COs to the jettisoned traps. Id. Using hand signals, CO [redacted] ordered the Miss AM to bring the vessel alongside the patrol vessel. Id.

After the COs secured the sinking line, they observed the Miss AM maneuvering in a figure 8 shape around the COs– first away from the patrol vessel, then ultimately returning closer. The COs then observed the Miss AM to be positioned in a way that obstructed the COs view of the Miss AM deck for approximately one (1) minute. Offense Investigation Report by SA Jeffrey Ray, p. 13 (June 30, 2006). Although CO [redacted] testified at the ALJ hearing that Mr. Celeste pulled alongside the Miss AM after approximately 5-7 minutes from the time he jettisoned the traps to when the COs boarded the vessel, I have discovered [redacted] that the elapsed time was closer to 2-3 minutes. [redacted] The 2-3 minute path of the Miss AM is documented as follows:



Offense Investigation Report by SA Jeffrey Ray, p. 13 (June 30, 2006).

Mr. Celeste has denied, and continues to deny, that he was trying to evade the COs during this episode. Rather, he claims that his maneuvering was the result of trouble with the vessel's throttle. Specifically, he testified that, "like I said, the screw was loose on the shifter itself, and it was an external problem, it wasn't where I had to take the whole control off and go underneath it with Alan keys and tighten it up, it was on the outside, so all I had to do is get a screwdriver- find one first and tighten it up." Tr. 232. Mr. Celeste later claimed, during my interview of him, that the shifter problem originated from a stripped screw, which required him to remove four (4) screws before he could get to the stripped screw in the throttle. Special Master Interview with Stephen Celeste (Sept. 21, 2011). The throttle problem, he claimed, prevented him from immediately complying with the COs' orders. In support of this stripped screw argument, Mr. Celeste provided me with a copy of receipt from Laurelton Welding Service, Inc., which purportedly indicates that Mr. Celeste had work done to fix the problem. See Invoice (June 18, 2006). The receipt is dated June 18, 2006. During the ALJ hearing, which took place on December 12, 2007, counsel for Mr. Celeste introduced evidence of a similar receipt. See Statement (June 26, 2006). The transcript reads:

Counsel: I'd like to show you, Mr. Celeste, what's been marked as respondent's Exhibit "A", do you recognize that document?

Mr. Celeste: Yes.

Counsel: Do you recognize that document?

Mr. Celeste: Yes.

Counsel: Okay, does that appear to be an accurate photocopy of the statement that you received from Laurelton (PH) Company regarding a repair of your shifter.

Mr. Celeste: Yes.

Counsel: Now, in looking at this document, you do see that the date is apparently 6/27, and then amended to 6/26, do you see that?

Mr. Celeste: Yes.

Counsel: Okay, but in any event, is there any doubt in your mind that the date of this receipt is June 26th?

Mr. Celeste: No, no doubt.

…

Counsel: Okay, This receipt indicates a repair was made in the amount of $60?

Mr. Celeste: Yes.

Counsel: Okay, can you read for the Judge exactly what is indicated was repaired?

Mr. Celeste: It just says, "Repaired morse control shifter" and that there was one hour labor, and the bill was for $60.

…

Counsel: But in any event, this repair receipt is after the date when you were interviewed, and you indicated you had not repaired it yet?

Mr. Celeste: Yes. Tr. 235-6.

I note that the date of the receipt that Mr. Celeste provided me is different than the date of the receipt that was introduced during the hearing (June 18th versus June 26th). Further, the exhibit that was introduced at trial did not include work done for a stripped screw, nor was

there any mention of a stripped screw during the entire hearing. In fact, upon a cursory inspection of the receipt that Mr. Celeste provided me, it is clear that the invoice item for "replace stripped screw" was written with a different pen than the other items on the invoice. Interestingly, Mr. Celeste testified during the hearing that he did not repair the shifter until after he was interviewed by SA Ray, which took place on June 22, 2006. The June 18, 2006 repair invoice was not introduced at trial. Based on Mr. Celeste's testimony at the hearing that he did not repair the shifter until after his interview, and the fact that the authenticity of the June 18, 2006 receipt is questionable, I do not find Mr. Celeste credible in his assertion that the shifter problem inhibited his ability to maneuver the Miss AM in response to the COs repeated commands.

After the COs boarded the Miss AM, they conducted a fifteen (15) minute inspection and did not find anything out of compliance. Mr. Celeste was then directed to re-secure the lobster line that had previously been dropped in the water. Upon retrieval, the COs discovered that twenty one (21) lobster traps in this line did not have the current 2006 red NMFS tags secured. Mr. Celeste said that he previously lost these traps and had recovered them on a recent trip on June 2, 2006. However, since he only had ten (10) NMFS lobster tags onboard on that date, he decided not to tag any of them. Tr. 259. Instead, Mr. Celeste baited the traps and reset them that day, despite the fact that he knew it was unlawful to fish with untagged traps. Tr. 260. During the boarding on June 16, 2006, the COs noticed a bundle of current red 2006 tags on-board. Investigative Report by CO [redacted], p. 2 (June 30, 2006). Theft of the lobster traps, Mr. Celeste said, was common practice in that particular area. Though he could not explain exactly why some traps had tags and others did not, he did mention that other

lobstermen may have taken his old traps and removed some of the tags to use as their own. He also explained that lobstermen would not dare go fishing without tags on the traps because law enforcement officials often times would inspect the traps at night. Finally, Mr. Celeste previously testified that he did not exceed his trap allocation as evidenced by him possessing the extra tags on board. Tr. 215-16. Lobstermen receive an allocation of replacement lobster tags beyond their allotted amounts to account for lost tags. Tr. 51-2. This statement was not disputed and Mr. Celeste indicated that his log book accurately documented all of the traps he set.

After discovering the 21 untagged lobster traps, the COs informed Mr. Celeste that he was in violation and they escorted the Miss AM to the Shark River Coast Guard Station. During the return trip, none of the COs noticed any issues with the Miss AM's throttle, nor did [redacted] [redacted] have any problems operating the vessel. Investigative Report by CO [redacted] p. 2 (June 30, 2006). The catch was seized and returned to the ocean. SA Jeff Ray and CO [redacted] interviewed Mr. Celeste on June 22, 2006 and SA Ray prepared an Offense Investigation Report.

Based on the reports by the COs, and the subsequent investigation by SA Ray, EA Deirdre Casey issued a NOVA on April 2, 2007, charging Mr. Celeste and the Miss AM with three (3) violations:

Count 1: possessing twenty-one (21) lobster traps without 2006 trap tags;

Count 2: impeding an investigation by jettisoning two (2) lobster traps overboard after Mr. Celeste was told by New Jersey Conservation Officers to not throw anything overboard; and

Count 3: failing to immediately comply with instructions issued by boarding officers to return to the position of the Conservation Officers' vessel in order for them to conduct a boarding.

EA Casey assessed $25,000 per count for a total assessed penalty of $75,000. The assessed penalty fell in the middle of the range for first time violators. Penalty Schedule. EA Casey assessed this amount because “trap tags are the primary enforcement tool to ensure that a vessel is not fishing in excess of its trap allocation” and that “violations in this case were intentional and sought to undermine the enforcement of the trap tag requirement.” Agency Preliminary Position on Issues and Procedures, p. 1 (June 7, 2007). On April 30, 2007, NOAA returned $2,700 for the value of the seized lobsters to Mr. Celeste because the OLE memo referring the case to the NOAA GCEL failed to identify the case as one which fell within the requirements of the Civil Asset Forfeiture Reform Act. Accordingly, NOAA missed the statutory deadline to file a notice as required under the Act (18 U.S.C. § 981 et seq.). Response by EA Deirdre Casey, p. 9.

Mr. Celeste hired a lawyer, Michael Chazen, to contest the charges against him in the NOVA. Mr. Chazen requested a hearing before an ALJ and the case was assigned to ALJ Walter J. Brudzinski. I note that Mr. Celeste had filed for personal bankruptcy in or around 2005. Tr. 5. Mr. Chazen advocated for a $37,500 settlement on behalf of his client with no admission of guilt and no permit sanctions. Email from Michael Chazen, Esq. to EA Deirdre Casey (Nov. 27, 2007). However, EA Casey was not inclined, nor did she have the authorization, to settle for less than half of the $75,000 assessed value. Email from EA Deirdre Casey to Michael Chazen, Esq. (Nov. 16, 2007). The failure to reach an agreement resulted in a hearing before ALJ Brudzinski on December 12, 2007.

Subsequent to the hearing, Mr. Chazen advised Mr. Celeste that his chances of success were minimal and that, if he lost, his vessel would be sanctioned for six (6) months. He also

faced the possibility of a higher penalty than what was assessed. Mr. Celeste was also aware of the high penalties imposed upon other fishermen. His counsel's candid legal advice, and the fear of a six month vessel permit sanction, prompted Mr. Celeste to settle the case before ALJ Brudzinski issued a final decision. Special Master Interview with Stephen Celeste (Sept. 21, 2011).

The parties signed the Settlement Agreement on February 4, 2008. Mr. Celeste agreed to pay $68,000, plus 4% interest. It was provided that payments would be spread out over an eighteen (18) month period, with a $40,000 balloon payment at the end. In October 2009, Mr. Celeste was unable to make the balloon payment. Through his lawyer, Mr. Celeste sought to renegotiate his Settlement Agreement and submitted inability to pay documents. Mr. Celeste signed a modified Settlement Agreement on January 5, 2010. In the modified agreement, Mr. Celeste agreed to a four (4) week sanction for the Miss AM in lieu of the $40,000 balloon payment. The economic impact of the sanction was mitigated by allowing Mr. Celeste to break the sanction into two (2) fourteen (14) day blocks. Mr. Celeste selected the period from January 6, 2010 to January 20, 2010, a period when the Miss AM would not usually fish. EA Casey selected the period from June 15, 2010 to June 29, 2010, a period in which the Miss AM would ordinarily fish. Mr. Celeste paid a total of $31,106.54 as a monetary penalty before he signed the modified Settlement Agreement.

Discussion

Mr. Celeste primarily argues that the assessed penalty was excessive and upon the conclusion of the hearing, the prospect of paying the full penalty compelled him to settle the case. In response, EA Casey states that Mr. Celeste was assessed a $75,000 penalty for three

(3) intentional violations and that the penalties were within the penalty schedule, were supported by substantial evidence, and were not excessive. Response by EA Deirdre Casey, p. 1. Further, EA Casey points out that Mr. Celeste was represented by counsel who bargained for a lower penalty after presenting evidence before an ALJ. Finally, she notes that Mr. Celeste was able to renegotiate the terms of his settlement agreement, which reduced the remaining $40,000 balloon payment to two (2) fourteen (14) day permit sanction blocks, one of which he chose. Id. at 2.

Under the Secretarial Decision Memorandum dated March 16, 2011, I am permitted to review cases in which GCEL assessed an excessive penalty that unfairly forced settlement. In this case, Mr. Celeste, after having an opportunity to present evidence before an ALJ, elected to settle because he felt that the likelihood of prevailing was low, and he would not be able to pay the assessed penalty and serve the potential permit sanction. I find that a $25,000 assessed penalty concerning the underlying lobster trap tag violation was excessive. EA Casey argues that the assessed penalties were in the middle of the penalty range and that trap tags were the primary enforcement tool to ensure that vessels did not exceed their trap allocations. However, several mitigating factors suggest that the penalty should have been lower. First, there was no indication that Mr. Celeste was fishing beyond his allotment of traps because he had ample replacement tags on board, and the violation did not implicate conservation measures as a result. Second, although Mr. Celeste knowingly fished with untagged lobster traps, his explanation that he found the traps after they were lost and did not tag them the first time because he did not have enough tags, is not contradicted. Finally, there was no financial incentive for Mr. Celeste not to tag the lobster traps, particularly because he had extra tags

readily available on board. Therefore, the assessed penalty for this particular count appears to be excessive given the relative inconsequence of the violation.

However, Mr. Celeste does not deny that he intentionally dropped the lobster trap into the water in an attempt to evade law enforcement detection. Further, Mr. Celeste's explanation that shifter problems precluded him from immediately complying with law enforcement orders is not believable. Mr. Celeste testified that he knew that he was going to be boarded, yet he put his vessel in gear to move away from the COs. Additionally, his inconsistent statements, as well as his submission of a questionable document in support of his Application for Review, undermine his credibility concerning other aspects of his Application. Therefore, I find that Mr. Celeste's evasive actions were purposeful and he should be subject to significant penalties.

Mr. Celeste settled for $68,000, but ultimately paid $31,106.54 for three (3) violations, totaling approximately $10,000 per violation, in addition to serving a four (4) week vessel permit sanction. I do not have the authority to review permit sanctions. Although I find the underlying penalty assessment for the lobster tags to be excessive, the end result was fair and reasonable in light of the intentional nature of the obstruction violations.

Recommendation

I recommend that the Secretary take no action concerning this Application for Review.

Case 209
NE 065007 FM/V
F/V Sea Hound
Peter W. Taylor, Owner/Operator

Fisherman alleges that he was forced to settle because his lawyer said he would lose before an ALJ and it would cost more than double the lawyer's negotiated settlement to appeal to the federal court.

Findings of Fact

Peter W. Taylor is a long-line commercial fisherman from Chatham, Massachusetts. Mr. Taylor began fishing in 1972 and, aside from attending and graduating from college and three (3) years in the army, he is a lifelong resident of Chatham. In 1997, Mr. Taylor had the 40' fishing vessel Sea Hound built, and he owns and operates the vessel to this day. Mr. Taylor previously owned the 36' fishing vessel Double Trouble, which sank in 1988 or 1989, and the 35' fishing vessel Against All Odds, which he sold in 1996 to purchase the Sea Hound.

Mr. Taylor was a founding member of the Cape Cod Commercial Hook Fisherman's Association ("CCCHFA") and until last year had been its president for ten (10) years. The CCCHFA is a fishermen advocacy organization.

On January 29, 2006, Mr. Taylor was fishing aboard the Sea Hound. This case alleges that Mr. Taylor unlawfully harassed and refused to cooperate with an observer during this trip. On board the vessel on January 29, 2006, in addition to Mr. Taylor, and the observer, [redacted] were a deckhand, [redacted] who was never interviewed by the investigating NOAA SA Thomas S. Gaffney and [redacted] a haddock tagger for the CCCHFA, who was interviewed twice by SA Gaffney.

On November 18, 2011, I interviewed [redacted] who related to me [redacted] recollection of the January 29, 2006 fishing trip. Special Master Interview with [redacted] (Nov. 18, 2011). [redacted] has worked for Peter Taylor since 2000 because [redacted] believes Mr. Taylor is all business and is out to make money. [redacted] was onboard the Sea Hound on January 29, 2006 when an incident arose with the observer, [redacted] [redacted] described Mr. Taylor as someone who does not say much, is all business when he is on the boat, tries to get stuff done as quickly as possible and does everything by the book. Id.

On the day in question, [redacted] arrived at the dock and [redacted] was already on board. Prior to departing on their trip, [redacted] told [redacted] that Mr. Taylor has a reputation for being "difficult to deal with", that [redacted] was surprised [redacted] had worked for Mr. Taylor for this long, and that "[Peter] was a real jerk." EA MacDonald was not aware at the time of the NOVA of [redacted] comments as reported to me by [redacted] I believe that to be true because [redacted] was not interviewed by SA Gaffney during his investigation. Id.

Typically, Mr. Taylor takes the wheel at the beginning of the trip. At the same time, [redacted] typically handles the fishing gear and other tasks. [redacted] acknowledged that, because [redacted] is constantly on task, it would be difficult to have an observer talk to [redacted] while [redacted] prepares for a trip. In fact, it is dangerous for observers to be talking to [redacted] while [redacted] is working because the hook lines come up quickly. Usually, if an observer tries to ask [redacted] questions while [redacted] is working, [redacted] would refer their questions to Mr. Taylor. Id.

[redacted] has been present on all of Mr. Taylor's fishing trips on board the Sea Hound since [redacted] was hired in 2000. [redacted] commented that some observers come with bad attitudes and have preconceived ideas of what Mr. Taylor is like on the vessel. Further, [redacted] stated that many

observers are out on the vessel to have a good time and to smoke cigarettes. Mr. Taylor, however, would usually not allow observers to smoke because of dangerous materials on board that could catch fire, and has warned them accordingly. Nonetheless, said that Mr. Taylor would usually get along with observers. Id.

stated that knows and who worked for Mr. Taylor for a few months. It did not work out because Mr. Taylor "goes out harder than most" and Mr. Taylor swore at frequently. Id.

stated that noticed that Mr. Taylor and were engaged in a "shouting match" after they returned to port. There is no documentary evidence supporting this assertion. However, could not hear the substance of the conversation because was in the parking lot. acknowledged that Mr. Taylor is pretty well known for having a foul mouth and that some people take offense. Id.

confirmed that Mr. Taylor was hostile to and that maintained composure throughout the trip. initially stated that Mr. Taylor, who was well known to and family, had visited after the incident to tell would be interviewed by a NOAA SA about the fishing trip with and asked to "get amnesia." subsequently qualified statement that Mr. Taylor said "get amnesia" by stating that Mr. Taylor visited and that he made statements that may have interpreted as "get amnesia" but he did not use those words. Special Master Interview with (Nov. 28, 2011).

In my interview of , she stated that Mr. Taylor met at her truck before came on board and told that did not have to talk to the observer and that the observer

was a jerk. Once on board, [redacted] told [redacted] that the observer program was having trouble with Mr. Taylor. [redacted] confirmed that there was a verbal exchange between [redacted] Taylor and [redacted] on the trip home and that Mr. Taylor used foul language but that [redacted] was not intimidated by Mr. Taylor. Id.

In his interview with SA Gaffney, Mr. Taylor defended his actions by stating that [redacted] set a hostile tone when [redacted] first came on board the Sea Hound. Mr. Taylor asked to check [redacted] safety gear, was initially rebuffed and only relented after Mr. Taylor threatened to contact the Coast Guard to confirm that Mr. Taylor had the right and obligation to check [redacted] gear. Mr. Taylor said that [redacted] then tossed [redacted] survival suit at Mr. Taylor's feet and called him an "asshole." Mr. Taylor's counsel repeated this allegation in his brief filed in connection with the appeal to an ALJ. [redacted] denies [redacted] made that statement.[1] Although there is no other witness to the statement, SA Gaffney states in the OIR that Mr. Taylor told him that [redacted] was "lippy" when [redacted] came on board. Thereafter, [redacted] persisted in asking Mr. Taylor questions such as: "what is the weight of the anchor," "what is the diameter and strength of line (rope) on board," and inquiring about his fishing gear, but Mr. Taylor would not answer these questions. During his interview by SA Gaffney in February 2006, Mr. Taylor stated that he could not answer questions about the fishing gear he was going to use because he had multiple types on board and that he did not know what he was going to use. In his interview with me, Mr. Taylor stated that he did not answer the questions because he did

[1] I contacted [redacted] of AIS, Inc., contractor for the NMFS Observer Program, for contact information for [redacted] and was informed that [redacted] had not been an employee of AIS since March 8, 2007 and that [redacted] had no current contact information for [redacted].

not know the answers to those and other questions. Special Master Interview with Peter Taylor (Nov. 11, 2011).

[REDACTED] stated that Mr. Taylor told [REDACTED] not to talk to the crew at any time, that if [REDACTED] had any questions, [REDACTED] was to ask only Mr. Taylor, and that Mr. Taylor would not answer any of [REDACTED] questions. These statements were confirmed by [REDACTED] in [REDACTED] meeting with SA Gaffney on February 8, 2006. Mr. Taylor stated during my interview of him that he instructed [REDACTED] not to ask questions of his crew for reasons of safety. He did not want his crew distracted. Id.

On this trip across the Chatham bar, [REDACTED] insisted on getting information concerning a FVTR. Mr. Taylor told [REDACTED] that he usually fills out the FVTRs at the end of the trip and could not give [REDACTED] that information until the trip ended. From my observation, Mr. Taylor has a short fuse and even during my interview constantly used rough language. According to [REDACTED] own statement, [REDACTED] was not intimidated by Mr. Taylor or his language. Id.

[REDACTED] was unable to complete [REDACTED] required duties as an observer because of Mr. Taylor's behavior. When [REDACTED] informed Mr. Taylor that [REDACTED] needed to sample fish, Mr. Taylor responded that he did not have to answer any questions or assist [REDACTED] [REDACTED] [REDACTED] was unable to sample any fish because Mr. Taylor "refused to give [REDACTED] any discards during haul back." Id. Mr. Taylor agreed that fish were discarded without [REDACTED] being able to sample them but Mr. Taylor stated that they were discarded without being sampled because [REDACTED] never asked to sample them. Id.

Mr. Taylor was initially confident that the observer program would be successful. He gladly took observers because he believed that the information gathered would be helpful to the fishing industry. However, he soon because disillusioned because many paid observers were only along for the ride. Mr. Taylor reported these observers to NMFS for not doing their job. Mr. Taylor stated to SA Gaffney that he had likely received reports about Mr. Taylor's treatment of observers because Mr. Taylor was "essentially protesting against the observer program because he thought that observers were not doing their jobs thoroughly or professionally." Record of Interview by SA Thomas Gaffney (Feb. 4, 2006).

When SA Gaffney interviewed Mr. Taylor, [redacted] was present at Mr. Taylor's request. [redacted] confirmed that [redacted] had been logging observer complaints made by Mr. Taylor and other CCCHFA members and had passed on those complaints to [redacted] Id. at 2. Mr. Taylor stated that he was subsequently warned by an observer that he was being watched by NMFS and A.I.S., Inc. (the observer program) because of his complaints. Mr. Taylor had a prior confrontation with an observer. On January 24, 2006, four (4) days before [redacted] encountered Mr. Taylor, another observer, [redacted] showed up unannounced on the dock to accompany Mr. Taylor as an observer. Earlier that morning another observer, who had been scheduled to go with Mr. Taylor, opted to go fishing with another fisherman. When [redacted] showed up, Mr. Taylor refused to allow him on board primarily because he had received no advance notice that [redacted] had been selected as an observer for that trip. Special Master Interview with Peter Taylor (Nov. 11, 2011). Subsequently, in reviewing this encounter, EA

MacDonald decided not to charge Mr. Taylor for the occurrence [redacted]

[redacted]

[redacted]

On August 17, 2007, EA MacDonald issued a NOVA to Mr. Taylor alleging in Count I, that on January 29, 2006, Mr. Taylor, as owner/operator of the fishing vessel Sea Hound, unlawfully refused to provide reasonable assistance to a NMFS approved observer, [redacted] by refusing to allow the observer to inspect the fishing vessel's log and by denying the observer's request for the FVTR number or to see the FVTR for that trip. Count II alleges that on that same date, Mr. Taylor unlawfully harassed the observer by engaging in conduct that created an intimidating, hostile, or offensive environment, including offensive language directed at the observer. Specifically, the NOVA alleges the following:

a. [redacted] was not allowed to talk to the respondent's crewman, but only to the respondent. Further, the respondent said that he would not answer any of the observer's questions;

b. In response to the observer informing the respondent about the observer's duty to get certain data by asking questions and that he would have to sample some of the fish landed by the respondent, "I have to take you with me by law, but the law does not require me to answer any of your questions or assist you and the NMFS has all of my information on file."

c. In response to the observer's attempts to gather required data about the respondent's fishing experience: "f… you, I have many f… years as a captain, a lot more than you."

d. In response to the observer's request for the respondent's vessel trip report number, "I'm not giving you any information, I'll give the VTR (vessel trip report) to NMFS but not you." And further, "f… you, I am not giving you the VTR number, I know the regulations."; and

e. In response to the observer's stating that he would have to write up the respondent for being uncooperative, "f… you, I will write the NMFS myself and tell them I am uncooperative."

Mr. Taylor was assessed a civil penalty of $10,000 for count I and $25,000 for Count II for a total assessment of $35,000. This was Mr. Taylor's first offense. The penalty schedule relevant to the allegations contained in Counts I & II provides for a penalty of $5,000 to $50,000 (and/or up to 90 day permit sanction) for a first offense. Penalty Schedule.

On March 31, 2008, Mr. Taylor's lawyer, Harvey B. Mickelson, sent a letter to EA MacDonald rejecting "a settlement in the amount of $22,500 and a 15 day permit sanction..." Letter by Harvey B. Mickelson, Esq. to EA J. Mitch MacDonald (Mar. 31, 2008). Mr. Michelson further opined in that letter that Mr. Taylor's "… chances of a judge determining a penalty, if any, in an amount greater tha[n] that which you have offered would be inappropriate." Id. In a letter dated April 1, 2007, EA MacDonald replied: "Consequently, while I agree with you that ALJ Brudzinski is unlikely to increase the assessed penalties, he is equally as unlikely, however, to decrease them." Letter by EA J. Mitch MacDonald to Harvey B. Michelson, Esq. (Apr. 1, 2008). Shortly after receiving the letter, Mr. Taylor's counsel advised Mr. Taylor to settle the case because he would lose before the ALJ and end up paying a $35,000 penalty. Because of this, Mr. Taylor agreed to settle for $17,500 and a ten (10) day vessel and operator permit sanctions.

Discussion

It is Mr. Taylor's position that the people at AIS, Inc. and NMFS had targeted him for his prior complaints about observers and sent [redacted] as an observer to ignite Mr. Taylor's well known fuse. Mr. Taylor decided to appeal the NOVA. He stated to me that someone at NMFS asked him what his availability was for a hearing. Mr. Taylor told the individual that any month but May would work because May was his busiest month. The hearing date was scheduled for

the middle of May. Mr. Taylor's counsel advised him to settle the case because he would lose before an ALJ. A settlement agreement was signed on May 8, 2008. The agreement provided for payment of a $17,500 penalty and a 10 day permit sanction on both his operator's and vessel's permits. Mr. Taylor has paid the penalty and served the time.

NOAA's case file in this case includes three (3) observer cases tried to a decision before a USCG ALJ. In the Matter of Robert Palmer, 1996 WL 1352611 (NOAA), is a case decided on April 10, 1996. Mr. Palmer was charged in Count I with intimidation and impeding and interfering with the work of a female observer by his tongue waggling, repeated sexual comments, cussing and yelling, and risking her safety. Mr. Palmer intimidated the female observer to the extent that she ceased doing her job and became physically ill. In Count II, Mr. Palmer was charged with tampering and destruction of observer records about his harassment. In Count III, he was charged with sexual harassment of a female observer. The NOAA EA assessed a penalty of $20,000. Other joint and several respondents settled for $6,000 leaving Mr. Palmer exposed to a potential $14,000 penalty. The ALJ assessed the full $14,000 penalty but based on the particular sensitivity of the observer to the abusive conduct and the fact that Mr. Palmer had not worked in Alaska for four (4) years, the ALJ suspended $7,000 of the penalty provided that Mr. Palmer not commit a further violation of the fishing laws for a two (2) year probationary period. It is worth noting that, unlike the observer in Mr. Palmer's case, ███ █████ said ██ was not intimidated by Mr. Taylor's conduct, but that it did detrimentally affect ██ ability to gather information.

In the Matter of: Chris Evans, Respondent, 1996 WL 1352610 (NOAA), also decided on April 10, 1996, Mr. Evans was charged in count 1, with interference by continued sexual

harassment of a female observer, which eventually led to her leaving the vessel prior to the completion of the fishing voyage, and in count 2, with sexual harassment. The joint and several penalty assessment was $15,000. Other respondents settled for $4,000 leaving Mr. Evans exposed to a potential $11,000 penalty. The ALJ assessed an $11,000 penalty but, in part due to Mr. Evans' limited ability to pay and the fact that he had not worked in the fishing industry or anywhere since 1992, the ALJ suspended $10,500 of the penalty on condition that he not commit another offense within a two (2) year probationary period.

In the Matter of Ken Cronce, Brenda Cronce, Respondents, 1994 WL 1246358 (NOAA) was decided on September 12, 1994 and charged in Count I, that Mr. Cronce forced himself into the female observer's bunk against the observer's wishes, and in Count 2, that Mr. Cronce repeatedly denied the observer access to the ship's communication equipment. The original penalty assessment was $15,000. The ALJ found that the Agency did not establish count 2, and dismissed that charge. The ALJ assessed a $5,000 penalty against Mr. and Mrs. Cronce on the remaining count.

All three (3) cases involve egregious conduct toward an observer and the penalties, which were established by an ALJ after hearing, are well below the settlement in Mr. Taylor's case. EA MacDonald points out that these cases were decided in 1994 (one case) and 1996 (two cases).

In Count 1 of the NOVA, Mr. Taylor was charged with refusing to provide required information requested by the observer, and in Count 2, with harassing an observer by creating an intimidating, hostile and offensive environment that prevented the observer from obtaining all of the information he was required to obtain. These are separate violations but they stem

from the same occurrence: Mr. Taylor prevented Mr. Hocker from obtaining information about the fishing trip that, as an observer, he was required to obtain. There is no question that Mr. Taylor's actions violated the regulations and it is not a defense to these violations that Mr. Hocker was "lippy" when he first came on board or that there was an obvious clash of personalities between the captain and observer. Therefore, I conclude that Mr. Taylor committed the offenses charged and that he had no legal defense for his actions.

However, I find that the assessed penalty was excessive and the result of overzealous enforcement. The following facts support a finding that this case involves an overzealous prosecution of Mr. Taylor. First, this case involves a first time violation. The applicable penalty schedule for a first offense is from $5,000 to $50,000 and/or up to a ninety (90) day permit sanction. In this case, EA MacDonald followed a familiar pattern of assessing a penalty on the high side of the schedule and then eventually settling for approximately 1/2 of that amount after having advised the fisherman and/or his counsel, that if they pursue an appeal before an ALJ, there is a reasonable likelihood that the original assessed penalty will be affirmed. Because of this risk, fishermen, with advice of counsel, are forced to settle for an amount that they believe to be excessive.

Second, the amount of this settlement was well in excess of the ALJ decisions in the three (3) observer cases cited, supra. Those cases involved egregious conduct toward an observer and the penalties were established by ALJ's after a full hearing. Although these were old decisions, I found them in NOAA's case file for Mr. Taylor.

Third, I find in reviewing the case file that there is circumstantial evidence that both SA Gaffney and EA MacDonald wanted to punish Mr. Taylor for his use of abusive/foul language

and for protesting the observer program. confirmed that he had been logging observer complaints by Mr. Taylor and other CCCHFA members and passed those complaints on to the Chief of the Fisheries Sampling Branch (NOAA). I find credible the testimony of Mr. Taylor about his early confrontation with when first came on board; the testimony of that told him that Mr. Taylor had a reputation for "being difficult to deal with" and that "Peter [Mr. Taylor] was a real jerk"; and the testimony of that, once was on board the Sea Hound, told that the observer program was having trouble with Mr. Taylor.

However, EA MacDonald responds that in assessing a penalty in this case, he considered comment to SA Gaffney that Mr. Taylor had suggested that forget about the observer incident. EA MacDonald states:

> Subsequent to the violations, Mr. Taylor visited an independent witness and made statements that led that witness to believe Mr. Taylor wanted the witness to "get amnesia." Stating or suggesting to a witness that it would be good to forget what happened is serious misbehavior. This was considered an aggravating factor that increased the assessments. Response by EA J. Mitch MacDonald, p. 16.

was clear in second interview with SA Gaffney "that the phrase 'get amnesia' were own words, not [Mr.] Taylor's words." Record of Interview (Jan. 24, 2007).

The NOVA was issued eight (8) months later without the alleged interference violation being charged. I have to assume that EA MacDonald made a reasoned decision not to charge Mr. Taylor with this alleged violation.

In this case, he did not and Mr. Taylor should not be penalized for an uncharged, questionable violation as an aggravating factor in assessing a penalty in this case. I recognize that Mr. Taylor has been charged with two (2) separate counts but in reality, they both stem from the same overall complaint that Mr. Taylor was uncooperative with [redacted] On this issue, I find that [redacted] contributed to the hostile environment on board the Sea Hound on January 29, 2006, which should mitigate against a harsh penalty. Therefore, I find that a reasonable resolution of this case is to charge the minimum penalty for a first offense ($5,000) for both counts in the NOVA for a total of $10,000 and that the sum of $7,500 be refunded to Mr. Taylor.

Recommendation

I recommend that the Secretary remit the amount of $7,500 to Mr. Taylor.

Case 210
NE 0603068 FM/V
F/V Holly & Abby
Stephen Paul Welch, Owner
[redacted] Operator

Fishing vessel owner complains that NOAA falsely accused his vessel's captain of fishing in a closed area which resulted in an excessive penalty and continued, constant aggravation from NOAA.

Findings of Fact

Stephen Paul Welch has been a full-time commercial fisherman for thirty-three (33) years since 1978. At the outset, he worked as a deck hand for about one (1) year and then became operator of that vessel the next year. During the period 1982-1984, Mr. Welch went to Cape Cod Community College and fished part-time. Subsequently, he operated other owners' vessels until 1986-1987, when he bought his first fishing vessel, the John Austin, which he moored and offloaded in Scituate, Massachusetts. He was fishing for multispecies with federal and state permits. Mr. Welch operated this vessel for about two (2) to three (3) years after which he bought the 42' fishing vessel Cathy Elizabeth. Mr. Welch fished for multispecies with the Cathy Elizabeth, had federal and state permits, and moored and offloaded her in Scituate. He used her mostly for trip fishing until about 1994 when he sold her and purchased the 70' trip boat American Heritage based out of Scituate but often kept in Gloucester, Massachusetts. He fished with the American Heritage for monkfish out of Gloucester, New Bedford, and Scituate depending on the season. At some point, Mr. Welch converted the American Heritage to a dragger, lost all his money and sold her in about 2008.

In 2001-2002, he bought the 55' Holly & Abby, with state and federal permits, to fish for multispecies. The Holly & Abby was moored in Scituate, Massachusetts, but had been in New Bedford, Massachusetts and New Jersey for a few months depending on the season. Mr. Welch hired a captain to operate the Holly & Abby because, at the time, he was operating the American Heritage. Initially, he hired [redacted] then [redacted] and later others to operate the Holly & Abby. Mr. Welch still owns the Holly & Abby and he operated her for a couple of years after the American Heritage sale, but currently he operates a smaller dragger, the 44' Abby & Holly,[1] which he bought about 2009. [redacted] now operates the Holly & Abby out of Gloucester and New Bedford in the springtime for monkfishing. In September 2011, Mr. Welch sold the Abby & Holly and bought the 45' Mystic, which either he or [redacted] operates. The Mystic is moored and offloads in Plymouth, Massachusetts, and has a multispecies permit.

On December 4, 2006, the Holly & Abby embarked on a one (1) day fishing trip from Plymouth, Massachusetts. [redacted] entered into the DAS system via VMS. Offense Investigation Report by SA James MacDonald, p. 4 (Dec. 12, 2006). Data from VMS revealed entry into the Western Gulf of Maine Closed Area by .93 nmi. Id. According to the VMS data, the maximum amount of time the vessel could have spent inside the RCA is 4 hours, 12 minutes. Id. However, someone at NOAA told Mr. Welch that the Holly & Abby had been inside the closed area for one (1) hour. Special Master Interview with Stephen Welch (Dec. 19, 2011).

[1] This is not a transposition of the vessel name. Mr. Welch owned two (2) vessels with similar names: the Holly & Abby and the Abby & Holly.

On December 6, 2006, ASAC Williams informed SA MacDonald of the incursion. SA MacDonald left a voicemail message for Mr. Welch concerning this incursion. NOAA VMS Technician Linda Galvin sent an email to the Holly & Abby asking that someone contact SA MacDonald on his cell phone. Offense Investigation Report by SA James MacDonald, pp. 4-5 (Dec. 12, 2006).

At 12:11 pm on December 6, 2006, [REDACTED] contacted SA MacDonald who informed the captain of the incursion into a closed area, advised him to return to Gloucester and notified him that the Holly & Abby catch would be seized. [REDACTED] explained that [REDACTED] had fallen asleep and drifted into the closed area. At 12:45 pm, SA MacDonald spoke with Stephen Welch and advised him that the catch would be seized.

Later that day, SA MacDonald met with [REDACTED] at New England Marine Resources, Inc. in Gloucester, Massachusetts. [REDACTED] explained that the fish would be unloaded and stored until the next morning when it could be accurately weighed. SA MacDonald interviewed [REDACTED] who repeated that [REDACTED] had fallen asleep and drifted into the closed area, that [REDACTED] had not fished in the closed area and that there were plenty of fish outside the closed area. In my interview of Mr. Welch, he was vehement that [REDACTED] [REDACTED] had fallen asleep, drifted over the line and had not fished inside the closed area. Special Master Interview with Stephen Welch (Dec. 19, 2011). I cannot accept this as a fact since Mr. Welch was not on board the Holly & Abby at the time she entered into the closed area. According to Mr. Welch, prior to the introduction of the VMS system fishing vessels intentionally entered into a closed area for sleep in order to avoid being hit by other vessels who were actively fishing outside the closed area. Id.

When SA MacDonald interviewed [REDACTED] the captain stated that [REDACTED] did not know why [REDACTED] VMS unit was sending positions every two (2) hours and not every hour. Offense Investigation Report by SA James MacDonald, pp. 6-7 (Dec. 12, 2006). Mr. Welch thinks that NOAA inferred that [REDACTED] was tampering with the VMS unit aboard the vessel. Special Master Interview with Stephen Welch (Dec. 19, 2011). However, according to Mr. Welch, this was the result of an overloading of the VMS reporting by all fishing vessels, which had become a requirement only days earlier on December 1. Id. According to Mr. Welch, NOAA was experiencing problems because the system could not handle the influx of transmissions. Id.

On December 6, 2006, [REDACTED] signed a Waiver of Claim to and Abandonment of the seized catch. The fish were sold on December 8, 2006. New England Marine Resources, Inc. bought most of the catch (1,205 lbs. of cod, 10 lbs. of pollock, 320 lbs. of yellowtail flounder, and 260 lbs. of skate wings) for $6,705.85 and Seafresh USA, Inc. purchased the remainder of the catch (133 lbs. of monkfish livers) for $665.00, for a total of $7,370.85.

On December 11, 2006, SA MacDonald issued an EAR to [REDACTED] charging [REDACTED] with entering in a closed area and sent a copy to Mr. Welch. Offense Investigation Report by SA James MacDonald, p. 7 (Dec. 12, 2006).

Subsequently, Mr. Welch, as owner of the Holly & Abby and [REDACTED], as operator, were charged for fishing in the Nantucket Lightship Closed Area on February 18, 2007. (Case No. NE0700552.) Priors Report. Later, Mr. Welch, as owner and [REDACTED] as operator of the Holly & Abby, were charged with one (1) count of exceeding the monkfish possession landing limit, three (3) counts of making a false statement and one (1) count of

disobeying an order not to discard fish. In this case, there was a seizure of the catch that was sold for $11,032.25. (Case No. NE0700631). Priors report.

On August 22, 2008, EA J. Mitch MacDonald issued a NOVA to Stephen P. Welch and [redacted]. EA MacDonald charged the respondents with one (1) count of entry into the Western Gulf of Maine Closure Area by .93 nmi and assessed a civil penalty of $5,000 in addition to forfeiture of the proceeds from the sale of the seized catch of $7,370.85 (case No. NE 0603068). Mr. Welch told EA MacDonald that he would not get a lawyer to negotiate a settlement. Mr. Welch and his father-in-law met with EA MacDonald to negotiate a settlement and EA MacDonald was polite, but refused to answer questions about the case. Special Master Interview with Stephen Welch (Dec. 19, 2011). EA MacDonald believes that this meeting took place prior to his issuing a NOVA, rejects the claim that he refused to answer questions, and states that this would be inconsistent with his normal course of conduct and his willingness to meet with Mr. Welch and his father-in-law. Response by EA J. Mitch MacDonald, p. 4.

In October 2008, the parties reached a global settlement agreement involving this case, NE 0603068 FM/V, and the two (2) other previously mentioned cases: Nos. NE 0700552 and NE 0700631. Under the terms of the agreement, the respondents admitted the violations and in this case (NE 0603068) the closed area charge was reduced to a written warning and the respondents agreed to forfeit the $7,370.85 proceeds from the sale of the seized catch. Case No. NE0700552 (fishing in a closed area) was settled by payment of a $13,000 penalty. Case No. NE0700631 (count 1: landing overage; counts 2, 3, and 4: false statements and there was no reference to count 5) was settled by reducing counts 2, 3 and 4 to a written warning, payment of $8,000 and forfeiture of the $11,032.25 proceeds from the sale of the seized catch.

Failure to pay the settlement amounts in the other two cases would reinstate the full amount of $5,000 assessed in this case. Paragraph seven (7) of the settlement agreement provides that: "Failure of the respondents to pay the civil penalty in full as required shall vitiate paragraph two (2) of this Settlement Agreement. In such an instance, the originally assessed amounts (less any amounts already paid) shall become a final judgment." Settlement Agreement (Oct. 2008). Paragraph two (2) provides that: "The NOAA agrees to reduce the penalty in case NE 0603068 FM/V to a written warning." Id.

On October 18, 2008, Stephen Welch delivered a check to NOAA in the amount of $21,000 in full settlement of all three (3) cases.

Discussion

Mr. Welch challenges the settlement of case No. NE 0603068 ([redacted] closed area case), but not case Nos. NE0700552 and NE0700631. Mr. Welch knows that, as the vessel owner, he is responsible for his operator's mistakes even if [redacted] was operating behind his back (NE0700552 and NE0700631).

Mr. Welch states that he settled his case because, when he received the NOVA, his stomach was turning, he could not sleep, and he wanted to get the matter resolved. He had never heard of anyone being successful on appeal. Mr. Welch mistakenly believed that he had paid a civil penalty of $4,000 in case No. NE0603068, which he believed to be excessive under the circumstances. However, the settlement of this case resulted in a seizure and only a written warning. As I have previously concluded, I do not have the authority to remit forfeitures except to the extent that a civil penalty was paid from the proceeds of the seizure. Case No. NE 0603068 falls outside the scope of my review, as it was not one in which a civil

penalty was paid. As mentioned above, the settlement agreement provided for a reinstatement of the originally assessed penalty of $4,000 in Case No. NE 0603068 if non-payment of the compromise penalties in case Nos. NE0700552 and NE0700631 occurred. There was no reinstatement because Mr. Welch made these payments.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 212

NE 0701883

F/V Venture

Nordic, Inc., Owner

Vessel owner complains he received an excessive penalty for inadvertently exiting a permitted fishing area on two (2) separate occasions to fish in a closed area.

Findings of Fact

E. Daniel Eilertsen ("Mr. Eilertsen") comes from a long, ancestral line of fishermen from Norway and after World War II, from Fairhaven, Massachusetts. Mr. Eilertsen started fishing for his father in 1973 and by 1987 started his own fishing business. In 1996 or 1997, Mr. Eilertsen formed Nordic, Inc., which owned the fishing vessel, Venture, and three (3) other vessels. Additionally, Mr. Eilertsen has an ownership interest in two (2) other fishing vessels. Mr. Eilertsen stopped fishing in 2000, except for one (1) or two (2) trips a year for scientific research purposes.

Mr. Eilertsen, along with many other fishermen, had been waiting for years for a particular area in the Nantucket Lightship Closed Area to open up for scallop harvesting. In July 2007, access was permitted in that closed area. Mr. Eilertsen made every effort to provide the captain of the Venture, [redacted], with the right tools to make the catch, including an extra man to help shuck scallops in order to keep [redacted] in the wheelhouse since this was the first allowable access to the area and there would be many vessels in that area.

On June 14, 2007, the Venture departed from New Bedford, Massachusetts on a Nantucket Lightship Access Area ("closed area") fishing trip where she was allowed to fish in a specified area ("permitted access area"). Fishermen fishing in the "permitted access area"

were not permitted to fish in other parts of the "closed area." NOAA's VMS showed the Venture fishing in the "permitted access area" and crossing into the "closed area" four (4) or five (5) times. Offense Investigation Report by SA Christopher McCarron, p. 3 (July 2, 2007). Mr. Eilertsen opines that ██████ was making ██ runs within the permitted access area, then pulling ██ nets, turning ██ attention to shucking scallops and thereby drifting into the "closed area." Special Master Interview with Daniel Eilertsen (Sept. 8, 2011). Mr. Eilertsen further states that there were no scallops to be found in the closed area. However, this opinion is inconsistent with ██████ subsequent statement to SA James MacDonald. Offense Investigation Report by SA Christopher McCarron, p. 4 (July 2, 2007).

On June 15, 2007, ██████ called SA MacDonald and stated that, while fishing in the "permitted access area," ██ was concerned that ██ had fished in the "closed area." In response to SA MacDonald's questions, ██████ admitted: "Yeah, I was in that area, I realize it now"; "Yes, [I was fishing], I did about four (4) half-hour tows in there"; "Yeah, they [the tows] were productive." Supplemental Offense Investigation Report by SA James MacDonald (June 22, 2007).

NOAA's VMS indicated two (2) incursions by the Venture as follows:

The first incursion involved four (4) positional reports:

June 15, 2007, 06:46 GMT (02:46 EDT), measured distance 0.14 n mi; speed 1.53 knots;

June 15, 2007, 07:16 GMT (03:16 EDT), measured distance 0.90 n mi; speed 3.05 knots;

June 15, 2007, 07:46 GMT (03.46 EDT), measured distance 2.01 n mi; speed 2.88 knots;

June 15, 2007, 08:17 GMT (04:17 EDT), measured distance 0.54 n mi; speed 2.95 knots.

The second incursion involved one (1) positional report:

June 15, 2007, 10:56 GMT (06:56 EDT), measured distance 0.67 n mi; speed 4.67 knots. Report from VMS Specialist Linda Galvin (June 28, 2007).

NOAA states that most of the noted speeds are consistent with fishing and the first incursion involved one position of 2.1 nautical miles within the "closed area" and the second was .67 nautical miles within the "closed area." Id. Once ashore, [REDACTED] stated to NOAA personnel that [REDACTED] had just made a mistake in entering the closed area but that this mistake was partly due to the malfunction of the vessel's VMS unit which was damaged in a thunderstorm. As a result, [REDACTED] stated [REDACTED] became disoriented and entered the closed area. On instructions from EA J. Mitch MacDonald, the catch of 3,087.5 lbs. of scallops was seized by NOAA and sold for $21,612.50. Id.

On August 14, 2007, a NOVA was issued charging Nordic, Inc. (owner) and [REDACTED] (operator) with unlawfully exiting the "permitted access area" and fishing in the "closed area" and assessing a $25,000 penalty in addition to seizure of the catch proceeds of $21,612.50. [REDACTED] stated that, following this incident, [REDACTED] "quit the boat," was "stuck by [REDACTED]" "never had violation," [REDACTED] fishing inside the closed area "was an honest mistake" due to "failure of electronics", was "towing east/west – no attempt to go in and then get out" and "because of this, [REDACTED] had a hard-time finding a job." EA J. Mitch MacDonald Notes re: F/V Venture. On October 21, 2008, [REDACTED] who was not represented by counsel, signed a settlement agreement in which [REDACTED] agreed to pay $6,500 over twelve (12) months at $540 a month and agreed to forfeit any interest [REDACTED] may have had in the seized scallops sold for $21,612.50.

On January 20, 2009, Mr. Eilertsen signed a settlement agreement with NOAA on behalf of Nordic, Inc. in which he agreed to pay a civil penalty of $6,300 and to forfeit the $21,612.50

proceeds from the sale of the seized scallops. Mr. Eilertsen was asked why he did not pursue an appeal and his response was that he believed that his chances of success before an ALJ were minimal and that the cost to appeal the case would greatly exceed the benefit.

Discussion

Mr. Eilertsen argues that this case should have resulted in a written warning which would have been sufficient because it was an honest, careless mistake. I agree that it was an honest mistake but, as [redacted] stated at the time, [redacted] did four (4) half hour tows in the closed area which were productive. Under the circumstances, seizure of the catch was appropriate.

Mr. Eilertsen also complains that his penalty was excessive as compared to other penalties assessed by NOAA for the same closed area violation. Mr. Eilertsen cites three (3) examples. The fishing vessels Endeavor and Jacob Allen received written warnings and the Celtic never received a violation notice for the same violation because she had a scientist onboard and called one of the SAs to request permission to re-enter the permitted area from the closed area to fish. Mr. Eilertsen has pointed out that he paid a $6,300 settlement, [redacted] [redacted] paid a $6,500 settlement, both lost the value of the catch of about $21,000 and Mr. Eilertsen was stuck having to pay for all costs of the trip including fuel, ice, water and insurance. He estimates a total cost of $50,000 for an unintentional incursion into a closed area.

In his response, EA MacDonald recalls discussing four (4) similar closed area cases with Mr. Eilertsen's counsel in which other fishermen received civil penalties ranging from $15,000 for having unstowed gear while in the closed area up to $30,000 for fishing in the closed area. All four (4) cases resulted in substantial permit sanctions. According to EA MacDonald, the

Endeavor case had yet to be processed and the Jacob Allen received a warning for one case of a 1/3 nautical mile and other 1/4 or less nautical mile incursions into a closed area. The Northeast GCEL had a practice of not charging for 1/4 nautical mile incursions into a closed area and usually resolved those cases with a written warning. Response by EA J. Mitch MacDonald, p.5. EA MacDonald is aware of an investigation report which refers to a potential closed area incursion by the Cellie, but that case appears to be related to mechanical and safety issues caused by high wind and seas. EA MacDonald is not aware of the outcome of the Cellie case but believes that the case was not processed until after the Venture case was settled.

The assessed penalty was originally $25,000. As the result of negotiations between EA MacDonald and Mr. Eilertsen's lawyer, the assessment was reduced by one half (1/2) to $12,500 and settled for $6,300 which was one half (1/2) of the amended assessment. Additionally, the violation was to be a written warning in NOAA's consideration of any penalty or sanction to be imposed within five (5) years from the date of the Settlement Agreement. Considering the totality of the circumstances in this case, I find that the resolution of this case was fair and reasonable.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 214
NE 0701294 FM/V
F/V Evergreen
Mark Bruce, Operator
Mar-Li-Mar, Inc., Owner

Fisherman complains about NOAA's imposition of an excessive penalty.

Findings of Fact

Mark Jeffrey Bruce is a third generation fisherman who has been fishing since 1981. In the beginning, he went dragging with his father, who owned the F/V Kristina J, a small wooden eastern rig vessel. Mr. Bruce worked for his father for about two (2) years, and in 1983 began scalloping with his uncle because of inconsistencies in fish prices. He worked for his uncle for about a year. Thereafter, Mr. Bruce began working on the deck of the scalloper F/V Donna Lynn. One time, a mate did not show up for work and Mr. Bruce ended up as captain and continued working on the Donna Lynn for two (2) years as her operator. At nineteen (19), he was one of the youngest scallop captains operating out of New Bedford, Massachusetts.

After that, he went on various boats, dragging and scalloping, working as mate and on deck. In 1986, Mr. Bruce and his father bought the fishing vessel Zibet which they owned through Zibetan Corp. Mr. Bruce owned 25% and his father owned 75% of the Zibetan Corp. common stock, but their split was 50-50 on the operations side. They operated the Zibet together for three (3) years. Thereafter, Mr. Bruce and his father purchased the F/V Dolphin through Mar-Li-Mar, Inc. They each owned 50% of the Mar-Li-Mar, Inc. stock. Mr. Bruce operated the Dolphin and his father continued operating the Zibet. This arrangement lasted until 2002 when they amicably separated their interests, Mr. Bruce receiving the Dolphin and his father receiving the Zibet.

Mr. Bruce operated the Dolphin until 2004. He was looking for a steel western rig vessel because the Dolphin was a thirty-eight (38) year old wooden boat which was difficult to take out in bad weather and for which it was difficult to find crew. In 2004, Mr. Bruce found the Evergreen in Alabama and bought her through Mar-Li-Mar, Inc. The Dolphin and the Evergreen are scallopers. He transferred the permit from the Dolphin to the Evergreen and scrapped the Dolphin. From 2004 to the present, Mr. Bruce has been operating the Evergreen. Currently, he owns 100% of the stock in Mar-Li-Mar, Inc. Mr. Bruce hires handicapped people to work for him.

On April 26, 2007, Massachusetts Environmental Police Officer ██████ boarded the Evergreen to inspect the vessel's permits and logbooks. EPO ███ remained on board to observe the offloading of scallops. Narrative by MEP Environmental Protection Officer ███ ███ There were problems with the valve that lifts the fishing dredge up and down. Mr. Bruce called to have someone fix it because it was dangerous. Special Master Interview with Mark Bruce (Sept. 22, 2011). That person came and was working on the dredge at the same time as the offloading was progressing.

Typically, Mr. Bruce offloads three closed (3) bags of scallops at the same time. Open bags go up on their own. At one point, Mr. Bruce saw an open bag on deck. ███████, the vessel's on deck handy man, who is mentally challenged, took the bag to have a twister tie put on it. Some hydraulic fluid squirted on the bag and Mr. Bruce told ██████ to "get rid of it" by which he meant that the bag should be put aside in a fish basket, washed and re-bagged because Mr. Bruce is a stickler for quality. Id. EA Deirdre L. Casey disputes this interpretation because according to her the words "to get rid of" mean to dispose of or throw

away and because Mr. Bruce did not say to [redacted] to "move the bag" or to "change the bag." Response by EA Deirdre Casey, p. 4.

The offloading continued with Mr. Bruce on the dock at the dealer's facility keeping track of the tally. At some point, Mr. Bruce heard a radio transmission incoming from MEP Captain [redacted] that someone had just thrown a bag of scallops overboard. It was later determined that [redacted] took Mr. Bruce's statement literally, which is how it should have been taken according to EA Casey, and threw the bag of scallops overboard.

During the offloading, SA Joseph D'Amato received information concerning an overage of scallops and dumping of fish in the New Bedford Harbor. Offense Investigation Report by SA Joseph D'Amato, p. 5 (May 7, 2007). SA Todd Nickerson and SA D'Amato went to investigate the situation. After SA D'Amato confronted Mr. Bruce about the bag of scallops that had been thrown overboard, Mr. Bruce told everyone in his crew not to hide anything or do anything stupid and the offload continued. SA D'Amato asked Mr. Bruce why he had come in with so many scallops, to which Mr. Bruce responded that he did not know that he had an overage. Special Master Interview with Mark Bruce (Sept. 22, 2011). EA Casey argues that Mr. Bruce was aware of the overage because, in a meeting with him and his lawyer, he had told her that [redacted] was simply trying to help him out by throwing the scallops overboard, he knew that the crew was splitting up bags to make them look like the crew's messes, and that there were bags under the ice. Response by EA Deirdre Casey, p. 5. According to Mr. Bruce, throwing away the bag would not have been to his advantage as there was already an excess of scallops offloaded. Special Master Interview with Mark Bruce (Sept. 22, 2011). EA Casey argues that, if [redacted] had not been caught, throwing the bag away would have reduced the overage.

Response by EA Deirdre Casey, p. 5. However, the bag of scallops thrown overboard was not included in the overage tally and the "dumping of the bag" was considered in the assessment of the penalty. Id. According to EA Casey, getting rid of the scallops, splitting fifty (50) lbs. bags into plastic baggies to make them look like they are the crew's "messes" or "shack" for personal consumption, discussed infra, and filling out a FVTR that reflects an 18,000 lbs. legal landing were all consistent with hiding an overage. Id. at 8. SA D'Amato pointed out that Mr. Bruce had written 18,000 lbs. on his FVTR. According to Mr. Bruce, SA D'Amato said that Mr. Bruce knew he had an overage, to which Mr. Bruce responded: "How did I know? We are still unloading the boat." Special Master Interview with Mark Bruce (Sept. 22, 2011). EA Casey believes that Mr. Bruce's statement is a contrivance, that it is contradictory to his actions and statements on the date of the incident, and that he knew about the overage at the time of the offload because '[REDACTED] described Mr. Bruce as 'nervous', pacing and running his hands through his hair after only a 'few vats' had been weighed." Id. at 6.

SA Nickerson states in a supplemental report that a crew member had told him that Mr. Bruce had directed the crew to hide the overages and that, after being pressed, the crew member revealed two (2) additional hiding places. Supplement by SA Todd Nickerson, p. 2 (Apr. 26, 2007). SA Nickerson claims that he was assured that there were no other hidden scallops, but he then discovered additional bags in the hold. Id. Mr. Bruce states that he told SA Nickerson that there were no other scallops except what was in the fishhold and the ten (10) bags of scallops in the refrigerator that were for his daughters' teachers, the priest, the deacon, and family members. Special Master Interview with Mark Bruce (Sept. 22, 2011). EA Casey disputes that Mr. Bruce directed SA Nickerson to the messes. Response by EA Deirdre Casey, p.

7. According to her, SA Nickerson found the bags in the refrigerator and Mr. Bruce then stated that they were messes belonging to the crew. Id. These bags totaled seventy (70) lbs. and the agents added them to the rest of the offloaded scallops.

According to the Offense Investigation Report prepared by SA D'Amato, there were two (2) bags under the floor boards (the "bilge" or "shaft compartment"). Offense Investigation Report by SA Joseph D'Amato, p. 8 (May 7, 2007). Mr. Bruce claimed not to be aware of this in my interview and does not think that one could put bags of scallops under the floor boards. If his crew did this, it was without his knowledge. [1]

The total weight of all scallops offloaded from the Evergreen was 18,860 lbs. The catch was seized and sold for $138,055.20.

On April 30, 2007, SA D'Amato issued separate EARs to Mar-Li-Mar, Inc. and to Mark Bruce charging them in one (1) count with exceeding the scallop landing limit and in another count with dumping fish. As a result of further investigation, a count was added for maintaining false information in a FVTR. Offense Investigation Report by SA Joseph D'Amato, p. 11 (May 7, 2007).

On March 13, 2008, EA Casey issued a NOVA to Mark Bruce and Mar-Li-Mar, Inc. charging them with three (3) counts: count one, exceeding the maximum scallops landing limit of 18,000 lbs. by 860 lbs. on April 26, 2007; count two, dumping fish; and count three, submitting a false FVTR. EA Casey assessed a civil penalty of $40,000 for count one, $25,000 for

[1] EA Casey states that this is inaccurate because Ms. Lafreniere, Mr. Bruce's counsel, had been sent the investigation reports prior to the case being charged in November of 2007. Id. The reports contained two (2) references to scallops hidden under the floor boards. Id. Mr. Bruce discussed the investigation reports with EA Casey in a May 2008 meeting. Id.

count two, and $10,000 for count three for a total assessed penalty of $75,000. EA Casey additionally issued a NOPS that proposed a four (4) month operator and vessel permit sanction.

On June 26, 2008, Mr. Bruce signed a Settlement Agreement on his own behalf and on behalf of Mar-Li-Mar, Inc. wherein he agreed to pay a compromise civil penalty of $34,500, forfeit the proceeds of $138,055.20 for the seized catch, and accept a two (2) month suspension of the vessel permit from February 1, 2009 through March 31, 2009.

Discussion

Mr. Bruce believes that his penalty was excessive. He wanted to pursue the matter further, but was advised by other fishermen that he should settle his case. He claims that EA Casey did not want to hear his side of the story and he felt that, if he pushed things further, it might get worse.

Pamela Lafreniere, Mr. Bruce's counsel, argues that the forfeiture of the entire catch and not just the overage, payment of a substantial civil penalty and a two (2) month permit sanction was excessive, especially since this was a first offense. Additionally, Ms. Lafreniere asserts unequal treatment in this case because NOAA, in other cited cases, takes the penalty out of the proceeds from the seized catch.

EA Casey disputes Mr. Bruce's claim that she did not want to hear his side of the story. Response by EA Deirdre Casey, p. 8. She points out that she met with him and his lawyer for this very reason, and that shortly after the meeting, she received an email from Ms. Lafreniere stating "thanks for taking the time to meet with [Mr. Bruce], it made him feel better." Id. In that same email, Ms. Lafreniere outlined the offer made by Mr. Bruce at the meeting: $15,000 on count one, $5,000 on count two and $5,000 on count three (total $25,000) along with

voluntary abandonment of the seizure. Id. EA Casey made a counter proposal: $20,000 on count one, $10,000 on count two, $8,000 on count three (total $38,000) together with forfeiture of the seized catch and a one month vessel sanction. Email from EA Deirdre Casey, to Pamela Lafreniere, Esq. (June 6, 2008). In a subsequent email and in response to an email from EA Casey, Ms. Lafreniere wrote that she understood the $20,000 on the overage, she thought that $5,000 was a fair and appropriate settlement on count three and offered a compromise of $7,500 on the dumping violation charged in count two. Emails from Pamela Lafreniere, Esq. to EA Deirdre Casey (June 6, 2008). This brought the settlement offer to $32,500. According to EA Casey, getting rid of the scallops, splitting fifty (50) lbs. bags into plastic baggies to make them look like they are the crew's "messes" or "shack," and filling out a FVTR that reflects an 18,000 lbs. landing were all consistent with hiding an overage. Id. However, she settled this case for less than she normally would for such violations because of the value of the forfeiture. Id.

Under the circumstances of this case, I do not find that the penalty was excessive or that there was overzealous or abusive conduct resulting from broad and powerful enforcement authority that led to a "forced settlement." Although there are a number of factual disputes, their resolution is not essential to reach what I believe is a fair and reasonable outcome in this case. I have taken into consideration that a mentally challenged person threw a bag of scallops overboard in the middle of the offload in the agents' presence and that this was Mr. Bruce's first offense. However, I agree with EA Casey that splitting 50 lbs. bags into plastic baggies to make them look like they are the crew's "messes" or "shack" and filling out a FVTR that reflects an 18,000 lbs. legal landing were consistent with hiding an overage. At one point, Mr. Bruce

offered to settle this case for $32,500. He eventually settled for $34,500. I find the $2,000 difference to be of little consequence and not excessive.

Recommendation

I recommend that the Secretary take no further action concerning this Application for Review.

Case 215
NE 0603165 FM/V
F/V Jessica and Susan
Paul Lemieux, Owner
[REDACTED] Operator

Vessel owner complains that the penalties levied against his company and his captain, which included $11,000 against the company and $7,000 individually against the captain, a fifteen (15) day vessel and operator sanction and seizure of the $28,039 catch, were excessive.

Findings of Fact

Paul Lemieux (Mr. Lemieux) of Lakeville, Massachusetts has been the owner/operator of Blue Fleet Welding for twenty-six (26) years. He is also a 50% owner of Diamond Dog Fishing Corp. ("Diamond Dog"). The company was the registered owner of the Jessica and Susan, a commercial fishing vessel that fished primarily out of New Bedford, Massachusetts. Diamond Dog sold the vessel in the summer of 2011. At all times relevant to this complaint, [REDACTED] captained the Jessica and Susan. Mr. Lemieux testified that he had spent a substantial amount of money to make the Jessica and Susan seaworthy, including borrowing $125,000 from the New Bedford Economic Development Council, so that the captain would be outfitted with the necessary equipment to fish, including a brand new net.

On December 19, 2006, [REDACTED] was fishing aboard the Jessica and Susan in the Western US/Canada Management area when the USCG boarded his vessel. During the boarding, the USCG discovered an undersized mesh trawl net, six (6) lobster claws, and [REDACTED] expired operator's permit (expiration date: November 18, 2006). According to Mr. Lemieux, one of the crew members was saving the six (6) lobster claws for his son to make a hat similar to those found in some waterfront restaurants. Special Master Interview with Paul

Lemieux (Sept. 8, 2011). When boarded by the Coast Guard, the Jessica and Susan had two (2) trawl nets onboard: a forward and an aft net. [REDACTED] initially told the Coast Guard that [REDACTED] had been fishing with the forward net when it was obvious that [REDACTED] had been fishing with the aft net. Indeed, according to a later observation by SA Kevin Flanagan, the forward net appeared new and unused, while the aft net was wet and contained fresh fish and debris. Offense Investigation Report by SA Kevin Flanagan, p. 6 (Jan. 5, 2007). The aft mesh net measured 5.85'', but the regulations required a minimum measurement of 6.5''. As a result, the Coast Guard escorted the Jessica and Susan back to New Bedford, Massachusetts. Id. at 5.

SA Flanagan met the vessel at the dock in the early morning on December 20, 2006. Two (2) USCG members, who had escorted the Jessica and Susan back to port, were locked out of the vessel because [REDACTED] had locked the vessel and departed with the crew. Id. Subsequently, SA Flanagan seized the 16,596 lbs. of mixed species of fish from the Jessica and Susan and sold the catch for $28,039. Later that morning, SA Flanagan interviewed [REDACTED] [REDACTED] and [REDACTED] informed SA Flanagan that [REDACTED] had been fishing with the forward net before it was damaged. [REDACTED] subsequently used the aft net for [REDACTED] last three (3) trawls. Id. at 7. It is customary for fishermen to keep a spare net onboard. However, Mr. Lemieux indicated that the aft net had shrunk while in storage. Special Master Interview with Paul Lemieux (Sept. 8, 2011).

On February 22, 2007, EA Deirdre Casey issued a NOVA and NOPS to Diamond Dog and [REDACTED] charging them with four (4) counts for violations of the Magnuson Stevens Act:

Count 1: fishing with an undersized mesh net (5.85'' versus 6.5'' minimum) ($15,000);

Count 2: possessing six (6) mutilated lobster claws ($1,500);

Count 3: making a false statement to a USCG officer concerning which mesh net [REDACTED] used ($10,000); and

Count4: operating with an expired permit (written warning).

The total assessed monetary penalty was $26,500. Further, EA Casey assessed a sixty (60) day vessel permit sanction on the Jessica and Susan and the same for [REDACTED] as operator.

On August 17, 2007, the parties entered into a Settlement Agreement in lieu of a hearing. In the settlement agreement, Diamond Dog and [REDACTED] did not admit the violations against them, but Diamond Dog agreed to settle the case for $11,000. [REDACTED] individually agreed to pay $7,000 in penalties plus interest, which Diamond Dog paid. Further, the Jessica and Susan received a fifteen (15) day vessel permit sanction and [REDACTED] received a fifteen (15) day operator permit sanction. Mr. Lemieux also agreed to forfeit the proceeds from the seized catch of $28,039.

[REDACTED] quit as captain of the Jessica and Susan shortly after this incident.

Discussion

Mr. Lemieux settled this case because his lawyer advised him that if he did not prevail before an ALJ, then he would be liable for the full assessed penalty. Mr. Lemieux was also not confident that he would succeed in an administrative hearing. Pamela Lafreniere, Diamond Dog's counsel in this Application for Review, argues that the Jessica and Susan's violation did not warrant a maximum penalty that included a significant monetary penalty, a permit sanction, and seizure of an entire catch. Ms. Lafreniere believes that her client's penalty or

seizure should be consistent with how much [redacted] caught with the undersized trawl net. Special Master Interview with Paul Lemieux (Sept. 8, 2011).

In response, EA Casey wrote that she considered the statutory factors in the Magnuson Stevens Act when assessing the penalty. This included the intentional nature of the violation, the fact that [redacted] chose not to use the legal size net that was available to [redacted] that there was evidence [redacted] knew the net was undersized (in telling the USCG not to measure the net and that it would be destroyed), and that [redacted] then provided a false statement to the boarding officers. EA Casey further considered that an undersized mesh net strikes at the heart of conservation efforts by entrapping undersized fish and that the net was more than ½ inch undersized. Finally, she notes that the settlement was based on the respondent's evidence of his inability to pay. Response by EA Deirdre Casey, p. 7.

There is a dispute of fact in this case whether [redacted] was actually fishing with the forward net before switching to the undersized aft net. However, based on the contemporaneous observations by the USCG and SA Flanagan concerning the unused condition of the forward net, I find that [redacted] did not use the forward net and instead used the undersized aft net. This conclusion is further bolstered by the fact that even Mr. Lemieux, in my interview with him, questioned [redacted] capacity for the truth. Special Master Interview with Paul Lemieux (Sept. 8, 2011).

Therefore, the sole issue is the penalty assessment and whether it was excessive and forced an unfair settlement. Diamond Dog, owner of the Jessica and Susan, and [redacted] jointly and severally received a $26,500 penalty for what was a grossly negligent, if not intentional, violation by [redacted]. In addition, it received a vessel and operator permit

sanction, and NOAA retained the proceeds from the seized catch. This was an unfortunate case for Diamond Dog and Mr. Lemieux because it was obvious that the company made significant financial investments in the Jessica and Susan to outfit her properly for fishing. However, the illegal actions by, at best, a careless captain resulted in sizeable penalties against the vessel owner, which was legally responsible for his actions.

Though Ms. Lafreniere argues that Diamond Dog should not have received a monetary penalty, seizure, and permit sanction, it is beyond my authority to consider the permit sanction. Furthermore, as EA Casey points out, the small mesh net implicated conservation measures because the net was more than ½ inch undersized, which prevents undersized fish from escaping. Since I find that [redacted] used the undersized aft net, I find that the seizure of the entire catch was justified. With respect to the monetary penalty, I do not find an $11,000 settlement for Diamond Dog to be an unfair penalty, particularly because ample evidence suggests that this was an intentional violation on the part of [redacted]. Further, Mr. Lemieux stated in my interview of him that Diamond Dog paid the $7000 penalty on [redacted] [redacted] behalf. It is immaterial, however, who paid the penalty, only that the penalty was assessed against the responsible individual. Therefore, after considering the facts and circumstances of this case, and the fact that EA Casey considered Diamond Dog's ability to pay in assessing the penalty, I do not find that the $11,000 settlement against Diamond Dog was unfair or excessive.

Recommendation

I recommend that the Secretary take no action concerning this Application for Review.

Case 216
NE 052021 FM/V
F/V Sweet Misery
Todd A. Sutton, Operator
Sutton Enterprises, Inc., Owner

Fisherman complains about excessive and unfair settlement in a case involving falsified application for an Area 3 lobster permit.

Findings of Fact

Todd A. Sutton ("Mr. Sutton") is a first generation fisherman who lives in Newport, Rhode Island and has been fishing full-time for lobster and monkfish for about twenty-three (23) years. At some point, Mr. Sutton began gillnetting and more recently he engages in scalloping. He is the majority stockholder and officer of the Mary Lou Fishing Corp. which owns the F/V Redemption and the sole stockholder and officer of Sutton Enterprises, Inc. which owns the F/V Sweet Misery. The Redemption was purchased in June of 2011 and is operated by [REDACTED] The Sweet Misery was acquired in 2001 and is operated by Mr. Sutton. From about 1993-1994 to 2001, Mr. Sutton owned the F/V Sea Note, first as a sole proprietor and then through a corporation. The Sea Note was engaged solely in lobster fishing. In 2001, Mr. Sutton sold the Sea Note, bought the Sweet Misery and transferred the Sea Note's fishing history to the Sweet Misery to qualify her for various permits. Newport, Rhode Island is Mr. Sutton's home port.

Mr. Sutton uses notebooks for logbooks and does not keep them beyond two (2) years because they pile up. Special Master Interview with Todd Sutton (Sept. 13, 2011). When the Sweet Misery was acquired, Mr. Sutton did not have his logbooks from the Sea Note. He had never set 1,200 lobster traps, had very little fishing history in Access Management Area 3 ("Area

3") and was not able to prove his lobster landings with his logbook to qualify for lobstering in Area 3. At this point, Mr. Sutton made a rash decision and signed a false affidavit on July 17, 2003, in which he attested that he met the requirements for an Area 3 permit. Id. In the affidavit, he requested a lobster trap allocation of 1,000 or more lobster traps for Area 3 and submitted a vessel logbook belonging to a friend, [redacted] in support of his application. Affidavit of Todd Sutton (July 17, 2003).

To prove that he had met the requirement for landing over 25,000 lbs. of lobster, Mr. Sutton submitted tax returns. To prove that he had set 1,700 traps and hauled, soaked and rehauled 200 traps, he submitted [redacted] logbook. The logbook was for the period of June 23, 1997 to December 4, 1997, the number of crew members was about three (3) for each trip and the trips lasted several days. Offense Investigation Report by SA Christopher McCarron, p. 4 (Jan. 31, 2006). The logbook shows that lobster gear had been hauled as far as 155 miles from Newport, Rhode Island, the home port of the Sea Note. The VMS coordinates corresponded to the depths recorded in the logbook ranging between twenty-eight (28) and one hundred and thirty-three (133) fathoms of water. NMFS issued an Area 3 permit for the Sweet Misery on October 6, 2004.

In October 2004, SA McCarron received a number of anonymous complaints concerning the Sweet Misery's Area 3 lobster permit and began an investigation. Offense Investigation Report by SA Christopher McCarron, p. 3 (Jan. 31, 2006). The substance of the complaints was that the Sweet Misery had not been in existence during the qualifying years, and that Todd Sutton's previous fishing vessel, the Sea Note, was thirty-five (35) feet long and was not capable of fishing in Area 3 with 1,700 traps. Id.

SA McCarron's review of the USCG vessel documentation system revealed that the Sea Note was thirty-five (35) feet with a gross tonnage of fourteen (14). The area represented in the logbook was typically fished by offshore vessels which were sixty (60) feet or longer. Captains of other vessels had not seen or heard of the Sea Note fishing in Area 3. Id. However, the Timothy Michael, operated by [REDACTED] was known to have fished in Area 3.

On September 19, 2006, SA McCarron sent a letter to Palombo Fishing Corp., owner of the Timothy Michael, and requested the 1997 logbooks, settlement sheets and W-2(s) for that vessel. Letter by SA Christopher McCarron (Sept. 19, 2006). [REDACTED] contacted SA McCarron on September 20, 2006 and explained that he had settlement records but no logbooks. Offense Investigation Report by SA Christopher McCarron, p. 5 (Jan. 31, 2006). SA McCarron compared the logbook that Mr. Sutton had submitted for the Sweet Misery to the settlement sheets for the Timothy Michael. Id. at 6. The entries were compatible.

On November 21, 2006, SA McCarron and SA Todd Nickerson interviewed [REDACTED] [REDACTED] a deckhand/deckboss on the Sea Note between 1995 and 2001. SA McCarron asked if the vessel ever fished in the canyons (Area 3) and [REDACTED] response was "are you kidding me." Id. at 9.

On November 21, 2006, [REDACTED] provided a written statement to NOAA. [REDACTED] stated that [REDACTED] was the deckhand/deckboss aboard the thirty-five (35) foot long Sea Note from 1995 to 2001. Written Statement by [REDACTED] (Nov. 21, 2006). The vessel had lobstered from north of Newport Bridge to just south of Coxes Ledge about twenty (20) miles south of Newport, Rhode Island. Id. There were never more than three (3) people aboard the Sea Note,

they fished on day trips, the buoy lines were 25-30 fathoms long, and the maximum number of traps fished was 1,400. Id.

SA McCarron discovered that the Sweet Misery had been issued an Area 3 permit in 2004, 2005, and 2006 and that the Sea Note had landed less than 5,000 lbs. of lobster in 1997. Offense Investigation Report by SA Christopher McCarron, p. 9 (Jan. 31, 2006).

On December 14, 2006, SAs Chris Schoppmeyer and Anthony Forestiere interviewed former captain of the Timothy Michael. SA Schoppmeyer showed a logbook, but it was not familiar to and did not think it contained the fishing history for the Timothy Michael. Report of Interview with by SA Anthony Forestiere (Dec. 14, 2006). SA Schoppmeyer asked if knew Todd Sutton. Id. responded that they had been roommates from 1995 to 2000, but did not fish together. Id. According to fished inshore while Mr. Sutton fished offshore. Id. Upon SA Schoppmeyer showing a logbook and Palombo Fishing Corporation's settlement sheets to and inquiring whether knew individuals whose names appeared at the top of the logbook entries, many of which were similar to the names in the settlement sheets, explained that could not dispute the names. Id. then stated that it looked like fishing logbook, but he was not sure how Mr. Sutton had obtained it. Id. said this was a long time ago and it is possible that had given it to Mr. Sutton. Id.

On December 19, 2006, SAs McCarron and Nickerson interviewed Mr. Sutton. Offense Investigation Report by SA Christopher McCarron, p. 10 (Jan. 31, 2006). Mr. Sutton explained that he had obtained a logbook from who at one time had operated an offshore lobster vessel in Newport, Rhode Island. Id. Mr. Sutton and had been roommates

and Mr. Sutton used [redacted] logbook. Id. Initially, Mr. Sutton stated that he did not remember how he had obtained the logbook, but later explained that he had asked [redacted] for it. Supplement to Offense Investigation Report by SA Todd Nickerson (Dec. 19, 2006). Mr. Sutton said that he had fished inshore and never in the area indicated in the logbook. Id.

On December 19, 2006, following the interview, Mr. Sutton consulted counsel, Pamela F. Lafreniere, and provided a written statement to NOAA. He expressed remorse about his actions and wrote that he had intended to use the trap allocation and not to sell it, but that due to increased fuel prices it had stopped being cost effective to fish in Area 3. Written Statement by Todd Sutton (Dec. 19, 2006). In other words, he went through all the trouble of obtaining an Area 3 lobster permit but never fished in the area.

On January 19, 2007, SA McCarron issued an EAR charging Todd Sutton with one (1) count of falsifying a lobster permit application.

On August 17, 2007, EA J. Mitch MacDonald issued a NOVA to Todd Sutton and Sutton Enterprises, Inc. The NOVA alleged that on August 1, 2003, Mr. Sutton had falsified an application for an Area 3 lobster permit by submitting information from another fisherman's fishing logbooks and assessed a penalty of $40,000. An accompanying NOPS revoked the respondent's American lobster permit and suspended his other federal fishing permits for ninety (90) days.

Although Mr. Sutton retained Ms. Lafreniere to represent him and she engaged in negotiations on his behalf, at some point Mr. Sutton was no longer able to afford her services and had to continue the settlement negotiations on his own. Special Master Interview with Todd Sutton (Sept. 13, 2011). In the course of settlement discussions, EA MacDonald told Mr.

Sutton that he was lucky to be receiving such a penalty and that EA MacDonald's colleagues had encouraged him to assess a higher penalty. Id.

On January 16, 2008, the parties signed a Settlement Agreement. Mr. Sutton admitted the violations, agreed to pay a compromise civil penalty of $20,000 pursuant to a payment schedule, agreed to a revocation of the vessel and operator Area 3 Limited Access American lobster permit, accepted one hundred and twenty (120) day vessel and operator permit sanctions, and agreed to forfeit four (4) Southern Area monkfish DAS for the Sweet Misery's 2007-2008 allocation. Under the agreement, Mr. Sutton picked the dates for serving sixty (60) days of the permit sanction and NOAA picked the remaining sixty (60) days.

On June 14, 2011, I granted Mr. Sutton a stay of payments due NOAA ($9,235.40) until the Secretary has received and acted upon my recommendation in connection with this case.

Discussion

Prior to signing the settlement agreement, Mr. Sutton had not appealed his case because he could not afford a lawyer. Special Master Interview with Todd Sutton (Sept. 13, 2011).

Mr. Sutton knows that what he did was wrong, but points out that he was not stealing from anyone and that his actions did not hurt anyone. Id. Since he fished in Area 2, which had an 800 lobster trap restriction and since the most restrictive rule applies, he would not have been able to take full advantage of the Area 3 permit. Id. In the end, Mr. Sutton never used the Area 3 permit. Id.

Ms. Lafreniere's position is that like-kind cases are treated differently. Special Master Interview with Todd Sutton (Sept. 13, 2011). [REDACTED], owner and operator of F/V

Shamrock, was charged with the same violation (false statement in connection with an application for Area 3 permit) and a penalty was assessed against ███ for $40,000 with a fishing vessel permit sanction of thirty (30) days. Because of ██ inability to pay the penalty, ██ did not pay a civil monetary penalty. Ms. Lafreniere argues that this should apply in Mr. Sutton's case as well. Id. The minimum fine under the penalty schedule was $5,000 but in the case of Shamrock, it was reduced to $0. The sole penalty in the Shamrock case was a permanent revocation of the Area 3 permit. Ms. Lafreniere noted that Mr. Sutton cooperated with NOAA, which is a mitigating factor which should inure to his benefit under the MSA. In the Shamrock case, there was no cooperation. The operator of the Shamrock said absolutely nothing. Id.

EA MacDonald argues that the penalty in this case is appropriate because it was assessed in accordance with the MSA, NOAA's penalty schedule and assessment policies in effect at the time. Response by EA J. Mitch MacDonald, p. 5. The penalty range for a false permit information violation for a first-time violation is $5,000 to $80,000 and/or up to a ninety (90) day permit sanction. Id. EA MacDonald argues that Mr. Sutton has committed a serious violation since permitting is the "keystone in a limited access fishery." Id. Additionally, the Shamrock case is distinguishable because ██████████ qualified for a permit, but exaggerated the number of traps with which ██ had fished in the permitted area. Id. at 6. Mr. Sutton did not qualify for a permit and submitted someone else's fishing history representing it to be his own. Id. Finally, Mr. Sutton was not forced to settle as he could have appealed his case to an independent ALJ. Id. at 7. If Mr. Sutton has an inability to pay the remainder of the settlement amount, he should seek reduction of the penalty and submit financial information to NOAA in support of a reduction.

It is unclear on what basis Mr. Sutton's permits, other than the one for which he did not qualify, were suspended for 120 days, a period in excess of the 90-day permit sanction contained in the penalty schedule. However, I do not have the authority to review permit sanctions and therefore I cannot recommend relief concerning those permits. With respect to the monetary penalty, Mr. Sutton has paid in excess of $10,000. While Mr. Sutton has submitted as his own someone else's fishing history in order to qualify for an Area 3 permit, he has shown remorse for his actions and has fully cooperated with NOAA in the investigation of this case. However, as SA McCarron has pointed out:

> Limited access permits are the cornerstone of effort reduction in fishery management regimes. They are designed to put a cap on effort and are limited to the historical participants. Limited access permits that are obtained under false pretences impact future regulations and the historical participants. Response by SA Christopher McCarron (Nov. 8, 2011).

Therefore, I conclude that the penalty in this case was fair and reasonable and if Mr. Sutton does not have the ability to pay the balance of his penalty ($9,235.40), I suggest he apply to NOAA for a reduction or forgiveness of this amount.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 217
NE 053085 FM/V
F/V Captain Lyman
WWJT, Inc., Owner
[redacted] Operator

Vessel owner complains of an excessive penalty for a technical violation caused by an electronics technician who failed to plot a legal fishing area on the vessel's computer as requested by owner.

Findings of Fact

John Fernandez III is the 100% stockholder of WWJT, Inc. which owns the fishing vessel Captain Lyman. Mr. Fernandez started working in the fishing industry in 1976 and over the years became 100% stockholder of corporations that own several scallopers moored in Newport News, Virginia. Additionally, Mr. Fernandez is an equal owner with his father of a Southeast shrimp vessel which is docked in Fort Meyers Beach, Florida. Mr. Fernandez does not operate any of his fishing vessels and hires captains to operate those vessels.

The Captain Lyman is a 75' single dredge scallops vessel that Mr. Fernandez purchased in 2001. [redacted] originally started as a mate on one of Mr. Fernandez's other vessels, was eventually promoted to captain of the Captain Lyman, and was the operator of the Captain Lyman at the time of this complaint.

On July 13, 2005, the Captain Lyman left New Bedford to fish in the Closed Area 1 Access Area Scallop Fishery. On the day the Captain Lyman left port, [redacted] emailed Mr. Fernandez that there was a problem with the port generator. Mr. Fernandez did not receive this email until the next morning because he was travelling by airplane on the 13th. On the morning of July 14, 2005, Mr. Fernandez monitored the Captain Lyman's position, something he

does every morning with all his vessels, and discovered on his computer that the Captain Lyman had exited the access area at approximately 4 am and re-entered it at 7 am. He emailed this information to [redacted] who responded immediately that [redacted] had not crossed the line and was never closer than four (4) miles from the line according to the access area plot lines installed by [redacted] of KWC Electronics on the Captain Lyman's computer.

However, Mr. Fernandez finally determined that his plot lines were correct and that the Captain Lyman had indeed crossed the line on four (4) separate occasions. He ordered [redacted] to immediately return to Newport News, Virginia. Thereafter, he called VMS technician Linda Galvin in Gloucester and advised her that the Captain Lyman had crossed the line and had been ordered to return to her home port of Newport News. Mr. Fernandez believes that he then contacted SA Daniel Driscoll to apprise him of the situation. Mr. Fernandez also believes that he had notified NMFS of the violation prior to his call with SA Driscoll. SA Driscoll's office, cell and home telephone numbers were on a Hertz memo card along with [redacted] contact information.

SA Driscoll states in his OIR that "[a]s soon as it was determined that the Captain Lyman had been outside of the Closed Area 1 Scallop Access Area, I contacted the vessel owner, John Fernandez, and advised him of the situation. He stated in substance that he had contacted the operator and was told that the vessel never left the scallop access area. He then stated that he would have the vessel return to Newport News immediately. He had KWC Electronics put the lines in the vessel's computer before it sailed." Offense Investigation Report by SA Daniel Driscoll, p. 4 (July 29, 2005). Mr. Fernandez thereafter notified SA Driscoll what time the Captain Lyman would arrive in port on Sunday morning, July 17, 2005. When the Captain

Lyman landed, SA Driscoll, Mr. Fernandez, [redacted] and [redacted] met on board and confirmed that [redacted] had failed to update the Access Area plot lines on the Captain Lyman's computer as Mr. Fernandez had requested.

On July 17, 2005, SA Driscoll served a one (1) count EAR for fishing in a closed area on both [redacted] as operator and Mr. Fernandez as owner. At the same time, SA Driscoll seized the catch of 2,470 lbs. of scallops, which was sold for $18,525.

On or about September 15, 16, or 19, 2005, Mr. Fernandez spoke by telephone with EA MacDonald about the case. Mr. Fernandez indicated that he monitors his vessel, called the vessel and told the operator to return to shore, and fired the operator. See, Undated Notes of J. Mitch MacDonald, Enforcement Attorney, NOAA GCEL. On September 22, 2005, Mr. Fernandez discussed a settlement with EA MacDonald for a civil penalty equal to the value of the proceeds from the seized catch. On the same date, EA MacDonald issued a NOVA charging [redacted] and WWJT, Inc. with possessing scallops while outside the Closed Area 1 Sea Scallop Access Area and assessed a penalty of $20,000. On September 24, Mr. Fernandez signed a Settlement Agreement agreeing to pay a penalty of $18,525 which was to be paid from the seized catch proceeds of that same amount and to forfeit and relinquish any right to the seized catch proceeds. He further agreed that this offense would be considered a written warning for a period of one year from July 14, 2005.

Discussion

Mr. Fernandez argues that the penalty was excessive in light of the fact that he self reported the violation, that it was [redacted] fault for not installing the correct plot lines as requested by Mr. Fernandez prior to the trip, that the owner and operator were totally co-

operative, and that it was an unintentional violation. From emails dated September 13, 2005, between EA MacDonald and SA Driscoll, EA MacDonald knew that [redacted] did not accurately update the plot lines on the Captain Lyman's computer. Finally, Mr. Fernandez pointed out that he received a NOVA because the Captain Lyman drifted out of a resource abundant area and not because the vessel inadvertently drifted into a resource rich area.

EA MacDonald states that he considered all of these facts in mitigating the penalty to equal the proceeds from the seized catch. However, Mr. Fernandez states that he had no choice but to settle this case, because if he did not he would be potentially liable for the $20,000 penalty together with the loss of the proceeds for the seized catch. Further, EA MacDonald told Mr. Fernandez that if he did not accept the settlement, it would constitute a prior violation on his record. Therefore, for all these reasons, he agreed to settle on what he believes to be unfavorable terms. EA MacDonald agreed that if Mr. Fernandez settled, he would not pay out of pocket for a penalty, the violation would be considered as a written warning for only one (1) year from the date of violation, and it would not be considered a written warning for another fishing vessel owned by WWJT, Inc.

I find under the circumstances of this case that an $18,525 penalty was excessive and that the terms of the offered settlement unfairly prejudiced the outcome of this case. There is no question the violation occurred. However, the violation was a first offense, unintentionally caused by an independent third party's mistake, was self reported and did not harm the resource. A more appropriate penalty would be $5,000 which is the minimum penalty for a first time violation of this offense. Since the Settlement Agreement specifically states that the vessel owner would pay a compromise civil penalty of $18,525 and that it would be paid from

the proceeds of the seized catch, I find that the vessel owner is entitled to a remittance of $13,525.

Recommendation

I recommend that the Secretary remit the sum of $13,525 to WWJT, Inc. in connection with its Application for Review.

Case 218
SE 0701005 FM
F/V Little Jo
[REDACTED], Operator
M.L.B., Inc., Owner

Corporate vessel owner complains that an unfair penalty was paid for being forced by inclement weather to improperly transit a closed area to assure the safety of the vessel, captain and crew when not fishing at night.

Findings of Fact

James Paul Freeman has filed this Application for Review on behalf of M.L.B., Inc. ("MLB") which has owned fishing vessel Little Jo since at least 2007. MLB does not own any other vessels. Mr. Freeman is a second generation fisherman, has been in the fishing business for about twenty-two (22) years, and is an officer of MLB. Mr. Freeman's father is MLB's sole stockholder and president. Mr. Freeman is also employed by King's Seafood, Inc., a fish wholesaler in Port Orange, Florida. Mr. Freeman's father is the majority stockholder of King's Seafood. Little Jo and other vessels offload at King's Seafood. Mr. Freeman is in the process of purchasing ownership in MLB and King's Seafood. [REDACTED] operated the Little Jo in 2007, but now operates other fishing vessels owned by Mr. Freeman, King's Seafood and other individuals.

At 7:25 (EDT) on April 6, 2007, the Little Jo was observed by the Coast Guard transiting half a nautical mile inside the Oculina Experimental Closed Area (OECA). Her fishing gear was not in the water, but she was preparing to set gear. Offense Investigation Report by SA Richard Chesler, p. 3 (May 7, 2007). At 10:22 (EDT), USCG Officer [REDACTED] boarded the vessel east

of the OECA as longline gear was being retrieved from the water from the first set of the day and observed 1,500-1,800 lbs. of golden tile fish in the fish hold. Statement of USCG Officer [redacted] According to [redacted] the fish had been caught seaward of the 100 fathom curve (an area outside of the OECA) and [redacted] provided the vessel's logbooks in support of [redacted] statement. There was an additional 300 lbs. of fish harvested during the first set of the day. Offense Investigation Report by SA Richard Chesler, p. 7 (May 7, 2007). [redacted] explained that, after fishing on April 5, [redacted] had proceeded inshore for a night of rest. Officer Lewis informed the captain that [redacted] was not allowed to transit through the OECA area with fish on board. [redacted] was not aware of that regulation and stated that this was his first time fishing in this area. [redacted] further stated that [redacted] was not fishing in the closed area, was not anchored in this area and was transiting the area for the sole purpose of moving from rougher, deeper water offshore to shallower water inshore to sleep and for the safety of the vessel, captain and crew. There was no seizure of the Golden Tile fish.

On June 21, 2007, EA Karen Raine issued a NOVA to M.L.B., Inc. and [redacted] jointly and severally, charging them with unlawful fishing in the Oculina Bank HAPC Experimental Closed Area on April 6, 2007 and assessed a civil penalty of $7,500.

MLB hired counsel to represent it in an appeal of the NOVA. However, at some point, Mr. Freeman learned that the hearing would be before a Coast Guard ALJ and not a jury in federal court. Mr. Freeman and other MLB personnel felt that the trial would not necessarily be fair because the Little Jo had been originally charged by the Coast Guard and this appeal would be before a Coast Guard ALJ. Mr. Freeman had not discussed a particular case with

anyone, but he had heard people complain about heavy fines when they appealed their case to an ALJ. The decision was made to settle the NOVA.

A Settlement Agreement was signed in August 2007. The parties agreed to a compromise settlement of $4,000, which MLB paid in full.

Discussion

Mr. Freeman's position is that, under the circumstances of this case, an appropriate penalty would have been to issue a warning. He explains that there were no prior violations that could be imputed to the corporation. At the time, seas were 10-15 foot, the conditions were unsafe for rest and sleeping, and the crew's lives were more important than any fish product. Due to these safety concerns, the vessel crossed the OECA to seek calmer conditions inshore.

EA Raine disputes the claim that there were 10-15 foot waves because the Coast Guard Weather Log indicated that, during the incursion and the subsequent boarding outside of the OECA, the sea waves ranged from two (2) to three (3) feet and the sea swells from three (3) to five (5) feet. Response by EA Karen Raine, pp. 3-4. Additionally, [redacted] did not mention anything about inclement weather in [redacted] written statement, during the Coast Guard boarding, or the subsequent interview with a SA. Id. at 4. This argument was first raised in conversation with EA Raine in defending the NOVA. Id. EA Raine argues that the regulations do not provide an exception for a vessel transiting through the OECA. Id. Even if there was such an exception, it would not apply in this case as the Coast Guard documents revealed that the Little Jo was preparing to set her fishing gear in the water, an activity encompassed in the definition of fishing under 16 U.S.C. §1802(16). Id. She also points out that golden tilefish, a

snapper-grouper species, was in the vessel's hold while the vessel was in the OECA. Id. Finally, EA Raine argues that the penalty in this case is appropriate because it is on the low end of the penalty range of $500-$50,000 for a first time violator for closure violations in 2007. Id. at 5.

Mr. Freeman does not dispute that the Little Jo was in a closed area, but argues that she was only transiting through the area. However, the regulations do not provide an exception for a vessel transiting the OECA and the evidence is clear that the Little Jo was preparing to set gear, which is an activity included in the definition of fishing. Since the Little Jo was a first time violator, I find that the penalty of $4,000, which is on the low end of the penalty range for a first time closed area violation, is appropriate in this case.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 219

NE 980248
F/V Victor
AGA Fishing Corporation, Owner
George Jones III, Operator-deceased

Fisherman complains of an excessive, disparate penalty that unfairly forced settlement.

Findings of Fact

Antonette Jones ("Mrs. Jones") was, at all times material to this complaint, the sole stockholder/officer of AGA Fishing Corporation ("AGA"), which owned the fishing vessel Victor. Mrs. Jones later named the vessel Georgy I in memory of her deceased son, George Jones III. Mrs. Jones' father-in-law, husband, George Jones, Jr., and son, George Jones III, were all fishermen. AGA purchased the Victor in 1987. Mr. George Jones, Jr. operated the Victor until medical problems prevented him from fishing, and in 1998 Mr. George Jones III took over as operator of the Victor. Mr. George Jones III was murdered on August 5, 1999. Subsequently, Mrs. Jones sold the Victor and is no longer in the fishing business.

On October 17, 1998, a USCG aircraft spotted the scalloper Victor in the Western Gulf of Maine ("WGOM") restricted area. The USCG vessel Reliance was directed to investigate. It was subsequently determined that the Victor was scalloping in the closed area, had made seven (7) passages in that area, and that her deepest incursion was .6 nautical miles inside the closed area. USCG personnel from the Reliance boarded the Victor, talked to the captain, George Jones III, examined the Victor's charts, and determined that the Victor was scalloping within the closed area.

Captain Jones stated he was not aware that the WGOM was closed. The Victor's charts had some closed areas plotted but not the WGOM. Captain Jones had not altered course to avoid detection in a closed area when the USCG aircraft flew over the vessel and the captain stated that, on a previous trip in this same area, he had radioed a passing USCG cutter to inquire if the area was clear for fishing. He was assured by the USCG that the area was clear. In response to AGA Fishing Corp.'s lawyer's FOIA request, the USCG reported that there were no USCG cutters in that area during the time frame requested. Response by EA Joel LaBissonniere, p. 3 (Nov. 10, 2011). Captain Jones further stated that he had contacted the Provincetown and Cape Cod Canal Coast Guard Stations prior to this trip to determine the boundaries of the closed areas. There was evidence that Captain Jones had called the Cape Cod Canal Coast Guard Station on March 13, 1998 which pre-dated the effective date of the WGOM closure and there was no evidence of such a call to the Provincetown Coast Guard. Id.

In support of Captain Jones' argument that he was not aware of the closed area, many other captains, in addition to Captain Jones, had signed a statement affirming that they had not received notice of the WGOM closing. For those fishermen who did receive the notice, it was confusing and arguably applied only to multi-species fishing and not scalloping.

The Victor was monitored by NOAA through its VMS system, which clearly showed that the Victor was within the closed area. "During the two (2) days preceding the violation in question, the vessel's VMS showed the vessel fishing in a north-south pattern, just outside the WGOM closure. When the vessel entered the closed area, however, it never travelled more than 1/2 mile inside the closure…" and "… fished in an east-west direction for several hours, never more than 1/2 miles inside the closed area." Id. On the evening of October 16th, 1998,

just before the Victor was sighted inside the closed area by the USCG aircraft, the Victor's VMS system had been turned off for over nine (9) hours. Id.

The Coast Guard cited the Victor's captain, George Jones III, and owner, AGA Fishing Corp., with fishing in a closed area. NMFS thereafter seized seventy-three (73) bags of scallops and 3,000 lbs. of monkfish which was sold for $21,299.81.

On February 3, 2000, EA LaBissonniere issued a NOVA and NOPS for fishing (scalloping) in a closed area for which it assessed a civil penalty of $35,000, seizure of the catch for $21,299.81 and a thirty (30) day vessel permit sanction. It being subsequent to his murder, Captain George Jones III was not charged.

On April 27, 2001, Antonette Jones signed, on behalf of AGA Fishing Corp., a Settlement Agreement with NOAA which provided for payment of a civil penalty in the amount of $10,000, paid over time, forfeiture of $21,299.81 from the sale of scallops and monkfish seized from the Victor on October 18, 1998 and serving a twenty (20) day vessel permit sanction.

Discussion

AGA Fishing Corp.'s defenses are inadequate notice of the WGOM closed area; lack of knowledge on the part of Captain Jones that he was in a closed area; and excessiveness of the penalty because it was larger than that paid by other fishermen for the same or similar offenses.

As to Mrs. Jones' first defense, inadequate notice of the closed area, there appears to be credible evidence that many fishing vessel owners/operators in the Northeast region did not receive written notice that the Gulf of Maine was a closed area. In looking at the notice that was received by permit holders, there is a legitimate argument that the notice is confusing in

that it does specifically state that the area is closed to multispecies permit holders but does not specifically state that it applied to scallopers. EA LaBissonniere responds that if this case had gone to a hearing, he was prepared to present testimony of a NMFS fishery policy analyst that this particular notice was sent to all permit categories, not just multispecies fisheries. Response by EA Joel LaBissonniere, p. 4 (Nov. 10, 2004). Additionally, EA LaBissonniere argues that scallopers receiving this notice would have realized that it applied to "all vessels," with some non-relevant exceptions. Id. at 5. However, the title of the notice, "Changes to the Multispecies Gulf of Maine (GOM) Areas Clauses" is misleading and it is conceivable that many scallopers seeing the title of the notice would set it aside as not being applicable to them.

As to Mrs. Jones' defense that her son did not know that the WGOM was closed, EA LaBissonniere argues that the Victor's VMS records establish that she was fishing in a north-south direction before she entered the closed area; fishing back and forth in an east-west direction no more than .6 nautical miles parallel to and inside the closed area boundary line; and, on the evening of October 16, 1998, when the vessel was located within 1/2 mile of the closed area, her VMS system was turned off for over nine (9) hours, all of which showed that Captain Jones knew he was fishing in a closed area. Captain Jones is not available to challenge EA LaBissonniere's argument that he was intentionally fishing in a closed area nor can Mrs. Jones help because she was not on board the Victor when these events occurred. However, the undisputed facts are that Captain Jones was fishing in a north-south pattern outside the closed area and in an east-west pattern inside the closed area which was parallel to and no more than .6 nautical miles from the closed area boundary. These facts and the fact that the Victor's VMS

system was turned off for nine (9) hours while she was in the closed area lend credence to EA LaBissonniere's argument.

Mrs. Jones next argues that her penalty was excessive and/or disproportionate to settlement agreements with other fishermen charged with WGOM closed area violations in 1998. I have examined a list of 1998 WGOM closed area violation settlements that were submitted by the Victor's lawyer to me during Mrs. Jones' interview. EA LaBissonniere acknowledges at least one of those cases had been submitted to him by AGA's Counsel prior to settlement. Mrs. Jones argues that they support her claim that she paid an excessive penalty. However, I have reviewed summaries of these cases submitted by EA LaBissonniere and find them all to be distinguishable from the Victor's case as to the underlying facts. Another difference between the cited cases and the Victor case is that they were all first offenses. On March 23, 1995, the Victor's owner, AGA, was charged with failing to comply with the DAS program and falsely reporting its fishing trip for which it paid a $10,000 penalty and forfeited four (4) DAS. I believe that Mrs. Jones' husband, George Jones, Jr. and not her son, George Jones III, was the captain on that occasion. However, the resolution of that case is a prior offense attributable to the Victor and AGA as its owner.

I find that Captain George Jones III either knew or should have known that he was improperly fishing in a closed area. Based on this fact and the vessel owner's prior violation, I find that the settlement involving a penalty equal to that paid in connection with a prior violation (seizure of the catch and a twenty (20) day vessel permit sanction) is fair and reasonable and not excessive.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 220
NE 050009 FM/V
NE 052109 FM/V
NE 0603093 FM/V
F/V Moragh K
[redacted] Operator
K&K Fishing Corp., Owner

Corporate vessel owner complains about an excessive penalty in a case involving a well known problem of shrinkage of the square mesh codends. As a result of the shrinkage, this vessel owner paid a $28,500 penalty and forfeited a seizure worth $22,921.50. He claims other vessel owners did not even receive a warning.

Findings of Fact

Lawrence Patrick Kavanagh, Jr. has been in the fishing business for about forty (40) years. Initially, Mr. Kavanagh worked for his father who was a fishing boat captain and later became a fishing boat owner/manager. Currently, Mr. Kavanagh is president of K&K Fishing Corp., which is a family-owned business that owns two (2) fishing vessels: Moragh K and Mary K. These vessels have federal multispecies and lobster permits and are docked in New Bedford, Massachusetts. A second family-owned corporation, Kavanagh Fisheries, Inc., owns a third fishing vessel named the Atlantic, a scalloper.

NE 050009 FM/V

On January 3, 2005, the USCG boarded the Moragh K when the vessel was about to offload in Gloucester, and discovered eighty-eight (88) lobsters, twenty-two (22) of which had an illegal carapace length greater than five inches (5"). The Moragh K had a valid Federal Limited Access American Lobster permit for fishing in Lobster Management Areas 2 (LMA 2) and 3 (LMA 3), but did not have the proper endorsement to fish for lobster in Lobster Management

Area 1 (LMA 1). It was determined that the majority of lobsters on board were harvested in LMA 1. voluntarily abandoned the twenty-two (22) oversized lobsters, which were released into the Gloucester Harbor. On January 3, 2005, an EAR was issued to K&K Fishing Corp. for this violation. provided a written statement explaining that was in possession of twenty-two (22) oversized lobsters by accident and that was unaware of the regulations that prohibited from keeping lobsters from LMA 1 when fishing in LMA 3.

NE 052109 FM/V

In January of 2005, Mr. Kavanagh noticed that his then square mesh codend had grossly distorted meshes after only about six (6) months of use. Written Statement by Lawrence Kavanagh (Sept. 23, 2005). Mr. Kavanagh threw the codend away and discussed the problem with of Levin Marine Supply. On January 10, 2005, he purchased a new and improved version of the square mesh codend which measured 6.5" and which was impregnated with wax to prevent shrinkage resulting from imbedded sand. The Coast Guard measured the new and improved square mesh codend at 6.5" in February of 2005. Written Statement by (Sept. 23, 2005). The new codend was used for fishing in February, March, April, a small part of May, June, and September 2005. Written Statement by Lawrence Kavanagh (Sept. 23, 2005).

On September 20, 2005, the USCG boarded the Moragh K. Officer instructed the boarding team to measure the nets in the aft reel. Offense Investigation Report by USCG Officer , p. 1 (Oct. 4, 2005). The USCG measured the codend of the fish net which is at the top of the trawl net. The regulations require that the mesh of the codend be 6.5" or larger. There were two (2) fishing nets on board and both had required

codends. One (1) net had a square shaped mesh at the codend which had recently been purchased, and the other had a diamond shaped mesh purchased two (2) years prior to the boarding. The USCG measured both nets. The square mesh codend was measured at two (2) locations and yielded an average size of 5.812”. The diamond mesh codend was measured at one (1) location and yielded an average mesh size of 6.0875”. The square mesh codend was measured a third time at another location and yielded an average mesh size of 5.843”. A fourth measurement of the square mesh yielded a mesh size of 5.887” for a combined average of the third and fourth measurements of 5.865”. The diamond mesh codend was measured for a second time at another location and yielded an average mesh size of 6.212” for a combined average of the first and second measurements of 6.15”. The mesh codend of a third (orange) stored net was measured at 6.493” and deemed to be within regulation. The captain and the crew were cooperative during the measurement.

After the boarding, Mr. Kavanagh was very surprised when informed about the codend measurements. Mr. Kavanagh had purchased the new and improved square mesh codend to avoid the exact problem with which he was now charged. [redacted] and the crew had been unaware of any shrinkage. Had they known, they would have replaced the square mesh codend. Written Statement by [redacted] (Sept. 23, 2005). Additionally, the square mesh codend had not been used for two (2) months and was relatively new. Id. The diamond mesh codend had been purchased two (2) years earlier and had always measured according to the legal requirements. Id.

On September 20, 2005, USCG issued an EAR charging Moragh K and [redacted] in one (1) count of fishing with undersized nets. On the same date, NOAA ASAC Louis Jachimczyk

instructed SA Christopher McCarron to take custody and sell the catch of the Moragh K upon her arrival in New Bedford, Massachusetts. Upon arrival, 15,465 lbs. of mixed finfish were seized and sold for $22,921.50.

On September 21, 2005, NOAA SAs McCarron and Kevin Flanagan boarded the Moragh K. They interviewed in the wheelhouse of the vessel. Offense Investigation Report by SA Christopher McCarron, p. 4 (Sept. 22, 2005). stated that the square mesh codend had been purchased from Levin Marine Supply Co. in January 2005 and that it was 6.5”. Neither the captain nor the crew had been aware that the net meshes were too small to use. SA McCarron interviewed Mr. Kavanagh aboard the vessel on the same day. Id. Mr. Kavanagh explained that he had bought the codend in question in January of 2005 to replace a “grossly distorted” one. He did not know that the meshes were undersized.

On September 21, 2005, SA McCarron also interviewed of Levin Marine Supply. Id. vin stated that there were several problems involving square nets shrinking and that it was a well known problem in the industry. Sometime before the summer of 2004, became aware of rapid shrinkage problems with the square mesh codend that he was selling. Written Statement by (Sept. 27, 2005). was in contact with Euronette of Portugal, the parent company of EuroFishing Gear of New Bedford which sold the codends. Id. The parent company developed a process for resolving the problem. Id. This process involved impregnating wax into the braids to prevent sand penetration and shrinkage. Id. Beginning in the summer of 2004, Levin Marine Supply sold dozens of these new and improved codends, including the sale to the Moragh K. Id. Nevertheless, a number of vessels reported a problem with the improved codends and returned them in new or almost new condition. Id. The first

return took place on February 17, 2005. Id. When new, the codends measured 6 and 5/8", but after just two (2) fishing trips, they measured 6" or less. Id. [redacted] could not contact all of his customers to inform them of the problem because [redacted] records did not identify the purchasers. Id.

At a March 9, 2005 meeting in Gloucester, this problem was discussed. Massachusetts State Senator Bruce Tarr, Coast Guard Officials, representatives of EuroFishing Gear, MEP, NMFS and fifteen (15) local fishermen were present at that meeting. Gloucester Meeting Airs Net Shrinkage Concerns, Commercial Fisheries News, 15A (Apr. 2005). The following is a relevant news report of what was discussed at the meeting concerning the shrinkage of the square codends:

> As more fishermen use the new square mesh, more vessels are being cited for operating with nets that have shrunk below the minimum openings allowed.
>
> Violations regarding gear configuration can lead to hefty fines, and the industry is understandably very concerned about potential enforcement action by the Coast Guard, NMFS, and/or state agencies. And the increased number of violations has inevitably created tension between fishermen and the various enforcement agencies
> …
> "The Coast Guard will take a close look at all pending violations," said Cmdr. Gregory Hitchen, deputy chief of law enforcement for Coast Guard District One.
> Id.

NE 0603093 FM/V

On November 24, 2006, the Moragh K began a fishing trip which ended on December 1, 2006. The duration of this trip was six (6) days and twenty-one (21) hours and the vessel's limit was seven (7) days worth of codfish. The vessel was also subject to a 500 lbs. landing limit per day up to 5,000 lbs. landing limit per trip. Thus, according to NOAA, the landing limit for this

trip was 3,500 lbs. of codfish. On December 4, 2006, the Moragh K reported landing 5,000 pounds of Atlantic codfish.

On January 22, 2007, SAs Troy Audyatis and Shawn Eusebio contacted and Mr. Kavanagh. understood that was allowed to catch 500 lbs. per DAS up to 5,000 lbs. per trip and that possession limit clock began when the vessel left the dock. SA Audyatis explained that the clock began running when the first signal was received that the vessel had crossed the VMS demarcation line outside of the harbor.

On January 30, 2007, SAs Eusebio and Audyatis again interviewed SA Audyatis asked why the demarcation line had been crossed on December 1, but the landing was not reported until December 4. explained that had steamed back inside the VMS demarcation line because of bad weather, anchored in Cape Cod Bay, and was planning on heading back to fish as soon as the weather improved. The weather continued to be bad offshore and steamed back to New Bedford and sold the catch to Bergies Seafood, Inc. made a calculation and assumed that had been fishing long enough to land 5,000 lbs. of codfish.

On January 31, 2007, Mr. Kavanagh submitted a written statement. The statement supported testimony that the Moragh K had sought shelter in Cape Cod Bay after crossing the demarcation line due to bad weather, and this had resulted in a discrepancy between the dock-to-dock and the VMS DAS time.

On January 31, 2007, SA Audyatis issued EARs to and to K&K Fishing Corp. for exceeding the codfish landing limits.

On April 17, 2007, EA Charles R. Juliand emailed to Mr. Kavanagh's counsel, Pamela F. Lafreniere, Esq., an offer to settle the three (3) cases for a total of $38,750 and forfeiture of the seized proceeds of $22,921.50 from sale of the fish in the undersized mesh case. He stated that, absent a settlement by April 30, 2007, the following NOVAs and NOPS would issue:

1. NE 050009 FM/V (22 oversized lobsters)
   NOVA $5,000

2. NE 052109 FM/V (undersized mesh)
   NOVA $42,500
   NOPS 45 days at sea
   Seizure $22,921.50

3. NE 0603093 FM/V (cod overage)
   NOVA $11,600
   NOPS 15 days at sea

Email from EA Charles Juliand to Pamela Lafreniere, Esq. (Apr. 17, 2007). This would have resulted in a total penalty of $59,100, including forfeiting sixty (60) DAS and the $22,921.50 seized catch.

On May 16, 2007, Mr. Kavanagh signed a global settlement agreement for all three (3) cases. Mr. Kavanagh (signing on behalf of K&K Fishing Corp.) and [redacted] admitted to the violations and agreed to pay, pursuant to a payment plan, $28,500 for fishing with undersized nets, $3,500 for having 22 oversized lobsters and $7,000 for exceeding landing cod limits for a total of $38,750. They forfeited rights to proceeds in the amount of $22,921.50 from the sale of 15,465 lbs. of mixed finfish seized on September 20, 2005 as the result of the undersized codend mesh and agreed that the violations would constitute prior violations for a period of three (3) years from the dates of the violations.

Discussion

Mr. Kavanagh does not complain about his settlement concerning the oversized lobsters or the cod overages. However, Mr. Kavanagh asserts that he did everything he could to comply with the mesh size regulation and has been punished for his efforts. At issue are two (2) separate meshes, a diamond shape one and square shape one. EA Juliand responds that Mr. Kavanagh should have used the common sense approach followed by a number of fishermen who had returned their wax-impregnated square mesh codends in new or almost new condition due to shrinkage problems. Response by EA Charles Juliand, p. 7. EA Juliand also states that Mr. Kavanagh could have replaced the square mesh codend with a diamond mesh codend and then checked his nets on a regular basis to ensure compliance. Id.

Ms. Lafreniere notes that none of the Gloucester fishermen received even a warning for the rapid shrinkage problem with the square mesh codend. However, Ms. Lafreniere did not cite to any specific instances when a violation was ignored by enforcement authorities. It is her position that, in light of the circumstances, NOAA should return all funds including the proceeds for the fish that it had seized and sold for the undersized mesh violation. She believes that, if any punishment is imposed in the case of the undersized mesh, it should be in the form of a written warning. In response, EA Juliand points to a case involving an undersized mesh, published on August 29, 2005, in which the ALJ found that the respondent had notice of the shrinkage problem. See In The Matter of: Miss Amanda, Inc., Joseph A. Scola, Respondents, 2005 WL 2886667 (N.O.A.A.), p. 4 (2005). The respondent in that case offered as an exhibit a letter from a company selling codends, stating that the shrinkage was recognized by the manufacturer and distributor. Id. ALJ Brudzinski stated that no specific intent was necessary

on the part of the respondent to prove a violation and found that the assessed penalty of $10,000 was appropriate for an undersized codend mesh of .29''. Id. at 6.

Mr. Kavanagh had two (2) undersized nets: a diamond mesh codend and a square mesh codend. The diamond mesh codend violation is similar to the one in the case cited by EA Juliand who threatened to issue a NOVA for the undersized mesh for both codends for a total of $42,500. The penalty range for the undersized diamond mesh codend (between 1/4 and 1/2 inch) was between $1,000 and $20,000 and significantly lower than the penalty range for the undersized square mesh codend (greater than 1/2 inch) between $5,000 and $80,000. Penalty Schedule, p. 2 (May 2002). The undersized mesh codend violations were settled for payment of $28,000 and forfeiture of the $22,921.50 proceeds from the sale of the seized catch.

The Diamond Mesh Codend

Mr. Kavanagh knew that nets shrink and was therefore responsible for ensuring that his were compliant. Similarly to the violation in Miss Amanda, the diamond mesh codend violation falls within the $1,000 to $20,000 penalty range for a first time violation because the mesh was between one quarter and one half of an inch smaller than the minimum required. In Miss Amanda, ALJ Brudzinski found that the assessed civil penalty of $10,000 was appropriate. However, at that time, the ALJ was bound by a presumption that NOAA's assessment of civil penalties was valid. That presumption has since been removed,[1] and I am not bound by it.

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[1] Amended rules (eff. June 23, 2010): 75 Fed. Reg. 35631 (June 23, 2010).

Effective as of June 23, 2010, NOAA published a final rule that amends the procedures governing the agency's administrative proceedings for the assessment of civil penalties; suspension, revocation, modification, or denial of permits; issuance and use of written warnings; and release or forfeiture of seized property. The principal change removes the requirement that an Administrative Law Judge state

Therefore, I find that $10,000 or the middle of the penalty range for a first time violation is excessive and the penalty should be closer to the minimum.

The Square Mesh Codend

With respect to the wax-impregnated square mesh codend purchased in January of 2005, Mr. Kavanagh had actual knowledge of a shrinkage problem and attended a meeting in New Bedford in March of 2005 where this problem was discussed. Beginning in February 2005, a number of other fishermen returned their newly purchased wax-impregnated square mesh codends because of shrinkage. This option was available to Mr. Kavanagh. Under the applicable penalty schedule, mesh undersized in excess of a half inch is penalized between $5,000 and $80,000 for first time violations. However, I find that under the circumstances of this case the penalty should be at the lower end of the schedule for a first time violation.

On April 17, 2007, EA Juliand sent an email to Ms. Lafreniere, threatening to charge Mr. Kavanagh with a civil penalty of $42,500 for fishing with undersized nets, the seizure of $22,921.50 and a permit sanction of forty-five (45) days at sea if he did not settle by April 30, 2007. I find that such a penalty would be excessive for a first time violation, especially in light of the widespread shrinkage problem that other fishermen were experiencing with the square mesh codends. I find that the threat of assessing an excessive penalty unfairly forced Mr. Kavanagh to settle the codend case for $28,500. I find that a civil penalty of $6,000 for the

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good reason(s) for departing from the civil penalty or permit sanction assessed by NOAA in its charging document. This revision eliminates any presumption in favor of the civil penalty or permit sanction assessed by NOAA. The other change corrects a clerical error in a citation to rules pertaining to protective orders issued by Administrative Law Judges.

codend violations is fair and reasonable under the circumstances of this case. I make this finding based on the fact that NOAA seized the entire catch worth $22,921.50, that a minimum penalty of $1,000 is appropriate for the diamond mesh codend because it was a first time violation and, for that same reason, a minimum penalty of $5,000 is appropriate for the new square mesh codend, especially since it was caused by a manufacturer's defect.

With respect to the seizure, there was a NOAA policy in effect at the time that authorized seizure of a catch in excess of $10,000 that had been obtained with a mesh codend undersized by more than half an inch. Memo for Northeast Directives Manual by Former SAC Andrew Cohen (Jan. 24, 2005). In this case, one of the mesh nets was undersized in excess of half an inch and therefore the seizure of the catch was authorized.

I find that EA Juliand threatened to issue a NOVA that provided for an excessive penalty and permit sanction as a means for unfairly forcing K&K Fishing Corp. to settle its case for the excessive amount of $28,500. Therefore, I find that K&K Fishing Corp. should be reimbursed the difference between $28,500 and $6,000, or $22,500.

Recommendation

I recommend that the Secretary remit $22,500 to K&K Fishing Corp.

Case 222

NE 052108, NE 060042, NE 0700496
F/V Galaxy
Galaxy Marine, Inc., Owner
William J. Norton, Principal
[redacted], Operator
[redacted] Operator

Corporate vessel owner complains that its vessel was set up for seizure of her catch; that the NOAA Enforcement Attorney withheld an exculpatory document that would have provided a defense to the charged violation; and that the NOAA Enforcement Attorney forced the vessel owner to settle its case for an excessive penalty to allow the vessel owner to proceed with a needed refinancing of its fishing operation.

Findings of Fact

William J. Norton's first career was in the glass business. In 2001, he loaned money to a fisherman; over time he loaned more money to the point where he became an investor and principal in a corporation, D & S Fish, Inc., which owned the fishing vessel One Sister. In 2004, D & S Fish sold the One Sister and purchased a larger vessel, the Galaxy. Sometime in 2004, after the Galaxy purchase, D & S Fish was dissolved and Galaxy Marine, Inc. was formed to take title to the Galaxy. Mr. Norton was the sole stockholder, officer and director of the corporation. Mr. Norton was not an experienced fisherman so his business plan was to hire two (2) captains with separate crews to operate the Galaxy on a full time basis. After one (1) captain with crew completed a forty-eight (48) hour fishing trip, the catch was offloaded and the Galaxy was re-provisioned, a second captain and crew would take the vessel on another trip.

In 2004-2005, Mr. Norton hired [redacted] as one of his captains.[1] [redacted] had an operator's permit. During this time, Mr. Norton also hired [redacted] as the other captain. At the time [redacted] was hired, [redacted] had fished with [redacted] before and knew [redacted] had an operator's permit. When Mr. Norton hired [redacted] he looked at the captain's permit but did not notice that the permit had expired.

<u>NE 052108</u>

On September 21, 2005, the <u>Galaxy</u>, with [redacted] as operator, left New Bedford harbor in Massachusetts to fish for scallops. Mr. Norton claims that, once the <u>Galaxy</u> cleared the barrier, she was boarded by the USCG. He states that, a crew member called to tell him of the boarding, informing him that the USCG checked everything and there were no problems. There is no evidence in the case file that supports this claim.

That day, the <u>Galaxy</u> fished for and landed 403 lbs. of scallops, which [redacted] intended to offload in Hyannis, Massachusetts. Before getting to Hyannis, the USCG boarded the vessel and discovered that [redacted] had an expired operator's permit. The USCG escorted the <u>Galaxy</u> back to New Bedford where the 403 lbs. catch was seized and sold for $3,868.00. <u>Offense Investigation Report by SA Joseph D'Amato, p. 7 (Nov. 8, 2005)</u>. After the

[1] On September 22, 2011, during my interview of William Norton and [redacted] I was informed by [redacted] that [redacted] had appeared before me, in my capacity as a United States Magistrate Judge, as a defendant in a criminal case in 1999 and again in 2001. I was further informed that both appearances involved the question of pre-trial release/detention. I did not recognize [redacted] nor do I have any recollection of [redacted] appearance before me on two (2) occasions over ten (10) years ago. Following the interview, Mr. Norton and his counsel, Pamela Lafreniere, Esq., indicated that they had no objection to my reviewing this application. On September 23, 2011, by email, I notified NOAA's General Counsel of my prior contact with [redacted] and requested that she notify me, in writing, whether she had any objection to my reviewing this Application for Review. No objection has been received.

Galaxy was boarded, Mr. Norton received a call from SA Joseph D'Amato who told him there were three (3) issues: the captain's expired operator's permit; an illegal alien issue; and a violation of the 75-25 rule, which requires that 75% of the crew on board a fishing vessel must be American citizens. [REDACTED] was the alleged illegal alien and, since there were only three (3) crew on board, the 75-25 rule was allegedly violated. Regulations at the time required operators to be U.S. citizens. It later turned out that [REDACTED] was from Honduras and had been granted political asylum by the U.S. and would not be considered an alien. Therefore, there was no violation of the 75-25 rule. Subsequently, on July 10, 2007, Galaxy Marine, Inc. was charged in a one (1) count NOVA for landing 403 lbs. of scallops without a valid operator permit for which it was assessed a penalty of $5,000 in addition to the seizure of the catch.

NE 060042

On November 26, 2005, [REDACTED] and the Galaxy were fishing in or close to the boundary of the NLCA. The Galaxy had been issued a Letter of Authorization for the Collection of Bivalve Shellfish from the PSP Temporary Closed Area ("Shellfish LOA"). Letter of Authorization for the Collection of Bivalve Shellfish from the PSP Temporary Closed Area (Nov. 17, 2005). The participation period was from 11/17/05 to 12/31/05. Id. [REDACTED] stated that the NOAA LOA was accompanied by a chart with the permitted area shown within a rectangle. Chart Entitled "We Need Sea Scallops" (undated). I am informed that the chart was not attached to the Agency's LOA. According to the NOAA employee who maintains LOAs, the chart was attached to a Massachusetts LOA and the NOAA LOA required that fishermen needed both letters while fishing in the closed area.

maintains that was within the area marked on the chart when was boarded by the USCG on November 27, 2005. The NOAA LOA allows the possession of shellfish collected from the toxin area "provided the vessel complies with the following conditions and requirements and all other applicable Federal fishing regulations." stated in interview that produced the NOAA LOA and the USCG verified the letter's authenticity. Special Master Interview with William Norton and (Sept. 22, 2011).

EA J. Mitch MacDonald responds that there is no evidence that provided to the USCG a copy of the chart that was allegedly attached to the NOAA LOA. There is also no indication in the USCG reports that provided the USCG with a Massachusetts LOA which was required to accompany the NOAA LOA. The NOAA LOA authorized collection of twenty (20) samples, but the USCG found four (4) bushels of scallops on board. None of the samples were labeled as required by the LOA. NOAA states that, these facts indicate that was fishing for human consumption rather than providing samples to the Food and Drug Administration. was allowed to retain twenty (20) sample scallops, voluntarily returned the remainder to the sea and was directed to proceed out of the Nantucket Lightship Closed Area ("NLCA") to an area where the Galaxy was authorized to fish.

Prior to leaving this area, the USCG gave an EAR charging with (1) fishing inside the NLCA with bottom tending gear; (2) fishing for scallops under a general category permit outside of the Southern New England dredge exemption area; and (3) transiting a closed area with improperly stowed gear. EAR (Nov. 26, 2005). On August 29,

2006, EA MacDonald issued an amended NOVA charging the Galaxy's owner and [REDACTED] [REDACTED] with unlawfully entering and engaging in fishing for scallops 1.2 nautical miles inside the NLCA and assessing a $25,000 monetary penalty and a thirty (30) day permit sanction for the Galaxy and [REDACTED].

On behalf of the Galaxy's owner and captain, Ms. Lafreniere filed for an ALJ hearing. In this connection, counsel made a demand to NOAA for documents. EA MacDonald responds that, under NOAA's regulations, they forwarded the investigation reports and other documents they relied on when assessing the penalty. Other discovery was provided in the Preliminary Position on Issues and Procedures. However, Ms. Lafreniere alleges that EA MacDonald failed to produce the chart as part of his discovery obligation. Statement of Counsel during Special Master Interview with William Norton and [REDACTED] (Sept. 22, 2011).

Other than privileged documents, EA MacDonald states he would not intentionally withhold an exhibit or part of a document that would have been required to be produced as part of the Agency's discovery. Unless this document was presented to EA MacDonald in the investigation report or by the respondents, he expects that he did not know about the chart, likely because it was a state generated document. At the time that this case was pending before an ALJ, [REDACTED] was incarcerated in federal prison and was not available either to testify, assist Ms. Lafreniere in the defense or produce the chart which was in [REDACTED] possession.

Ms. Lafreniere states that NOAA produced a copy of the NOAA LOA, but not the chart which described the permitted fishing area. I did not find either document in my review of NOAA's case file concerning this case. The exhibits were produced by [REDACTED]

during [redacted] interview. Ms. Lafreniere maintains that, if she had a copy of the chart, she would have had a defense to this NOVA.

NE 052172

The penalty paid in this case is not being challenged by the claimant but is being reported for its relevance to subsequent penalty assessments. On December 19, 2005, the Galaxy was being operated by [redacted] when she was charged with fishing in a closed area. On February 14, 2006, a NOVA issued for this violation with an assessed penalty of $15,000. On March 10, 2006, a Settlement Agreement was signed which provided for payment of $7,600 to be paid in accordance with a payment schedule together with abandonment of the seized catch proceeds of $3,600.

NE 0700496

On October 4, 2006, [redacted] was the operator of the Galaxy when it was boarded by the USCG. As part of its vessel inspection, the USCG measured the twine top mesh and discovered in its first measurement that it had a 9.525" average mesh size and on the second measurement a 9.6" average mesh size. The applicable regulation requires a 10" mesh size. Additionally, the Galaxy was fishing in an area that required a turtle excluder device (TED) which she did not have. The USCG issued an EAR to the Galaxy and [redacted] charging them with these two (2) offenses.

On July 10, 2007, EA MacDonald issued a NOVA charging the Galaxy and her operator in Count 1 with having undersized twine top mesh, for which they were assessed a $15,000 penalty, and in Count 2 with not having a required TED, for which they were assessed a penalty of $7,000, for a total assessed penalty of $22,000.

Ms. Lafreniere was engaged to represent [redacted] and the Galaxy in this matter. On March 13, 2007, Ms. Lafreniere wrote EA MacDonald enclosing a copy of a new procedure (adopted after the Galaxy mesh violation) for measuring of twine top mesh which, she argues, would have resulted in a different outcome in the Galaxy case. She also provided a list of similar cases which resulted in written warnings or minimal penalties ($2,600 being the largest). Letter from Pamela Lafreniere, Esq. to EA J. Mitch MacDonald, with Enclosures (Mar. 13, 2007). EA MacDonald responds that the assessed penalties in the cited cases were primarily $5,000, which is consistent with variations in the vessels' permit categories, the twine top mesh sizes, the amounts of catch involved, and the Agency's penalty schedule guidelines. Settlement amounts were generally around 50% of the assessment. One exception was the Leonardo. The owner in that case settled separately from the operator and settled for 40% of the assessment, or $2,000. The operator defaulted and was responsible for the remaining balance. The Jersey Cape was assessed $5,000 for its undersized twine top, not $10,000 as indicated in the list. The Jersey Princess II was given a warning by enforcement. It was not forwarded to GCEL for review and consequently no penalty was assessed. The penalty guidelines for nets with meshes undersized by less than ¼ inch usually resulted in a written warning. The Margaret Rose measurement was within this range. This vessel received a written warning by enforcement, and the case was not referred to GCEL for a NOVA. The Galaxy had one (1) prior violation that was settled less than seven (7) months prior to these violations and two (2) other violations occurring within roughly a one (1) year time span.

On July 26, 2007, three (3) of the above cases (NE 052108, NE 060042 and NE 0700496) were settled for payment of a $28,000 penalty and a twenty (20) day permit sanction for the

Galaxy and [redacted]. [redacted] was included and [redacted] was excluded from this Settlement Agreement. Mr. Norton states that he was forced to settle this case because, at the time of settlement, he was negotiating a bank refinancing agreement for $600,000 and EA MacDonald used that information to leverage a settlement. EA MacDonald responds that he has no memory of speaking with anyone from any bank involved with Mr. Norton, and there is nothing in the files or his phone records that indicates to him that he spoke with Mr. Norton's bank.

Discussion

There is no question as to the liability of Galaxy Marine, Inc. with respect to case no. NE 052108 (no operator's permit), case no NE 052172 (admitted fishing in a closed area), and case no. NE0700496 (undersized twine top mesh and no required TED). [redacted] Norton and [redacted] [redacted] challenge the charge of fishing in a closed area in case no. NE060042. The question presented is whether EA MacDonald was required to produce a chart that was attached to the Massachusetts LOA for entry into the NLCA and whether, if produced, it would have provided Mr. Norton with a defense to this violation. NOAA's case file did not contain either the Massachusetts LOA or the chart and I only became aware of the chart when [redacted] gave it to me during his interview. According to [redacted], when Mr. Norton settled the case, [redacted] was incarcerated and could not help Mr. Norton by producing the chart.

However, the several USCG reports concerning the Galaxy boarding state that [redacted] [redacted] was 1.2 nautical miles within the NLCA, that her fishing dredge was hanging over the starboard gunwale, that he had four (4) bushels of scallops on board and that he produced the NOAA LOA, which the USCG verified as being authentic. In these reports, there is no

mention of the Massachusetts LOA or its attached chart and, during the boarding, [redacted] only delivered the NOAA LOA to the USCG. Report by USCG Officer Christine Alexander (Nov. 27, 2005). After seeing the NOAA LOA, the USCG allowed [redacted] to retain twenty (20) species of ocean quahog and scallops as authorized by NOAA's LOA, and the captain voluntarily returned the balance of four (4) bushels to the sea. Id. at 2. I note further that the twenty (20) species were not labeled as required by NOAA's LOA. Id. Therefore, I find credible evidence that the Galaxy was fishing within the NLCA, was not just collecting samples as authorized by the NOAA LOA and that the chart would not have provided a defense to the violation charged in the NOVA.

The next question presented is whether the assessment was excessive and, if so, was Mr. Norton unfairly coerced into settling this case for an unreasonable amount. In order to review the penalties assessed/settled in these cases, it is important to understand the timeline of violations, the NOVAs and settlements. The relevant dates follow:

Case No.	Date of Violation	Date of NOVA	Assessed Penalty	Date of Settlement
1. NE 052108	9/21/2005	7/10/2007	$5,000 + catch	7/26/2007
2. NE060042	11/27/2005	8/29/2006	$25,000	7/26/2007
3. NE052172	12/19/2005	2/14/2006	$15,000 (settled $7,600)	3/10/2006
4. NE0700496	10/4/2006	7/10/2007	$22,000 ($15,000 mesh; $7,000 TED)	7/26/2007

The first offense in time (NE052108) involved the Galaxy's captain operating without a valid operator's permit.

The second offense in time (NE 060042) involved a closed area violation.

The third offense in time (NE 052172) also involved a closed area violation. A NOVA in this case issued on February 14, 2006, assessed a $15,000 penalty and the case was settled for $7,600 by a Settlement Agreement dated March 10, 2006. This case then became a first offense.

On August 29, 2006, following the settlement of case NE 052172, a NOVA was issued in case no. NE 560042 charging the owner with fishing in a closed area for which the owner was assessed a $25,000 penalty. This case was appealed to an ALJ. While this case was pending, the Galaxy was charged by an EAR for having an undersized twine top mesh and no TED.

On July 10, 2007, EA MacDonald issued two (2) separate NOVAs for case no. NE052108 (operating the Galaxy without a valid permit) for which he assessed a $5,000 penalty and case no. NE 0700496 (undersized twine top and no TED) for which he assessed a penalty of $22,000. Therefore, as of July 10, 2007, there were three (3) pending cases against the Galaxy for a total assessed penalty of $52,000 which were all settled on July 26, 2007 for $28,000, or a little more than half of the assessed penalties.

Although case No. NE052172 (closed area violation) was the Galaxy's third offense in time, it was the first to receive a NOVA and the first to be settled. Therefore, this case was assessed as a first offense. Case No. NE060042 (fishing in a closed area) was the second offense in time, second case to receive a NOVA and was assessed as a second offense for $25,000,

which is below the minimum for a second offense. Case No. NE052108 (no valid operator's permit) and Case No. NE0700496 (undersized twine top mesh and no TED) were assessed within the applicable penalty schedule as second offenses. Therefore, I conclude that the penalty assessments for these four (4) cases were reasonable and did not unfairly force a settlement for approximately one half (1/2) of the assessed penalties.

Recommendation

I recommend that the Secretary take no action with respect to this Application for Review.

Case 223

Enforcement Action Report #137042
Captain Vito's Seafood, Dealer
Vito Ciaramitaro II, Principal

Former lobster dealer/restaurant owner complains that he was forced to pay a $35,000 penalty which drove him out of business.

Findings of Fact

Captain Vito Ciaramitaro ("Captain Vito") is an 83 year old Italian immigrant retiree with limited English abilities. He started VC Seafood, Inc. in 1982, which was a small seafood restaurant that sold fried foods in Gloucester, Massachusetts. It was later renamed Captain Vito's Seafood. Captain Vito's Seafood, in addition to its restaurant business, also operated a small fish market which purchased some lobsters from vessels and resold them to the public and to local area dealers. Captain Vito's had a small lobster tank "enough to fill about 1500 lbs." Vito Ciaramitaro II ("Vito II") is Captain Vito's son who worked as an employee at Captain Vito's Seafood. He currently works as a deck-mate aboard the Grace Marie, a multispecies dragger. Vito II is the father of four (4) children. Special Master Interview with Vito Ciaramitaro I and II (Sept. 27, 2011).

Around 2002, Vito II took over the business from his father. In 2000, Captain Vito's Seafood (then known as VC Seafoods, Inc.) possessed a valid federal fisheries permit for American lobsters. 2000 Federal Lobster Permit. Vito II noted that the business had a federal lobster dealer permit for every year between 1982 and 2000. Captain Vito's Seafood had all of its permits displayed on the wall, including a valid Massachusetts state lobster permit. Also,

towards the end of 2000, Captain Vito suffered the tragic loss of his other son. Special Master Interview with Vito Ciaramitaro I and II (Sept. 27, 2011).

Sometime between 2000 and 2002, [redacted] a state inspector, came into Captain Vito's Seafood and informed Vito II that he no longer needed a federal permit. [redacted] allegedly took the permit off the wall. Since the Ciaramitaros trusted [redacted] they obliged and did not reapply for another federal lobster dealer permit. [redacted] has since passed away. According to Vito II, there was no cost associated with getting a lobster dealer permit, nor was there a federal reporting requirement, at the time, for dealing in lobsters exclusively. Special Master Interview with Vito Ciaramitaro I and II (September 27, 2011). EA Juliand does not refute this statement in his response.

On May 6, 2004, while investigating another vessel that had landed lobsters at Captain Vito's Seafood, SA Patrick Flynn discovered that Captain Vito's Seafood did not possess a valid federal permit for American lobster. SA Flynn interviewed Vito II, who stated that he did not know he needed a federal permit to purchase lobsters from federally-permitted vessels. He did, however, provide SA Flynn with a valid Massachusetts state retail permit. Offense Investigation Report by , p. 8.

During the course of his investigation, SA Flynn interviewed dealers in the area and confirmed that they had purchased lobsters from Captain Vito's Seafood in the past. He also interviewed several of the federal permitted fishing vessels that landed at Captain Vito's Seafood. All the vessel captains indicated that they had no knowledge of Captain Vito Seafood's permit issue, but noted that some of their slips contained a dealer number.

Shortly after the conclusion of the interviews, SAs Flynn and Chris Schoppmeyer helped Vito II obtain a 2004 federal dealer permit, which was issued on May 17, 2004. Id. at 44. Subsequently, Vito II received an EAR on November 10, 2004, which documented various instances when Captain Vito's Seafood bought and sold lobsters without a valid federal permit. SA Flynn allegedly informed Vito II that the penalty would be no more than $3-$4000.[1] The case was assigned to EA Charles Juliand on August 23, 2005.

Attorney Elizabeth Murray assisted Vito II in pursuing settlement discussions with EA Juliand before a NOVA was issued. EA Juliand initially offered $50,000 to settle the case, and then later offered $45,000. Email from Elizabeth Murray, Esq. to EA Charles Juliand (June 12, 2006) and Email from EA Charles Juliand to Elizabeth Murray, Esq. (June 30, 2006). Ms. Murray made several arguments In support of a greater penalty reduction. First, she argued that Captain Vito's Seafood's violation amounted to a mere paper violation that did not harm the fisheries because there was no reporting requirement for lobster-only endorsed federal dealer permits. Second, though she conceded that Captain Vito's Seafood should bear some of the responsibility for not having a federal lobster dealer permit, she faulted NOAA for dropping her client from the permits list entirely after Captain Vito's Seafood did not renew its federal lobster permit after 2000. She attributed the failure to renew the permit, in part, to the death of Captain Vito's other son in late 2000. Third, Ms. Murray highlighted her client's financial struggles. In particular, she noted that Vito II was struggling to "make it" after taking over his father's business because the weather, availability of fish and start up expenses all adversely

[1] EA Juliand states that SA Flynn vehemently denies this assertion. Response by EA Charles Juliand, p. 4. SA Flynn was not able to comment on this case.

affected his business. Email from Elizabeth Murray, Esq. to EA Charles Juliand (June 30, 2006). Based on these reasons, Ms. Murray proposed a $25,000 settlement and a two (2) year dealer permit sanction. Id.

EA Juliand responded to Ms. Murray's arguments as follows:

> After some discussion and serious reflection I have decided to offer to split the difference between our last two positions. That means that I'll take $35,000 in a lump sum to settle the whole shebang…Be assured that I have considered all your points, individually and collectively, and that – as Regis P. would say – this is my final offer. This offer shall expire at c.o.b. on Friday July 7th. As they say in certain parts of Gloucester ….ciao. Email from EA Charles Juliand to Elizabeth Murray, Esq. (June 30, 2006).

Nevertheless, Ms. Murray continued to attempt to negotiate more favorable terms. In particular, she wanted to secure a longer time period in for Vito II to come up with the $35,000 lump sum payment beyond the 90 days proposed by EA Juliand. The negotiation up to this point was that Vito II would have been liable for the full $50,000 payment if he failed to come up with the lump sum payment within 90 days. EA Juliand wrote:

> The reason that I reduced the penalty was because I was under the impression that a lump sum was coming and I wanted to put this case behind me and move on to other more pressing matters…Perhaps its time that Vito II talked to Vito I about a loan. Otherwise, this window of opportunity to settle this case for relatively "short" money will close. I want to wrap this up, one way or the other, by August 10th. If we haven't signed by by [sic] then, I'm withdrawing my settlement offer. Thanks for your help to date. Email from EA Charles Juliand to Elizabeth Murray, Esq. (July 27, 2006).

Ms. Murray pushed for EA Juliand to reconsider the payment options. She noted:

> [Vito II] is making best efforts to come up with the whole sum, but he is struggling. If he gives you $15,000 to $20,000 up front, roughly half of what is owed, he shouldn't shoot up to $50,000 after 90 days. There should be a sliding scale of some sort…I am not trying to drive you (or me crazy) but I am sitting next to a lot of desperation here. And I think its real. Email from Elizabeth Murray, Esq. to EA Charles Juliand (July 31, 2006).

EA Juliand responded:

> My last offer is just that. Pls [sic] see attached. If it isn't signed by August 10th, it's withdrawn & all the time we've spent will have been wasted. If Vito II can't live with what I've offered, I'm at a loss to know how he's going to handle the NOVA/NOPS that will necessarily come his way. In any event, negotiations are over. Email from EA Charles Juliand to Elizabeth Murray, Esq. (July 31, 2006).

In the end, the parties settled for a $35,000 civil penalty payable within ninety (90) days. Captain Vito's Seafood, Inc. neither confirmed nor denied the truth of the case report, but admitted, for settlement purposes that it had purchased from five (5) federally permitted vessels, lobsters totaling 8,051 lbs. valued at $43,205. The Settlement Agreement stipulated that failure to pay the $35,000 within ninety (90) days would result in a $50,000 penalty assessment payable over eighteen (18) months with a 2% annual interest rate. Should Vito II fail to make that payment, there would be a $100,000 default assessment and the suspension of all federal permits until payments were made.

The parties signed the Settlement Agreement on August 3, 2006 and Vito II delivered a $35,000 check to the Department of Commerce that day. The money was withdrawn from his children's college fund. Vito II could not cope with the aftermath of paying what he believes to be an extraordinarily excessive penalty relative to a minor violation. As a result, he sold the building his family owned and the business carried on therein, and dissolved Captain Vito's Seafood in 2007. Vito II feels that NOAA "took away his family history." Meanwhile, Captain Vito believes that the government "threw him out of business." Special Master Interview with Vito Ciaramitaro I and II (Sept. 27, 2011). EA Juliand responds that it is unfortunate that Vito II suffered business reversals. However, unsupported assertions do not constitute credible

evidence that the settlement in this case caused Vito II's business to fail. Response by EA Charles Juliand, p. 6. I find the testimony of Vito I and Vito II to be credible.

Discussion

Vito II argues that the penalties imposed were significant and, together with the costs of settlement and attorney's fees, drove them out of business. Application for Review. In response, EA Juliand argues that the $35,000 settlement was negotiated at arms' length with experienced counsel. Further, he notes that the settlement was reasonable in light of the volume (not less than 8,051 lbs of lobster) and value (not less than $43,205) of the unlawful purchases over a three (3) year period. Response by EA Charles Juliand, p. 6.

Under the Secretarial Decision Memorandum of March 16, 2011, the Secretary empowered me to review cases in which conduct of the kind specifically enumerated in the OIG's September 2010 Report existed and prejudiced the outcome of the case. The OIG's September 2010 report identified cases where "broad and powerful enforcement authorit[y] led to overzealous or abusive conduct."

This case clearly falls under that category. Captain Vito's was a modest seafood market and restaurant with a relatively small lobster tank. Evidence substantiates that it had a valid federal lobster dealer permit through 2000. Subsequently, the permit was not renewed. There was absolutely no evidence that Captain Vito's intended to violate any regulations. Rather, this was a paperwork case. Further, EA Juliand has not denied the assertion that there is no reporting requirement for a lobster-only endorsed federal dealer permit. Therefore, no conservation considerations were implicated.

All these facts were made apparent to EA Juliand when he was assigned the case, particularly during negotiations with Vito II's lawyer. Despite these overwhelming mitigating factors and Vito II's lack of culpability, EA Juliand initially wanted to charge a $50,000 penalty and used that figure as leverage to coerce a $35,000 settlement. It is relevant that EA Juliand threatened a more significant NOVA/NOPS if Vito II did not accept the $35,000 offer, and he imposed a hard deadline for the settlement. Although EA Juliand asserts that the settlement was negotiated by two (2) experienced lawyers, the fact is that EA Juliand had all the power and Vito II, through Ms. Murray, was forced to settle or else face an even higher penalty. These actions demonstrate broad enforcement authority and overzealous and abusive conduct, and, in my view, violate fundamental fairness and compassion.

I note, however, that Ms. Murray conceded in an email that Vito II should bear some responsibility and is not without fault for not keeping up with the NOAA permitting regulations. I agree that ignorance of the law is not an excuse. However, because of the significant mitigating circumstances in this case, Vito II's penalty should be reduced to $5,000, the minimum penalty pursuant to the penalty schedule that existed at the time.

Recommendation

I recommend that the Secretary remit $30,000 to Vito Ciaramitaro II in connection with this Application for Review.

Case 224

NE 0702909 FM/V

F/V Western Sea

Western Sea, Inc., Owner

[redacted] Principal

Daniel Fill, Operator/Complainant

Vessel operator complains about the excessive penalty against him for failing to submit timely VTRs and for failing to report to the IVR system. The enforcement attorney assessed a $510,000 penalty against the owner and operator for fifty one (51) different violations, which forced the vessel operator to accept a $51,000 settlement.

Findings of Fact

Daniel Steve Fill of Sedgwick, Maine is a self-employed fisherman who started fishing when he was thirteen (13) years old. He is a single father to a thirteen (13) year old son and supports his mother and sister, who currently live with him. After graduating from high school in 1982, Mr. Fill began his fishing career as a crew member on a sardine ship. Mr. Fill acknowledges that he is not very educated and as such, has problems keeping up with NMFS requirements. He later became captain of the Duchess II and the Western Sea which are two (2) vessels owned by Western Sea, Inc. Both vessels fished for herring and occasionally landed ground fish. The Western Sea is a 74' dragger that hails from Rockland, Maine. Mr. Fill worked for Western Sea, Inc. until spring, 2008. Around that time, Mr. Fill purchased an old tuna boat in 2008 and invested whatever money he had to make the vessel seaworthy. Special Master Interview with Daniel Fill (Sept. 27, 2011).

On April 4, 2006, NOAA SA James MacDonald issued a written warning to Daniel Fill and the Western Sea. The warning stemmed from Mr. Fill's failure to timely submit FVTRs. In the

Complaint Action Report, SA MacDonald indicated that he would monitor the Western Sea's FVTR submission more carefully over the next year to ensure compliance.

Herring fishing vessels are required to submit weekly landings reports, including any herring discarded at sea, to the IVR system by telephone. The fishermen are required to submit not only hail weights of their catches, but also to identify the approximate location where they caught the fish. NOAA Fisheries Service, Sustainable Fisheries Division, uses data obtained from the IVR system to track the total allowable catch (TAC) of certain species in specific areas. Once the TAC reaches approximately 95%, NMFS officially closes an area to fishing. In addition to the IVR system, NMFS also uses weekly dealer reports and monthly FVTRs submitted by fishermen for data gathering purposes. However, NMFS relies on the IVR reporting because it is the only source of weekly reporting that it receives concerning where fish have been caught.

In and around the 2006 herring season, ███████ of the Maine Department of Marine Resources "(DMR") was handling both the Maine herring reporting requirements as well as the NMFS IVR reporting requirements for much of the Maine herring fleet, including for the Western Sea. It was ██ practice to call the fishing vessels to obtain weekly landing information and, in turn, report this information to the IVR system on behalf of the fishermen. However, prior to the start of the 2007 herring season, ██████ left ██ position and the person who took over ██ responsibilities did not provide the same accommodation. On November 8, 2006, ██████ sent an email to the entire herring fleet. In relevant part, it says, "If you have been emailing or calling me with your IVR numbers you will now have to call them in to MNFS [sic] directly." Email from DMR Employee ██████ to Herring Fleet (Nov. 8, 2006). Stephen Ouellette, Esq., who represents Mr. Fill in this matter, reports that, despite

this email, 10-20% of the herring fleet became non-compliant with NMFS reporting requirements within a month. Special Master Interview with Daniel Fill (Sept. 27, 2011).

On July 26, 2007, SA MacDonald contacted Alison Verry of the Fisheries Statistics Office concerning landing records for the Western Sea. Ms. Verry was unable to locate any records in the IVR database from the Western Sea for the entire 2007 year. Mr. Fill had not called into the IVR system to report herring landings during a nine (9) week stretch from May to August 2007. Further, Mr. Fill failed to submit FVTRs in a timely manner on thirty nine (39) different fishing trips between May and August 2007. In total, FVTRs had not been filed on 4,247 metric tons (9,592,000 lbs.) of herring landed in 2007. Offense Investigation Report by SA James MacDonald, p. 8 (Aug. 8, 2007).

On August 2, 2007, SA MacDonald spoke to Mr. Fill concerning the Western Sea's non-reporting issues. During the conversation, Mr. Fill indicated that he knew he was behind on his reporting, but explained that he is a single actor that has to do everything for the vessel. In fact, Mr. Fill provided SA MacDonald with copies of fifteen (15) FVTRs that had been filled out, but not yet sent to NMFS. The FVTRs had been due on July 15, 2007. SA MacDonald seized those particular FVTRs. Id. at 7.

Further, Mr. Fill had not yet completed any FVTRs for the period between June 22, 2007 and August 2, 2007. However, he documented each trip meticulously in a log book, and provided copies to SA MacDonald. Finally, asked whether he had been reporting to the IVR system, Mr. Fill indicated that he had lost the number and would contact another fisherman for the number.

According to EA Charles Juliand, late reporting can be just as serious a problem for fisheries managers as non-reporting. The late IVR reporting created total uncertainty as to where the Western Sea caught the huge amounts of herring that it landed and deprived fisheries managers of timely discard information. Because each herring management area is allotted a limited amount of herring (i.e. a quota), it is vital to the program that the owners/operators timely and accurately call in. Each report is important because each one either reduces the amount of quota remaining to be caught by permitted fishers in that area during the balance of the fishing year, or, in the case of negative reports, informs NOAA that vessels are not actively fishing. Reports of poundage called in to the IVR program must be both timely and accurate to ensure that each participant in the fishery can fish for the maximum allowable catch from a given area but no more. These requirements are crucial to NOAA's efforts to track the number of vessels engaged in the fishery and their harvest amounts by area, perform accurate stock assessments, and monitor compliance in a timely manner. When sloppy or haphazard compliance with reporting and call-in requirements (as well as deliberate misreporting and non-reporting) takes place, it becomes extremely difficult for NOAA to effectively manage the herring fishery. Response by EA Charles Juliand, p. 5. EA Juliand also notes that "serious violations of the law require the imposition of substantial penalties to deter those individuals who ignore the regulations from engaging in illegal behavior in order to realize a short term financial gain." Id. at 1.

It should be noted that, after the encounter with SA MacDonald, Mr. Fill sent NMFS all of the requisite FVTRs. Additionally, on August 3, 2007, Mr. Fill called the IVR system and reported approximately 9,760,000 lbs of herring for the entire 2007 herring season. He

subsequently reported three (3) more herring landings during the months of August and September 2007. Memorandum from Alison Verry, Fishery Statistics Office, to the Record (September 6, 2007). In short, Mr. Fill actively tried to comply with the requirements after he was notified of the late filings.

Further, Hannah Goodale, Supervisory Policy Analyst in the Sustainable Fisheries Division, urged that there be a severe penalty assessment against the Western Sea in order to "provide an incentive for other industry members to comply with the reporting requirements." Memorandum from Hannah Goodale, Supervisory Policy Analyst, Sustainable Fisheries Division, to SA James MacDonald (undated).

On September 7, 2007, EA Juliand issued a NOVA to Daniel Fill and Western Sea, Inc., charging them, jointly and severally, with fifty-one (51) counts of late or non-reporting of FVTRs and failing to call into the IVR system to report catches. EA Juliand assessed a $10,000 penalty for each instance in which Mr. Fill did not call into the IVR system and for each instance in which Mr. Fill failed to timely submit a FVTR, even though FVTRs are required to be submitted to NMFS no later than the 15th of the month following the fishing activity. Thus, total penalties of $510,000 were assessed. In addition, EA Juliand assessed a two (2) year vessel permit sanction on the Western Sea.

Mr. Fill retained counsel, Stephen Ouellette, separate from Western Sea, Inc., to challenge what he believed to be an excessive penalty assessment. Mr. Ouellette requested a hearing on behalf of Mr. Fill, but continued to engage in settlement discussions with EA Juliand.

Ultimately, EA Juliand offered a compromised settlement of $127,500. EA Juliand then suspended $76,500 of the penalty resulting in a $51,000 settlement. It was provided that Mr. Fill would be subject to an eight (8) month operator permit sanction if he committed a violation within two (2) years of the date of the agreement. The Settlement Agreement was signed on January 23, 2008. Mr. Fill made several payments but ultimately could not meet the monthly payments outlined in the payment schedule. Mr. Fill has paid $26,000 to date with a balance due to NOAA, including interest, of not less than $26,266.66. Email from Ann Favaza to Donna Lee Mclemore (Sept. 27, 2011).

Western Sea, Inc. signed a separate Settlement Agreement on January 24, 2008 and paid a $38,500 compromised penalty. Western Sea, Inc. Settlement Agreement (Jan. 24, 2008). Mr. Fill and Western Sea, Inc. were charged jointly and severally for the penalty assessed in the NOVA. Interestingly, this is the only case of all the cases reviewed in which the owner of a fishing vessel paid less of a penalty than the captain for the captain's violation.

Discussion

Mr. Fill argues that NMFS did not make any attempt to contact him directly after ██ ████ no longer reported to the IVR system on his behalf. Further, he claims that NMFS allowed his violations to multiply over time. Finally, he argues that the excessive penalty assessment forced him to settle for an unreasonable amount because of the risk that, on appeal to an ALJ, there was a likelihood that he would be found liable for a $510,000 penalty. Special Master Interview with Daniel Fill (Sept. 27, 2011).

In response, EA Juliand maintains that the assessed penalty of $10,000 for each count was reasonable under the nature and circumstances of the violations. He suggests that the

$10,000 for each count was within the lower end of the suggested penalty range. Finally, he notes that the "repetitive violations" involved more than 9 million lbs of herring, and that Mr. Fill had previously received a written warning about the FVTRs. Response by EA Charles Juliand, p. 3. Under the Secretarial Decision Memorandum of March 16, 2011, I am permitted to review cases where GCEL attorneys charged excessive penalties in a manner that unfairly forced settlement. This case meets that standard.

Mr. Fill is a hardworking fisherman of limited financial means who had difficulty keeping up with FVTR reporting requirements despite his intention to comply. In fact, when SA MacDonald boarded the Western Sea on August 2, 2007, Mr. Fill had already filled out FVTRs, but had not yet submitted those reports to the NMFS office. I find credible Mr. Fill's testimony that he was overwhelmed by the combined burden of operating the vessel and keeping up with reporting requirements imposed by NOAA. Furthermore, Mr. Fill found it difficult to adapt to the new IVR reporting requirements after [redacted] left [redacted] position with the Maine DMR. It was not Mr. Fill's intention to violate the reporting regulations for personal gain; his failures were the product of considerable inadvertence, but were not purposeful.

EA Juliand assessed a $510,000 penalty for roughly nine (9) weeks of non-reporting to the IVR system and failing to submit FVTRs. A $510,000 penalty assessment is wholly inconsistent with fundamental fairness and common sense. I fail to see how a $510,000 penalty assessment differs from a $5,000 penalty for the purposes of removing "the incentive to commit further violations." I also fail to see how Mr. Fill realized any "short term financial gain" by "engaging in illegal behavior." Response by EA Charles Juliand, p. 1. I give weight to

the fact that Mr. Fill reported all of his landings promptly after being notified that he was not in compliance with reporting requirements.

I understand that EA Juliand's $510,000 penalty assessment was motivated in part by SA MacDonald and Ms. Goodale's urging of a stiff penalty as an incentive to other Maine herring fishermen to comply with the reporting requirements. I also understand that it is important for NOAA Fisheries Management to maintain accurate statistics in order to precisely predict the TAC and to know when to close a particular area for fishing. However, this case should have focused more on compliance rather than punishment. If the reporting numbers are absolutely crucial for the NMFS Fisheries Division, then NOAA personnel could have made more of an effort to increase compliance and to actively obtain the necessary data. I find that the $510,000 penalty assessment and subsequent $51,000 settlement did little to address the non-compliance issue because it served only to imperil an otherwise hardworking fisherman of modest financial means.

Given the reoccurring nature of these violations, together with the fact that the FVTRs were required to be submitted on a monthly basis, I conclude that it would be more appropriate if Mr. Fill was assessed a penalty for each month of non-compliance for the failure to call into the IVR violations and for failure to timely submit FVTRs. Mr. Fill's violations took place during three (3) months between May and August 2007. Accordingly, Mr. Fill should then be charged six (6) counts: three (3) for failure to timely submit FVTRs, and three (3) for failure to report to the IVR system. Assuming a minimum penalty of $5,000 for each count, which is at the lowest end of the penalty schedule, the total assessed penalty in this case should be $30,000. This amount is more in line with the $38,000 settlement paid by the Western Sea

owner. Mr. Fill has paid a total of $26,000 so far, and owes a balance of $26,266.66. Because of Mr. Fill's personal circumstances as a single parent who also supports his mother and sister, I find that $26,000 is a fair and reasonable settlement for a penalty that should have been $30,000.

Recommendation

I recommend that the Secretary forgive Mr. Fill's remaining balance owed to NOAA and accept his prior payment of $26,000 in full satisfaction of the settlement of this case.

Case 225

NE 020006 FM/V

F/V Lady Caroline II and F/V Nancy A

Edward Ahearn, Jr., Owner/Operator

Fisherman complains about the excessive assessed penalties totaling $280,000. Fisherman admits to attributing excess fish from one vessel to another. Fisherman later provided false documents in response to a court-ordered subpoena. He settled for $100,000.

Findings of Fact

Edward Ahearn, Jr. of Waretown, New Jersey is a fourth generation fisherman. Mr. Ahearn previously owned the 39' Nancy A, a fiberglass gillnet vessel named after his wife, and continues to own the Lady Caroline II and the Mary Ann in his personal capacity. He agreed to sell one of his three (3) vessels, which turned out to be the Nancy A, in connection with a 2004 Settlement Agreement with NOAA. Mr. Ahearn maintains two (2) vessels because they allow him to maximize DAS to catch primarily monkfish out of Point Pleasant, New Jersey.

On January 11, 2002, SA Christopher Musto and Commanding Officer (CO) Clint Dravis of the New Jersey Division of Fish and Wildlife were conducting a commercial fisheries inspection in the port of Point Pleasant, New Jersey. SA Musto observed the Lady Caroline II offloading and he proceeded to the vessel to conduct an inspection. Mr. Ahearn described the encounter as "aggressive" and "forceful." Special Master Interview with Edward Ahearn (Dec. 8, 2011). SA Musto noticed that Mr. Ahearn, who was the captain of the Lady Caroline II, had already filled out the FVTR prior to offloading the monkfish. On the FVTR, Mr. Ahearn reported landing 3,300 lbs. of monkfish and 260 lbs. of monkfish livers. When SA Musto asked Mr. Ahearn how he knew exactly how much whole monkfish he had onboard, Mr. Ahearn stated that he made

an assumption. Mr. Ahearn then asked, "That's all you are allowed for the day, right?" When SA Musto asked if he had listed on the FVTR all the fish he had on board, Mr. Ahearn stated "maybe a little more, or [a] little less and I have livers." Offense Investigation Report by SA Christopher Musto, p. 6 (Feb. 11, 2002). In fact, Mr. Ahearn had 4,100 lbs. of monkfish on board and 360 lbs. of monkfish livers.

Mr. Ahearn was also running his DAS clock. SA Musto notified Mr. Ahearn that allowing his DAS clock to run violated the DAS regulations. Mr. Ahearn questioned why SA Musto insisted that he turn off his DAS clock, despite the fact that the running clock adversely affected him only. EA Casey responds that the more time the clock records as fishing time, the more fish the vessel was allowed to land. Therefore, Mr. Ahearn's running of his DAS clock undermined control measures designed to sustainably manage monkfish. Response by EA Deirdre Casey, p. 5. Nonetheless, on the occasion in question, Mr. Ahearn promptly called into the DAS program to stop the clock from running.

Mr. Ahearn and his crew continued to offload monkfish and stopped doing so upon reaching the legal limit of 3,320 lbs. Approximately 800 lbs. of monkfish remained onboard the Lady Caroline II.

A disagreement then ensued between SA Musto and Mr. Ahearn concerning the meaning of the word "land", though, Mr. Ahearn maintains that the discussion was civil.[1] Special Master Interview with Edward Ahearn (Dec. 8, 2011). Specifically, Mr. Ahearn erroneously contended that, so long as he did not offload the remaining monkfish, they would not count as being

[1] 50 C.F.R. § 600.10 define "land" as: "to begin offloading fish, to offload fish, or to arrive in port or at a dock, berth, beach, seawall, or ramp." It is a broad definition that includes Mr. Ahearn's actions on this date.

"landed." He claimed he had intended to leave the monkfish onboard overnight. Meanwhile, SA Musto asserted that Mr. Ahearn had to offload the entire catch. SA Musto called EA J. Mitch MacDonald, who notified him that his interpretation was correct and that he should seize the entire catch if Mr. Ahearn continued to resist. Offense Investigation Report by SA Christopher Musto, pp. 8-9 (Feb. 11, 2002).

Mr. Ahearn finally obliged after being informed that his actions could constitute interference with an investigation. He instructed his crew to offload the remaining 800 lbs. of monkfish, and about 360 lbs. of monkfish livers. Id. at 10. SA Musto seized, in total, 4,100 lbs. of monkfish and 360 lbs. of monkfish livers from the Lady Caroline II and sold the catch for $5,946.00 that same day. Id. at 11. On January 22, 2002, SA Musto issued an EAR to Mr. Ahearn and the Lady Caroline II for landing monkfish overages and for providing a false statement. On January 31, 2002, SA Musto changed the false statement charge to submitting a false FVTR. Id. at 12.

Subsequently, SA Musto learned that the Lady Caroline II had offloaded 3,300 lbs. of additional monkfish, plus 288 lbs. of livers on the same day at Point Pleasant Fisherman's Cooperative prior to the boarding by SA Musto. Supplemental Investigative Report by SA Christopher Musto, p. 1 (Apr. 15, 2002). SA Musto reviewed the DAS call-in information for the Lady Caroline II and the Nancy A and discovered that [REDACTED] had called into the DAS program on January 11, 2001 purportedly as the operator of the Nancy A at the same time [REDACTED] was a crewmember on the Lady Caroline II. Id.

Further investigation by SA Musto revealed that on four (4) different dates, including January 11, 2001, Mr. Ahearn or [REDACTED] called into the DAS program and made a false

declaration that the Nancy A was fishing, even though the Lady Caroline II was the only vessel then operating. Mr. Ahearn then filed false FVTRs, attributing fish landed by the Lady Caroline II to the Nancy A.

The case was assigned to EA Deirdre Casey and she issued a NOVA and NOPS on September 12, 2002, charging Mr. Ahearn and [redacted] operator of the Nancy A, with four (4) violations occurring on various dates in January 2002:

Count 1: Submitting false FVTRs to NMFS for the Lady Caroline II for December 26, 2001, January 2, 2002, January 6, 2002, and January 11, 2002 ($40,000 individually against Mr. Ahearn);

Count 2: Submitting false FVTRs to NMFS for the Nancy A on December 26, 2001, January 2, 2002, January 6, 2002, and January 11, 2002 ($40,000 joint and several liability against [redacted] Ahearn and [redacted]);

Count 3: Falsely declaring into the DAS program for the Nancy A on December 26, 2001, January 2, 2002, January 6, 2002, and January 11, 2002 ($40,000 joint and several liability against [redacted] Ahearn and [redacted] ; and

Count 4: Making a false statement, to wit, "maybe a little more or little less" than 3,300 lbs. of monkfish and "some livers" onboard the Lady Caroline II on January 11, 2002 ($10,000 against Mr. Ahearn individually).

Accordingly, total penalties assessed equaled $130,000. EA Casey also assessed a thirty (30) day operator permit sanction for Mr. Ahearn, as well as forfeiture of twelve (12) DAS for the Lady Caroline II.

Mr. Ahearn retained Stephen Ouellette, Esq., and he requested a hearing before an ALJ, to be held in New Jersey. On or about March 13, 2003, in response to a court-issued subpoena, Mr. Ahearn submitted to NOAA, through Mr. Ouellette, a false invoice from Southside Marina

for the purchase of fuel on January 6, 2001, for the Nancy A. In addition, on March 13, 2003, Mr. Ahearn, through Mr. Ouellette, submitted a second false document in response to the subpoena, again from Southside Marina confirming the fuel purchase by the Nancy A on January 6, 2001, one of the dates on which Mr. Ahearn alleges the Nancy A went fishing. Finally, Mr. Ahearn submitted a false settlement sheet, through Mr. Ouellette, in response to the subpoena, again purportedly corroborating the fuel purchase that never took place. Response by EA Deirdre Casey, p. 9. Mr. Ahearn had asked the owner of Southside Marina to produce fraudulent invoices for the Nancy A in order to show that Mr. Ahearn made fuel purchases for the vessel on January 6, 2001, when he did not. Supplement to Offense Investigation Report by SA Christopher Musto, p. 6 (Mar. 24, 2003).

Mr. Ouellette comments that it became apparent to him that Mr. Ahearn would have to change his testimony immediately prior to a scheduled deposition. This prompted Mr. Ouellette to consider settlement. Special Master Interview with Edward Ahearn (Dec. 8, 2011). EA Casey clarifies that Mr. Ouellette called EA Casey on the morning of the schedule deposition to say that he could not have his client testify under oath. During a meeting that morning with EAs Casey and MacDonald, SA Musto and ASAC Scott Doyle, EA Casey alleges that Mr. Ouellette admitted that Mr. Ahearn had told him the truth the previous night (May 7, 2003), including that he had provided false records in response to a court issued subpoena. EA Casey then served Mr. Ahearn on or about May 20, 2003, with an amended NOVA and NOPS, charging Mr. Ahearn with submitting three (3) false documents in response to the court's subpoena. Amended Notice of Violation Assessment and Notice of Permit Sanction (May 15, 2003). The

three (3) new counts resulted in an additional $150,000 assessed penalty. Response by EA Deirdre Casey, p. 9.

Settlement discussions began on May 8, 2003, the date Messrs. Ouellette and Ahearn cancelled the deposition, and continued for eleven (11) months. During a telephone conference with the ALJ on November 4, 2003, Mr. Ouellette stated that Mr. Ahearn would stipulate to liability on all counts. Response by EA Deirdre Casey, p. 9.

Because EA Casey had by this time assessed a total of $280,000 in penalties, Mr. Ouellette was prepared to argue inability to pay on the part of his client. Mr. Ahearn's accountant issued a report in March 2004 indicating that Mr. Ahearn had a projected annual income of between $40,000 and $50,000 with approximately $140,000 of equity in his home. Email from EA Deirdre Casey to Stephen Ouellette, Esq. (Mar. 25, 2004). Shortly after receiving this report, EA Casey learned that Mr. Ahearn had refinanced his home without informing NOAA or his accountant. Email from EA Deirdre Casey to Stephen Ouellette, Esq. (Mar. 25, 2004). Further, NOAA announced changes to monkfish regulations which reduced the DAS allocation for vessels. Id. A reduction in the DAS allocation for vessels decreases the value of the federal fishing permit. Both factors affected the analysis provided by Mr. Ahearn's accountant. EA Casey also sought independent appraisals of Mr. Ahearn's three (3) vessels in order to determine their fair market value. According to the appraisal, the three (3) vessels and permits, owned free and clear, had a combined value of $260,000. Email from EA Deirdre Casey to [REDACTED] (Mar. 30, 2004).

Sometime during the protracted settlement discussions, Mr. Ouellette alleges that he received a message on his office telephone, at the end of which the message was a recording of

a privileged conversation between EAs Casey and MacDonald. The conversation was captured inadvertently when EA Casey's telephone failed to disconnect after she left a message on Mr. Ouellette's answering machine. According to Mr. Ouellette, the conversation included a discussion of how NOAA would proceed if the ALJ did not levy a significant enough penalty, including possible criminal prosecution. Mr. Ouellette notes that even if he was successful in arguing inability to pay, his client could serve a significant permit sanction and face the possibility of criminal proceedings. These two (2) factors played a role in influencing his decision to advise his client to settle.

EA Casey maintains that the privileged conversation included a discussion about how NOAA would proceed given Mr. Ahearn's continuing lack of veracity during settlement negotiations and the newly uncovered violations. Response by EA Deirdre Casey, p. 10. The settlement options discussed included possible criminal prosecution of the newly discovered violations. However, EA Casey asserts that she immediately called Mr. Ouellette after she realized that she had inadvertently left the message. When she could not reach him, she called Mr. Ouellette's secretary and instructed her to tell Mr. Ouellette that he should delete the message. Regardless, EA Casey maintains that Mr. Ouellette has never before raised concerns with either EA Casey or EA MacDonald directly concerning the possibility of criminal prosecution against his client until now. Id. at 12.

Despite EA Casey's claim that neither she nor EA MacDonald expressly or implicitly threatened criminal charges if Mr. Ahearn did not settle the case, Mr. Ouellette sought reassurance from the EAs in the Settlement Agreement that if the case settled there would be no criminal prosecution. EAs Casey and MacDonald reassured Mr. Ouellette that they would

not pursue criminal charges against Mr. Ahearn. However, they did not waive the right to bring future charges for actions unknown at the time. Email from EA Deirdre Casey to Stephen Ouellette, Esq. (Apr. 15, 2004). I cannot determine, based on the testimony and written response by EA Casey, whether Mr. Ouellette listened to the privileged message before or after he received EA Casey's message instructing him to delete the message. I do find, however, that Mr. Ouellette's advice to his client to settle was influenced, in part, by the possibility of criminal prosecution against his client, despite the fact that EAs Casey and MacDonald made no direct threats to that effect. That said, it is more likely that Mr. Ouellette advised his client to settle because he learned that Mr. Ahearn had proffered false documents in response to a court subpoena.

On April 22, 2004, Mr. Ahearn reached a settlement with EA Casey whereby he agreed to pay a compromised penalty of $100,000 plus 1% interest by August 1, 2004. EA Casey noted that given the changes in the DAS regulations, which would have severely impacted Mr. Ahearn's ability to pay the assessed penalty, and Mr. Ahearn's resulting anticipated inability to service new debt, the settlement amount was more than what NOAA would have received had the case gone to a hearing because the payment originated from Mr. Ahearn's father. Memorandum to File. Mr. Ahearn avoided a possible permit revocation of the Lady Caroline II by settling the case. Response by EA Deirdre Casey, p. 14.

In addition to admitting all the violations charged, Mr. Ahearn forfeited carry-over DAS for the Lady Caroline II and the Mary Ann. Mr. Ahearn also agreed to sell one (1) of his three (3) vessels by August 20, 2004, and agreed that a failure to do so would result in a permit sanction for the Nancy A until the sale was made. The purpose was to limit Mr. Ahearn to two (2) fishing

vessels only. Email from EA Deirdre Casey to Stephen Ouellette, Esq. (April 9, 2004). Finally, Mr. Ahearn forfeited his interest in the $5,946.00 proceeds stemming from the January 11, 2002 seizure. The Settlement Agreement contained the standard default and acceleration clauses common to NOAA settlement agreements. In this case, failure to adhere to the terms of the Settlement Agreement would automatically reinstate the $280,000 assessed civil penalty. Mr. Ahearn borrowed $100,000 from his parents' retirement account, and he issued a check for $100,000 payable to the Department of Commerce on April 29, 2004.

Discussion

Mr. Ahearn admits to all of the alleged violations, including attributing fish from one of his vessels to another. He further admits that "when confronted with the gravity of the violation that I had committed, I attempted to avoid it, further compounding my problems. I now know what I did was wrong." Application for Review. Mr. Ahearn agreed to settle the case because he believed the penalty may have increased before an ALJ beyond the $280,000 assessed penalty and he was faced with possible criminal charges. He claims that the settlement caused significant hardship for his family, particularly at a time when his children were close to college age. Finally, Mr. Ahearn claims that the possibility of criminal prosecution motivated his parents' to assist him financially. Special Master Interview with Edward Ahearn (Dec. 9, 2011).

In response, EA Casey states that the penalty assessment in this case was based on the deliberate scheme to undermine two (2) critical controls in the monkfish fishery management plan, accurate reporting through FVTRs and effort control through DAS. "The accuracy of the FVTRs and dealer reports is crucial to the preservation of the fishery resources because it

provides for the collection of reliable data essential to effectively assess the stock of fish and provide for sound conservation management to ensure that the stock is adequate for future fishermen." In The Matter Of: Clarke A. Reposa, Sr. Todd Chappell Reposa, 2004 WL 3106012 (NOAA); see 16 U.S.C. §1801(a)(7) and (8); see also In the Matter of: Matsubun Gyogyo Co., Ltd, 2 O.R.W. 466, 1981 NOAA Lexis 18, at *12 (NOAA). At the time of the violations, vessels were not authorized to consolidate permits or DAS (i.e., fish the allocation of more than one (1) permit on one (1) vessel). 50 C.F.R. § 648.4(a) (9) (G). The "inefficiency" of running multiple vessels was built into the control measures. According to EA Casey, Mr. Ahearn's intentional false statements posed an additional and significant threat to the enforcement of these critical control regulations. Once his scheme was revealed, and he was charged, Mr. Ahearn took extraordinary step of soliciting false records and statements from purported witnesses to conceal his underlying lies. Providing false records in response to a court-issued subpoena undermines the integrity of the administrative process and warranted significant penalties. Response by EA Deirdre Casey, p. 15.

The basic facts of this case are not disputed. Indeed, Mr. Ahearn admits to the violations alleged in the first NOVA, and substantial evidence suggests that Mr. Ahearn was culpable for the violations alleged in the amended NOVA. Not only did Mr. Ahearn knowingly disregard DAS regulations and accurate reporting requirements, but he also went to great lengths in an attempt to cover up his violations. Furthermore, his claim that he decided to settle because an ALJ could have raised his penalty beyond $280,000 is not credible. The decision to settle was motivated largely by the discovery that he had submitted false documents in response to the subpoena. Therefore, the sole issues presented are whether the

total penalty assessment was excessive and whether the subsequent settlement was unfairly coerced.

Under the Secretarial Decision Memorandum dated March 16, 2011, I am permitted to review NOAA enforcement cases where a GCEL attorney assessed an excessive penalty that unfairly forced settlement. EA Casey initially assessed a $130,000 penalty for four (4) counts of falsifying FVTRs, falsely declaring into the DAS system, and making a false statement. With respect to the false FVTRs and the DAS call-in violation, those violations intentionally undermined enforcement efforts. Mr. Ahearn also landed multiple trips from one (1) vessel during the same day. EA Casey asserts, and I find convincing, that the "inefficiency" of running multiple vessels was built into the control measures. Response by EA Deirdre Casey, p. 15. Therefore, Mr. Ahearn's violations warranted significant penalties.

Mr. Ahearn was later assessed $150,000 for providing NOAA with three (3) false documents pursuant to a court-issued subpoena. Substantial evidence in the case file supports the validity of these counts. By providing false documents pursuant to a court-ordered subpoena in order to cover up his previous violations, Mr. Ahearn committed serious civil and, possibly, criminal violations. Further evidence suggests that Mr. Ahearn refinanced his home without notifying the proper parties during settlement discussions. Mr. Ahearn was also ably represented by counsel who understood the significance of intentionally providing false documents. Under the totality of these extraordinary circumstances, including Mr. Ahearn's deliberate disregard of NOAA regulations and subsequent efforts to provide false documents in response to a subpoena, a $100,000 penalty, plus interest and the forfeiture of his catch, was fair. By settling this case, Mr. Ahearn also avoided permit sanctions on his vessels. Though he

had to sell the Nancy A to satisfy the Settlement Agreement, the purpose was to limit Mr. Ahearn's fishing fleet to two (2) vessels. Since he owned the Nancy A free of encumbrances, he could have used the sale proceeds to pay a significant portion of the settlement amount, but for one reason or another, elected to borrow the settlement payment from his parents. I therefore cannot find that equitable relief is warranted in this case.

Recommendation

I recommend that the Secretary take no action concerning this Application for Review.

Case 226
NE 010098
F/V Katie Paul
Lauren Jo, Inc., Owner
Walter T. Allyn, Principal
James Allyn, Operator

and

NE 010099
F/V Matthew Mellisa
Lauren Jo, Inc., Owner
Walter T. Allyn, Principal
[redacted] Operator

Fisherman complains that NOAA coerced a settlement by seizing the entire catch as a means of forcing him to accept an excessive penalty.

Findings of Fact

Walter Lawrence Allyn at 83 years old is a retired commercial fisherman who lives in Stonington, Connecticut. Mr. Allyn started fishing in 1946-1947, left the fishing business for approximately thirty-seven (37) years and re-entered the business in 1983 when he bought the Lauren Jo through Lauren Jo, Inc. Mr. Allyn's oldest son, David, operated the Lauren Jo until she was sold in 1990 to purchase the Matthew Mellisa, which Mr. Allyn operated. In 1993, Mr. Allyn purchased the Katy Paul which was principally operated by his youngest son, James. Both vessels were owned by Lauren Jo, Inc. The Katy Paul was sold four (4) to five (5) years ago. In 2001, Mr. Allyn's son, James, Mr. Allyn and [redacted] Mr. Allyn's first mate for years, operated the Katy Paul and the Matthew Mellisa out of Stonington, Connecticut. Mr. Allyn managed the vessels.

On March 13, 2001, the Katy Paul was offloading scallops at the Town Dock in Stonington, Connecticut when she was boarded by Connecticut Environment Police (CEP). At this time, the Matthew Mellisa was standing by at the entrance to Stonington Harbor to offload her scallop catch. The CEP officer noted that the Katy Paul's Federal Sea Scallop permit had expired. When Mr. Allyn was informed that the permit had expired, he volunteered to the CEP Officer that if the Katy Paul did not have a valid permit, the same would be true for the Matthew Mellisa. That proved to be the case.

On March 13, 2001, EAR's were issued to Lauren Jo, Inc. as the owner of both the Katy Paul and Matthew Mellisa and to the operators of both vessels for possessing scallops without a valid permit. NOAA SA Christopher McCarron seized both vessels' catches which were subsequently sold. The sum of $24,154.05 was realized from the sale of the catch from the Katy Paul and $36,537.80 from the sale of the Matthew Mellisa's catch for a total of $60,691.85. After the catches were seized, Mr. Allyn paid his crew and all expenses of the trip as if the catch had not been seized.

Federal vessel permits for scallops for the year 2000 expired on February 28, 2001. NOAA permit records indicate that 2001 scallop renewal applications were mailed to vessel owners on January 12, 2001. Mr. Allyn told the SAs that he had not received renewal permit applications for the Katy Paul or the Matthew Mellisa. However, Mr. Allyn had received short term permits for Atlantic herring issued December 27, 2000, received in early January 2001, effective January 10, 2001 and expiring April 30, 2001. Mr. Allyn's lawyer opined in a fax dated March 28, 2001 to EA Charles Juliand that "the receipt of these permits in January gave the

owners the belief that these permits were the renewals for the upcoming year." Faxed Letter from Stephen Ouellette, Esq. to EA Charles Juliand (Mar. 28, 2001).

On July 31, 2001, EA Juliand issued a NOVA to each vessel for fishing for Atlantic sea scallops without a valid permit. In addition to the seizure ($60,691.85), he assessed each vessel an $18,000 penalty. On August 1, 2001, Mr. Allyn, on behalf of Lauren Jo, Inc., signed a consolidated Settlement Agreement in both cases in which it was agreed that a compromise penalty of $10,000 against each vessel for a total of $20,000 would be paid from the proceeds of the sale of the seized catch. The balance of the sale proceeds ($40,691.85) was returned to Lauren Jo, Inc.

Discussion

Mr. Allyn asserts that the penalty was excessive under the circumstances of this case, and that he was forced to settle if he wanted to recoup payments he previously made to the crew and for expenses of the trip from the proceeds of the seized catch. As far as Mr. Allyn was concerned, a prolonged, expensive appeal before an ALJ was not an option.

Mr. Allyn makes the following arguments in support of this application for a return of some or all of the penalty:

1. Neither the vessels nor operators had any prior violations;
2. The violation occurred within days of the permit expiration date;
3. He had not received the renewal applications for both vessels that NOAA allegedly sent to him on January 12, 2001;
4. He had received short-term, Atlantic herring permits from NOAA for both vessels at or about the time that he would have received scallop renewal permits and placed them on board his vessels in the mistaken belief that they were his scallop permits;

5. NOAA continued to issue sailing numbers for both vessels after the permits expired;
6. Mr. Allyn self reported a no permit violation for the Matthew Mellisa which was waiting offshore to offload; and
7. As soon as he realized that his permits had expired, he went to Gloucester, Massachusetts the next day (April 15, 2001) to renew his permits.

EA Juliand states in his Response that "[a]ll of Mr. Allyn's arguments were considered by agency counsel [EA Juliand]. After said consideration, agency counsel agreed to settle for no civil penalty, no permit sanction time, and take only some of the proceeds from the seized catches, despite the fact that both vessels were clearly in violation and their entire catches were harvested illegally." Response by EA Charles Juliand, p. 5.

However, prior to settlement, the total potential loss to the vessel owner was in excess of $96,000 plus the cost to the owner who had paid the crew on board both vessels and all expenses of the trip for both vessels. I have reviewed many cases involving seized catches. In most of those cases, the vessel owner had to pay the cost of the trip but the crew would not get paid unless the owner was able to recoup some or all of the crew's share in the seized catch. I have reviewed two (2) cases from the Southeast Region where the EA did not seize the catch in order to allow the corporate vessel owner and captain use of the catch proceeds, during the pendency of the case, to pay the crew and the cost of the trip. Mr. Allyn was not given that option by EA Juliand and instead was threatened with not only the loss of the catch but a substantial penalty. See, Response by EA Cynthia Fenyk in Cases 102A and 102B.

The question presented in this Application for Review is whether EA Juliand "charged excessive penalties in a manner that unfairly forced settlement." Secretarial Decision Memorandum (Mar. 16, 2011). Under the circumstances of this case, I find that the penalty

assessed to the owner of both vessels of $18,000 for each vessel for a total penalty of $36,000; as well as seizure of the catch for a total of $60,691.85 for both vessels for a total overall potential loss of over $96,000, to be excessive. Further, I find that Mr. Allyn was forced to settle this case because he needed proceeds from the catches to reimburse himself for payments he made to the crew and for the expenses of the trip for each vessel. The case settled immediately after the NOVA issued which supports Mr. Allyn's argument that he needed to make a deal quickly to get reimbursed for his payments to the crew and expenses for the trip. Considering all of the circumstances of this case, I find compelling evidence that a fair and reasonable settlement of the case would be to treat the violations as a first offense for each vessel and assess the then minimum penalty of $5,000 for that vessel's failure to have a valid scallop permit. Therefore, I recommend that the Secretary remit $10,000 to Lauren Jo, Inc. as the owner of both vessels.

Recommendation

I recommend that the Secretary remit $10,000 to Lauren Jo, Inc.

Case 227
F/V Ruth and Pat
NE 0703972
Margaret F. Inc., Owner
Mark C. Bichrest, Operator

Fisherman was coerced into paying an excessive penalty.

Findings of Fact

Mark C. Bichrest lives in Harpswell, Maine and has been a commercial fisherman since 1977. Mr. Bichrest targets mostly herring as operator of the 90' fishing vessel Ruth and Pat purchased in 2006, owned by Margaret F., Inc. and moored in Portland, ME. The Ruth and Pat offloads at Ocean Crest Seafood in Gloucester, Massachusetts and the Portland Fish Exchange. In 2000, the Margaret F., Inc., a corporation controlled by Mr. Bichrest, purchased the 70' bottom trawler, Jennifer + Emily, which primarily targets ground fish, has been operated the last few years by [redacted] and is moored and offloads in Gloucester.

The Ruth and Pat was purchased in 2006 but Mr. Bichrest did not start fishing for herring until the week beginning June 24, 2007 (week 26). Special Master Interview with Mark Bichrest (Dec. 9, 2011). Mr. Bichrest had been issued a federal herring all areas limited access permit effective June 22, 2007. Id. Holders of this permit are required not only to file FVTRs and properly maintain logbooks, but also to call into the IVR (Interactive Voice Reporting System) each Tuesday for the previous weeks' herring catch even if no herring was caught that week. Id.

When Mr. Bichrest started fishing for herring in June 2007, he was unaware of the IVR reporting requirement. Sometime in August 2007, Mr. Bichrest learned from other fishermen that they were getting letters concerning failure to report into the IVR system. As a result, on

August 23, 2007, the Ruth and Pat called in a total of 1,250,900 lbs. of herring covering reporting weeks 26 through 32, and on August 24, she called in an additional 186,100 lbs. of herring covering weeks 33 & 34. On September 20, someone from the Ruth and Pat contacted NOAA to say they could not get through to the IVR call-in system to report their most recent herring trips, and the NOAA official entered three (3) trips for the Ruth and Pat totaling 940,700 lbs. of herring covering weeks 35-37. On October 12, the Ruth and Pat called in a total of 1,892,660 lbs. of herring covering weeks 38 through 41. Out of 16 reporting weeks, two (2) IVR reports were received by the due date (weeks 34 and 41); three (3) IVR reports were over a month late and the remainder were late by either a few weeks or days. The following is a summary of the Ruth and Pat's IVR reporting history:

Permit	Week	Week Ending Date	Report Due Date	Date Reported	Lbs. Kept	Lbs. Discarded
410574	26	6/30/2007	7/3/2007	8/23/2007	119,600	0
410574	27	7/7/2007	7/10/2007	8/23/2007	0	0
410574	28	7/14/2007	7/17/2007	8/23/2007	142,400	0
410574	29	7/21/2007	7/24/2007	8/23/2007	197,300	0
410574	30	7/28/2007	7/31/2007	8/23/2007	404,100	0
410574	31	8/4/2007	8/7/2007	8/23/2007	162,600	0
410574	32	8/11/2007	8/14/2007	8/23/2007	224,900	0
410574	33	8/18/2007	8/21/2007	8/24/2007	117,300	0
410574	34	8/25/2007	8/28/2007	8/24/2007	68,800	0
410574	35	9/1/2007	9/4/2007	9/20/2007	634,700	0

410574	36	9/8/2007	9/11/2007	9/20/2007	105,000	0
410574	37	9/15/2007	9/18/2007	9/20/2007	201,000	0
410574	38	9/22/2007	9/25/2007	10/12/2007	498,100	0
410574	39	9/29/2007	10/2/2007	10/12/2007	528,960	0
410574	40	10/6/2007	10/9/2007	10/12/2007	398,800	0
410574	41	10/13/2007	10/16/2007	10/12/2007	465,800	0

Attachment 3 to Offense Investigation Report by SA James MacDonald (Oct. 16, 2007).

On August 22, 2007, SA James M. MacDonald "received information from the NOAA Northeast Sustainable Fisheries Division that the Ruth and Pat appeared on VMS to be actively fishing for herring in the Gulf of Maine, but that no reports of any landings had been received from her through the IVR system." Offense Investigation Report by SA James MacDonald, p. 8 (Oct. 16, 2007). On August 28, 2007, SA MacDonald boarded the Ruth and Pat in Portland and spoke with Mr. Bichrest who produced a valid operator's permit and a properly maintained logbook. When SA MacDonald asked Mr. Bichrest if he was current with his IVR reporting, he stated that his ex-wife was taking care of his reporting requirements.[1] During this interview, SA MacDonald "stressed the importance of submitting these reports in a timely manner." Id. at 9. On August 30, 2007, two (2) days after SA MacDonald's meeting with Mr. Bichrest aboard the Ruth and Pat, nine (9) FVTRs were filed late on behalf of the Ruth and Pat for fishing trips landed from June 25 through July 31, 2007.

[1] On October 15, 2007, SA MacDonald subsequently confirmed in an interview with [redacted] [redacted] that [redacted] had an agreement with [redacted] to complete the IVR reports for the Ruth and Pat and that [redacted] had no excuse for [redacted] late reporting. Id. at 11.

On October 10, 2007, SA MacDonald sent Mr. Bichrest an EAR for failing to timely report to the IVR system and for failing to timely file FVTRs. On December 12, 2008, EA Juliand issued a NOVA and NOPS to Mr. Bichrest as operator and Margaret F. Inc. as owner of the Ruth and Pat for failing to timely report to the IVR system (8 counts) and for failing to timely file FVTRs (9 counts). The NOVA assessed a penalty of $10,000 per count for a total of $170,000. The NOPS sought a permit sanction of eight (8) months for both the operator and owner of the Ruth and Pat. Mr. Bichrest had no prior violations.

After receiving the NOVA and NOPS, Mr. Bichrest had Stephen Ouellette, Esq. and subsequently Charles Remmel, Esq. represent him in an appeal.

As a result of negotiations between Messrs. Remmel and Juliand, a Settlement Agreement was signed on April 27, 2009 that provided for a compromise penalty of $85,000 (half of the assessed penalty of $170,000). NOAA suspended $57,000 of the penalty if Respondents did not commit a federal fisheries violation relating to catch reporting within eighteen (18) months from the date of the Agreement. Mr. Bichrest was required to make a cash payment of $8,000 on the settlement date and $20,000, plus interest paid in five (5) equal installments every other month. The operator and vessel permit sanction of two (2) months was suspended. Mr. Bichrest "was running scared" and settled the case because of the potential of a $170,000 penalty or more, as well as operator/owner permit sanctions for eight (8) months, if he appealed his case to an ALJ.

Discussion

Mr. Ouellette, who represented Mr. Bichrest in his Application for Review of this case, noted that NOAA receives daily reports of vessel landings from dealers because they are

required to report every pound. As such, he believes that NOAA should have known whether a vessel failed to call into the IVR system or failed to file FVTRS. Yet, the Agency's response was to do nothing until August 2007 when many fishermen, including Mr. Bichrest, were out of compliance. "If the true intent was to bring people into compliance… why wait six months until you bother to tell them…" Statement of Counsel during Special Master Interview with Mark Bichrest (Dec. 9, 2011).

EA Juliand responds to each of these arguments as follows:

Importance of FVTRs

FVTRs are required to be submitted by owners or operators of vessels within fifteen (15) days of the end of each calendar month for all trips taken that month. Each FVTR is required, by 50 CFR §648.7(b)(1)(i), to include the vessel name, the USCG documentation number, the permit number, the date/time sailed, the date/time landed, the trip type, the number of crew, the gear fished, the quantity and size of gear mesh/ring size, the chart area fished, the average depth, the latitude and longitude of areas fished, total hauls per area fished, average tow time duration, hail weight (in pounds) of all species or parts of species (such as monkfish livers) landed or discarded, the name of the dealer who receives the fish, that dealer's permit number, the date sold, the port and state of landing, and the vessel operator's name, signature and operator permit number. Finally, if no fishing trip is made during a month, a report stating so must be submitted. How NOAA uses the required information varies depending upon its changing needs. Additionally, the required information is compared with other sources of information, including written reports required to be submitted to NOAA by fish dealers and direct observation by enforcement personnel, to provide NOAA with a way to cross-check

information and to encourage accurate reporting. See In the Matter of Clarke A. Reposa, Sr. et. al., 2003 WL 21734021 (NOAA) *13.

Dealer Reports

While it is true that dealers are supposed to report all landings, dealers do not file those reports daily (and not all dealers report in an accurate and timely manner).

Failure to Warn

Mr. Ouellette's "belief" that NOAA was aware of the violations at issue immediately upon their commission and deliberately let the respondents pile up the violations before referring the matter for enforcement action is baseless. According to the sworn testimony of Ms. Alison Verry (who reviewed IVR reports for NMFS), it was not until "mid to late 2007" that NOAA specifically began to look at vessels that had not been reporting their herring to the IVR system on a timely basis. Response by EA Charles Juliand, p. 7.

I find that IVR reporting requirements are important and should not be ignored by fishermen; that dealer reports are not sufficient to relieve fishermen of their reporting requirements; and I do not find that NOAA deliberately failed to warn fishermen that they were out of compliance in order to allow violations to multiply over time.

Under the Secretarial Decision Memorandum dated March 16, 2011, I am permitted to review cases where GCEL attorneys charged excessive penalties in a manner that unfairly forced settlement. Furthermore, I am permitted to review cases involving conduct specifically enumerated in the September 2010 OIG Report, including "broad and powerful enforcement authorit(y) [that] led to overzealous or abusive conduct." OIG Final Report (Sept. 2010). With

respect to the latter, I find that EA Juliand exhibited overzealous or abusive conduct when he assessed $10,000 for each FVTR that Mr. Bichrest filed late, which unfairly forced settlement.

A written warning was appropriate in the circumstances. This was Mr. Bichrest's first NOAA violation. When SA MacDonald boarded his vessel on August 28, 2007, Mr. Bichrest was cooperative and presented an accurately-maintained logbook. When SA MacDonald made him aware of the importance of FVTR filings, Mr. Bichrest submitted all the late reports within two (2) days and remained in compliance after that date. Despite his cooperation and demonstrated willingness to comply with the regulations, EA Juliand still assessed a significant penalty for each late filed FVTR. Unlike Daniel Fill, see supra Case 224, who had previously been warned about his late submission of FVTRs before being assessed a significant penalty, Mr. Bichrest received no such warning. Mr. Bichrest was not afforded any benefit of the doubt. Because of his lack of culpability, and the fact that FVTR compliance objectives were met after a simple oral warning from SA MacDonald, I find that the nine (9) counts in the NOVA for failure to file timely FVTRs demonstrated an exercise of overbroad enforcement authority.

The same cannot be said concerning the eight (8) counts for failure to report to the IVR system. Mr. Bichrest should have known about the requirement to make timely reports to that IVR system. Therefore, EA Juliand was justified in assessing a penalty for the violation.

I now turn to the penalty assessment in this case. EA Juliand maintains that the assessed penalty of $10,000 for each count of seventeen (17) counts was reasonable given the nature and circumstances of the violations. He suggests, in this and similar cases, that $10,000 per count was within the lower end of the suggested penalty range. Additionally, he notes the repetitive nature of the violation over a three (3) month period. Nevertheless, I find that a

$170,000 assessed penalty and a threatened eight (8) month vessel and operator sanction were excessive, especially since Mr. Bichrest was new to herring fishing, had only obtained a permit in June 2007 (week 26), was unaware of the IVR reporting requirement, and was immediately compliant with FVTR submission requirements after he received an oral warning from SA MacDonald on August 28, 2007.

EA Juliand assessed $10,000 for each count for failing weekly to report to the IVR system (8 counts) and for failing monthly to timely file FVTRs (9 counts). Because of the recurring nature of these violations, and consistent with my findings in other cases (Case 224: Daniel Fill; Case 47: Agger Fish Company, Inc., Report and Recommendation of the Special Master Concerning NOAA Enforcement Action of Certain Designated Cases (Apr. 2011), I conclude that it would be more appropriate if Mr. Bichrest were assessed a penalty for each month of failure to call into the IVR system. Mr. Bichrest's violations took place over a period of one half (3.5) months. Keeping in mind that this was Mr. Bichrest's first offense, the penalty should be the minimum under the existing penalty schedule ($5,000) charged for the IVR offense for a total of $15,000 over three (3) months.

With respect to the FVTR violations, however, I find that a written warning would be more appropriate because 1) Mr. Bichrest was immediately compliant after an oral warning; and 2) Mr. Fill in Case 224 received a written warning before he was assessed a penalty for the same violations. Therefore, I find the entire penalty assessment to be excessive. Where a written warning was sufficient to achieve compliance goals, the penalties asserted in this case demonstrated overzealous enforcement authority that unfairly forced Mr. Bichrest to settle this case for $28,000. I find that $15,000 would be a more appropriate settlement.

Recommendation

I recommend that the Secretary remit $13,000 to Margaret F. Inc. in connection with this Application for Review.

Case 228
NE 051209 FM/V and NE 06018 FM/V
F/V Lady Dee
Andrew E. Lang, Owner
[redacted] Operator

Vessel owner complains about the excessive penalty levied against his captain for two instances of landing scallop overages.

Findings of Fact

Andrew Lang of Portsmouth, New Hampshire, is a 1975 graduate of Colorado State University, has been married for thirty seven (37) years and has four (4) children. He grew up in a fishing family and started lobster fishing in 1986-1987. His father was a part-time fisherman and one of his sons is also a fisherman. Mr. Lang is an ornamental horticulturalist who owns and operates Lang's Landscape Service in Greenland, New Hampshire, a business that specializes in horticulture and landscaping. His father started the business approximately sixty (60) years ago. Mr. Lang is also currently working on research for what he says is the first open ocean aquaculture site for the cultivation of mussels.

Mr. Lang typically fishes from December to April in order to supplement his income as a horticulturalist during the growing season. As such, he purchased the 54'8'' fishing vessel, Lady Dee, a steel hulled vessel hailing out of Portsmouth, New Hampshire that fishes primarily for mussels, scallops and ground fish. Mr. Lang spent approximately a half million dollars outfitting the Lady Dee to be a scalloping vessel in the hope that it would be a good investment. He owns the vessel individually and, from 2001-2004, operated the vessel himself. However, the declining health of his parents around 2004 prompted him to hire captains to conduct the Lady

Dee's fishing operations, including At all times relevant to this complaint, operated the Lady Dee. In 2005, Mr. Lang was involved in a marina accident that left him incapacitated for several months with five fractured ribs. During this time, contacted Mr. Lang to see if could run his vessel for him and Mr. Lang hired because had a strong reputation for catching fish.

On December 12, 2005, the USCG boarded the Lady Dee, while docked, on a routine inspection and informed them that had sixty one (61) bushels of unshucked scallops onboard. The USCG contacted SA Patrick Flynn, who then arrived at the scene with SA Daniel D'Ambruoso. The SAs observed to be upset and belligerent. The USCG on board the Lady Dee subsequently conducted a thorough search of the vessel and discovered approximately 231.5 lbs. of shucked scallops, in addition to thirty-nine (39) bushels of unshucked scallops. Offense Investigation Report 1 by SA Patrick Flynn, p. 8 (Dec. 29, 2005).

explained to the law enforcement officials that the Lady Dee was experiencing engine problems and, as a result, was forced to return to port early. Id. at 6. During my interview with Mr. Lang, he confirmed that he had received a phone call from that morning concerning engine problems. In fact, Mr. Lang had installed an engine on the Lady Dee around June 2005 after the previous engine "blew up." On that day, told SA Flynn that and crew planned on shucking the rest of the scallops while tied to the dock. However, SA Flynn informed that was legally allowed only 400 lbs. of shucked scallops or 50 bushels of unshucked scallops per regulations. SA Flynn then seized both logbook for this particular trip as well as entire catch of

shucked scallops, which were sold to Intershell Seafood Corporation that day for $2,025.63. The USCG returned the thirty nine (39) bushels of unshucked scallops to the ocean. Id. at 10.

On December 28, 2005, SA Flynn issued an EAR to [REDACTED] for exceeding the catch limit for scallops. On December 29, 2005, SA Flynn issued a separate EAR to Mr. Lang for the same violation. [REDACTED] of Intershell Seafood Corporation convinced Mr. Lang not to discipline [REDACTED] for this violation. According to Mr. Lang, [REDACTED] told him that [REDACTED] had offered to weigh the unshucked scallops from the Lady Dee in order to prove that the remaining unshucked scallops would have been under the legal limit. The SAs involved allegedly refused to allow [REDACTED] to weigh the scallops. Special Master Interview with Andrew Lang (Oct. 17, 2011). EA Juliand responds by noting that the sixty one (61) bushels that Mr. Lang admitted to landing was already over the landing limit by 11 bushels, and consequently, it was not possible for the unshucked scallops to meet the landing limit.[1] Response by EA Charles Juliand, p. 5.

Several months later, on March 9, 2006, the Lady Dee, with [REDACTED] on board, was scalloping approximately forty (40) miles south of Block Island before landing in Newport,

[1] EA Juliand further wrote that: "61 bushels minus 39 bushels is 22 bushels. Those 22 bushels of shellstock yielded 231.5 pounds of scallop meats (i.e. 10.52 pounds of meat per bushel.) Simple arithmetic shows that 10.52 pounds of meat per bushel of shellstock times the 39 bushels remaining on the vessel would have yielded 410.28 pounds of scallop meat, or thereabouts. That amount of scallop meat plus the 231.5 pounds of meat already on board equals 640.78 pounds. This would have exceeded the legal 400 pound limit by 240.78 pounds. Scallop fishermen are well aware of what kinds of yields they are getting (i.e. pounds per bushel) from the shellstock as they are cutting it. Therefore, [REDACTED] knew, or should have known, that [REDACTED] catch wouldn't be close to being at or below the 400 pound limit if [REDACTED] shucked the rest of the scallops at the dock. Instead, [REDACTED] brought them all in and (presumably) hoped that nobody with a badge would check his landing." Response by EA Charles Juliand, p. 5.

Rhode Island. Upon the Lady Dee's return, the Rhode Island Department of Environmental Management Environmental Police Officers ("EPO") boarded the vessel for a routine inspection. [REDACTED] informed the EPOs that [REDACTED] possessed 7.5 bags of scallops when, in fact, EPOs later discovered 9.5 bags of scallops onboard. The EPOs initially left the vessel before realizing that the 9.5 bags of scallops may have exceeded the possession limit. The EPOs returned to the Lady Dee, weighed the bags and discovered that the total weight approximated 503 lbs., and exceeding the possession limit of 400 lbs. by 103 lbs. According to the dealer, the Lady Dee had previously landed 395 lbs. and 400 lbs. on March 3rd and March 7th, 2006 respectively. The Lady Dee had eight (8) bags of scallops for both landings. Offense Investigation Report 2 by SA Christopher McCarron, p. 5 (Mar. 10, 2006).

SA Christopher McCarron was assigned to the case and interviewed [REDACTED] and [REDACTED] crew that same day. [REDACTED] indicated that [REDACTED] was not aware of the additional two (2) bags of scallops and that [REDACTED] crew may have been trying to hide the extra bags. SA McCarron seized both the log books from [REDACTED] and the entire 503 lbs of scallops from the Lady Dee. He sold the catch for $4,250.35. On March 9, 2006, SA McCarron issued an EAR to both [REDACTED] and Mr. Lang for exceeding the general category scallop possession limit. After [REDACTED] second violation, Mr. Lang informed [REDACTED] that [REDACTED] should make other employment arrangements.

The Lady Dee case was assigned to EA Charles Juliand, who issued a NOVA and NOPS on December 5, 2007 to Mr. Lang and [REDACTED] jointly and severally. EA Juliand assessed a $97,500 penalty for the two (2) incidents of exceeding the scallop possession limit on December 12, 2005 and March 9, 2006 ($37,500 penalty on Count 1 and $60,000 penalty on Count 2).

Further, the NOPS imposed a six (6) month permit sanction on the Lady Dee and a one (1) year operator sanction on [redacted].

Mr. Lang and his wife, Christine, along with attorney Stephen Ouellette, met with EA Juliand sometime after he issued the NOVA. Mr. Lang described the meeting as polite and cordial. However, he remembers distinctly that EA Juliand conveyed to him that if he did not agree with the NOVA, Mr. Lang could appeal to the ALJ, but that the assessed penalty could then potentially be greater than $100,000.

Mr. Lang, with counsel present, settled both cases on June 6, 2008 for a compromised penalty of $20,000. The parties also agreed to a two (2) month vessel permit sanction on the Lady Dee. The Settlement Agreement inadvertently omitted language pertaining to the two (2) seizures worth a total of $6,275.98. After the Settlement Agreement, EA Juliand sent an addendum to Mr. Ouellette for Mr. Lang to sign agreeing to forfeit the proceeds from the seizure. The addendum was not returned. Nevertheless, EA Juliand notes that neither Mr. Lang nor [redacted] made a claim in response to Seizure Notices sent to them on February 8, 2006 and April 6, 2006 respectively. Therefore, Mr. Lang forfeited the seizures pursuant to 15 CFR §904.504(b)(4). The Settlement Agreement further stipulated that NOAA would not pursue charges for an incident involving the Lady Dee that occurred on April 6, 2008 involving [redacted] the captain Mr. Lang hired to replace [redacted] [redacted] independently agreed to serve a twelve (12) month operator permit sanction.

Discussion

Mr. Lang elected to settle the case because the burden of the mortgage on his house and the Lady Dee made it impossible for him to pay the potential $100,000+ in penalties.

Ultimately, Mr. Lang would like to be vindicated of any wrong-doing besides hiring [redacted] as his captain. He believes that he was made a scapegoat in order for NOAA to make a case against [redacted]. Mr. Lang maintains that he did not know about [redacted] previous history of law enforcement encounters with NOAA, and, had he known, he would never have hired [redacted] Special Master Interview with Andrew Lang (Oct. 14, 2011).

In response, EA Juliand states that Mr. Lang is legally responsible, under the doctrine of respondeat superior, for the actions of [redacted] on board Mr. Lang's vessel. Further, EA Juliand states that he has been exhorting vessel owners for years at public meetings to call NMFS to inquire about the enforcement history (if any) of prospective vessel operators. Finally, EA Juliand questions Mr. Ouellette's claim that [redacted] separated the extra bags of scallops. He points out the vessel is only 55' and every crew member had a financial interest in every pound of scallop. Response by EA Charles Juliand, p. 7.

There is no question of fact in this case. Mr. Lang was unaware of [redacted] prior enforcement history and he hired [redacted] to run the Lady Dee because of [redacted] reputation. [redacted] then exceeded the scallop possession limits not once, but twice, within a three (3) month period. Given [redacted] experience and the clear language of the scallop landing limits (400 lbs. or 50 bushels), I find it hard to believe that [redacted] simply made a mistake on both occasions. Since Mr. Lang is the owner of the Lady Dee, he is legally responsible for [redacted] actions regardless of whether the violations were intentional or not.

The question then turns to the penalty assessment and final settlement. The Secretarial Decision Memorandum dated March 16, 2011, outlines eligible cases for my review, including cases in which GCEL attorneys charged excessive penalties in a manner that unfairly forced

settlement. Indeed, I question the initial penalty assessment of $97,500. Combined with the $6,275 in forfeited proceeds from the seizures, the total monetary potential loss exceeded $100,000 for approximately 300 lbs of scallop overages. I do not doubt that the potential penalty assessment was the motivating factor for Mr. Lang to seek an equitable settlement.

However, the second part of the analysis includes a determination whether the charged penalty unfairly forced settlement. As I have noted, ██████████ had a violation history and ██ twice landed scallop overages. I do not find that the overages were unintentional. I do not doubt Mr. Lang's sincerity in wanting to be a responsible vessel and business owner, nor do I question his genuine concern about the viability of his fishing business in light of changing regulations. I also understand how difficult it must be for Mr. Lang to have his captain betray his trust. However, given the totality of the circumstances, I find that the resulting $20,000 settlement was fair and reasonable.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 229

NE 030331 FM/V

Enforcement Action Reports 136902 and 136903

F/V Ocean Reporter

Billie J. Lee, Owner/Operator

Vessel owner complains about the inflexibility of the regulations associated with the regulations for catching cod and the excessive penalty paid to settle this case.

Findings of Fact

Billie James Lee of Rockport, Massachusetts is a retired commercial fisherman who fished for approximately thirty (37) years. He currently works part-time in boat repair and seasonal moorings. He is the owner of the Ocean Reporter, an unpermitted former multispecies fishing vessel that Mr. Lee hopes to sell in the near future. When he was a fisherman, Mr. Lee typically landed fish in Rockport. Mr. Lee has admitted that he is well-versed in fishing regulations. Special Master Interview with Billie Lee (Dec. 10, 2010).

Mr. Lee generally fished alone primarily because he could not afford to pay crew members or to purchase liability insurance. On December 20, 2003, Mr. Lee called into the DAS Notification system to signal the start of a fishing trip. He set sail from Rockport and returned on December 21, 2003, when he landed 1,161 lbs. of Atlantic codfish at the Gloucester Seafood Display Auction. This exceeded the Gulf of Maine (GOM) possession limit at the time by 161 lbs. (16.1%). When the Ocean Reporter returned to port that day, Mr. Lee did not receive a landing number from the DAS Notification system. Instead, Mr. Lee waited until December 23, 2003 to call out of the DAS system to obtain a landing number. He claims that he often forgot

to call into or out of the DAS system because he would be distracted onboard the Ocean Reporter.

On Christmas Day 2003, the Ocean Reporter obtained a sailing number from the DAS system and set sail. According to Mr. Lee, the Ocean Reporter experienced mechanical problems which forced him to return to port. However, Mr. Lee did not call out of the DAS Notification system when he returned to port. Mr. Lee fixed his vessel, set sail and returned to port the next day (December 26, 2003), but had not obtained either a sailing or landing number from the DAS system for that day. Mr. Lee claimed that the Ocean Reporter's net was entangled because of rough seas, which forced Mr. Lee back to port for repairs. The Ocean Reporter again left port to go fishing on December 27, 2003 without calling into the DAS system and returned that same day. Upon his return, Mr. Lee finally called out of the DAS system to obtain a landing number and landed 990 lbs. of Atlantic Cod at [REDACTED], a fish dealer. Since Mr. Lee set sail on the morning of December 27, 2003 and returned that same day, he was limited to a 500 lbs. daily possession limit. As such, he exceeded his daily allotment of codfish by 490 lbs. (98%).

Massachusetts Environmental Police (MEP) Officers [REDACTED] and [REDACTED] [REDACTED] spoke to Mr. Lee on December 27, 2003 and discussed with him his practice of not properly notifying the DAS system. Based on the conversation, the MEP Officers informed him that NOAA SAs would likely seize his catch.

The MEP Officers contacted NOAA SA Patrick Flynn, who set up an interview with Mr. Lee on December 30, 2003. During the interview, Mr. Lee admitted that he had not called in or out of the DAS system for his separate fishing trips on December 25, 26, and 27, 2003, and that

he had submitted FVTRs that covered those dates as one trip. Though he initially told SA Flynn he had slept on the boat all three (3) nights, he later recanted and confessed that he slept at home during those nights. Mr. Lee signed an abandonment form at the conclusion of the interview and SA D'Ambruoso seized Mr. Lee's catch of 990 lbs. of codfish and sold it for $891.00.

On January 21, 2004, SA D'Ambruoso issued an EAR (#136902) to Mr. Lee documenting four (4) counts of not properly calling into the DAS system; one (1) count of exceeding the Gulf of Maine cod landing limit; and one (1) count of providing inaccurate information on a FVTR. On January 30, 2004, SA D'Ambruoso issued another EAR (#136903) to Mr. Lee documenting one (1) additional count of exceeding the GOM possession limit and one (1) additional count of not properly calling into the DAS system.

Mr. Lee hired Robert A. Murray, Esq. to negotiate a settlement with EA Charles Juliand before he issued a NOVA. At the time, Mr. Lee was concurrently conducting scientific research with NOAA and therefore, wanted to resolve the violation issue quickly. On May 20, 2004, the parties agreed to a monetary settlement of $10,000. In addition, Mr. Lee and the Ocean Reporter agreed to reduce its DAS allocation by ten (10) days from 28.35 DAS to 18.35 DAS.

Discussion

Mr. Lee argues that the penalty is excessive because there is a lack of consistency in penalty assessments for similar violations. EA Juliand, on the other hand, points out that there was no penalty assessment in the case because Mr. Lee, through counsel, approached him and asked for a quick settlement. EA Juliand further claims that he has strived for consistency throughout his career. In this particular instance, EA Juliand indicates that Mr. Lee could have

been issued an eight (8) count, $40,000 penalty and a loss of 72 DAS. Accordingly, he asserts that Mr. Lee's claim that a $10,000 penalty and a loss of 10 DAS is excessive "rings hollow". Finally, EA Juliand considered Mr. Lee's attorney's pleas that "he screwed up and knows it" and "it will never happen again" when settling this case. Response by EA Charles Juliand, p. 5.

Stephen Ouellette, Esq. who represents Mr. Lee in connection with this Application for Review, primarily complains about the rigidity of the regulations. In particular, he notes that the regulations provide no flexibility even in life-threatening situations. Many fishermen, he commented, would rather land an overage than throw the excess catch overboard. In response, EA Juliand wrote that Mr. Ouellette's opinions should be directed to those in a position to modify the regulations. EA Juliand's role as an enforcement attorney is governed by the law as it is written.

Mr. Ouellette's statements may have some validity as an advocate for fishermen, but they have no bearing in this case because Mr. Lee intentionally violated a valid regulation. The facts are not disputed. Indeed, Mr. Lee admitted during my previous interview of him that he had willfully violated the Magnuson Stevens Act in this case. In relevant part, Mr. Lee stated that "[b]ack then, [I] just made a mistake…back then you thought you could get away with it and make some money." Excerpts from Special Master Interview with Billie Lee (Dec. 10, 2010).

The sole issue in this case is whether $10,000 is an excessive penalty for a willful violation of the possession limits. Mr. Lee claims that he chose to settle because "NOAA threatened to interview my neighbors and cause me additional headache" and he "felt compelled to settle because of the excessive fine and the possibility that the fine could be

increased if [Mr. Lee] brought the matter to a hearing before the administrative law judge." Letter from Billie Lee to Special Master (May 5, 2011).

Yet, Mr. Lee had the foresight to hire an experienced lawyer with the expressed purpose of settling the matter before EA Juliand had an opportunity to issue a NOVA. In that sense, Mr. Lee's assertion that he was "compelled" to settle because of the excessive fine is not credible because a penalty had not yet been established, Mr. Lee proactively tried to stop a NOVA from being issued and Mr. Lee admitted to the violations during my interview. In light of the willful nature of this violation and Mr. Lee's admitted understanding of the regulations, I see no reason to disturb the $10,000 settlement in this case.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 230
NE 980218
F/V Elizabeth J
William R. Reed, Owner/Operator

Fisherman, even though represented by counsel, felt compelled to settle for an excessive civil penalty in a minor FVTR case after receiving a NOVA and learning that the assessed penalty could be increased if he appealed to an ALJ.

Findings of Fact

William W. Reed lives in Hamden Bays, New York, which is on Long Island. Mr. Reed has been a full-time commercial fisherman since 1989 and catches primarily smaller species, including sea scallops and fluke. Mr. Reed has owned several vessels in the past, including the 43'11'' Elizabeth J, a standard stern rigged dragger, that his family built. In 1990-1991, Mr. Reed's father sold him the vessel. In 1998, Mr. Reed sold the Elizabeth J and bought the 55' fishing vessel Providence, a wooden dragger that sank in 2007 after the vessel hit a swell. Using insurance money from that accident, Mr. Reed purchased a new vessel, also named the Providence, approximately 4.5 years ago. Around that time, he also purchased the North Sea. All of Mr. Reed's vessels were previously, or currently, moored in Shinnecoch, New York.

In 1996 and 1997, Mr. Reed offloaded his catch from the Elizabeth J in cardboard containers at Pell's Dock in Shinnecoch, and from there it was trucked with other fishermen's catches to Jos. H. Carter, Inc. (Carter Fish Co.) for sale. In March 1997, an AIW was served on Carter Fish Co. and certain of its records were seized. Carter Fish Co.'s fish purchases were compared with FVTRs submitted by fishermen, including Mr. Reed. Offense Investigation Report by SA Stephen Alfieri, p. 2 (Jan. 21, 1999). A comparison of the records of Carter Fish

Co.'s purchases and Mr. Reed's FVTRs revealed discrepancies which were later charged against Mr. Reed. Id.

Beginning in November 2008, SA Stephen D. Alfieri received a request to investigate the Elizabeth J's offloads at Carter Fish Co. from March 1996 to February 1997 and compare them to the Elizabeth J's FVTRs for that same period. Id. As a result of that investigation, SA Alfieri identified alleged false reporting by the Elizabeth J of black sea bass, summer flounder and squid with estimated values on June 25 and June 26, 1996 as follows:

Date	Lb. BSB/Value	Lb. FLS/Value	Lb. Squid/Value
June 25, 1996	260 / $309.40	280 / $568.40	280 / $277.20
June 26, 1996	53 / $63.07	98 / $198.94	305 / $301.95

Id. at 4.

On December 14 and 16, 1998, SA Alfieri interviewed Mr. Reed concerning these discrepancies. Mr. Reed denied that he falsely reported catch data to NMFS. Mr. Reed stated that he did not weigh the catch on a scale nor was he present when his catch was weighed; that he unloaded the catch in cardboard boxes in Shinnecoch with his tally sheets of estimated species weights attached to each box; and that the proffered tally sheets from Carter Fish Co. did not belong to him. Mr. Reed speculated that Carter Fish Co. must have filed the wrong tally sheets with his paperwork.

On December 28, 1998, SA Alfieri issued an EAR to Mr. Reed for falsely reporting catch data to NMFS on June 25 and 26, 1996. EAR (Dec. 28, 1998).

On November 18, 1999, EA J. Mitch MacDonald requested a follow-up investigation of the Elizabeth J's sales of fish to Carter Fish Co. Supplement to Offense Investigation Report by

SA Frank Italia, p. 1 (Feb. 17, 2000). SA Frank Italia discovered under reporting discrepancies by Elizabeth J of 168 lbs. of fluke on August 18, 1996 with an estimated value of $859.45 and 151 lbs. of fluke and 368 lbs. of squid on August 25, 1996 with an estimated value of $893.70. On February 17, 2000, EA MacDonald requested in an email that SA Italia question Mr. Reed in a face to face meeting because EA MacDonald believed that Mr. Reed's records showed that Mr. Reed likely had information relating to Carter Fish Co.'s submission of false dealer reports and failures to submit dealer reports. Email from EA J. Mitch MacDonald to SA Frank Italia (Feb. 17, 2000).

On February 25, 2000, SA Italia telephoned Mr. Reed to set up a meeting and Mr. Reed agreed to an interview on March 2, 2000.

On February 28, 2000, SA Italia received a fax from Stephen M. Ouellette, Esq. advising him not to have direct contact with Mr. Reed. Supplement to Offense Investigation Report by SA Frank Italia, p. 2 (Feb. 17, 2000). SA Italia complied with Mr. Ouellette's fax and waited to set up a meeting at a later date. On March 3, 2000, SA Italia issued an additional EAR to Mr. Reed charging him with two (2) counts of making a false statement on his August 18 and 25, 1996 FVTRs.

Mr. Reed recalls being questioned by SAs on several occasions concerning the Carter Fish Co. and it was obvious to him that the SAs thought that Mr. Reed had information useful to them about alleged illegal activity at the company. Mr. Reed denied such knowledge. On May 5, 2000, there was a meeting at NOAA's office in Gloucester attended by SA MacDonald, SA Italia, Mr. Reed and Mr. Ouellette. Special Master Interview with William Reed (Dec. 8, 2011); EA J. Mitch MacDonald Notes (May 5, 2000). Mr. Reed recalls that SA Italia asked him about

alleged illegal activity at the Carter Fish Co. Id. Mr. Reed emphatically denied any collusion with Carter Fish Co.

On June 8, 2000, EA MacDonald issued a NOVA to Mr. Reed charging him in Count 1 with submitting a false FVTR of a June 25, 1996 landing and sale of 260 lbs. of black sea bass when no black sea bass were caught, and under reporting summer flounder that were caught and landed. Mr. Reed was charged with reporting only 70 lbs. of summer flounder, an amount that equaled the legal landing limit in New York at the time of the landing. He was charged with landing an additional 168 lbs. of summer flounder that he omitted and replaced with the black sea bass that he falsely reported catching. Mr. Reed was also charged with over reporting a June 26, 1996 sale of 55 lbs. of black sea bass when he landed only 2 lbs., and reporting only 70 lbs. of summer flounder, an amount that equaled the legal landing limit in New York at the time of the landing. He was charged with omitting his catching and landing of 28 additional lbs. of summer flounder.

In Count 2, Mr. Reed was charged with submitting a false FVTR that reported landing the legal limit in New York of 500 lbs. of summer flounder on August 18, 1996, but under reported an additional landing and sale of 168 lbs. of summer flounder on that date. Also in Count 2, Mr. Reed was charged with reporting a landing of only 100 lbs. of summer flounder and 15 lbs. of squid on August 25, 1996, but not reporting an additional landing and sale of 151 lbs. of summer flounder and an additional 368 lbs. of squid.

EA MacDonald assessed a penalty of $7,500 on each count ($3,750 for each false report) for a total penalty of $15,000. On July 10, 2000, Mr. Reed, without the benefit of counsel, sent a check for $15,000 to EA MacDonald. On August 22, 2000, at Mr. Ouellette's request, EA

MacDonald returned the $15,000 check to Mr. Reed. On January 3, 2001, Mr. Reed signed a Settlement Agreement that provided for the payment of a penalty of $15,000, which Mr. Reed paid.

Discussion

Mr. Reed first questioned whether Carter's records were accurate as he had denied that the proffered tally sheets did not belong to him. However, as EA MacDonald points out in his response, the evidence was considerable. It included dealer receipts, checks, and fish tickets that were attached to Mr. Reed's fish boxes identifying the fish species and weights. Also, the evidence showed that Mr. Reed landed illegal summer flounder that was omitted from his reports. Response by EA J. Mitch MacDonald, p. 4. Mr. Reed also stated that his FVTRs were only off by small amounts and that the value of the fish in question was de minimis. EA MacDonald responds that Mr. Reed's unreported catch exceeded the state landing limit by 240%, 40%, and 34%, in counts 1.A. and B. and 2.A., respectively and exceeded his reported amount in 2.B. by approximately 150%. His omission of squid involved a fishery subject to closures or landing limits based on the overall amounts reported to the NMFS. Id.

Mr. Reed suggests that he is entitled to relief because EA MacDonald charged an excessive penalty in a manner that unfairly forced settlement. I do not agree. First, I do not find the assessed penalty or settlement for the same amount to be excessive because there was credible evidence that supports a finding that these offenses were intentional. The then minimum penalty for a first time filing of a false FVTR was $5,000. According to the NOVA, there were four (4) false FVTRs filed that misrepresented the amounts of several different species. EA MacDonald assessed a penalty of $7,500 for each count rather than a penalty for

each FVTR. Considering the circumstances, I find that the penalty assessment and settlement in this case of $15,000 is fair and reasonable.

Recommendation

I recommend the Secretary take no action in connection with this Application for Review.

Case 231

Southern Connection Seafood, Inc.
NE 053020 FM/V
J. Patrick Reese, Jr., Owner/Dealer

Fish dealer complains that the proposed penalty in this case was excessive and the possibility of an ALJ increasing the penalty prompted him to settle the case. Fish dealer further complains that NOAA refused to negotiate what he considered to be an excessive penalty to begin with after the real estate market collapsed and he was unable to sell his commercial property to satisfy the Settlement Agreement.

Findings of Fact

James Patrick Reese, Jr. and his wife are the sole shareholders, directors and officers of Southern Connection Seafood, Inc., a seafood dealer located in Maryland. Mr. Reese started the business in 1985 out of his Chevy Chevette, from which he seafood to local shops and restaurants. He eventually incorporated Southern Connection in 1989. Southern Connection started renting a processing plant in Ocean City, Maryland, including an offloading dock, approximately ten (10) years ago. After 2004, Mr. Reese accepts offloads directly from vessels at that location. The business also has two (2) locations in Crisfield, Maryland: a trailer located on Highway Route 413 that handles sales and orders delivered primarily from trucks, and a 1.5 acre waterfront property with a soft shell crab processing plant. Mr. Reese states that no one offloads at the waterfront location anymore because his father, who ran that operation, was overwhelmed with the process. Southern Connection Seafood currently has forty (40) employees and fifteen (15) trucks, but in the past it has had as many as 120-130 employees. Special Master Interview with Patrick Reese, Jr. (Dec. 9, 2011).

In 2004, fishermen brought seafood to the Crisfield Highway Route 413 location by truck. Mr. Reese admitted that during this time, he did not check for federal or state permits because he took people at their word. This is no longer the case. Since the resolution of the present case, Mr. Reese has instituted new Standard Operating Procedures in order to stay in strict compliance with all state and federal fishing regulations. Statement from Patrick Reese, Jr., Southern Connection Seafood (undated).

[REDACTED] The investigation revealed that the fishing vessels Keller's Pride, Night Stalker and Gold Nugget II were landing scallop overages and selling them to a dealer in Chincoteague, Virginia. Any excess over the legal limit would be loaded onto trucks and transported to Southern Connection's Highway Route 413 location in Crisfield, Maryland, and would be sold there. Offense Investigation Report by SA Steven Niemi, p. 7 (June 8, 2005).

On August 25, 2004, EA Mitch MacDonald issued a demand letter to Southern Connection Seafood's Crisfield plant requesting records concerning the fishing vessels Golden Nugget II, Keller's Pride, and Night Stalker, as well as any information concerning [REDACTED] John T. Keller and Keller's Pride, Inc., the vessel owners. Demand Letter from EA J. Mitch MacDonald to Southern Connection Seafood, Inc. (Aug. 25, 2004). SAs Jeffrey Ray and Joseph Wilson arrived at Southern Connection that day to review the records.

Mr. Reese described the day when the NOAA SAs entered his highway trailer building as the "worst day of my life," after which, he "never felt the same about [his] government again."

Special Master Interview with Patrick Reese, Jr. (Dec. 7, 2011). During a conversation with the SAs, Mr. Reese informed them that he only purchased scallops from dealers at the highway location, and not from vessels. Offense Investigation Report by SA Steven Niemi, p. 7 (June 8, 2005). The SAs also asked Mr. Reese whether he had received any deliveries that morning. Mr. Reese stated that he interpreted the question to mean whether he purchased scallops from the Keller's Pride that morning and Mr. Reese responded that he purchased scallops from John Keller, whom he believed to be a dealer. As a result, Southern Connection did not report those purchases. Mr. Keller was the owner of Keller's Pride, Inc., a fish dealership located in Mappsville, Virginia.

In a separate interview, Mr. Keller insinuated that he may have told Mr. Reese that he was a dealer, even though he once told SA Ray that he never made that statement. See supra, Case 201. See also Offense Investigation Report by SA Steven Niemi, p. 16 (June 8, 2005). Mr. Reese claimed that he had met John Keller, owner of the Keller's Pride and Night Stalker, only once or twice, and has not seen him since 2004. Mr. Reese also informed the SAs that he maintained his business records at the waterfront location.

The SAs proceeded to the waterfront location, but discovered it was closed. When they tried to contact Mr. Reese by cellular phone, he was not available. Indeed, Mr. Reese was confused by the investigation and decided to seek out his lawyer, John Phoebus, immediately after the SAs left the trailer office. When the SAs met with Mr. Reese later that day, Mr. Phoebus was present. Mr. Reese ultimately provided purchase orders related to the Keller's Pride.

On August 26, 2004, the SAs again met with Mr. Reese at Southern Connection's waterfront facility. Mr. Phoebus was present and objected to NOAA's inspection of various records citing lack of authority. Id. at 11. After he was put in contact with EA MacDonald, Mr. Phoebus "rolled out the red carpet" and allowed the inspection. Id. at 12. According to SA Niemi, it was during this meeting that Mr. Reese admitted to also landing scallops from ██ ██████████ of the Gold Nugget II, the previous morning, despite the fact that he had told the SAs that he had only purchased scallops from the Keller's Pride. However, Mr. Reese maintains that the SAs were not clear in their questions the previous day. Special Master Interview with Patrick Reese, Jr. (Dec. 9, 2011).

A subsequent investigation revealed that Southern Connection purchased scallops from the fishing vessels Keller's Pride and Gold Nugget II on numerous occasions between April and August 2004 and failed to report its purchases to NMFS. Mr. Reese explained that, at least with respect to Keller's Pride, he thought he was purchasing product from Keller's Pride, Inc., the fish dealer, a transaction that did not require reporting.

In total, Southern Connection made sixty eight (68) purchases from the Keller's Pride and Gold Nugget II, but reported none of the purchases. Mr. Reese asserted that the "legality of the process" never occurred to him, and that he should have been more aware of the regulations surrounding scallops. Offense Investigation Report by SA Steven Niemi, pp. 18-9 (June 8, 2005). Mr. Reese further admitted in his interview that he did not have a good grasp of the reporting requirements because he had approximately 100 employees and his company "was trying to sell whatever was available." He maintains, and I find credible, that it was all an honest mistake. Special Master Interview with Patrick Reese, Jr. (Dec. 9, 2011).

The case was assigned to EA J. Mitch MacDonald, who issued a forty-one (41) count NOVA to Mr. Reese and Southern Connection Seafood, Inc. on January 30, 2006. EA MacDonald assessed a $445,000 penalty based on forty-one (41) violations, including one (1) count of making false statements,[1] various other counts for failing to report scallop landings to NMFS from the Keller's Pride, Night Stalker and Gold Nugget II, and several counts for purchasing overages from those vessels on different dates. Further, EA MacDonald assessed a thirty (30) day dealer permit sanction.

Mr. Reese hired Stephen Ouellette, Esq. to challenge what he believed to be an excessive penalty for non-intentional violations and he requested a hearing on the matter. Messrs. Reese and Ouellette went to Gloucester to plead their case with EA MacDonald. Mr. Reese was under the impression that the penalty would be around $35,000. Subsequent to this meeting, Mr. Reese's potential net worth increased dramatically in value because a real estate developer had signed a letter of intent to purchase Southern Connection's waterfront property in Crisfield, Maryland for $7,000,000. Mr. Ouellette disclosed the potential sale to NOAA. As a result, the potential sale was considered in arriving at a December 8, 2006 Settlement Agreement between Mr. Reese and NOAA. Special Master Interview with Patrick Reese, Jr. (Dec. 9, 2011); see also Email from Stephen Ouellette, Esq. to EA J. Mitch MacDonald (Oct. 19, 2010).

[1] "On August 25, 2004…James Patrick Reese, Jr. stated to NMFS SA Ray and Wilson that the Southern Connection Seafood, Inc. did not purchase or receive Atlantic sea scallops from the F/V's GOLD NUGGETT II or KELLER's PRIDE during 2004. Instead, according to Mr. Reese, Jr., Southern Connection Seafood, Inc. received and purchased scallops only from dealerships owned by John Keller, the owner of those two vessels. Contrary to this false assertion, Southern Connection Seafood, Inc. records show that they purchased Atlantic sea scallops directly from those vessels on numerous occasions in 2004." Notice of Violation Assessment (Jan. 30, 2006).

In the Settlement Agreement, EA MacDonald dismissed the false statement charge against Mr. Reese. Mr. Reese neither admitted nor denied the violations against his company. Southern Connection Seafood agreed to pay $185,000, which included a cash payment of $35,000 over time and a balloon payment of $150,000, plus interest, expressly contingent on the sale of Mr. Reese's waterfront property in Crisfield, Maryland. Mr. Reese personally guaranteed the $150,000 balloon payment. The Settlement Agreement provided Mr. Reese with an option to have his penalty reevaluated should his financial circumstances change.[2]

Southern Connection completed its payments on the $35,000 obligation in October 2009. The sale of the Crisfield waterfront property never materialized. Mr. Reese has been unable or unwilling to sell the Crisfield, Maryland property because of a severe decline in the local real estate market. As a result, he has not been able to meet the balloon payment obligation. Mr. Reese notes that he was willing to sell the Crisfield waterfront property and pay

[2] The specific language states: "It is understood and agreed that Southern Connection Seafood, Inc. contends that it does not and will not be able to fund this settlement from current operations, and relies on the ability of its guarantor to fund the $150,000 balloon payment due in 18 months from sale of property designated herein. It is understood and agreed that this may change as the respondent's business circumstances change. NOAA agrees that if Southern Connection Seafood, Inc. contends it is unable to meet the obligations hereunder, due to inability of the guarantor to sell the subject property or other circumstances such as changes in business, NOAA will consider reducing, extending, or suspending the penalty agreed to hereunder in accordance with its rules and regulations governing ability of respondents to pay solely at NOAA's discretion." Settlement Agreement.

the remaining $150,000 penalty when a sale was contemplated at $7,000,000. Mr. Reese estimates the current market value of the property to be around $500,000, and would prefer to keep the plant operational in order for his employees to continue working. Special Master Interview with Patrick Reese, Jr. (December 7, 2011). Therefore, he eventually offered $10,000 to settle the balloon payment. Email from EA J. Mitch MacDonald to Stephen Ouellette (March 4, 2010). EA MacDonald notes that this amount was raised to $25,000, and he expressed a willingness to settle for that amount with his supervisor. Response by EA J. Mitch MacDonald, p. 4.

In the beginning of 2009, EA MacDonald requested financial statements from Mr. Reese and Southern Connection in order to adjust the payment schedule. Financial statements were provided. NOAA hired Gerald Hellerman, an independent accountant, and he concluded that Southern Connection could pay the remaining penalty based on its 2009 operating cash flow of $470,000, Mr. Reese's $335,000 personal loan from the company and the company's cash balance on-hand of $400,000. Memorandum from Gerald Hellerman, Independent Financial Consultant (Sept. 17, 2010). Mr. Reese provided NOAA with financial documents pertaining to the first half of 2010, but did not provide subsequent documents for the latter half of 2010. Mr. Hellerman assumes that Mr. Reese is able to repay his company loan and that all of the remaining assets are liquid and capable of collection. I seriously doubt that to be the case, especially since Mr. Reese's bank notified him around December 9, 2010 that it had decided not to renew his line of credit because of the lack of collateral stemming from the decline in value of his property. Email from Patrick Reese, Jr. to Stephen Ouellette, Esq. (Dec. 9, 2010).

Mr. Reese has requested, and was granted, a stay of the balloon payment that he owes NOAA pending the resolution of the Application for Review of his case. Request for Stay from Stephen Ouellette, Esq. to Special Master (Dec. 12, 2011).

Discussion

Mr. Reese believes he is entitled to relief because his violations were unintentional, his records were accurate although not reported to NOAA, and he provided NOAA SAs with all requested documents in good faith. Mr. Reese noted that if he was intentionally violating the regulations, he would have maintained no records. Further, Mr. Reese had minimal financial incentive to violate the law because his profit margin was only 35 cents per pound and he gained approximately $15,000 in profit from the illegal scallops for that year. The 35,000 lbs of scallops Southern Connection bought that year from Keller's Pride and Gold Nugget II were less than 2% of his total company sales. Finally, Mr. Reese argues that the proposed penalty was excessive but the possibility of an ALJ increasing the penalty prompted him to agree to settle the case. Application for Review, p. 2.

In response, EA MacDonald states that he had no authority to modify the settlement terms because it required approval by NOAA General Counsel. However, EA MacDonald asserts that he was willing to review the balloon payment and sought financial information in order to recommend a modification to his supervisors. Response by EA J. Mitch MacDonald, p. 4. In an email dated December 15, 2010 to his supervisor, EA MacDonald recommended accepting what he believed to be a $25,000 offer to settle the $150,000 plus interest balloon payment.

I am empowered, under the Secretarial Decision Memorandum of March 16, 2011, to review cases where GCEL attorneys assessed an excessive penalty that unreasonably forced an

unfair settlement. This case involved a $445,000 penalty assessment and a subsequent $185,000 settlement with $150,000 expressly contingent on the sale of a piece of property. I find the penalty to be excessive and the settlement unfair in light of the circumstances.

There is no dispute that Southern Connection purchased scallops that were illegally harvested by Mr. Keller and his associates. Mr. Reese has admitted that his company was not cognizant of the various scallop reporting requirements, and has since implemented Standard Operating Procedures at Southern Connection to ensure strict compliance with state and federal fishery regulations. There is no indication that Mr. Reese was deliberately engaged in deceitful behavior in order to realize any financial gain. I am satisfied on the evidence that Mr. Reese believed that Mr. Keller was a dealer and that purchases made from dealers do not need to be reported. He maintains, and I find credible, that these were honest mistakes.

Having established the degree of culpability in this case, I turn to the penalty assessment. Southern Connection was assessed a $445,000 monetary penalty for its unwitting role in an organized scheme to land scallop overages by third persons. Mr. Reese had no actual knowledge nor was he a known participant in this scheme. Because of Southern Connection's plant location by Highway Route 413, it receives daily shipments by truck. As such, in 2004 Southern Connection relied heavily on the representations made by fishermen concerning the legality of their product. Though Mr. Reese and Southern Connection should have been more cognizant of the reporting requirements, particularly as it pertains to transactions with fishermen who had established landing limits, I find the $445,000 penalty assessment to be inconsistent with the nature and circumstances of the violation.

I find it excessive the fact that Mr. Reese was forced to personally guarantee the $150,000 balloon payment. Mr. Reese's company was liable for a $445,000 penalty, which we know is about equal to Southern Connection's 2009 total operating cash flow. Memorandum from Independent Financial Consultant Gerald Hellerman, (Sept. 17, 2010). Therefore, Mr. Reese, who personally owned the waterfront property that he leased back to his company and who had received an offer to purchase that property for $7,000,000, had to make a serious decision: place his company in a precarious financial situation and risk the jobs of approximately 100 employees, or step up and agree to be personally liable for the $150,000 balloon payment. I further note that both Messrs. Reese and Ouellette were under the impression that the compromised penalty would be around $35,000 before Mr. Ouellette properly notified EA MacDonald of the potential sale of Mr. Reese's property for $7,000,000. This is bolstered by the fact that the Settlement Agreement contained bifurcated payments of $35,000 and the $150,000 balloon payment premised on the sale of the property. It is clear, therefore, that the balloon payment was included to take advantage of the potential windfall from the $7,000,000 sale. Mr. Reese elected to guarantee the balloon payment, thereby keeping the company in business and continuing to offer employment to a large number of people.

Southern Connection Seafood has paid $35,000 to date. Contrary to Mr. Hellerman's opinion, I suggest the best evidence of Southern Connection's and Mr. Reese's ability to pay is the fact that in December 2010 Mr. Reese's bank did not renew the company's line of credit. This may well have affected Mr. Reese's ability to satisfy his personal guarantee. However, I find Mr. Hellerman's assessment immaterial to this case because the parties explicitly agreed

that the balloon payment was contingent upon sale of the waterfront property for a consideration of approximately $7,000,000. Moreover, Mr. Reese has admitted wrongdoing, paid a sizeable $35,000 penalty for a first time violation, implemented substantial Standard Operating Procedures in order to comply with state and federal regulations, and has had no state or federal violations since this case. Given his lack of culpability, admission of fault, cooperation with the investigation, and subsequent remedial measures, and the fact that the Settlement Agreement was premised on a no-longer viable sale of the Crisfield waterfront property, I find that the $35,000 paid to date, and an additional $25,000 recommended by EA MacDonald to his supervisor, would sufficiently address the past violations.

Recommendation

In light of these facts and circumstances, I recommend that the Secretary, pursuant to the Settlement Agreement in this case, forgive and cancel the balloon payment of $150,000, together with accumulated interest, and absolve Mr. Reese from any personal liability in this matter upon receipt of $25,000 from Southern Connection Seafood, Inc. and/or Mr. Reese.

Case 232
NE 020040, NE 020195 and NE 033004
F/V Survivor
F/V Rainbow Chaser
RAJ Fish Company, Owner
Ronald T. Ringen, Operator/Principal

Lobster fisherman complains that he paid an excessive penalty for highly technical violations derived from a complicated set of rules. Fisherman further complains of being the target of a false statement made by a Special Agent and a misleading NOAA exhibit at an ALJ hearing.

Findings of Fact

Ronald T. Ringen is a second generation fisherman who started lobster fishing at the age of 17 and became a full-time fisherman after graduating from high school in 1982. Mr. Ringen primarily fishes for skimmer clams and lobsters from his home port in Freeport (Long Island South Shore), New York. Starting in 1982, Mr. Ringen has owned a series of fishing vessels, primarily for harvesting lobsters, that ranged from 31' to 45'. At one point, Mr. Ringen owned two (2) 21' fishing vessels, the Caroline and the Alicia Kelly. Both vessels were used simultaneously for harvesting lobsters. Mr. Ringen operated one (1) vessel and hired a captain to operate the second vessel.

Local fishermen were upset that Mr. Ringen was operating two (2) vessels. Subsequently, the Alicia Kelly burned at her mooring and a fire device was discovered on the Caroline. Mr. Ringen then used insurance money from the Alicia Kelly to purchase the Nana Marie, which he later sold to purchase the Rainbow Chaser. At some point prior to 2001, Mr. Ringen purchased the Survivor. Both of these vessels were owned by RAJ Fish Company.

Subsequently, Mr. Ringen sold the Caroline and in 2006 sold the Rainbow Chaser to his father. Additionally, prior to 2001, Mr. Ringen owned the C-Hawk, a 22' lobster boat, that in 2004 had a value of $1,500. Mr. Ringen was also a 50% stockholder of S & R Skimmer Corp., which in 2002 acquired the 69' clam boat, Sea Searcher II, which fished for skimmer clams as bait for fish. Financial Report (Dec. 14, 2004).

Starting in 1982, Mr. Ringen fished for lobsters in Long Island Sound but stopped in 1999 when there was a "die off" of lobsters. As a result, Mr. Ringen was out of business for six (6) months until he applied for and received a federal lobster permit to fish in the ocean off the North Shore of Long Island and New Jersey. Starting in 2001, Mr. Ringen alternated fishing between the Survivor and Rainbow Chaser because each vessel could only deploy 800 lobster traps.

NE 020040-EAR

On August 6, 2002, SA Block delivered an EAR to Mr. Ringen charging him as operator, and RAJ Fish Company as owner, of the fishing vessel, Survivor, in Count 1, with filing false VTRs; in Count 2, with selling lobsters to a non-federally permitted dealer; in Count 3, with filing a false FVTR; in Count 4, with unlawfully disposing of fish parts or other matter; in Count 5, with failing to timely complete a FVTR; in Count 6, with deploying gear not properly tagged; and in Count 7, with deploying unmarked gear.

NE 020195-EAR

On October 10, 2002, Mr. Ringen as operator and RAJ Corp. as owner of Rainbow Chaser were charged in an EAR, signed by SA Sara Block, with sales to non-permitted dealers (Counts 1, 2, 3, and 5) and filing false VTRs (Counts 4, 6, and 7).

NE 033004- EAR

On June 24, 2003, Mr. Ringen was charged as operator of the Survivor with twenty (20) counts of possessing or using improperly tagged lobster pot gear.

NE 020040, NE 020195 and NE 033004-NOVAS

On February 26, 2004, EA Deirdre Casey issued one (1) NOVA for cases NE 020040 and NE 033004 and a separate NOVA for case NE 020195. In case NE 020040, RAJ Fish Corporation as owner and Ronald Ringen as operator of the Survivor were charged as follows:

Count I: submitting false VTRs:
Assessed penalty: $18,000.

Count II: selling lobsters to dealers without a valid federal permit:
Assessed penalty: Warning.

Count III: Upon the approach of NMFS SA Sara Block, the Respondent unlawfully disposed of fish or parts thereof or other matter. Specifically, Mr. Ringen dumped the contents of a bucket he had been handing to someone on the dock after the approach of an authorized officer.
Assessed penalty: $15,000.

Count IV: operator failed to complete log book with all ascertainable information prior to entering port:
Assessed penalty: $750.

Count V: deploying lobster traps which were not properly tagged:
Assessed penalty: $10,000.

Count VI: deploying lobster traps with no tags:
Assessed penalty: $25,000.

In case NE 033004, Mr. Ringen as operator and RAJ Fish Corporation as owner of the Survivor were charged as follows:

Count VII: fished for scup with pots not properly identified:

Assessed penalty: $5,000.

Count VIII: failed to keep copies of logbooks for one (1) year:

Assessed penalty: $5,000.

Count IX: submitting a false report stating that the Survivor did not fish in the month of May 2003 when the Survivor was observed fishing on May 20, 2003:

Assessed penalty: $10,000.

Count X: on four (4) occasions purchasing Black Sea Bass without a valid permit. These were sales from the Survivor and Rainbow Chaser to RAJ Corporation:

Assessed penalty: $8,000.

This NOVA assessed a total penalty of $96,750 and was accompanied by a NOPS to Mr. Ringen seeking to suspend his operator's permit for 120 days.

In case NE 020195, RAJ Fish Corporation as owner of Rainbow Chaser and Mr. Ringen as operator of that vessel were charged in a separate NOVA as follows:

Count 1: submitting false VTRs:

Assessed penalty: $30,000.

Count 2: deploying lobster traps not properly tagged:

Assessed penalty: $2,500.

Total Assessment: $32,500.

Stephen Ouellette, Esq., on behalf of Mr. Ringen and RAJ Corporation, requested a hearing before an ALJ on both NOVAs. A week prior to the ALJ hearing, EA Casey and Mr. Ouellette engaged in settlement negotiations which resulted in a final proposal by EA Casey to settle all three (3) cases for payment of a $5,000 penalty over a year at 1% interest, the installation of a VMS unit on Rainbow Chaser, a three (3) month permit sanction for Rainbow

Chaser and revocation of the C-Hawk lobster permit. The offer was rejected by Mr. Ringen because of what he believed to be the onerous non-monetary conditions.

Several points of contention arose during the course of the hearing. As to Counts III and VI of NE 020040, Mr. Ouellette argues that Mr. Ringen had a viable and credible defense. Count III charged that Mr. Ringen "unlawfully disposed of fish or parts thereof or other matter after the approach by an authorized officer." NOVA (Feb. 26, 2004). Count VI charged Mr. Ringen with deploying traps without any tags. Id.

SA Block testified that she saw Mr. Ringen turn a bucket over and a burlap bag fall into the water. Transcript pp. 160-61. Within five (5) to ten (10) seconds, SAs Block and James Cassin were at the point where she said she saw a burlap bag go into the water and "we looked into the water and saw nothing." Id. SA Block further testified that, after repeated questioning, Mr. Ringen admitted that he dumped water and a burlap sack from the bucket. Id. During my interview of Mr. Ringen, he denied this. Special Master Interview with Ronald Ringen (Sept. 27, 2011). The only other witness to the events described in SA Block's OIR was [REDACTED] who told SA Block when she interviewed [REDACTED] that Mr. Ringen was returning the bucket to [REDACTED] [REDACTED] confirmed this in a sworn statement. Statement of [REDACTED] (Oct. 19, 2002).

As to Count IV (NE 020040), Mr. Ringen's logbook for this trip had been partially but not entirely completed before he arrived in port because the wind was blowing 26 knots with gusts up to 29 knots and Mr. Ringen had to concentrate on steering the vessel into port before completing the VTR. In SA Block's Response, she stated that regulations require this report be

filled out prior to entering port. No exception is made for weather. Response by SA Sara Block, p. 8. I find this to be a rather rigid application of the regulation.

As to Counts V and VI, NOAA presented two (2) separate exhibits of an orange mesh highflyer, used to identify a line of lobster pots. NOAA claimed that the highflyers were identical and were retrieved from Mr. Ringen's line of properly tagged pots and a nearby line of untagged pots. Transcript pp. 146-154. During the hearing, it was revealed, on cross-examination of NOAA's witness, that the two highflyer exhibits were pictures of the same highflyer. Id. at 154. This was not intentional and was a mistake made by SA Cassin while printing the exhibits to be presented during trial. SA Ray testified at the ALJ hearing that he saw the gear during the at-sea inspection and the highflyers were similar. Id.

After three (3) days of hearing in October 2004, the parties reached a consolidated settlement of all three (3) cases. On February 12, 2005, the parties signed a Settlement Agreement which provided in part:

> "The following counts were dismissed at the hearing on the merits in October, 2004: NE 020004 FM/V[1] Count 1 (charges D-I); NE 020195 FM/V Count 1 L-O):" and further that "the Respondents admit the violations alleged in the Notices [NOVAs], with the exception of Counts III and VI of the NOVA in NE 02004 FM/V[2] to which they plead Nolo Contendere…" Settlement Agreement (Feb. 12, 2005).

The Settlement Agreement further provided for Mr. Ringen to pay a compromise penalty of $30,000 at 5% payable in accordance with a payment schedule. Mr. Ringen agreed to pay a total of $32,250 ($30,000 plus interest) in equal installments of $300 a month with a balloon

[1] NE 020004 is a mistake. There is no such case number against these Respondents. It should be NE 020040 FM/V.

[2] Supra, FN1.

payment of $27,750 due on August 28, 2006. I find this typical provision in settlement agreements for term installment payments that end in a substantial balloon payment to be problematical because it should have been obvious to the parties at the time the agreement was signed that there was no chance that the balloon payment would be made. In most cases that I have reviewed where this provision was used in a settlement agreement, the Respondent defaulted when it came time to make the final balloon payment. The usual result was a new round of negotiations which resulted in a substantially lower penalty. This was the case with Mr. Ringen who paid a total of $5,100 in installments pursuant to the Agreement and then stopped payment. On July 20, 2007, a Modification of the Consolidated Settlement Agreement for all three (3) cases was signed and a compromise penalty of $22,500 was paid by Mr. Ringen. The $22,500 came in part from the sale of the C-Hawk's lobster permit. Additionally, Mr. Ringen agreed to 60 day operator and vessel permit sanctions to be served during the months of November 2007 to April 2008.

Discussion

Mr. Ringen believes that these violations should have never happened and that they occurred because other fishermen did not like him and encouraged NOAA enforcement personnel to pursue these violations.

Mr. Ouellette argues that Mr. Ringen's violations derived from a complicated set of highly technical regulations. In Mr. Ouellette's opinion, years before the NOVAs issued in this case, NOAA law enforcement would have merely informed Mr. Ringen about how to comply with the regulations. Instead, Mr. Ringen was threatened with excessive penalties of $127,250 and 120 day operator and vessel permit sanctions which eventually coerced him into an unfair

settlement. The settlement of this case forced Mr. Ringen to refinance his house and to sell his retirement home in Florida.

As to Mr. RIngen's argument that the penalty assessment was excessive, EA Casey counters that it was based upon multiple charges, most of which were ultimately admitted or not contested. Mr. Ringen was charged with filing multiple false FVTRs, fishing multiple times with improperly marked gear involving both lobster and fish traps, not properly maintaining FVTRs as required and selling to non-permitted dealers. Many of Mr. Ringen's violations were of regulations which facilitate the enforcement of conservation and management of fishing stock.

Mr. Ringen was charged with multiple violations. Some of the regulations he violated were complicated, but most were not. In reviewing the transcript, it appears that Mr. Ringen may have had a credible defense to one (1) or two (2) counts, but his experienced trial counsel, after three (3) days of hearing, obviously decided that Mr. Ringen was better off settling and was successful in substantially reducing the assessed penalty from approximately $130,000 to an eventual settlement of less than $30,000 with reduced sanction time and no VMS requirement. Although I agree that the initial penalty assessments were excessive and well beyond an amount that could be paid by Mr. Ringen, I find that the settlement was fair and reasonable under the circumstances of this case.

Recommendation

I recommend that the Secretary take no action concerning this Application for Review.

Case 233

NE 052013 FM/V

F/V Christine Roberta

H.N. Wilcox Fishing, Inc., Owner

Richard Walz, Operator

Fisherman complains about the excessive fines levied against him for landing a monkfish overage, frontloading his DAS clock, failing to have FVTRs on board and providing false statements.

Findings of Fact

Richard Robert Walz III is a first generation commercial fisherman who fishes primarily in Southern New England out of his home port of Tiverton, Rhode Island. He has been a full-time fisherman since graduating from college in 1984 with a degree in marine fisheries management. At all times relevant to this complaint, he has been the owner of the fishing vessels, Finest Kind and Ami Elizabeth, through their corporate entities: Finest Kind, Inc., and Andorra, Inc. respectively. Mr. Walz is also a part-time captain aboard the Christine Roberta, which is a ground-fish vessel owned by H.N. Wilcox Fishing, Inc. The principal of H.N. Wilcox Fishing, Inc. is [redacted] who also owns N. Parascandolo, Inc. The Christine Roberta hails out of Little Compton, Rhode Island. N. Parascandolo, Inc. operates a fish dealership with locations in Newport and Little Compton, Rhode Island.

On January 19, 2005, Mr. Walz, while on board the Christine Roberta, called into the DAS Notification System to signal the start of his trip. On this trip, he caught 2,955 lbs. of monkfish, but the regulations only allowed a daily limit of 1,826 lbs. Mr. Walz intended to wait at sea until he had been out fishing for over 24 hours so that he would be within the allowable limits for two (2) DAS. Mr. Walz states, however, that on that night his radar system

malfunctioned because of an electrical issue. Additionally, he claims there were also white-out conditions with wind blowing 20-30 knots in frigid temperatures, which forced him and his crew to return to port. Mr. Walz considered staying out in the harbor to run his DAS clock until he exceeded the 24 hour mark, which would have allowed him to land his catch legally. However, Mr. Walz saw law enforcement officials on the dock and decided to call out of the DAS system to signal the end of his trip. Special Master Interview with Richard Walz (Sept. 27, 2011).

Upon his return to port, Mr. Walz and his crew unloaded all 2,955 lbs. of monkfish at N. Parascandolo & Sons, Inc. Since this landing exceeded the daily limit, Mr. Walz told the dock master, [redacted] that he had landed two (2) days' worth of catch. Therefore, the dealer records reflect that the Christine Roberta landed 1,585 lbs. of whole monkfish on January 19, 2005, and 1,370 lbs. of whole monkfish on January 20, 2005. Because the regulations at the time did not allow for such an overage, Mr. Walz called back into the DAS Notification system at 10:11 pm after offloading the monkfish to signal that he was going back fishing. Mr. Walz, however, did not set sail immediately. Mr. Walz and Stephen Ouellette, Esq., who represents Mr. Walz in this complaint, believed that the regulations allowed for "frontloading" of the DAS clock in 2005. Rhode Island environmental police officers corroborated that the Christine Roberta did not set sail as indicated because they observed the Christine Roberta tied to the dock that night with no crew members on board. Narrative for EPO [redacted] (undated).

Around 4:00 am on January 20, 2005, Mr. Walz and his crew finally set sail and returned that same day at around 2:00 pm with an additional 400 lbs. of monkfish. Upon her return, Rhode Island Environmental Police Officers (EPO) boarded the Christine Roberta pursuant to a

Joint Enforcement Agreement with NOAA. During the boarding, Mr. Walz initially told the EPO officers that he had landed approximately 1800 lbs. of monkfish on January 19, 2005. He then told the EPO officers that he and his crew set sail that same night on another trip, but returned early the next morning because of weather conditions. He said that he did not call out of the DAS system to end that particular trip. However, he claimed that the Christine Roberta set sail later that day and returned with her current catch. Id. All of these statements were false. In addition, Mr. Walz provided written statements falsely attesting to the above facts. Richard Walz Written Statement (Jan. 20, 2005 at 2:15pm); Richard Walz Written Statement (Jan. 20, 2005 at 4:33pm).

The EPO officers further discovered that Mr. Walz did not have a vessel trip report logbook onboard. Instead, he wrote his trip landings on 3x5 index cards. Mr. Walz states that he had been using index cards to log his trips since he first started fishing. This practice allowed him to neatly fill out the VTRs at home rather than try to fill out the VTRs while the vessel is in motion at sea. Special Master Interview with Richard Walz (Sept. 27, 2011). He explained this to the EPO officers. However, as EA MacDonald points out, the index cards maintained by Mr. Walz contained false information. Response by EA Mitch MacDonald, p. 4. After the EPO officers interviewed several of his crewmembers, Mr. Walz admitted that he had landed the overage on January 19, 2005. Subsequently, Mr. Walz provided a third written statement admitting that he landed over 2000 lbs. of monkfish on January 19, 2005 and made another landing on January 20, 2005 at 2:00pm. Offense Investigation Report by SA Christopher McCarron, p. 9 (Jan. 21, 2005).

Throughout this process, NOAA SA Christopher McCarron was in contact with the EPO officers. Upon learning of this incident, SA McCarron contacted EA Deirdre Casey who authorized seizure of the entire catch, which was sold for $4,763.45. On February 3, 2005, SA McCarron issued Mr. Walz and H.N. Wilcox Fishing, Inc. EARs for exceeding the monkfish possession limit, failing to maintain a vessel logbook onboard, preloading the vessel's DAS and making false statements.

EA J. Mitch MacDonald was assigned to the case. On February 28, 2005, he charged H.N. Wilcox Fishing, Inc. and Mr. Walz jointly and severally in four (4) counts of violating the Magnuson Stevens Act:

Count 1: The Christine Roberta unlawfully landed 3,280 lbs. of monkfish on January 19, 2005, which exceeded the daily possession limit of 1,826 lbs.;

Count 2: Mr. Walz called into the DAS system at 10:11 pm on January 19, 2005, but did not set sail until 4:00 am on January 20, 2005. The Christine Roberta should have sailed within the hour of calling into the DAS system.

Count 3: Mr. Walz failed to have vessel log reports onboard on January 20, 2005; and

Count 4: Mr. Walz provided false statements to various Rhode Island EPO Officers and to SA McCarron on January 19 and 20, 2005.

EA MacDonald assessed a $15,000 penalty per count, totaling $60,000. He also issued a NOPS for 120-day vessel and operator permit sanctions.

Mr. Walz hired Stephen Ouellette, Esq. to challenge what he considered to be an excessive penalty. In light of Mr. Walz's ongoing cooperation in the case and his assertion that he misinterpreted certain regulations, Mr. Ouellette proposed a $10,000 settlement with no

permit sanctions. EA MacDonald rejected the offer based on Mr. Walz's credibility issues. Email from EA J. Mitch MacDonald to Stephen Ouellette, Esq. (Mar. 31, 2005). In the end, the parties settled the case for $23,000 in June 2008, plus forfeiture of the $4,763.45 proceeds for the seized catch. It was agreed that Count 2 would be dismissed. With respect to Count 3, Mr. Walz no longer uses index cards to log his FVTR entries.

The dealer, Parascandolo & Sons, Inc., and [redacted] settled their case separately for payment of $7,550.

Discussion

Mr. Walz was compelled to settle what he believed to be an excessive penalty and because of his perception that the penalty could increase if he brought the matter before an ALJ. He was also not confident he would prevail before an ALJ because of what other fishermen have told him. Further, he could not risk additional cost or expense since he had two (2) monkfish trips seized. Mr. Walz believes that a more suitable penalty would be limited to a seizure of the catch. Furthermore, Mr. Ouellette and Mr. Walz believe that at the time fishermen were permitted to "frontload" the DAS clock, meaning that they could call into the DAS Notification System and set sail several hours later. Finally, Mr. Ouellette argues that the regulations did not accommodate fishing vessels that catch over the legal limit, but for legitimate reasons were unable to stay at sea long enough to justify the limit. Special Master Interview with Richard Walz (Sept. 27, 2011).

In response, EA MacDonald notes that the assessments were reasonably related to the nature, circumstances and gravity of the violation, together with respondent's culpability and prior enforcement history. He points out that the monkfish supply was overfished when he

assessed the penalties. Finally, he emphasizes that Mr. Walz initially provided various false statements, before he subsequently admitted to landing illegally retained fish. Response by EA J. Mitch MacDonald, pp. 3-4.

I find no evidence to suggest that Mr. Walz was assessed a high penalty that unfairly forced him to settle. It is undisputed that Mr. Walz landed an overage on January 19, 2005, attempted to hide the overage by instructing the dealer to split the trip over two (2) days, frontloaded his DAS clock in order to provide an appearance of compliance, and provided oral and written false statements to enforcement officials in order to conceal his actions. Mr. Walz, however, claims that he was forced to return to the dock early because of inclement weather, thus preventing him from running his DAS clock at sea. His subsequent actions undermine this claim. If Mr. Walz was truly forced to return to port because of inclement weather, common sense dictates that he would have alerted the enforcement officials whom he claims he saw prior to landing. Furthermore, as EA MacDonald points out, Mr. Walz was not given the benefit of the doubt because of his subsequent false statements made during the investigation. Response by EA J. Mitch MacDonald, p. 4; see also email from EA J. Mitch MacDonald to Stephen Ouellette, Esq. (Mar. 31, 2005). Instead of notifying law enforcement, Mr. Walz consciously landed his catch and instructed the dealer personnel to split the catch into two (2) in order to create an appearance that his landing complied with the legal limit. Then, he submitted not one (1), but two (2) false written statements before finally admitting to the violations.

It is considerably more likely that Mr. Walz landed a substantial catch and did not return the overage because he was motivated financially to retain the catch. Mr. Walz claimed in my

interview that he believed it was legal for him to "frontload" his DAS clock during this time. But if Mr. Walz truly believed he was able to "frontload" his DAS clock, he subsequently would not have tried to conceal his landings from law enforcement. I understand that regulations with respect to running the DAS clock are rigid to ensure compliance. I further understand that is difficult for fishermen, who work hard daily at their craft and cannot control the amount of fish they are able to catch, to throw fish overboard to comply with DAS limitations, especially if the fish are dead. In this example, conservation goals are not achieved and the dead fish yield no economic value. This policy, however, is beyond the scope of my investigation and is best left to the lawmakers. In this case, Mr. Walz was aware of the regulations, consciously chose to circumvent them, and then subsequently provided false statements to law enforcement officials. I cannot recommend relief given the gravity of the violations committed.

EA MacDonald ultimately reduced the $60,000 assessed penalty to a $23,000 settlement, plus the catch proceeds of $4,763.45. He also dismissed Count 2, the "frontloading" violation. Therefore, the remaining three (3) counts and the final assessment of $23,000, or approximately $7,700 per violation, is consistent with the lower end of the first time violator penalty schedule ($5,000-$50,000). Finally, there was no permit sanction imposed, despite the initial 120 day assessment, thus allowing Mr. Walz to continue to pursue his livelihood. Given the totality of the circumstances, the willful nature of the violations and the various attempts to conceal them, including providing two (2) written false statements, together with the fact that Mr. Walz was ably represented by counsel, I find that the final settlement was fair and reasonable.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 234

NE950323

Sea Rich Seafoods, Inc., Dealer

Atlantic Gem Seafoods, Inc., Dealer

Thomas R. Reilly, Sea Rich Stock Holder

Dennis Saluti, Sea Rich Stock Holder

Principal owners of fish dealerships complain of overzealous enforcement, excessive penalties and settlement coercion.

Findings of Fact

Thomas R.F. Reilly

Thomas Robert Francis Reilly resides in Chatham, Massachusetts and is currently the operator of the 50' fishing vessel, Three Graces, which is docked in, and fishes for scallops from, Chatham. Mr. Reilly stated that fishing has been his lifelong passion. He started when at 12 to 15 years old, he would catch and sell fish to local restaurants. After Mr. Reilly graduated from high school, he became a full time fisherman and in 1976, purchased the Sheryl Ann, a 24' lobster boat that he operated from Plymouth, Massachusetts, where he fished for striped bass until 1980. In 1984-1985, Mr. Reilly sold the Sheryl Ann and built a larger 36' Sheryl Ann that he used to catch primarily cod out of Chatham.

In the mid 1990's, Mr. Reilly sold the Sheryl Ann and in 1998, built the 45' Three Graces, which was only permitted for catching tuna. In 2000, Mr. Reilly sold the Three Graces. In 2001, Mr. Reilly built another Three Graces, which he used for catching tuna and sea bass, lost the vessel in 2008 as a result of bankruptcy, and now operates the vessel for the new owner.

In 1981-1982, Mr. Reilly and a partner started Quality Seafoods, a fish market located in Taunton, Massachusetts. Quality Seafoods primarily purchased fish from wholesalers and sold

it to stores and restaurants. The success of the fish market in Taunton allowed Mr. Reilly and his partner to open a second fish store in Raynham, Massachusetts. While operating the stores, Mr. Reilly continued to fish aboard the Sheryl Ann. Because of lease problems in 1984, Mr. Reilly closed both Quality Seafoods locations, but from 1984 to 1987, he continued to sell wholesale fish to restaurants and other fish dealers from his truck. Mr. Reilly's truck fish business eventually moved from Taunton to New Bedford, Massachusetts. Sometime in the mid 1980's, Mr. Reilly and his Quality Fish partner dissolved their partnership and Mr. Reilly incorporated Sea Rich Seafoods, Inc. ("Sea Rich"). Mr. Reilly was the sole stockholder/officer/director of Sea Rich, which had state and federal dealer permits, and began selling product to restaurants and fish markets from a leased facility in New Bedford. Sea Rich did not have access to a dock for offloading fish from vessels but relied on product from fishing vessels and other dealers being shipped to it by truck.

Sea Rich started as a seller of fish to wholesalers and fish markets. During this time, Mr. Reilly met Dennis Saluti, who worked for Atlantic Coast Fisheries Co., a fish processing plant that unloaded vessels and was a large Sea Rich customer. Sometime in the early 1990's, Mr. Saluti contacted Mr. Reilly and told him that he wanted to move on from his position at Atlantic Coast Fisheries. As a result, the two formed Worldwide Seafoods, Inc. in 1990. Mr. Reilly had a 51% ownership and Mr. Saluti had 49% and was president of the company. Worldwide packaged and sold primarily monkfish, skate and dogfish to Western European customers. Worldwide also received supplies from up and down the east coast from wholesalers, vessels, and Sea Rich, which was located in the same building.

In 1992, Mr. Reilly gave Mr. Saluti a 15% ownership interest in Sea Rich. In 1991, Atlantic Gem Seafoods, Inc. was formed as a shell corporation to acquire the assets of Atlantic Pearl, Inc., which owned the trade name of Atlantic Gem for processed fish. Sea Rich did not use the shell corporation for the acquisition and, instead, acquired the assets of Atlantic Pearl, Inc. directly, and marketed its product under the Atlantic Gem logo as a division of Sea Rich. Atlantic Gem was then voluntarily dissolved in 1994. In 1996, on advice of counsel, a new Massachusetts corporation was formed, also called Atlantic Gem Seafoods, Inc. ("Atlantic Gem"), as a wholly owned subsidiary of Sea Rich, because when Mr. Reilly was contemplating the sale of Sea Rich, he thought that he would only sell a part of its business. Sometime in the 1990's, Worldwide acquired the assets from Belle Island in Newfoundland, Canada, which operated a fish processing plant in Newfoundland as a means for ensuring a supply source for Worldwide's customers. Belle Island Ventures, Inc. was incorporated in Massachusetts in 1996 and dealt primarily in underutilized species.

<u>Dennis Saluti</u>

Dennis Saluti is currently the co-owner of Quality Custom Packaging, Inc., a New Bedford seafood processing plant that packages fish for large companies. The company gets product, primarily scallops, from other companies and from auctions. There is no reporting requirement for this business.

Mr. Saluti started in the fish business after he got married in 1979. He was previously a math teacher, but joined his father-in-law's seafood company, Atlantic Coast Fisheries, after his marriage. Mr. Saluti worked primarily in marketing and sales and his focus was to try and open new markets in Western Europe. Mr. Saluti met Mr. Reilly in 1987, and in 1990, they started

Worldwide. At Sea Rich, Mr. Saluti worked primarily in marketing, sales, and finance including banking and credit lines. He was not responsible for any reporting requirements.

For about a year following the sale of Sea Rich in 1998, Mr. Saluti worked for the company that acquired Sea Rich, but then formed Markana Corporation which is essentially a fish broker with extensive customer contacts in Western Europe. Mr. Saluti divides his work week between Markana and Quality Custom Packing. Mr. Saluti has never owned a fishing vessel, nor has he ever possessed an operator's permit.

Sea Rich

Between 1992 and 1996, Mr. Reilly was traveling extensively. Messrs. Reilly and Saluti had opened an office, Pacific Gem, in Seattle, Washington in order to do business in Asia. Mr. Reilly traveled five (5) months of the year in Russia, Japan, and Korea, and lived in Seattle from October to May between 1994 and 1997. Mr. Reilly also had a house in Seattle until the sale of his company in 1998. Meanwhile, Sea Rich leased an offloading location in Stonington, Connecticut, and owned another facility in Newport News, Virginia. Mr. Reilly described his role as trying to secure supply of product wherever he could under the Atlantic Gem label. As such, he was buying fish from around the globe.

Despite the company's growth ($90 million in sales at its height), an international presence, global procurement process, international brand recognition, and a $17 million dollar credit line, Mr. Reilly stated that the company was underfunded. Consequently, the company was heavily leveraged. Messrs. Reilly and Saluti sought to lessen their workload around 1994-1995 and decided to sell the companies to cash in on their success. Further, the purchasing

company would have hired and allowed them to fulfill their dream of growing the company even larger to possibly a $500-$600 million dollar business.

Beginning in late 1996 and into 1997, Messrs. Reilly and Saluti engaged in efforts to sell Sea Rich, Atlantic Gem and their other business interests. In March 1997, they were finalizing a Letter of Intent with Mission City Management Inc. ("Mission City") for the sale of Sea Rich, Atlantic Gem, and Worldwide and Belle Island. Michael McHugh, counsel for the Respondents on this Application for Review, has provided me with an unsigned letter of intent by Mission City dated April 11, 1997 to purchase the stock of the companies controlled by Messrs. Reilly and Saluti. The essential terms of the stock purchase were payment in cash of $3.5 million dollars at the time of closing; $4,000,000 in preferred stock; repayment of debt owed by the companies to Messrs. Reilly and Saluti in the amount of $942,714; an employment contract for Mr. Saluti; and a three (3) year consulting contract of $250,000 per year for Mr. Reilly. Letter of Intent (Apr. 11, 1997).

The Investigation

In May 1995, SA Louis J. Jachimczyk was investigating a fishing vessel that allegedly had exceeded her Atlantic sea scallop DAS allocation. During that investigation, SA Jachimczyk reviewed some documents at Sea Rich Seafoods, Inc. ("Sea Rich") concerning the fishing vessel under investigation and discovered several potential violations by Sea Rich. Offense Investigation Report by SA Louis Jachimczyk, pp. 9-10 (Mar. 25, 1997). As part of this investigation, SA Jachimczyk met with Mr. Saluti in Sea Rich's office in New Bedford. At one point, Mr. Saluti excused himself to go to a back office. When he returned to the front office, he saw SA Jachimczyk behind a desk at one of the Sea Rich computers looking at information on

the computer screen. Mr. Saluti told SA Jachimczyk that he had no right to be searching through the company computer without the company's knowledge. SA Jachimczyk stopped and stepped away from the computer. According to a note in the Sea Rich case file, dated May 26, 1995, and authored by EA Mitch MacDonald: "Tom Reilly called at 2:15 concerned about L. Jachimczyk hitting buttons on computer." EA J. Mitch MacDonald Note (May 26, 1995). In a Memorandum to SA Gino Moro, through EA Charles Juliand and dated May 26, 1995, EA MacDonald stated, in relevant part, as follows: "The facts of the case to this point reveal that Agent Louis Jachimczyk discovered evidence on the dealer's computer of two sets of books." Memorandum (May 26, 1995).

Later that day, Messrs. Reilly and Saluti, company counsel, William H. Kettlewell, and SA Jachimczyk had a telephone conference call. SA Jachimczyk reiterated his request for documents to which Attorney Kettlewell requested that SA Jachimczyk put his request in writing so that Sea Rich could be sure what NOAA wanted and know precisely what records to produce. Before the call ended, Attorney Kettlewell advised SA Jachimczyk that Sea Rich wanted to cooperate with NOAA but that on his advice, Sea Rich wished to have all communications in writing. SA Jachimczyk refused to reduce any of his requests to writing and left Sea Rich. Special Master Interview with Thomas Reilly and Dennis Saluti (Jan. 10, 2012); Special Master Interview with William Kettlewell, Esq. (Jan. 10, 2012); Affidavit by William Kettlewell (May 5, 2011). EA Juliand's Response in this case denies that Mr. Kettlewell participated in this conference call. In support of his denial, he states:

> Louis Jachimczyk, now retired, informed agency counsel during a telephone call on February 21, 2012, that Mr. Kettlewell did not participate on the call at issue. According to Mr. Jachimczyk, "a New Bedford attorney, not Kettlewell, was on

> that call" and "Kettlewell didn't get involved until several months later." Mr. Jachimczyk could not recall the name of the New Bedford attorney mentioned initially, but he was certain that it wasn't Mr. Kettlewell. Upon being told, in a follow up call on February 21, 2012, that Mitch MacDonald's notes for May 26, 1995, showed that an attorney named Philip Beauregard may have been involved, Jachimczyk said that it was definitely Mr. Beauregard, not Mr. Kettlewell, who participated on the conference call on May 26, 1995. Response by EA Charles Juliand, p. 96, fn. 4.

In order to confirm EA Juliand's denial of Mr. Kettlewell's participation in this conference call, I contacted Sea Rich's counsel and requested that he check with his clients, Mr. Kettlewell, and if possible, Mr. Beauregard, to make sure that their recollection of this call was as set forth in Mr. Kettlewell's Affidavit, his sworn testimony, and the sworn testimony of Messrs. Reilly and Saluti. In response, I have received counsel's assurance that his clients' recollection of the participants and substance of the conference call was as originally presented to me during their interview and in Mr. Kettlewell's Affidavit. Subsequently, I received an Affidavit signed by Philip N. Beauregard, Esq. who states that he has no memory of participating in the referenced conference call; that he checked his work diary for that time (May/June 1995) and found no reference to such a call; that prior to the Spring of 1995, he had had limited experience with SA Jachimczyk and would recall any alleged call had he participated; and that, if he were aware of the need for such a conference call in the Spring of 1995, he would have directed the company to Mr. Kettlewell for advice. Affidavit of Philip Beauregard, Esq., with Attachment (Mar. 1, 2012).

On June 12, 1995, SA Jachimczyk went to the Sea Rich office seeking additional information concerning his investigation. He encountered Mr. Reilly and asked him to provide the names of the fishing vessels with which each non-reported cash transaction took place. Mr.

Reilly said he was unfamiliar with computers, stated that he could not even turn them on, and was unable to provide SA Jachimczyk with the requested information. Mr. Reilly called [redacted] [redacted] the company controller, and said, that "the slips only show cash, right?" Offense Investigation Report by SA Louis Jachimczyk, Repeated on pp. 36-57 (Mar. 25, 1997). Mr. Reilly handed SA Jachimczyk the receiver to speak with [redacted], who told SA Jachimczyk that the slips and/or checks would only show cash. Id. Messrs. Reilly and Saluti were both aware that there were cash transactions that took place at Sea Rich. Id. However, Mr. Reilly pointed out that it is not illegal to pay in cash.

On November 3, 1995, SA Jachimczyk applied for and received an AIW for the offices of Sea Rich Seafoods, Inc. and Atlantic Gem Seafoods, Inc. Warrant for Inspection (Nov. 3, 1995).[1] The AIW was executed on November 9, 1995, by a number of NOAA officers, and records from March 1, 1994 to November 3, 1995, were seized from both Sea Rich and Atlantic Gem. Between November 1995, when the AIW was executed, and April 1995, when the EAR was issued, both Sea Rich and Attorney Kettlewell attempted to make contact with SA Jachimczyk concerning his inquiry into the vessels that unloaded at Sea Rich. SA Jachimczyk did not respond to any of Sea Rich's or counsel's attempts to contact him concerning his investigation.

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[1] On August 4, 2011, I notified counsel for Sea Rich/Atlantic Gem and NOAA's General Counsel that in reviewing NOAA's files in this case, I discovered that on November 3, 1995, as United States Magistrate Judge, I had issued an Administrative Inspection Warrant of the Sea Rich/Atlantic Gem business premises. I informed counsel that I had no independent memory of the facts or circumstances that led to the issuance of the warrant and that I was confident that I could review the Sea Rich/Atlantic Gem Application for Review. I then requested that counsel inform their clients of my prior involvement with this case and report back to me if either client objected to my reviewing this Application. Both counsel reported that neither client had an objection. Letter from Special Master to Michael McHugh, Esq. and to Lois Schiffer, NOAA General Counsel (Aug. 4, 2011); Letter from Michael McHugh, Esq. to Special Master (Aug. 30, 2011).

Special Master Interview with Thomas Reilly, Dennis Saluti, and Bill Kettlewell, Esq. (Jan. 10, 2012).

On March 25, 1999, SA Jachimczyk completed his OIR which contained multiple counts of false reporting, non-reporting, illegal purchase/possession of fish products, interference with an investigation and false statements.

On April 11, 1997, SA Jachimczyk issued an EAR to Atlantic Gem and Sea Rich charging them with 109 counts of submitting false reports, purchasing illegal fish, failing to submit required reports and interference with, obstructing or delaying an investigation and making false statements to NOAA personnel.

On April 21, 1997, EAs Juliand and MacDonald issued a multi-count (113) NOVA charging essentially the same violations set forth in SA Jachimczyk's EAR. The NOVA was accompanied by a NOPS seeking to permanently revoke the federal dealer permit (No. 1458) for Sea Rich based on the violations set forth in the 113 count NOVA.[2] In the letter accompanying the NOVA, EA MacDonald stated that, if the NOVA were appealed, the ALJ "is not bound by the amount assessed in the Notice, but may fix a penalty based upon his judgment of what is appropriate up to the statutory maximum of $100,000 per count." Letter from EA MacDonald to Sea Rich Seafoods, Inc. (Apr. 21, 1997). According to Mr. Reilly, he thought he could be liable for a penalty up to $11,300,000.

The 113 count NOVA charges three (3) separate categories of violations: Counts 1 through 79 charge Sea Rich with unreported landings of fish/scallops by identified vessels; the even numbered counts 80 through 112 charge violations for failure to file weekly dealer reports

[2] I have not found a similar NOPS for Atlantic Gem's dealer permit No. 1575.

of cash purchases of fish/scallops during successive time periods (from November 3, 1994 through November 4, 1995); and the odd numbered counts 81 through 113 charge that Sea Rich/Atlantic Gem employees, Thomas Reilly and [REDACTED], interfered with a lawful investigation on June 12, 1995 (see supra, pp. 377-78 for description of the interference) by not providing names of vessels from whom the company purchased fish/scallops for cash in the seventeen (17) different time periods set forth in the even numbered counts 80 through 112.

By March 1997, it was well known in the fishing industry that Messrs. Reilly and Saluti were going to sell their companies. EA MacDonald states in his Response that it was his "… recollection that the Agency was aware of rumors that Sea Rich was for sale and that issuing a NOVA sooner rather than later would be prudent." Response by EA J. Mitch MacDonald, p. 10, fn. 25. [REDACTED]

[REDACTED]

Also on April 22, 1997, EA Juliand wrote to [redacted] of Mission City Management confirming an earlier telephone conversation detailing the charges against Sea Rich and Atlantic Gem. This conversation took place without Sea Rich's knowledge. Letter from EA Charles Juliand to [redacted] (Apr. 22, 1997).

On April 23, 1997, following the issuance of the NOVA and NOPS, , counsel for Sea Rich and Atlantic Gem sent letters to FleetBank and Mission City advising them of the charges. This had a devastating impact on the negotiations for sale of the companies and the transaction was seriously jeopardized. In addition, the companies' line of credit, which was crucial to the company's survival, was also placed at risk. On April 24, 1997, NOAA issued a press release titled New Bedford Fish Corporation Charged in Fishery Fraud Case and subtitled 4.7 million and dealer permit revocation sought. Press Release (Apr. 24, 1997).

The companies assert that the NOAA charges were largely frivolous and that the penalties assessed were outrageously excessive. Special Master Interview with Thomas Reilly

and Dennis Saluti (Jan. 10, 2012). The companies were prepared to challenge the NOVA/NOPS and instructed counsel to file for a hearing.

Messrs. Reilly and Saluti state, however, that at this point the situation faced by Sea Rich and Atlantic Gem was untenable. They assert that they were well aware from current press reports about the Spalt case (supra, Case 40) of the reputation of NOAA enforcement officials and the lengths to which they were willing to go to extract large penalties from companies in the fishing industry. They believed that the ALJs were routinely affirming NOAA's assessed penalties. Messrs. Reilly and Saluti and their counsel believed that, even in circumstances where counsel for NOAA grossly overcharged a case, there was no practical ability to overturn the original NOVA or NOPS absent assent by NOAA counsel. Id.

They stated further that Sea Rich and Atlantic Gem were well respected and very successful companies. However, they were highly leveraged in order to grow the company. They were also in the middle of negotiations for the sale of the companies that were threatened by the NOVA. If Sea Rich's permit was revoked and could not be transferred, the sale would be rendered impossible. The NOVA also placed all of Sea Rich's lines of credit in jeopardy. Without working capital, Sea Rich could not operate while pursuing an appeal before an ALJ. Id.

The company quickly came to the conclusion, after consulting with counsel, that it could not risk the time, effort and money to fight the charges. Furthermore, as set forth above, EA Juliand threatened to seek an Interim Order to shut down Sea Rich prior to an ALJ Hearing. See supra, pp. 380-81. Messrs. Reilly and Saluti were well aware of the Spalt case where an Interim Action Order had put those companies out of business before the ALJ hearing and, should that

occur in this case, there would be no sale of their companies. Thus, in their view, there was no practical alternative to settlement of the NOVA and NOPS that could achieve the goal of completing the sale, protecting the many jobs for company employees, payment of creditors and the preservation of at least some assets for the stockholders. Consequently, the company authorized counsel to negotiate the best deal possible. Id.

On April 29, 1997, Mr. Kettlewell made contact with EA Juliand to discuss the possibility of obtaining additional time in which to respond to both the NOVA and NOPS which had just been served. Mr. Kettlewell stated that, if the parties could resolve the NOVA and NOPS and the sale were to occur, creditors would be protected and NOAA would get its share of the money. EA Juliand stated he would consider the request and then asked whether Mr. Kettlewell had seen the result in the Spalt case. He told Mr. Kettlewell to tell "Tommy," a reference to Mr. Reilly, that "it doesn't pay to fight because otherwise you will end up like Jimmy Spalt" or words to that effect. Special Master Interview with William Kettlewell, Esq. (Jan. 10, 2012). Mr. Kettlewell suggested that not even an ALJ would make an award along the lines of the NOVA in this case and that the conduct in the Spalt case was far worse than even the alleged conduct in this case. EA Juliand told Mr. Kettlewell he should not be too sure about his assessment of the case and that he believed that he could get whatever assessment he sought no matter how high. Except for the words "no matter how high," EA Juliand has "no qualms with the content of this sentence." Response by EA Charles Juliand, p. 12, fn. 26.

At other times in the negotiations, EA Juliand made remarks to Mr. Kettlewell that he had worked on the New Bedford waterfront and knew what it was like to be a fisherman and that he was not going to let "Tommy" Reilly get away with what he had been doing. EA Juliand

said that any agreement had to provide that Mr. Reilly would not work in the fishing business for a very long time. Special Master Interview with William Kettlewell, Esq. (Jan. 10, 2012). EA MacDonald's notes from a settlement meeting on May 8, 1997 indicate that the parties discussed barring Mr. Reilly from the federal fisheries, including revocation of Mr. Reilly's personal tuna fishing permits. Response by EA J. Mitch MacDonald, p. 26, fn. 69. Mr. Kettlewell informed EA Juliand that those permits had absolutely nothing to do with the conduct contained in the NOVA and NOPS, but EA Juliand responded by saying that he was going to make sure that Mr. Reilly was out of the fishing business for a very long time. Special Master Interview with William Kettlewell, Esq. (Jan. 10, 2012). Notwithstanding the fact that not one (1) count of the NOVA or NOPS related to those permits, Mr. Reilly agreed to a two (2) to five (5) year sanction on his personal federal tuna permits.

On June 6, 1997, Sea Rich, Atlantic Gem and Messrs. Reilly and Saluti signed Settlement Agreements with respect to the violations alleged in the NOVA and the NOPS as well as other uncharged violations of the Act. The final penalty paid was $1,010,082.05 (one (1) million plus $10,082.05 in interest). Sea Rich's dealer permit No. 1458 was permanently revoked, and Mr. Reilly personally agreed not to apply for, receive or have an interest in any federal dealer permit for a period of seven (7) years. He further agreed to a five (5) year permit sanction on his vessel permits (the tuna permits) contingent on payment of the civil penalty, i.e., if the penalty was timely paid, the sanction would be reduced to two (2) years.

Mr. Reilly argues that as a result of the demands of EA Juliand in the negotiations, the terms of the Settlement Agreement ensured that he would not be able to work for the buyer

after the sale of the business as was originally intended. Special Master Interview with Thomas Reilly and Dennis Saluti (Jan. 10, 2012). EA MacDonald states in his Response:

> The signed settlement agreement did not bar Mr. Reilly from working for the new purchaser. These claims are contradicted by the plain language of the contract the claimants drafted and signed. For example, the express terms of the agreement anticipated that Mr. Reilly would keep working for Sea Rich until its sale. See paragraph 3.D. of the settlement agreement. My notes from settlement discussions on or about May 5, 1997, state that "T. Reilly out" on one line, followed by another line stating "consulting & $3/4 million retracted." This appears to me to refer to the purchaser's decision not to hire Mr. Reilly as a result of Mr. Reilly's involvement in the violations. Further, from undated notes that appear to have been taken near the of the [sic] Sea Rich closing because of a reference to the Sea Rich "closing on Monday," "Tom Reilly's restrictions are contained in the 4 corners of agreement." This is consistent with other notes that refer to Mr. Reilly's removal from domestic fisheries, not the international fisheries work he states in this complaint to have been moving toward…. Response by EA J. Mitch MacDonald, p. 27, fn. 72.

During the negotiations, Mr. Kettlewell pointed out to EA Juliand that the MSA had nothing to do with the manner and means by which fish was paid for by an un-loader, such as Sea Rich, and that there was no factual basis for the even numbered counts from 80 to 112 (cash transactions) of the NOVA. Special Master Interview with William Kettlewell, Esq. (Jan. 10, 2012). Mr. Kettlewell argues this was especially true in circumstances where a scallop purchaser, such as Sea Rich, buys scallops for cash from vendors other than federally permitted fishing vessels. According to EA MacDonald, "[t]here was no issue as to the form of the transactions, except to the degree they facilitated violations and prevented the Agency from information about what vessels landed the catch. Sea Rich could pay for the fish in any manner it chose." Response by EA J. Mitch MacDonald, p. 27, fn. 73. "The issue in these counts involved the failure to report the transactions as required by law. The transactions involved

over 650,000 pounds of fish and scallops worth approximately $1.08 million. The cash transactions facilitated non-reporting"… since "cash transactions are not as traceable as those purchased with checks. The applicable regulation, 50 C.F.R. §650.7(a)(1)," states, in part, that the dealer must provide information about the "name and permit number of the vessels from which fish are landed or received…" The charge in the NOVA referred to Sea Rich's failure to comply with the requirements of this section by not reporting cash transactions with vessels, not dealers. Id. at 27, fn. 74.

The negotiations with Mission City for the sale of the companies continued during the settlement discussions with NOAA and the Settlement Agreement was structured to permit a transaction to take place. However, the terms of the transaction were dramatically reduced from the original letter of intent which contemplated a purchase price of approximately $8.5 million dollars and favorable employment/consulting contracts for Messrs. Reilly and Saluti. The final transaction was an asset and not a stock purchase, and provided for $1.15 million dollars in cash consideration and assumption of certain liabilities of Sea Rich and Atlantic Gem. Of the cash paid at the closing, $900,000.00 plus interest on the NOAA Promissory Note was paid to NOAA, which together with a previously paid deposit of $100,000 on June 6, 1997, equals a total penalty payment of $1,010,082.05. Worldwide and Belle Island were sold in a separate transaction that same day.

Discussion

Counts 1 Through 79

Mr. McHugh, who represents Messrs. Reily and Saluti in this Application for Review, argues, with respect to Counts 1 through 79, that Sea Rich is not in a position to be able to

contest the factual allegations of these counts due to the passage of time, the lack of adequate documentation or adequate resources. He points out that the unequivocal testimony of Messrs. Saluti and Reilly demonstrates that it was not the practice or policy of Sea Rich to violate applicable regulations in its business. The company acknowledges that it is possible that mistakes were made at the loading docks.

EA MacDonald argues that a careful review of the OIR and its attachments and the NOVA reveal that these cash transactions were an attempt to hide the vessel's illegal landings. Response by EA J. Mitch MacDonald, p. 17, fns. 32-36.

EA MacDonald states that, from interviews of Sea Rich personnel following the settlement, it is clear that Sea Rich was hiding cash portions of transactions. Response by EA J. Mitch MacDonald, p. 19, fn. 42. EA MacDonald infers that since Messrs. Reilly and Saluti were in charge, they were active participants. I do not agree with EA MacDonald's inference and have attached as exhibits a copy of EA MacDonald's notes in their entirety of these post settlement interviews. EA J. Mitch MacDonald Notes (Oct. 27, 1997). In reviewing these notes, I conclude that Messrs. Reilly and Saluti were in charge of the entire Sea Rich enterprise, which, with their other company, Worldwide, employed over 200 people. Mr. Reilly was not in New Bedford for most of the year and Mr. Saluti had little or nothing to do with the offloading of vessels. However, they had some key employees who performed important functions or supervised others who performed those functions. Neither were in charge of record keeping and reporting. These responsibilities were assigned to and later, to as . Neither had access or knew the combinations to the safes where cash was kept. Mr. Reilly did not even know how to turn on a computer and no

witness stated that either of Messrs. Reilly and Saluti were involved in illegal cash purchases of fish products from vessels. In fact, EA MacDonald's interview notes make clear that several witnesses told him that sometime in 1994-1995, both Messrs. Reilly and Saluti put an end to cash transactions.

EA MacDonald states that "[f]ederally permitted dealers were required by law to report on a weekly basis… the name and permit number of the vessels from which fish are landed or received, dates of purchases, pounds by species, and port landed." 50 C.F.R. §648.7(e)(1). That is not the requirement for purchases from dealers.

Counts 1 through 79 refer to cash transactions that Sea Rich admits were a regular part of its business, including payment to vessels landing product as well as other transactions such as dealer to dealer transactions, that have no federal reporting requirement. According to Mr. McHugh, the penalties assessed in Counts 1 through 79 appear to be random in amount and unsubstantiated by any references to applicable evidence or regulations. Further, in many instances, the NOVA assessed multiple counts for a single landing.

I have compared the NOVA counts 1 through 79 with a schedule prepared by NOAA that describes the alleged illegal activity by Sea Rich / Atlantic Gem that is charged in these counts. Schedule Prepared by NMFS (May 15, 1997). This document was prepared after the NOVA issued, but contains all of the information referred to in counts 1 through 79, and is an updated version of a prior schedule prepared before the NOVA issued. I have included both schedules as exhibits in this case. The schedule describes purchases by Sea Rich/Atlantic Gem from identified fishing vessels; the date of purchase; the weights and dollar amounts paid for Northeast multispecies (NMS), Atlantic Sea Scallops (SES) and other miscellaneous fish such as

monkfish, lobsters, etc.; and unreported weights and unreported cash paid for these same fish products on those same dates. This information is based on Sea Rich/Atlantic Gem records obtained as a result of the AIW. Id.

The schedule supports the specific violations charged in counts 1 through 79. Id. In some cases, no dealer report of the transaction was filed (count 1); there were false dealer reports (count 2); and there were unreported overages landed by specific vessels on specific dates (count 3). Counts 2 and 3 describe a purchase of multispecies and scallops on the same date from the same vessel. This offload was falsely reported (count 2) to hide an overage of multispecies (count 3). As a result of randomly selecting different counts contained in counts 1 through 79 of the NOVA, I have confirmed that there was a pattern of underreporting offloads to hide overages from vessels and in some cases filing no dealer report at all. Not all of the transactions on the schedule were charged in the NOVA. Many of the unreported cash transactions were under $100, most were in the $2,000 to $6,000 range, and four were over $10,000. The penalty assessed for each of these counts ranged from $10,000 to $35,000. EA MacDonald states:

> The civil penalty assessment was commensurate with the respondent's violations. False reports were generally assessed at $15,000, including those relating to multispecies Days at Sea (e.g., counts 4, 6, 17, and 19). False reports and failures to report related to scallop possession limits or Days at Sea violations or were otherwise extensive (e.g., counts 11, 15, and 21-24). Because they related to covering up violations, in those instances a $25,000 penalty was assessed. If the false report or non-report did not cover up a vessel's illegal catch and involved only fish other than scallops or multispecies only, or was otherwise a small amount then it was assessed at $10,000 per incident (e.g., counts 71-78). Failures to report purchases from identified vessels were generally assessed at $15,000 for scallops and $10,000 for relatively low valued fish (e.g., counts 1 and 56). Purchasing illegally retained scallops was assessed at $35,000 per incident (e.g., counts 8 and 10) and $25,000 for generally lower valued multispecies (e.g., counts

18 and 20) as those purchases provided the incentive for landing illegally retained fish and scallops. Response by EA J. Mitch MacDonald, p. 31.

The total assessment for counts 1 through 79 was $1,765,000. From my experience in reviewing these cases, I find that an assessment of from $10,000 to $35,000 for a first offense for 79 separate counts of non-reporting, false reporting and hiding overages was excessive and should have been closer to the minimum penalty of $5,000 in accordance with the then applicable penalty schedule. Email from NOAA Paralegal Debra Ketchopulos to Special Master (Mar. 15, 2012).

Failure to Report Counts

The even numbered Counts 80 through Count 112 are identical in that they allege that Sea Rich violated 50 C.F.R. §§650.9(d)(5) and 651.9 (e)(4). Each count alleges failure to submit dealer reports of cash purchase transactions on a weekly basis from November 1, 1994 through November 8, 1995, and failure to include a specific total weight and price paid for each species of fish purchased or identify the vessel from whom the product was purchased. These cash purchase transactions are described in detail on a schedule entitled "Law Enforcement Confidential" dated April 14, 1997 which shows a total of 659,049 lbs. of fish products purchased for cash of $1,090,935.52 during seventeen (17) different time periods from November 3, 1994 through November 4, 1995. Law Enforcement Schedules (May 14, 1997). The time periods are random and describe cash purchase transactions of approximately $66,000 for each time period except for the last period (November 2, 1995 to November 14, 1995) in which transactions totaled $20,043.95.

In the OIR dated April 24, 1997, SA Jachimczyk charged that cash purchase records, allegedly obtained from Mr. Reilly, show that product was purchased during essentially the same time frame as the NOVA counts and that no records for these transactions were filed with NMFS. The penalty assessed for each of the seventeen (17) time periods for failure to report these cash purchases on weekly dealer reports was $75,000.00 for a total assessed penalty of $1,275,000.00.

Sea Rich, according to Mr. McHugh, had regularly made cash purchases of product from a variety of sources and not just from federally permitted vessels. It was the policy and practice of Sea Rich that the weekly dealer reports accurately record the required information. Further, during this period of time, there were substantial cash purchases that were not required to be reported on the weekly dealer reports. It is obvious from the OIR that SA Jachimczyk assumed that records of cash purchases he received from Sea Rich/Atlantic Gem pursuant to the AIW were all from federally permitted vessels and thus, required to be reported. According to Mr. McHugh, this clearly was not the case.

Mr. McHugh further argues that the respondents had no opportunity to rebut this assumption at the time due to coercion from NOAA which forced a settlement in a matter of weeks. Given the passage of time since then, and the absence of sufficient resources and records to develop a defense to the allegations, Sea Rich is at a distinct disadvantage. However, Mr. McHugh states that it is quite clear that where NOAA had what it felt was evidence of the failure to report cash purchases from federally permitted vessels, NOAA did so in Counts 1 through 79 discussed, supra.

EA MacDonald states in rebuttal:

> The clear language of the NOVA charges in count 1-79 refer mostly to false reports and purchases of illegal landings from specific identifiable vessels. A small number of counts, approximately 7, involve failures to report purchases made by identifiable vessels. In three of those instances, the failures to report involved trip amount that implicated Days at Sea limits and counting. The failures to report in the counts above 79 involved those from vessels that the Agency was unable to identify and potentially hid numerous other violations. Response by EA J. Mitch MacDonald, p. 20, fn. 45.

I find that the failure to report counts (even numbers from counts 80 to 112) are allegations that Sea Rich failed to report, on a weekly basis, the identity of the vessels, the weights and the price paid for fish products including lobster. The OIR described these purchases as cash transactions. Sea Rich argues that these were legitimate cash purchases that need not be reported to NMFS and EA MacDonald argues that these are cash purchases from vessels that must be reported. Unlike my conclusion concerning the allegations contained in counts 1 through 79, I find no evidence that clearly supports either contention. However, as Mr. McHugh has alleged and EA MacDonald has pointed out, there is some duplication in the failure to report violations charged in counts 1 through 79 and the even numbered counts from 80 to 112. EA MacDonald acknowledges seven (7). I have found ten (10) as follows: count 1 is included in count 98; count 7 is included in count 86; count 13 is included in count 88; count 33 is also included in count 88; count 42 is included in count 110; count 49 is also included in count 88; count 56 is included in count 96; count 61 is included in counts 80 and 82; count 69 is included in count 98; and count 72(b) is included in count 110 and also in count 112. NOVA; Schedule Prepared by NMFS (May 15, 1997). However, all of these transactions are for small amounts of approximately $1,000. Id. The Schedule of Cash Purchases involves approximately

$66,000 paid during these same time periods. EA MacDonald argues that the transactions described in counts 1 through 79 were excluded from the failure to report counts. I found no evidence supporting that statement but, since the alleged duplications are for de minimis amounts, I do not find the duplication of allegations in these counts to be of any serious consequence.

Reviewing the OIR and its attachments, the Cash Purchase Schedule dated April 14, 1997, the Schedule prepared by NMFS on May 15, 1997 and the NOVA, it is clear that the even numbered counts from count 80 to 112 cover a period of one (1) year from November 1, 1994 to November 8, 1995 and include as violations all cash purchases of fish product by Sea Rich during that time period without any differentiation between illegal cash purchases from vessels and legal cash purchases from dealers. I note that NOAA had seized all of Sea Rich's "records relating to the catch, take, harvest, receipt, purchase, processing and transferring of multispecies finfish and Atlantic sea scallops during the period November 1, 1994 to date." Warrant for Inspection (Nov. 3, 1995). However, NOAA was only able to identify 79 unreported cash purchases from specific vessels from March 1, 1994 to November 8, 1995 which it had previously charged as violations in counts 1, 7, 13, 33, 42, 49, 56, 61, 69 and 72(b). I find that these counts charging a failure to report cash purchases of fish/scallops from vessels, at best, establishes no more than probable cause for the violations charged. However, because of the limited scope of my review, I cannot determine whether NOAA would prevail on these counts by a preponderance of the evidence.

I do conclude that there is credible evidence that Sea Rich engaged in cash purchases of fish products, other than those identified in counts 1 through 79, for a substantial amount of

money during the period from November 3, 1994 through November 4, 1995. Although I am troubled by the lack of documentary evidence that would confirm the failure to report cash purchases from vessels as alleged in the even numbered counts, I am convinced that at least some of the unreported cash transactions during the applicable time period were from vessels. However, I find that the penalty of $75,000 assessed for each count for a total of $1,275,000 is excessive. In support of this finding, I found in the Spalt case file a penalty assessments schedule prepared by NOAA which provides, in relevant part, that the penalty for "Dealer and Vessel False Reporting and Non-Reporting" was $25,000. Penalty Assessments (undated). Additionally, NOAA personnel had prepared a similar penalty assessments schedule for the Sea Rich case which provided, in relevant part, that the penalty for "Dealer False Reporting and Non-Reporting" for multispecies was $15,000 and for scallops $25,000. Sea Rich Penalty Assessments (undated). I have discovered undated NOAA penalty schedule in NOAA's Sea Rich file that provided for a penalty range from $1,000 to $10,000 for a first time offense of "Failure to comply in a timely fashion or accurate fashion with log reporting, record retention, inspection, and other requirements." Atlantic Sea Scallop Fishery, 50 C.F.R. §650 (Penalty Schedule)(undated). This was a first offense and should have been assessed as such. The referenced penalty assessment schedules provide for a range from $1,000 to $25,000 for "Dealer False Reporting and Non-Reporting." Id. EAs Juliand and MacDonald assessed a $75,000 penalty for each of the failure to report counts. Clearly these penalty assessments are well in excess of what would be a reasonable penalty for each of these counts.

The Interference Counts

The odd numbered Counts 81 through 113 are identical with respect to the date and substance of the alleged interference differing only with respect to the dates of cash purchases of fish. Each odd numbered count from 81 through 113 states as follows:

> On or about [specific date], Sea Rich Seafood, Inc. and Atlantic Gem Seafoods, Inc., at New Bedford, MA, being persons subject to the jurisdiction of the United States and named as the Respondents herein, through their employees, agents, or representatives, Thomas Reilly and unlawfully interfered with, obstructed, delayed, or prevented a lawful investigation. Thomas Reilly and Respondents' employees, representatives, or agents, refused to provide NMFS Special Agent Louis Jachimczyk with the names of the persons from whom it purchased fish by cash transactions on the dates from [specific date] through [specific date]. Thus, the Respondents violated 50 C.F.R. §§ 650.9(d)(11) and 651.9(e)(24). NOVA.

The alleged interference is a single conversation on a specific date as set forth in the OIR as follows:

a. INTERFERENCE: On 06/12/95, I asked Mr. Reilly to provide me the names of the fishing vessels from which each non-reported cash transaction was purchased. Mr. Reilly did not provide me with the names of the fishing vessels. Mr. Reilly said he was unfamiliar with computers, "I can't even turn them on." Mr. Reilly called , and said, that "the slips only show cash, right?" Mr. Reilly handed me the receiver to speak with . told me that the slips and/or checks would only show "Cash". OIR, even numbered counts 80 through 108.

The dates of the cash purchases described in the even numbered counts 80 through 112 are identical to the dates in the corresponding odd numbered counts 81 through 113 charging interference. Counsel for Sea Rich/Atlantic Gem argues that the seventeen (17) interference counts, which were each assessed at $100,000 for a total of $1,700,000, relate to one (1) occurrence. EA MacDonald states that "[t]his conversation involved the refusal to provide

records for numerous transactions…" Response by EA J. Mitch MacDonald, p. 21, fn. 48. The interference counts in the NOVA charged a violation of 50 CFR §§650.9(d)(11) and 651.9(e)(24) which states that: "It is unlawful for any person to do any of the following: Interfere, obstruct, delay or prevent an authorized officer conducting an investigation." 50 CFR §650.9(d)(11); 50 CFR §651.9(e)(24).

I have read and re-read SA Jachimczyk's report of this conversation and cannot conclude that it was a refusal to produce records. I agree with Sea Rich's counsel that if this conversation constituted interference, it was at most a single occurrence and should have been so charged in the NOVA. Therefore, I find that the penalty assessed for the same allegation of interference for seventeen (17) different time periods at $100,000 for each time period was excessive. This is especially so because the then applicable penalty for Interference (assault, resist, oppose, impede, harass or intimidate, or interfere with an authorized officer) was $5,000 to $50,000 for a first offense; $35,000 to $80,000 for a second offense; and $60,000 to $100,000 for a third offense. Atlantic Sea Scallop Fishery (Penalty Schedule)(undated). There is no allegation that this violation was anything other than a first offense. I find that it was one (1) occurrence and should have been charged as one (1) occurrence.

The maximum penalty for interference under the circumstances of this case was $50,000 and should have been assessed for something less than the maximum. EA MacDonald in his response regarding the multiple Interference counts opines: "Even if the counts were mistakenly charged in any manner, however, there is no evidence that these charges prejudiced the outcome of this case." Response by EA J. Mitch MacDonald, p. 21, fn. 48. I disagree. I have found that the $75,000 assessment for each of the even counts from 80 to 112 was excessive as

was the $100,000 assessment for each of the odd numbered counts from 81 to 113. The assessment of these excessive penalties is persuasive evidence that the Agency sought to intimidate the Respondents and to force a settlement.

Unfairly Forced Settlement

I find that NOAA personnel learned of the potential sale of Sea Rich/Atlantic Gem; that they quickly issued an EAR containing 109 counts in response; that within ten (10) days, they issued a 113 count NOVA seeking a $4.74 million dollar penalty; that the day following the issuance of the NOVA, they contacted the potential buyer for Sea Rich/Atlantic Gem and notified it of the potential charges initiated the previous day; that in early discussions with Sea Rich's counsel, NOAA referenced, with an intention to intimidate, the Spalt case in which an ALJ had previously issued an Interim Order shuttering the Spalts' businesses, affirmed a $4.325 million assessment and ordered the permanent revocation of all dealer, vessel and operator permits; that, as a result of a NOAA press release, the potential sale of the company and the companies' credit line were jeopardized; that in early negotiations with Sea Rich's counsel, NOAA threatened to seek an Interim Order similar to the Spalts' that would have shuttered the company and prevented its then contemplated sale; that the Sea Rich NOVA seeking a $4.74 million dollar penalty was clearly designed to force settlement; and that NOAA utilized its broad and powerful enforcement authority in prosecuting this case to force a settlement.

Messrs. Reilly and Saluti had no options. If they were going to salvage anything from these businesses, they had only one (1) available option and that was to settle on whatever terms they could negotiate. The intensity with which NOAA pursued Messrs. Reilly and Saluti is best evidenced by the fact that Mr. Reilly had to relinquish his operator's (tuna) permit which

had no relationship to the charges contained in the NOVA. In order to salvage something from their once valuable business enterprise and to save jobs for their employees, they were coerced into an unfavorable settlement in which they lost the true value of their interest in Sea Rich and Atlantic Gem. Therefore, I conclude that NOAA charged excessive penalties in a manner that unfairly forced settlement, that NOAA exercised its broad and powerful authority to force a settlement and that NOAA personnel were arbitrary and capricious in their pursuit of the Respondents.

A Fair Result

I have concluded that both the penalty assessment and penalty paid in this case were excessive and unfair. I further find that a fair settlement of this case would be a penalty of $6,000 for each of the first 79 counts for a total of $474,000; of $7,500 for each of the 17 failure to report counts for a total of $127,500; and $25,000 for what I have previously found should have been one (1) count of interference. Therefore, I find that the total penalty that should have been paid in this case is $626,500. The respondents were unfairly forced to pay a penalty of $1,000,000. Therefore, deducting what I have found to be a fair and reasonable penalty of $626,500 from an unfair penalty paid of $1,000,000, I find that a fair result would be to reimburse Respondents for the difference of $373,500.

Recommendation

I recommend that the Secretary remit the sum of $373,500 to Respondents.

Case 235A
NE 0701526 FM/V
F/V Lady Irene
Harmony Fisheries, Inc., Owner
Charlie Dodge, Principal
[REDACTED], Operator

Vessel owner complains that he paid an excessive penalty after his captain unintentionally landed a monkfish overage.

Findings of Fact

Charlie Sherman Dodge of South Chatham, Massachusetts has been in the commercial fishing business since 1986. He is the president and owner of Harmony Fisheries, Inc., a Rhode Island corporation doing business in Massachusetts. Harmony Fisheries, Inc. is the registered owner of the fishing vessel, Lady Irene, a 44' wooden gill-netter, and the 48' Edward & Joseph, also a gill-netter. Mr. Dodge also owns the 40' Stranglehold in his individual capacity. All three (3) vessels are moored by the Chatham Fish Pier. Mr. Dodge purchased the Lady Irene in March 2007. This vessel possesses, among others, a category D monkfish permit. At all times relevant to this complaint, [REDACTED] was the captain of the Lady Irene.

On May 13, 2007, [REDACTED] was offloaded his catch from the Lady Irene at AML International in New Bedford, Massachusetts. [REDACTED] of Nebula Seafood, Inc. assisted in the offload of the catch into a truck owned by McCann Seafood. The captain and crew weighed the fish on a portable scale on the McCann Seafood truck. Massachusetts Environmental Police (MEP) Officer [REDACTED] arrived shortly after the Lady Irene landed and observed the offload. By [REDACTED] own admission, the Lady Irene had been fishing in the Southern Fishery Management Area for twenty four (24) hours and one (1) minute, which

granted her a 2,988 lbs. two (2) day catch limit for a combination of whole monkfish and monkfish tails after conversion. Monkfish tails have a conversion factor of 3.32 in order to calculate the whole weight, which is then used to calculate the catch limit.[1] Offense Investigation Report by SA Todd Nickerson, p. 3 (May 21, 2007).

During offload, Officer [redacted] observed that the Lady Irene had landed 3,091 lbs. of monkfish and 532 lbs. of monkfish tails. Using the conversion factor, Officer [redacted] calculated that the prorated 532 lbs. of monkfish tails were equivalent to 1,766 lbs. of whole monkfish, resulting in a total combined landing of 4,857 lbs. of monkfish. This exceeded the two (2) DAS monkfish possession limit by 1,869 lbs. Pursuant to telephone instructions from NOAA SA Shawn Eusebio, Officer [redacted] informed [redacted] of Nebula Seafood to withhold payment of $4,918.89 to the Lady Irene until a NOAA SA could interview the involved parties. Narrative for EPO [redacted] (undated). Mr. Dodge comments that he could ordinarily estimate the approximate weight of the catch based on the number of totes. On this particular trip, however, [redacted] was working with two (2) relatively new deckhands who may have incorrectly mixed the monkfish tails among the whole monkfish because they "screwed around." He acknowledged that [redacted] made a mistake and that the deckhands no longer work for him. Special Master Interview with Charlie S. Dodge (Nov. 11, 2011).

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[1] [1] 50 CFR §648.94(b)(2)(ii) reads:

> *Category B, D, and H vessels.* Limited access monkfish Category B, D, and H vessels that fish under a monkfish DAS in the SFMA may land up to 450 lbs (204kg) tail weight or 1,494 lbs (678 kg) whole weight of monkfish per DAS (or any prorated combination of tail weight and whole weight based on the conversion factor for tail weight to whole weight of 3.32).

SA Todd Nickerson was assigned to investigate the case. At some point after the seizure, of Nebula Seafood, , allegedly informed Mr. Dodge that his catch was within the legal limit and that the portable scale that belonged to McCann Seafood may have been inaccurate. Id.

On May 15, 2007, SAs Nickerson and Kevin Flanagan went to Nebula Seafood to pick up the seized proceeds check and to investigate the case further. During the visit, SA Nickerson noticed that the check amount was less than the amount of fish seized on May 13, 2007. The difference was about 1,100 lbs. SA Nickerson spoke to who provided various misleading statements concerning how the dealer handled the seized catch from the Lady Irene. also claimed that the scale used to weigh the Lady Irene's catch was inaccurate because it converted back and forth between pounds and kilograms. However, when asked whether had experienced problems with the scale before or after the Lady Irene landing, the answer was negative. Offense Investigation Report by SA Todd Nickerson, p. 9 (May 21, 2007).

On May 16, 2007, SAs Nickerson and Flanagan interviewed who had just returned from a trip abroad. ultimately conceded that the scale was accurate based on what the Special Agents told about their conversation with . believed that was mistaken in statements and that was confused about the fish processing procedure. In fact, even provided NOAA with a subsequent written statement clarifying the proper protocol at his plant. Written Statement by (May 17, 2007). Although Mr. Dodge, in his Application for Review, asserts

that Nebula Seafood personnel were "interrogated" and "bullied", SA Nickerson's Offense Investigation Reports contrasts Mr. Dodge's claim. Application for Review, p. 5.

On May 21, 2007, SA Nickerson issued EARS to [REDACTED] and Harmony Fisheries, Inc. for landing a monkfish overage. SA Nickerson also issued an EAR to [REDACTED] of Nebula Seafood for providing false statements and for interfering with a NOAA investigation. Mr. Dodge was not aware that [REDACTED] received an EAR stemming from the seized catch from his vessel. Special Master Interview with Charlie Dodge (Nov. 11, 2011).

On July 10, 2007, EA J. Mitch MacDonald issued a NOVA and NOPS to Harmony Fisheries, Inc. and [REDACTED] The NOVA assessed a $25,000 penalty for one (1) count of landing a monkfish overage on May 13, 2007. The NOPS assessed a thirty (30) day vessel and two (2) DAS permit sanction and a thirty (30) day operator permit sanction for [REDACTED] On August 15, 2007, EA MacDonald granted Mr. Dodge's request for a thirty (30) day extension of time to September 17, 2007 to request a hearing. In October 2007, EA MacDonald presented a settlement offer to Harmony Fisheries, Inc. and [REDACTED] proposing a $12,500 cash penalty, twenty (20) day vessel permit sanction and an operator permit sanction for [REDACTED] [REDACTED] EA MacDonald further warned [REDACTED] Dodge and [REDACTED] that, if they did not respond within ten (10) days, the original NOVA/NOPS penalties could become the final administrative action in this case. EA MacDonald offered [REDACTED] Dodge and [REDACTED] an opportunity to serve the operator permit sanction in January, which would have been their traditional low season. Email from EA J. Mitch MacDonald to [REDACTED] (Apr. 8, 2008).

Neither Mr. Dodge nor [REDACTED] responded within the ten (10) day period, which led EA MacDonald, on March 24, 2008, to issue a notice that Mr. Dodge and [REDACTED]

failed to timely request a hearing and that therefore the penalties in the NOVA and NOPS were final. Id. According to Mr. Dodge, EA MacDonald said that he wanted to "light a fire under [Mr. Dodge]." Application for Review, p. 6.

After receiving a notice in March 2008, Mr. Dodge offered to pay $9,000 to settle the penalty. He also offered to accept a sanction for the Lady Irene of thirty (30) days, but to reduce [REDACTED] operator permit sanction to fourteen (14) days. In response, EA MacDonald provided a revised Settlement Agreement providing that he would determine when [REDACTED] would serve the twenty (20) day operator permit sanction. In response to an email from [REDACTED] requesting to choose his sanction time, EA MacDonald wrote:

> While I have sympathy for your difficult circumstances and the role the sanction plays in increasing that difficulty, your delay is responsible for the increase both in the degree of difficulty in your circumstances and in the work required of my office on this case. I think a way to account for the increased burden of your delay and your circumstances is to keep the original 20 day sanction offer, but to allow you to choose 10-days to be served anytime within one year. You may also then choose to serve the other 10-days to begin either on May 1 or August 1. I know this is not all that you hoped for, but I hope that you will find it a reasonable compromise for both you and the Agency.
> Email from EA J. Mitch MacDonald to [REDACTED] (Apr. 8, 2008).

The next day, EA MacDonald sent a reminder email to Mr. Dodge, noting:

> I have not initiated the permit sanctions because we have been discussing settlement terms. I cannot delay this matter any longer, however, I will need a signed settlement agreement by close of business this Friday, April 11, 2008, or the original penalty and permit sanction will be imposed.
> Email from EA J. Mitch MacDonald to Charlie S. Dodge (Apr. 9, 2008).

On April 13, 2008, Mr. Dodge agreed to pay a $12,500 penalty, forfeit the seized catch proceeds of $4,918.89, and serve a twenty (20) day permit sanction plus a suspended two (2) DAS forfeiture. Further, instead of choosing the time of two (2) 10-day sanctions, as offered by EA MacDonald, [REDACTED] chose to serve a fifteen (15) day operator permit sanction. Mr.

Dodge settled the case because other fishermen told him that it was better to accept the settlement than to appeal the NOVA. Mr. Dodge also consulted with Stephen M. Ouellette, Esq., who told him that he would face a lengthy and costly appeal if he decided to challenge the NOVA. Special Master Interview with Charlie S. Dodge (Nov. 11, 2011).

Discussion

This was Mr. Dodge's first NOAA violation. In Mr. Dodge's words:

> I had never had any experience with NMFS GCEL before this time, although I had been fishing for approximately twenty years. When I asked other fisherman [sic] about their experience, I heard that it would be better to accept a settlement than to try and fight the NOVA. Legal costs were prohibitive. I did not ever expect to be in this position again, so a probationary period was not problematic. I also had no way of knowing that the choice to fight this initial NOVA would have such long-term consequences, and would be used against me in the future. Application for Review, p. 6.

In essence, Mr. Dodge settled this case because the assessed penalty was high and he did not have the means to contest the case financially. Further, he was told that if the case was prolonged, the penalty would revert back to the original assessed penalty and his vessels would be subject to longer permit sanctions. Mr. Dodge could not tie up his business for that period of time, and he claims he was therefore forced to settle. Mr. Dodge comments that he tries hard to abide by the rules because he cannot afford the violations. Special Master Interview with Charlie S. Dodge (November 11, 2011).

EA MacDonald responds that the penalty assessment was reasonably related to the nature, circumstances, extent, and gravity of the violation, the respondent's culpability, prior enforcement history, and that it was supported by substantial evidence The assessment, according to EA MacDonald, was within the penalty schedule for first-time violators ($5,000-$50,000). Response by EA J. Mitch MacDonald, p. 8. Further, EA MacDonald notes that the

NOVA and NOPS issued in this case became final administrative decisions after Mr. Dodge and [redacted] failed to timely submit a hearing request. EA MacDonald further notes that he could have forwarded the case for collection, but chose to settle the case in part because Mr. Dodge and [redacted] were pro se. Finally, he points out that Mr. Dodge signed a Settlement Agreement that acknowledged he understood the provisions of the Agreement and that the "violation constitutes a prior offense in NOAA's consideration of any penalty to be assessed or in any permit sanction to be imposed on the respondents for a period of five years from the effective date of this agreement." Id. at 8.

I note that EA MacDonald's accommodation of Mr. Dodge and [redacted] after the NOVA and NOPS were issued, is commendable. EA MacDonald demonstrated a willingness to consider the fact that Mr. Dodge was not represented by counsel and gave him several opportunities to reach an agreed upon settlement. The facts related to Mr. Dodge's violation are not disputed. Notwithstanding EA MacDonald's subsequent actions, it would appear that this was a simple case of [redacted] and his relatively inexperienced crew inadvertently landing a monkfish overage. As such, I question the initial $25,000 penalty assessment and $12,500 settlement.

First, the $25,000 penalty assessment, though within the penalty schedule, was arbitrarily imposed. There is no evidence that [redacted] intended to violate the regulations to realize a financial gain. The lack of intent in this case directly contrasts with that of Richard Walz, owner of the Christine Roberta.[2] EA MacDonald was also assigned to that 2005 case, where there was convincing evidence that Mr. Walz violated monkfish landing limits, instructed

[2] See supra, Case 233.

the dock foreperson to split the catch, and subsequently made false statements to federal agents in order to cover up his violations. In that case, EA MacDonald issued a four (4) count NOVA and assessed $15,000 per count, including one (1) count of landing monkfish overages.

The monkfish overage in Mr. Walz's case (1,454 lbs.) was similar to [redacted] overage in this case (1,869 lbs.), the difference being that Mr. Walz intended to circumvent the regulations and there is no evidence to suggest that [redacted] purposely did so. Yet, the penalty assessment was $10,000 higher for [redacted] violation than Mr. Walz's. The difference in penalty assessments given the degree of culpability between these two (2) fishermen is a clear example of one (1) of the issues specifically enumerated in the Inspector General's September 2010 Report, specifically, that "[r]egulatory enforcement processes are arbitrary…" As such, it would appear that the relevant statutory factors, including respondent's culpability and prior enforcement history, did nothing to influence the initial penalty assessment in this case. I note again that this was Harmony Fisheries, Inc.'s first NOAA violation.

In the case of Mr. Walz, I recommended that the Secretary take no action with respect to his Application for Review because the settlement was fair and reasonably reflected his culpability and state of mind. Mr. Walz was assessed $15,000 per count and settled his case for $23,000 for three (3) counts,[3] which amounts to $7,667 per count, including one (1) count of landing monkfish overages. Unlike Mr. Walz, there is no evidence that [redacted] possessed the intent to violate the regulations. Fundamental fairness and common sense dictate that the penalty assessed against [redacted] and Harmony Fisheries, Inc. should be lower than Mr.

[3] Count 2 was dismissed.

Walz's assessed penalty and eventual settlement of approximately $7,700 per count. I note also that unlike Mr. Walz, [redacted] and the Lady Irene served operator and vessel permit sanctions.

Recommendation

Accordingly, I recommend that the Secretary remit $5,000 to Harmony Fisheries, Inc. This recommendation is based on the fact that it was Harmony Fisheries, Inc.'s first documented NOAA violation, that this was an unintentional violation, and that the initial penalty assessment and settlement was substantially disproportionate to a more egregious, similar case handled by the same EA.

Case 235B
NE 0801438 FM/V
F/V Edward & Joseph
Harmony Fisheries, Inc., Owner
Charlie Dodge, Principal/Operator

Vessel owner/operator complains that he was coerced into settling what he believes to be a minor monkfish overage case after a NOAA enforcement attorney threatened to issue a $75,000 NOVA if he did not settle.

Findings of Fact

Charlie Sherman Dodge of South Chatham, Massachusetts has been in the commercial fishing business since 1986. He is the president and owner of Harmony Fisheries, Inc., a Rhode Island corporation doing business in Massachusetts. Harmony Fisheries, Inc. is the registered owner of fishing vessel, Lady Irene, a 44' wooden gill-netter and the 48' Edward & Joseph, also a gill-netter. In addition, Mr. Dodge owns the 40' Stranglehold in his individual capacity. All three (3) vessels are moored by the Chatham Fish Pier. The Edward & Joseph possesses a valid limited access Category D monkfish permit.

On April 11, 2008, Mr. Dodge was on a two (2) day fishing trip on board the Edward & Joseph in the Southern Fisheries Management Area, where he caught monkfish and skate. According to Mr. Dodge, he was aware that enforcement officers were on the docks even when he was six (6) miles offshore. He states that given that knowledge, he would not have intentionally landed an overage. Special Master Interview with Charlie Dodge (Nov. 11, 2011). SAs Todd Nickerson and Troy Audyatis monitored Mr. Dodge's offload of his catch into a truck owned by [redacted], a fish dealer in Chatham, Massachusetts. The SAs then inspected the Edward & Joseph but found that Mr. Dodge had not yet completed his FVTR for this trip.

Response by SA Troy Audyatis. In order to determine whether Mr. Dodge's catch was within the legal limit, the SAs accompanied the truck to Maguro America where the catch was weighed.

According to the weigh-out, Mr. Dodge landed 2,458 lbs. of whole monkfish, 331 lbs. of monkfish tails and 121 lbs. of monkfish livers, in addition to approximately 3,000 lbs. of skate wings. Since the Edward & Joseph possessed a limited access category D monkfish permit, Mr. Dodge was limited to a two (2) day catch limit of 2,988 lbs of whole monkfish.[1] Mr. Dodge was aware of the conversion factor for monkfish tails at the time. Using the monkfish tail conversion factor of 3.32 and excluding the weight of the monkfish liver, SA Nickerson calculated that Mr. Dodge had landed a total of 3,556 lbs. of whole monkfish (19% overage). After applying a standard five (5) % deduction, SA Nickerson revised the total to 3,378 lbs. Contrary to Mr. Dodge's assertion in his Application for Review, SA Nickerson did not factor in the weight of the monkfish liver and applied the standard deduction.

Since Mr. Dodge exceeded the two (2) day possession limit by approximately 390 lbs. (13% overage) and pursuant to the direction of EA Charles Juliand, SA Nickerson seized and sold the entire monkfish catch and retained the $4,236.20 proceeds. Offense Investigation Report by SA Troy Audyatis, p. 4 (Apr. 11, 2008). According to Mr. Dodge, SA Nickerson had a disagreement with EA Juliand on the telephone concerning whether his catch should have been

[1] 50 CFR §648.94(b)(2)(ii) reads:

> *Category B, D, and H vessels.* Limited access monkfish Category B, D, and H vessels that fish under a monkfish DAS in the SFMA may land up to 450 lbs (204kg) tail weight or 1,494 lbs (678 kg) whole weight of monkfish per DAS (or any prorated combination of tail weight and whole weight based on the conversion factor for tail weight to whole weight of 3.32).

seized. Special Master Interview with Charlie Dodge (Nov. 11, 2011). SA Nickerson disputes this claim, noting that there was no disagreement and that the conversation took place inside his vehicle with the door closed. Response by SA Todd Nickerson. Furthermore, Mr. Dodge also alleged that SAs Nickerson and Audyatis believed that it was an unintentional overage, and informed Mr. Dodge that he should proceed to a hearing on the matter. Id. They also allegedly offered to "speak up" for Mr. Dodge at the hearing. Id. SAs Nickerson and Audyatis deny both assertions. Responses by SAs Troy Audyatis and Todd Nickerson. At some point, Mr. Dodge expressed to the special agents, "Who in their right mind would steal $250 worth of fish?" He also commented that the fish dealer, [redacted] would never purchase any overages from him. Special Master Interview with Charlie Dodge (Nov. 11, 2011).

On April 29, 2008, Mr. Dodge received an EAR (#489024) from SA Nickerson. Mr. Dodge believed that this relatively small overage would result in a written warning only because, among other things, SA Nickerson did not seize the skate and allowed him to keep the skate to offset fuel costs. According to Mr. Dodge, SA Nickerson also believed that because this was an unintentional overage, a written warning would be sufficient. Both SAs deny that they ever intended to issue a written warning. Responses by SAs Todd Nickerson and Troy Audyatis.

According to Mr. Dodge, SA Nickerson allegedly told Mr. Dodge that EA Charles Juliand insisted that he issue an EAR. SA Nickerson disputes this claim. Response by SA Todd Nickerson. In a subsequent meeting with SA Nickerson, Mr. Dodge claimed that SA Nickerson told him that he wanted to build a case against another fisherman. Mr. Dodge refused to help and he allegedly received an EAR shortly thereafter. Application for Review. In response, SA Nickerson denies that he told Mr. Dodge that he was trying to build a case against other

fishermen. Response by SA Todd Nickerson. In fact, SA Nickerson states that Mr. Dodge initially told him that he was going to purchase scales on board his vessel and that SA Nickerson would include this fact in his Offense Investigative Report to show that he is trying to prevent a future overage. SA Nickerson would have issued the EAR regardless. Id.

Mr. Dodge states that, sometime after the EAR was issued, EA Juliand called him and requested his presence at NOAA Northeast headquarters in Gloucester. Mr. Dodge obliged without the presence of counsel. In this meeting, EA Juliand told Mr. Dodge that this was his second offense[2] and that he should settle the EAR, or else EA Juliand would issue a NOVA. Mr. Dodge also alleged that EA Juliand told him that he was "going for the max" on this case, that "[NOAA] has never lost a case" and that he "doesn't intend to start now." Special Master Interview with Charlie Dodge (Nov. 11, 2011). According to Mr. Dodge, EA Juliand intended to issue a NOVA imposing a $75,000 penalty, six (6) month permit sanction, and a 1-2 year loss of his operator permit. EA Juliand disputes this conversation, stating that he likely would have issued a $55,000 NOVA and a twelve (12) monkfish DAS NOPS. The "max", he notes, would have been for $130,000 and a permanent permit revocation. Also, EA Juliand denies saying that "NOAA has never lost a case" because it is not a true statement. Response by EA Charles Juliand, p. 5. EA Juliand ultimately offered to settle the case for $17,500 to be accompanied by a five (5) year probation period.

Mr. Dodge later consulted with his attorney, who informed him that it would be unlikely that he would prevail on his case before an ALJ. Based on this advice from counsel, and the fact that he was not willing or able to pay legal fees for a prolonged court battle, Mr. Dodge settled

[2] See supra, Case 235A.

this case on August 20, 2008. In the Settlement Agreement, Mr. Dodge, on behalf of Harmony Fisheries, Inc. and himself, agreed to pay $17,500 in monetary penalties in a lump sum before October 31, 2008. In addition, he agreed to relinquish his right to the $4,236.30 proceeds from the seized catch. Finally, he agreed to serve a probationary period from the date of the Settlement Agreement until September 30, 2009.

Discussion

Mr. Dodge argues that he was coerced into settling this case because EA Juliand threatened to assess a significant NOVA if he did not settle, because he "was intimidated" and "because the record in administrative hearings led me to believe there was not real chance [sic] of a legal defense, and because [he] was not in a financial position to pay for legal fees." Application for Review.

As I noted above, several facts are in dispute in this case, most of which involve what was allegedly said by an opposing party. I cannot resolve such disputed statements. Nonetheless, Mr. Dodge's claim that the SAs recommended that he take the case to a hearing and that they would testify on his behalf is not believable and runs counter to common sense. What is not in dispute is the fact that Harmony Fisheries, Inc.'s other vessel, the Lady Irene, was involved in a similar monkfish overage violation in 2007 in which Mr. Dodge, through Harmony Fisheries, Inc., paid a substantial settlement. Also, there is no dispute that Mr. Dodge knew about the monkfish tail conversion factor and the associated penalties if he were to exceed the landing limit. Despite this, he still landed a 19% overage. Mr. Dodge should have been more cognizant of the landing limits, even though he did not have a scale on board, particularly given that during my interview of him, he admitted that he could usually estimate the weight of

monkfish onboard based on the number of totes. Special Master Interview with Charlie Dodge (Nov. 11, 2011). However, given that this was Harmony Fisheries' second violation in less than one (1) year and that Mr. Dodge had more than twenty (20) years of fishing experience, it is reasonable for Mr. Dodge to comply with monkfish landing limits. Moreover, a settlement amount of $17,500, with no permit sanction, is consistent with the lower end of the penalty schedule for second time violators ($15,000 to $60,000). Accordingly, I do not find that the penalty was excessive in this case, nor do I find that settlement was coerced.

Recommendation

I recommend that the Secretary take no action in this Application for Review.

Case 235C
EAR 548084 (NE 0804877)
F/V Edward & Joseph
Harmony Fisheries, Inc., Owner
Charlie Dodge, Principal/Operator

Fishing vessel owner complains that NOAA forced him to forfeit the value of the seized tuna, worth $14,515.23, because he tried, but was unable, to renew his tuna permit prior to fishing for tuna.

Findings of Fact

Charlie Sherman Dodge of South Chatham, Massachusetts has been in the commercial fishing business since 1986. He is the president and owner of Harmony Fisheries, Inc., a Rhode Island corporation doing business in Massachusetts. Harmony Fisheries, Inc. is the registered owner of fishing vessel Lady Irene, a 44' wooden gill-netter, and the 48' Edward & Joseph, another gill-netter. In addition, Mr. Dodge owns the 40' Stranglehold in his individual capacity. All three (3) vessels are moored by the Chatham Fish Pier. In the past, the Edward & Joseph has possessed various federal fisheries permits for blue fin tuna.

On November 8, 2008, Mr. Dodge was eager to embark on a fishing trip for blue fin tuna with his deck hand, [REDACTED] because he received a call that there was a "tuna bite" off the coast of Chatham. Prior to the trip, he attempted to renew his tuna permit on the NMFS website. When Mr. Dodge went to check the NMFS website, he claimed that it indicated that he had a valid permit. According to Mr. Dodge, there was no print option so he could not produce a physical copy of the valid permit from his computer screen. [REDACTED] was present when Mr. Dodge tried to renew his tuna permit and corroborated his statement.

According to [REDACTED], the screen message displayed: "You currently have a rod and reel permit for blue fin tuna." [REDACTED] Letter (Dec. 10, 2008).

NMFS previously sent Mr. Dodge a letter notifying him that all holders of 2007-2008 tuna permits with expiration dates of May 31, 2008 would be extended until December 2008.[1] See Permit Holder Letter. When Mr. Dodge received that letter in April 2007, he had a valid permit for the 2006-2007 fishing year only, which had expired on May 31, 2007. The fiscal year for tuna permits usually runs from July to May of the following year. Mr. Dodge, however, did not renew his permit for the 2007-2008 year, which in turn meant that he was not entitled to a permit extension until December 2008. Nonetheless, Mr. Dodge claims he was under the mistaken impression that his permit was valid for the fiscal year 2008 based on a combination of what the physical permit seemed to indicate (May 31, 2008) and the April 15, 2007 letter that he misinterpreted. A tuna permit renewal costs only $28.00.

[1] The previous NMFS notification was dated April 15, 2007. The letter reads in relevant part:

> Our records indicate that you are holding an Atlantic tunas permit or an Atlantic HMS permit for the 2006 fishing year, which ends May 31, 2007.
>
> Permit effective dates and cost
> The 2007/2008 HMS permits are effective from the date they are issued through December 31, 2008. Therefore, Atlantic tunas, Atlantic HMS Angling, and Atlantic HMS Charter/Headboat permits issued for the 2007/2008 season can potentially be valid for 19 months (June 2007 through December 2008).
>
> **Due to the extended duration of the permit, changes to your permit category may be made under the following circumstances: a) When you renew the permit for the upcoming season; b) During the time period of January-May 31, 2008; or c) Within 10 calendar days from the permit's date of issuance, to correct any errors in permit category.**

At the time, Mr. Dodge relied upon a hard copy of the blue fin tuna permit that he thought was valid. He provided me with a photocopy of the permit that was issued on July 1, 2005. See Expired Tuna Permit. Based on a cursory examination, the permit appeared to have an expiration date of May 31, 2008. However, the actual expiration date should have been May 31, 2006 because permits are issued on an annual basis. Mr. Dodge must have realized at some point that the permit expired in 2006 because he applied for, and received, a renewal in July 2006. Regardless, Mr. Dodge went tuna fishing on November 8, 2008 after he tried, but was unable, to renew his permit on the computer for the 2007-2008 fiscal year. On November 8, 2008, Mr. Dodge caught one (1) 630 lbs. Atlantic (1) blue fin tuna and sold it to Maguro America on November 9, 2008 for $6,043.39.

That same day, Mr. Dodge called his fish buyer, ████████ of Maguro America, to make sure his tuna permit was actually valid. Because of two (2) prior NOAA violations, see supra, Case 235A and 235B, Mr. Dodge was especially concerned about his compliance with applicable regulations. Special Master Interview with Charlie Dodge (Nov. 11, 2011). Mr. Dodge also acknowledged that ████████ is a good friend. ████████ navigated to the NMFS website and tried to renew Mr. Dodge's permit. The website similarly indicated that Mr. Dodge had a valid tuna permit and ████████ told Mr. Dodge accordingly. Statement of ████████ (Dec. 12, 2008). I was provided with a computer printout of the "cookies"[2] from ████████ computer to prove that ██ did, in fact, navigate to the NMFS website in order check on Mr. Dodge's permit status. Cookies History.

[2] Cookies are small files stored on a user's computer that can be used to track a user's internet activity.

On November 10, 2008, Mr. Dodge again left port aboard the Edward & Joseph and caught a 731 lbs. Atlantic blue fin tuna. On this occasion, a USCG petty officer boarded the vessel to conduct a routine safety inspection. The petty officer examined the blue fin tuna permit with an expiration date of what appeared to be May 31, 2008. As a result, [REDACTED] issued Mr. Dodge an EAR for catching a blue fin tuna without a valid permit. Narrative for Sergeant [REDACTED] (undated). [REDACTED] also directed him to return to port without an escort. Offense Investigation Report by SA Shawn Eusebio, p. 2 (Dec. 4, 2008). Mr. Dodge tried to explain to the petty officer that even though his permit appeared to have expired, it was actually valid because of the NMFS notification letter that he had previously received. Offense Investigation Report by Officer [REDACTED] (undated). When Mr. Dodge returned to port, Massachusetts Environmental Police (MEP) seized the 731 lbs. blue fish tuna and withheld the $8,471.84 proceeds. The MEP officer, after examining the tuna permit, also came to the conclusion that it showed an expiration date of May 31, 2008. Offense Investigation Report by SA Shawn Eusebio, pp. 5- 6 (Dec. 4, 2008).

Meanwhile, SA Shawn Eusebio was contacted about the case and proceeded to conduct an investigation into the permitting issue. When SA Eusebio checked the status of the Edward & Joseph on the NMFS permitting website on November 10, 2008, he discovered that she last held a valid permit for the 2006-2007 year which expired on May 31, 2007. Id. at 4. After the boarding on that same day, Mr. Dodge was able to, and did, renew his tuna permit for the 2008-2009 year. On November 14, 2008, [REDACTED] contacted SA Eusebio and informed him that [REDACTED] had checked the NMFS website which showed that Mr. Dodge had renewed his tuna permit. Mr. Dodge also urged [REDACTED] to tell SA Eusebio that he had previously

landed a blue fin tuna on November 8, 2008 so as not to arouse suspicion that he was trying to hide the landing. Special Master Interview with Charlie Dodge (Nov. 11, 2011). Subsequently, on November 24, 2008, SA Eusebio and Joseph D'Amato went to Maguro America and seized the proceeds from the Edward & Joseph tuna landings in the amount of $6,043.39 and $8,471.84.

On December 4, 2008, SA Eusebio issued an EAR to Mr. Dodge for landing Atlantic blue fin tuna without a valid permit. Id. at 9. Mr. Dodge retained Nancy Zimmer, Esq. as counsel to negotiate with EA J. Mitch MacDonald prior to the issuance of a NOVA. Through a series of telephone calls, the parties settled on April 7, 2009. Mr. Dodge abandoned all rights, title, and interest in the proceeds from the sale of the seized Atlantic blue fin tuna, worth $14,515.23. Mr. Dodge also received a written warning for the violation. He understands that, as a fisherman, he needs to contribute to rebuilding the fish stock, but he also expressed that it is "sad" to be made to feel like a "criminal" based on unintentional violations. Special Master Interview with Charlie Dodge (Nov. 11, 2011).

Discussion

According to Mr. Dodge, EA MacDonald threatened to issue a NOVA in this case without first considering the merits unless Mr. Dodge agreed to forfeit the proceeds of the tuna catch. Mr. Dodge alleges that EA MacDonald told him that it would cost $50,000 to bring this case before an ALJ. Application for Review, p. 5. Finally, Mr. Dodge argues that he would not risk fishing for tuna without a permit that costs only $28 to renew. In response, EA MacDonald states that it was not his practice to make recommendations to defense counsel or pro se respondents, nor was he in a position to estimate the cost of appeal. Furthermore, EA

MacDonald notes that he looked at the merits of this case extensively, including conversations with the case agent and others within the Agency in an attempt to meaningfully weigh the evidence in this case and determine what actually happened. Finally, EA MacDonald states that, after a consideration of the merits, he eliminated any unjust enrichment on the part of Mr. Dodge by settling for a forfeiture of the tuna, but did not assess a civil penalty. Response by EA J. Mitch MacDonald, p. 7.

It is not disputed that Mr. Dodge did not have a valid tuna permit when he landed the two (2) blue fin tuna on November 8, 2008 and November 10, 2008. Moreover, the evidence substantiates that Mr. Dodge applied for, and received a tuna permit, on June 1, 2005. That permit, even though it appeared to have an expiration date of May 31, 2008, actually expired on May 31, 2006. Further, Mr. Dodge had applied for, and received, a valid permit for the fiscal year 2006-2007. As a veteran commercial fisherman involved as both a vessel owner and operator of multiple fishing vessels, Mr. Dodge should have been aware that tuna permits are only valid during the fiscal year. Therefore, his argument that he believed he had a valid tuna permit for fiscal year 2007-2008 is unpersuasive, especially since he attempted to renew/obtain a permit by computer prior to his first tuna trip.

I find that Mr. Dodge learned of an unusual, out of season "tuna bite" off of Chatham and wanted to catch tuna, regardless of whether he had a valid permit.[3]

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[3] [redacted] letter, dated December 12, 2008, reads in relevant part:

> On Saturday November 8th [2008] a tuna bite started off Chatham Massachusetts. I contacted many fisherman [sic] as this was quite unusual this late in the fall. One boat owner I called was Charlie Dodge."

I credit EA MacDonald's statement that he gave Mr. Dodge the benefit of the doubt concerning his assertion about the NMFS website, considered the merits of the case, and decided to seize the tuna without assessing any corresponding penalties. Although I understand Mr. Dodge's predicament that his tuna permit violation was, in part, caused by a problem with the NMFS website, I cannot find that EA MacDonald charged an excessive penalty in a manner that forced an unfair settlement or that he exhibited any conduct outlined in the OIG's September 2010 Report.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 236

NE 000038 FM/V
South Pier Fish Company, Inc., Dealer
L. Paul Barbera, Jr. and Peter Barbera, Owners

Fish dealer complains that its officers/stockholders were coerced to pay an excessive penalty by the threat of criminal prosecution.

Findings of Fact

South Pier Fish Company, Inc. ("South Pier") is a seafood distributor which started doing business in 1982. It is located in Narragansett, Rhode Island and has operated in the same facility since its beginning. L. Paul Barbera, Jr. founded South Pier and was the sole stockholder until about 1995 when his brother, Peter Barbera, joined the company as an equal stockholder. The brothers are officers of the corporation. South Pier has federal and state permits and operates out of a building that is not accessible to fishing vessels. South Pier purchases its product mostly from New England dealers and fishing vessels that transport product by truck to South Pier's facility. South Pier then sells the fish to wholesalers, retailers, and restaurants. Prior to 1982, Paul Barbera had worked at the Fisherman's CO-OP in Pt. Judith, Rhode Island. Prior to joining South Pier, Peter Barbera worked for about twelve (12) years at the Town Dock Fish Company in Narragansett, Rhode Island.

In May of 1998, NOAA and the Rhode Island Department of Environmental Management (DEM) opened a joint investigation of South Pier with a focus on false reporting of summer flounder overages.

On November 7, 1998, DEM officers [redacted] and [redacted] interviewed [redacted] in connection with summer flounder landings at South Pier. [redacted] stated that [redacted] had not sold summer flounder to South Pier, but [redacted]

had been doing it and had been using [redacted] name because of quota limits. As far as Paul Barbera was concerned, [redacted] were doing business with South Pier. Special Master Interview with L. Paul Barbera, Jr. and Peter Barbera (Dec. 14, 2011).

On March 16, 2000, NOAA executed an AIW at South Pier. FBI agents helped with the AIW by copying the company's hard drive.

On June 8, 2000, SA Flanagan and DEM Officer [redacted] interviewed [redacted] [redacted] owner and operator of the F/V Valkyrie Rose, concerning [redacted] involvement in selling summer flounder overages to South Pier. [redacted] admitted to the violation. Written Statement by [redacted] (June 8, 2000).

On March 8, 2001, SAs Flanagan and McCarron interviewed [redacted] [redacted] of South Pier. [redacted] stated that [redacted] did not know what happened to old tally sheets and that [redacted] had been instructed by Paul Barbera on how to launder overages. According to [redacted] Peter Barbera, [redacted] and [redacted] knew that South Pier was buying overages. [redacted] stated that there had been meetings with these individuals about how to conceal overages. [redacted] explained that invoices were fabricated to cover the overages, a practice known as "spreading the dates," and some overages were reported as monkfish. [redacted] said that they were labeled as "Whole – Misc" in the computer to keep them separate from the original entries for [redacted] [redacted] stated that [redacted] was instructed to use [redacted] name for landings by [redacted] and to issue a check to [redacted] [redacted] said that [redacted] was told to attribute the F/V Valkyrie Rose landings to the F/V Vulture.

Peter Barbera stated that [redacted] instructed South Pier which vessel had caught the fish. Special Master Interview with L. Paul Barbera, Jr. and Peter Barbera (Dec. 14, 2011). A witness statement by [redacted] indicates that Paul Barbera knew that the summer flounder came from [redacted] vessel, but was trying to hide the overages by attributing them to [redacted] Witness Statement by [redacted] (Nov. 7, 1998). According to Peter Barbera, on one occasion, [redacted] reported to South Pier that the fish being sold to them came from the Vulture, but South Pier later found out that the Vulture had not left port on that particular day. Special Master Interview with L. Paul Barbera, Jr. and Peter Barbera (Dec. 14, 2011).

Paul Barbera asserts that subsequent to [redacted] interview with SA Flanagan, [redacted] told Mr. Barbera that SA Flanagan had threatened criminal action if [redacted] did not cooperate with NOAA. Special Master Interview with L. Paul Barbera, Jr. and Peter Barbera (Dec. 14, 2011). SA Flanagan denies making such a threat. Response by SA Kevin Flanagan. He adds that this was purely a civil matter as illustrated by the application for an AIW. Id. SA McCarron was present at this interview (March 8, 2001) and two (2) subsequent interviews of [redacted] Response by SA Christopher McCarron. SA McCarron states that these interviews took place at the office of J. Terence Houlihan, Jr., Esq., [redacted] lawyer, in Newport, Rhode Island and that SA Flanagan did not threaten [redacted] with criminal action. Id. EA MacDonald highly doubts the allegation because of his experience with SA Flanagan. Id. He points out that [redacted] lawyer was present at [redacted] interviews; had SA Flanagan made this comment, EA MacDonald is certain that [redacted] lawyer would have brought it to his attention and that he would have remembered such a comment. Response by EA J. Mitch MacDonald, p. 3.

EA MacDonald's recollection is that the Agency did not intend to turn this case into a criminal matter and he believes that his memory is corroborated by the fact that the Agency sought an AIW rather than a criminal search warrant. Response by EA J. Mitch MacDonald, p. 3. EA MacDonald does not recall contacting the US Attorney's office to refer this case for criminal prosecution. Id. He points to an email from J. Terence Houlihan, Jr., Esq., [redacted] lawyer, who wrote that "[SA] Kevin Flanagan would like to interview my client. He assures me his intent is to proceed with civil sanctions but he cannot represent that his superiors will only consider civil sanctions." Email from J. Terence Houlihan, Jr., Esq., to EA J. Mitch MacDonald (Feb. 2001).

Paul Barbera states that subsequent to execution of the AIW, Peter DiBiase, Esq., South Pier's counsel at the time, said that NOAA was looking for an opportunity to turn this case into a criminal prosecution. Special Master Interview with L. Paul Barbera, Jr. and Peter Barbera (Dec. 14, 2011). Peter Barber asserts that, during one particular interaction between the Barbera brothers and SA Flanagan in Paul Barbera's office, SA Flanagan said that, if he could, he would turn this investigation into a criminal case. Special Master Interview with L. Paul Barbera, Jr. and Peter Barbera (Dec. 14, 2011). SA Flanagan denies that he considered turning this case into a criminal matter. Response by SA Kevin Flanagan, p. 2. He points out that most of the evidence was obtained through an AIW, and it was preferable to proceed within the civil arena while investigating the matter. Id. Otherwise SA Flanagan would have handled the evidence and witness interviews differently and would have had to coordinate the investigation with the prosecuting Assistant U.S. Attorney. Response by EA J. Mitch MacDonald, p. 5. EA MacDonald states that, contrary to seeking to make the case criminal, SA Flanagan's actions

were consistent with proceeding civilly. Id. According to EA MacDonald, subsequent to the execution of the AIW, SA Flanagan had the opportunity to refer the matter criminally, but instead issued an EAR and forwarded the case to GCEL. Id. GCEL did not refer the matter for criminal prosecution, but instead issued a NOVA and a NOPS. Id.

On March 26, 2001, SA Flanagan mailed a ten (10) count EAR to South Pier.

On May 22, 2002, EA MacDonald issued a nineteen (19) count NOVA to South Pier, the first 10 counts of which corresponded to the EAR, and assessed a $270,000 total penalty. Paul Barbera expected a $10,000 penalty and was shocked at the assessed penalty of $270,000. Special Master Interview with L. Paul Barbera, Jr. and Peter Barbera (Dec. 14, 2011). In essence, all of the counts charged South Pier with providing false information in its dealer reports. Counts 1 through 5 charged South Pier with summer flounder overages landed by F/V Valkyrie Rose but reported as landed by F/V Vulture, or reported as monkfish. Counts 6 through 10 charged South Pier with summer flounder overages landed by [redacted] The landings were split over a number of days to appear to satisfy the maximum landing requirements (in one case 3 days, in a second case 2 days, and in a third case 4 days), were underreported (count 9), or falsely reported as purchased from [redacted] (count 10). Count 11 charged South Pier with summer flounder overages landed by F/V Billy II as monkfish. Counts 12 through 15 charged South Pier with summer flounder overages landed by F/V Hunter but underreported and monkfish landings over reported (count 12); reported for the wrong date (count 13); reporting ninety-five (95) lbs. of fluke and 262 lbs. of monkfish when there were only twelve (12) lbs. of monkfish and an additional unspecified amount of summer flounder worth $250 (count 14); and over reporting the monkfish landings, but not reporting an

additional unspecified amount of summer flounder worth $800 (count 15). Counts 16 through 19 charged South Pier with summer flounder overages landed by F/V Trinity, but split over a number of days (in one case 4 days and in a second case 3 days) to appear to satisfy the maximum landing limits. Accompanying the NOVA was a NOPS which imposed a dealer permit sanction of 630 days (21 months).

The Barbera brothers admitted to the violations alleged in the NOVA. Special Master Interview with L. Paul Barbera, Jr. and Peter Barbera (Dec. 14, 2011). Actually, South Pier had stopped this practice before the execution of the AIW because the Barbera brothers were uncomfortable with it and had fired [redacted] the truck driver, who obtained the fish from fishing vessels and was paid a commission for the amount of fish [redacted] delivered to South Pier. Id.

In February of 2003, the parties reached a settlement. South Pier Fish Company, Inc. and the Barbera brothers agreed to pay $225,000. NOAA agreed to hold the 630 day sanction in abeyance until January 31, 2004, provided the civil penalty was paid and no penalty of at least $5,000 had been imposed for a violation occurring during the abeyance period. NOAA further agreed not to refer the case for criminal prosecution and, if there was a federal criminal investigation, to recommend against prosecution. On February 19, 2003, South Pier paid the settlement amount. In addition to this amount, South Pier and the Barbera brothers paid the state of Rhode Island $50,000 for these same offenses.[1] Special Master Interview with L. Paul Barbera, Jr. and Peter Barbera (Dec. 14, 2011).

[1] I have no authority to review any settlement with the state of Rhode Island.

Discussion

Paul Barbera asserts that South Pier was a target and that SA Flanagan was vindictive in his pursuit. Special Master Interview with L. Paul Barbera, Jr. and Peter Barbera (Dec. 14, 2011). EA MacDonald states that there is no evidence to support this contention; to the contrary, Mr. Barbera operated illegally and tried to launder his illegal conduct. Response by EA J. Mitch MacDonald, p. 5. South Pier does not deny wrongdoing and neither do its employees. Special Master Interview with L. Paul Barbera, Jr. and Peter Barbera (Dec. 14, 2011).

According to Peter Barbera, South Pier settled in part because of the psychological impact the case had on him and his family. Special Master Interview with L. Paul Barber, Jr. and Peter Barbera (Dec. 14, 2011). He needed to get it over with even if it meant shutting down South Pier. Id. According to counsel, South Pier could fight and get the penalty reduced but would have to pay legal fees. Id. However, from conversations with counsel and people in the industry, Paul Barbera knew that South Pier would not win in a hearing before an ALJ. Id.

According to Paul Barbera, another reason South Pier settled was that he was intimidated from the execution of the AIW and the perceived threat of criminal prosecution. Special Master Interview with L. Paul Barbera, Jr. (Dec. 14, 2011). EA MacDonald rejects the allegation that criminal prosecution was threatened by NOAA. Response by EA J. Mitch MacDonald, p. 6. EA MacDonald believes that, if Mr. Barbera felt a threat of criminal prosecution, it derived from Mr. Barbera's having committed the violations alleged in the NOVA or from advice from another source such as his lawyer. Id. Normally, criminal investigations proceed first, and any civil action would follow. Id. at 14. Legal counsel had warned the Barbera brothers that they would likely be swapping dollars off of the penalty for legal fees and

the possibility of a permit sanction that would put South Pier out of business if they pursued an appeal. Special Master Interview with L. Paul Barbera, Jr. (Dec. 14, 2011). At that time, South Pier had between fifteen (15) and twenty (20) employees. Id.

Leonard L. Bergersen, counsel for South Pier and the Barbera brothers in this Application for Review, is amazed at the multiplicity of charges since one (1) act was charged as three (3) separate violations, something repeated throughout the NOVA in order to increase the amount of penalty that could be collected. EA MacDonald believes that Mr. Bergersen's amazement stems from a distortion of the record. Response by EA J. Mitch MacDonald, p. 8. According to EA MacDonald, it is clear from the NOVA that there is only one (1) charged violation for each illegal transaction that the claimants attempted to cover up. Id. at 12. He states that the violations were charged on a transaction basis and focused on each separate party with which the respondents illegally transacted business. Id. They were assessed a $10,000 civil penalty for each transaction, instead of being charged on a false report by false report basis which would have resulted in fifty-seven (57) counts. Id. at 12-13. Additionally, EA MacDonald states that he assessed the penalty at the lower end of the range for a first-time dealer reporting violation. Id. at 8. The penalty for false reporting in relation to purchases of groundfish ranged from $5,000 to $50,000 and up to a ninety (90) day permit sanction. According to EA MacDonald, the violations were egregious examples of intentional misreporting. Id. They involved conspiratorial acts with independent parties designed to cover up the vessel's and the dealer's known violations. Id. They also involved a quota species that is managed through the use of dealer reports to determine accurate amounts. Id.

Upon a cursory review of the NOVA and Settlement Agreement, I conclude that the assessed penalty seems excessive. However, after a more careful review of the substantial evidence of an intentional scheme, in concert with others, to hide numerous fishing violations, I conclude that the penalty assessment and settlement were fair and reasonable. Therefore, under the circumstances of this case, I do not find that the penalty was excessive or that there was overzealous or abusive conduct resulting from broad and powerful enforcement authority that led to a "forced settlement." There is no evidence that SA Flanagan was vindictive or had any motive to be vindictive; nor is there evidence that SA Flanagan or NOAA sought to turn this case into a criminal matter. I agree with EA MacDonald that accurate reporting of fish landings is essential to the effective management of fisheries and the preservation of resources. Response by EA J. Mitch MacDonald, p. 8.

Recommendation

I recommend that the Secretary take no further action in connection with this Application for Review.

Case 237

Enforcement Action Reports 73351 and 73352
FV Vila Nova Do Corvo II
Vila Nova Do Corvo II, Inc., Owner
Carlos Rafael, Principal
[REDACTED] Operator

Scallop vessel owner complains that he was unfairly coerced into settling his case after NOAA withheld the $158,663 proceeds from a seized catch after it discovered that the vessel twine top measured below regulation size. NOAA retained $25,000 from the seized catch and returned the remaining proceeds to the vessel owner.

Findings of Fact

Carlos Rafael of North Dartmouth, Massachusetts emigrated to the United States in 1968 from the Azores in Portugal and in 1980 started Carlos Seafood, a wholesale fish dealer in New Bedford, Massachusetts. Since that time, he has gradually purchased numerous fishing vessels. He currently co-owns a fleet of forty (40) fishing vessels with his wife or other partners through various corporate entities. In particular, Mr. Rafael and his wife are co-principals of the corporation, Vila Nova Do Corvo II, Inc., which is the registered owner of the scallop vessel, Vila Nova Do Corvo II, a limited access full-time scalloper. Mr. Rafael purchased the vessel in 2006. At all times relevant to this complaint, [REDACTED] was, and still is, the operator of the Vila Nova Do Corvo II.

On December 20, 2006, the Vila Nova Do Corvo II made her first fishing trip under Mr. Rafael's ownership. The vessel was fishing in Vineyard Sound when four (4) Coast Guard Officers boarded the vessel for a routine inspection. During the inspection, the USCG Officers measured the twine tops on the vessel's two (2) scallop dredges. The twine top allows fish to

escape from the chain bag on a scallop dragger. Regulations require that twine top netting be at least 10'' wide on average. The measurement on the first dredge averaged approximately 9.86'' and the measurement on the second dredge averaged 9.35''. All other inspection points were compliant with applicable regulations. Offense Investigation Report by [REDACTED] MK2, p. 1 (Dec. 21, 2006).

Consequently, the USCG escorted the Vila Nova Do Corvo II back to port where it awaited the arrival of a NOAA SA. Offense Investigation Report by Troy Audyatis, p. 3 (Jan. 9, 200[7]). According to Mr. Rafael, he met the vessel at port and noticed that rocks from the ocean floor had damaged the twine top so that there was a 5'9'' hole through the port side—a hole so large that Mr. Rafael was able to walk through it. Mr. Rafael asserts that the hole was not taken into consideration when the USCG measured the twine top. Mr. Rafael states that he is allowed by regulations to retain 300 lbs. of by-catch. In this particular instance, the Vila Nova Do Corvo II only caught 60 lbs. of by-catch between the two (2) dredges, which demonstrated that the twine top was sufficient for fish to escape. Special Master Interview with Carlos Rafael (Oct. 13, 2011).

On December 21, 2006, NOAA SA Troy Audyatis interviewed [REDACTED] and Mr. Rafael. Mr. Rafael informed SA Audyatis that he purchased 10.25'' twine top from Luso's Fishing Gear, Inc. Mr. Rafael provided SA Audyatis with the invoice to prove that he made the purchase. Luzo Fishing Gear, Inc. Letter and Invoice (Jan. 9, 2007).[1] Additionally, this was the

[1] EA Juliand notes that the operators knew or should have known that mesh size can change over time. He further asserts that a prudent owner would have checked, or had his employees check, his twine top mesh size regularly to make sure that it remained in compliance with the law. Finally, he notes that it is immaterial how the mesh size changes over time. Response by EA Charles Juliand, p. 4.

first fishing trip with the new twine top. Despite this fact, SA Audyatis, at the direction of EA Charles Juliand, seized the entire 21,161 lbs. scallop catch, which included the 59 lbs. of mixed fish from the Vila Nova Do Corvo II.[2] Offense Investigation Report by Troy Audyatis, p. 3 (Jan. 9, 200[7]). In his response, EA Juliand notes that the port side twine top would not have resulted in a seizure because the twine top was less than .25'' undersized. However, since the starboard size twine top measured greater than .5'' undersized, it warranted the seizure of the entire catch based on the Agency's seizure policy. Response by EA Charles Juliand, p. 4. SA Audyatis sold the seized scallops for $158,663 and the mixed fish, which a regularly sized twine top was supposed to minimize, for $29.50.

Immediately following the seizure, Mr. Rafael brought SA Audyatis to the storage unit where he kept other identical twine top that measured 10.25''. Offense Investigation Report by Troy Audyatis, p. 7 (Jan. 9, 200[7]). Based on a small sample, SA Audyatis confirmed that the twine tops were compliant with the regulations. Mr. Rafael had purchased a large quantity of 10.25'' twine top from a local distributor because he was informed there would be a twine top shortage from its manufacturer in Portugal. Special Master Interview with Carlos Rafael (Oct. 13, 2011).

On December 28, 2006, EA Audyatis issued two (2) EARs to [redacted] and to Vila Nova Do Corvo II, Inc. for using undersized twine top. Mr. Rafael returned the entire shipment of twine top to the distributor after this incident. He currently purchases only 12''-13'' twine

[2] At the time, NOAA had a written policy that included a directive for catch seizures if the violation was for "fishing with small mesh nets or net liners." If the mesh size is more than .5'' below regulations, the policy specifies that seizures should automatically occur when the catch exceeds $10,000 in scallop value. Northeast Manual Directive Memorandum by SAC Andy Cohen (Jan. 24, 2005).

tops to ensure absolute compliance. Id. After the seizure, Mr. Markey conducted settlement discussions with EA Juliand before he issued a NOVA. Mr. Rafael wanted an expeditious settlement because NOAA withheld the proceeds from the seized catch, which Mr. Rafael needed to pay expenses for the trip and the mortgage on the Vila Nova Do Corvo II. Id.

During settlement negotiations, Mr. Markey offered to pay $5,000-$7,500 plus the return of the entire catch to settle the EAR. Alternatively, EA Juliand first offered to settle the case for $100,000 retained from the seized proceeds. EA Juliand continued: "… if a pre-NOVA settlement isn't reached in the near future that [sic] the Agency will issue a NOVA for $22,000 and seek to retain the entire seized amount." Email from EA Charles Juliand to Attorney John Markey, Jr., Esq. (Dec. 10, 2007). EA Juliand then offered to return half of the value of the seizure to Mr. Rafael. EA Juliand wrote:

> As I mentioned, if we go to a hearing, it will be necessary for your client's long and illustrious enforcement history to be laid out for the judge – who will be in a position to increase the penalty or add a permit sanction if that seems appropriate (I believe that I'll be able to differentiate him from the folks who got $5,000 fines.) Id.

Mr. Markey contends that NOAA has no legal basis for attributing violations by one vessel to another vessel owned by a different corporate entity, despite the fact that Mr. Rafael may be a co-principal of both entities.[3] Mr. Rafael acknowledges that his captains and their crews sometimes make unintentional mistakes that are outside of his control. Mr. Rafael claims that he has never received a permit sanction for any of his vessels, but readily admits

[3] EA Juliand provides NOAA's policy with respect to assessing prior violations. It states, "If two or more vessels are owned by separate corporations, but the same person or company controls these corporations, then a violation by one vessel is imputed to be a prior for the other vessel or vessels." Memorandum for Consideration of Prior Violations in the Assessment of NOAA Civil Administrative Penalties and Permit Sanctions (July 27, 2000).

that some have paid penalties as a result of "small potatoes" violations. Special Master Interview with Carlos Rafael (Oct. 13, 2011). In response, however, EA Juliand notes that Mr. Rafael's various vessels have totaled $167,767 in penalties for 29 violations between 1989 and 2006. Response by EA Charles Juliand, p. 9.

NOAA retained the $158,692.50 proceeds from the seized catch until December 10, 2007 when, almost one (1) year after the catch was seized, Mr. Rafael settled the case for $25,000 paid to NOAA from the value of the seized catch. Settlement Agreement. NOAA returned the balance of $133,692.50 from the proceeds to Vila Nova Do Corvo, Inc.

Discussion

Mr. Rafael alleges that EA Juliand unfairly coerced him into settling because NOAA withheld the proceeds from the entire seized catch. Under financial pressure and unable to pay vendors, employees and other bills, Mr. Rafael was forced to settle the case. Furthermore, he believes that NOAA unfairly targeted him because he has been an outspoken critic of NOAA's general enforcement actions in various media outlets. Application for Review, p. 7.

Mr. Markey asserts that NOAA, and in particular EA Juliand, was aware of his client's financial status and believed that he could extract higher penalties from him for that reason. Special Master Interview with Carlos Rafael (Oct. 13, 2011). In response, EA Juliand states that there is no basis for Mr. Markey's unsupported assertion because at the outset of any enforcement case, he makes no judgment concerning a Respondent's ability to pay. Response by EA Charles Juliand, p. 5. He also asserts that there is no evidence of animosity on his part against Mr. Rafael because of his fleet ownership or his criticism of NOAA's law enforcement actions. Id. at 9. EA Juliand argues also that NOAA was entitled to seize the proceeds pursuant

to Agency Policy. Further, he states that the entire catch was subject to seizure because it violated the Magnuson-Stevens Act. 16 USC §1857(1)(a).

Mr. Markey argues that the seizure was excessive and that if there was indeed a NOAA seizure policy, it is not uniformly applied. In support of this proposition, Mr. Markey provided me with a list of other substantially similar twine top violations that did not result in the seizure of the entire scallop catch. He compiled the following list from either Commercial Fisheries News or from other lawyers he contacted:

1. FV Amanda C (NE 050038 FM/V)
   Date of Violation: July 26, 2004 (Twine top measurement averaged 8.78'')
   Assessed Penalty: $5,000
   Settlement: $2,600
   Seizure: None

2. FV Jersey Princess II (NE 050018 FM/V)
   Date of Violation: March 10, 2005 (Twine top measurement averaged 9.5625'')
   Assessed Penalty: Counts reduced to warnings
   Seizure: None

3. F/V Leonardo (NE 060039 FM/V)
   Date of Violation: October 7, 2004 (Twine top averaged 8.21'')
   Assessed penalty: $5,000
   Settlement: $2,000
   Seizure: Vessel had not begun to fish.

4. F/V Lophuis (NE 050033 FM/V)
   Date of Violation: November 17, 2004 (Twine top averaged 9.475'')
   Assessed penalty: $7,500
   Settlement: Reduced to warning
   Seizure: None

5. F/V Intrepid (NE 060007 FM/V)
   Date of Violation: October 27, 2005 (Twine top averaged 9.265'')
   Assessed penalty: $5,000
   Settlement: $2,500
   Seizure: None
   See Violations for Twine Top that Measured Smaller Than 10 Inches.

In response, EA Juliand states that four (4) out of the above five (5) cases were general category scallop vessels that were limited to 400 lbs. of scallops. Further, he states that the USCG will generally not involve itself in at-sea seizures valued at under $10,000. General category scallop vessels usually do not catch $10,000 worth of scallops given their 400 lbs. limit. The only vessel that was a full time limited scalloper, like the Vila Nova Do Corvo II, was the Leonardo. In that case, EA Juliand observes that there was no seizure because the vessel had not yet started fishing. Response by EA Charles Juliand, p. 5. Finally, EA Juliand responds that Mr. Rafael's corporations have a far more extensive enforcement history than did the owners on the above list, and Mr. Rafael's settlement was fair because it reflected Mr. Rafael's enforcement history. Id. EA Juliand chose to settle the case for less than 16% of the originally seized proceeds after taking into account the complainants' arguments for leniency. Finally, EA Juliand questions my authority to rule on the appropriateness of seizures under 16 USC §1858(e). Id. at 7.

I address the authority issue first. Under the Secretarial Decision Memorandum dated March 16, 2011, I am authorized to review "[c]ases in which GCEL attorneys charged excessive penalties in a manner that unfairly forced settlement." As I noted earlier in this report, though I do not have the authority to rule on seizures only, I do have the authority to consider cases in which a civil penalty was paid from the seizure. Mr. Rafael and Vila Nova Do Corvo II, Inc. paid a civil penalty from the proceeds of the seizure. Therefore, I have jurisdiction to consider the merits of this case.

Second, I conclude that there is insufficient evidence to support Mr. Markey's assertion that EA Juliand's actions were motivated by personal animus or Mr. Rafael's financial status.

However, I note that Mr. Rafael is well known in the fishing industry because of his ownership interest in numerous scallop vessels, and Mr. Juliand and Mr. Rafael know each other on a personal level because they once traveled together and attended the same event in New Finland. Special Master Interview with Carlos Rafael (Oct. 13, 2011).

With respect to the underlying settlement, the Secretarial Decision Memorandum authorizes me to review cases that encompass "conduct of the kind specifically enumerated in the IG's September 2010 Report [that] prejudiced the outcome of the case." This includes "broad and powerful enforcement authorit[y] [that] led to overzealous or abusive conduct." I find that the scallop seizure and subsequent settlement for possessing undersized twine top meet these criteria.

The facts in this case are not disputed and they establish that Mr. Rafael purchased and installed regulation size twine top (10.25'') on the Vila Nova Do Corvo II during her initial fishing trip under Mr. Rafael's ownership. This fact is corroborated by Mr. Rafael's warehouse full of the same size twine top. Since it was a new set of uniform-sized 10.25'' twine top and the Vila Nova Do Corvo II's first trip, I do not agree with EA Juliand's assertion that "a prudent owner would have checked…twine top mesh size regularly." Response by EA Charles Juliand, p. 4. There is no way for [REDACTED] or Mr. Rafael to suspect that a twine top would shrink on its first use.

It is also undisputed that the twine top shrunk while in use to an average of 9.86'' on the port side and 9.35'' on the starboard side. As EA Juliand observes, mesh nets, and twine top in particular, can shrink for any number of reasons. However, twine top does nothing to capture scallops. Unlike a typical mesh net, twine top on a scallop dredge exists to minimize by-catch

while scalloping only. In this case, the Vila Nova Do Corvo II caught only 59 lbs. of by-catch, which demonstrates that the twine top effectively served its purpose. Therefore, I question EA Juliand's overly broad interpretation and application of NOAA law enforcement's seizure policy, applicable to "fishing with undersized mesh nets." Indeed, unlike a gill net or trawl net, whose primary purpose of the net is to catch fish, the twine top played no role in the amount of scallops that were harvested.[4] Seizing the entire $158,000+ scallop catch for a modestly undersized starboard dredge twine top was an overly broad exercise of enforcement power, particularly because Mr. Rafael purchased regulation size twine top, and it was the Vila Nova Do Corvo II's first trip in which that twine top was employed.

I also find that the seizure was used by EA Juliand as a means of leverage to coerce settlement. Mr. Rafael testified that the trip proceeds were necessary for him to pay the mortgage on this newly-acquired vessel, as well as the costs of the trip. This could not be done until some or all of the seized scallop proceeds were returned to the vessel owner. Special Master Interview with Carlos Rafael (Oct. 13, 2011). Regardless of whether EA Juliand was aware of Mr. Rafael's financial situation at the time, EA Juliand's first proposal was the retention of $100,000 from the seized proceeds. He also threatened to issue a NOVA for $22,000 and seizure of the entire $158,663 sale proceeds. EA Juliand points out that he settled for 15.8% of the seized catch because he took into consideration Mr. Markey's arguments for

[4] EA Juliand cites In the Matter of: Miss Amanda, Inc., Joseph Scola, 2005 WL 2886667 *4 (NOAA) for the proposition that the ALJ in that case rejected Respondent's argument that everyone knew that nets shrink and that it was not their fault. No specific intent or fault is required in proving a violation. Response by EA Charles Juliand, p. 4. However, that case is distinguishable from the present case in that the former involved an undersized trawl net whose primary purpose was to catch fish. In contrast, twine top does nothing to capture scallops. Further, liability is not disputed in this case. Rather, the settlement amount is being challenged.

leniency, the seriousness of the offense, and the owner's extensive enforcement history. Response by EA Charles Juliand, pp. 4-5. However, the amount of the settlement relative to the seized catch is immaterial because the entire seizure was used as leverage to coerce what should have been a nominal settlement in the first place.

EA Juliand argues generally that the penalty must remove the incentive to violate the law for those seeking short term financial gain. That may be so, but this particular penalty did nothing to deter future violations because the shrinkage was largely outside of Mr. Rafael and [redacted] control. Further, there was no short term financial gain because the twine top does nothing to capture scallops and the by-catch was sold for only $29.50. In short, the penalty paid in this case does not correlate with the nature, circumstances, extent, and gravity of the violation. 16 U.S.C. §1858(a).

Mr. Markey initially offered to pay $5,000 to $7,500 for the violation with the proceeds from the sale of the seized catch being returned. I believe that the high end of Mr. Markey's offer ($7,500) to be a fair resolution given Mr. Rafael's lack of culpability, the remedial steps he has taken to avoid a future violation, and the fact that there were no conservation measures implicated.

Recommendation

I recommend that the Secretary remit $17,500 to Vila Nova Do Corvo II, Inc. in connection with this Application for Review.

Case 238

NE 970027 FM/V and NE 970060 FM/V
F/V Perseverance
K & T Fishing, Inc.
Malvin Kvilhaug, Owner
Kenneth H. Thuestad (dec.), Owner/Operator

Fishing vessel owner complains about the excessive penalties imposed for two (2) incursions into a closed area that forced him into an early and unfair settlement of the case. Additionally, vessel owner complains that he was forced individually to pay a corporate penalty. Vessel owner also argues that NOAA, without precedent, seized his scallop vessel before the resolution of the case, which denied the owner an opportunity to earn the money necessary to pay the proposed penalty and other creditors.

Findings of Fact

Malvin Kvilhaug came to the United States in 1961 from Norway and immediately started fishing as a deckhand in New Bedford, Massachusetts. He eventually worked his way from being a first mate to captain, and ultimately to vessel owner. Mr. Kvilhaug currently owns three (3) scallop vessels in whole or in part through various corporations: the Sandra Jane (J&M Fishing Corp.), the Contender (Michigan Fishing Corp.) and the Concordia (Michigan Fishing, Inc.). All three (3) vessels are moored in Fairhaven, Massachusetts. In 1986, Mr. Kvilhaug and Kenneth Thuestad purchased the 75' scalloping vessel Perseverance through their corporate entity, K & T Fishing, Inc. Mr. Kvilhaug and Mr. Thuestad, whom Mr. Kvilhaug described as an "ambitious young man", had been deck mates aboard the fishing vessel, Michigan. At all times relevant to this complaint, Mr. Thuestad was the captain of the Perseverance. Mr. Kvilhaug,

meanwhile, served as the manager of all business operations, including dealing with applicable regulations and permits. Special Master Interview with Malvin Kvilhaug (Nov. 22, 2011).

On March 19, 1997, the USCG cutter, Escanaba, was patrolling Closed Area II (closed area) when it picked up on radar three (3) vessels operating inside the closed area with their navigation lights extinguished. Supplemental Offense Investigation Report by USCG [redacted] (Mar. 23, 1997). A fourth vessel, later identified as the Perseverance, was spotted without her navigation lights on and plotted to be 1.8 nautical miles inside the closed area. Id. The USCG communicated through radio with Mr. Thuestad and subsequently boarded the vessel. After determining there was a violation, the USCG escorted the Perseverance back to New Bedford where the case was transferred to NOAA.

Several NMFS SAs boarded the vessel at the dock on March 20, 1997. While in the wheelhouse, SA Kevin Flanagan saw the Perseverance course plotted on the plexiglass-encased map. Supplemental Offense Investigation Report by SA Kevin Flanagan (Mar. 26, 1997). The plotted lines seemed to indicate that the Perseverance had been towing inside of the closed area near the location at which the vessel was spotted by the Coast Guard. Id. In total, NOAA SAs seized 9,072 lbs. of scallops and 170 lbs. of mixed fish worth $71,933.97 including approximately nineteen (19) bags of sea scallops in a light green vat hidden underneath some floorboards. Supplemental Offense Investigation Report by SA Shawn Eusebio (Mar. 26, 1997).

Mr. Kvilhaug contends that the USCG has had issues plotting vessels in the past. He cited one incident involving his vessel, the Sandra Jane. He disputes that Mr. Thuestad was in the closed area as alleged on March 28, 1997. In fact, Mr. Kvilhaug states that he was willing to

challenge this seizure and spoke to his former counsel, Richard Moses, Esq., to that effect. Special Master Interview with Malvin Kvilhaug (Nov. 22, 2011).

In response, EA MacDonald states that Mr. Kvilhaug and Mr. Thuestad both had opportunities to produce plotter data, personal fishing logs and charts to disprove the allegations against them. Instead, EA MacDonald asserts, Mr. Thuestad and Mr. Kvilhaug signed a Settlement Agreement on behalf of K & T Fishing, Inc. admitting corporate liability for illegal operations inside the closed area. EA MacDonald admits, however, that he remembers little of these cases except in a general context. Response by EA J. Mitch MacDonald, p. 2. I can identify no competent evidence that supports Mr. Kvilhaug's assertions that the USCG erred in plotting the Perseverance's position.

On March 28, 1997, EA J. Mitch MacDonald issued a joint NOVA to K & T Fishing, Inc. and Mr. Thuestad for one (1) count of unlawful entrance into a closed area. EA MacDonald assessed an $80,000 penalty, including a three (3) year operator permit sanction and a three (3) year vessel permit sanction. Notice of Violation Assessment and Notice of Permit Sanction (Mar. 28, 1997).

On May 3, 1997, the USCG cutter Escanaba conducted a routine patrol of fisheries off the coasts of Nantucket and Cape Cod.[5] Draft Affidavit of USCG LTJG [redacted] (undated), ¶19. At around 12:00 am, the USCG picked up intermittent radar contact with a vessel twenty five (25) nautical miles away inside Closed Area II (closed area). Id. at ¶21. At approximately 1:46 am, the USCG identified the target as two (2) separate vessels operating in

[5] The source of this information originated from an unsigned affidavit from USCG LTJG [redacted] who was an officer on board the Escanaba during the May 3, 1997 incident.

close proximity to one another. Id. The USCG observed the vessels on radar to be traveling at approximately 2.5 knots inside the closed area, a speed consistent with fishing. Id. The Escanaba maintained a continual radar track on the two (2) vessels throughout the night.

At 1:46 a.m., LTJG [redacted] observed visually that the contacts were operating without their required navigational lights. Id. at ¶22. At approximately 2:00 am, the vessels were also observed on radar to have stopped completely for several minutes before increasing their speeds to ten (10) knots towards the western edge of the closed area, an activity which is consistent with a vessel stopping to pull up fishing gear and steaming to another location. Id. at ¶23. The Escanaba made numerous hails to the two (2) vessels on the Channel 16 CHF-FM radiotelephone throughout the night, but received no responses. At 2:05 am, the USCG cutter, Monomoy, joined in the pursuit of the two (2) vessels. At approximately 2:40 am, when the vessels reached a third vessel, the vessels changed directions with one (1) vessel traveling north and one (1) vessel traveling south.

The Escanaba contacted the USCG Air Station to supply an aircraft at 3:00 am. At 4:12 am, the USCG helicopter spotted the south-bound vessel and identified it as the Weymouth. At approximately 4:16 am, the USCG Falcon Jet spotted a vessel later identified as the Perseverance running without navigation lights. At around 6:50 am, the Monomoy caught up with the Perseverance and USCG officers boarded the vessel. Upon boarding, USCG officers observed large amounts of unshucked scallops on deck and the fishing gear appeared available for fishing. Id. at ¶30. The USCG notified Mr. Thuestad that they would seize the 2,105 lbs. of scallops, 900 lbs. of unshucked scallops and 50 lbs. of monkfish from the Perseverance. Mr.

Thuestad was also issued an EAR for illegally fishing inside the closed area. The Perseverance returned to New Bedford and the scallops on board were seized and sold for $14,360.07.[6]

On June 17, 1997, the Perseverance was in the middle of another scallop trip when she was seized in the open ocean by a USCG vessel. EA MacDonald was quoted in South Coast Today as saying, “We will be going in this week to get the seizure warrants and start the whole foreclosure process” and that “[w]hen we come across repeat offenders like this we’re going to try and remove them from the fisheries.” “Coast Guard Seizes Two Scallopers”, South Coast Today (June 19, 1997). It is unclear who authorized the seizure of the Perseverance on the open ocean, but EA MacDonald speculates that the decision was made by NOAA’s General Counsel Office. Mr. Kvilhaug does not recall receiving any documentation concerning the seizure of the vessel. Special Master Interview with Malvin Kvilhaug (Nov. 22, 2011).

The USCG escorted the vessel to Boston, Massachusetts, where the scallop catch was not seized and Mr. Thuestad was able to use the proceeds to offset the cost of fuel and equipment and to pay his crew. NOAA GCEL ordered the vessel to be tied up until pending matters were resolved, suspended the operating permit, and retained the proceeds from the

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[6] John Markey, counsel for Mr. Kvilhaug in this matter, argues that there was some confusion between the USCG boarding report and the EAR. The latitude/longitude coordinates appeared to be approximately thirty (30) miles apart. Special Master Interview with Malvin Kvilhaug (Nov. 22, 2011). I was also provided with a DVD of footage taken by the USCG helicopter on May 3, 1997, which Mr. Markey argues supports his theory that the USCG may have misidentified the Perseverance for another vessel. The DVD initially displays aerial footage from a USCG aircraft clearly showing the blue scallop vessel, Weymouth, at night. Subsequently, during daylight hours, the DVD shows a USCG boarding of the maroon-colored Perseverance. Despite Mr. Markey’s assertions, there is sufficient, credible evidence that the Coast Guard pursued the Perseverance from the Closed Area II to where USCG officers boarded the vessel outside of the closed area. That explains the difference in the coordinates.

previous two (2) seizures. That same day, EA MacDonald issued a second NOVA to K & T Fishing, Inc., Kenneth Thuestad and Malvin Kvilhaug, charging them jointly and severally with three (3) counts of violating the Magnuson Stevens Act:

Count 1: The Perseverance unlawfully entered four (4) nautical miles into the closed area on May 3, 1997 and operated in a manner consistent with fishing;

Count 2: The Perseverance unlawfully refused to allow an authorized officer to board the vessel for purposes of inspection because it failed to stop for the USCG after the USCG repeatedly hailed the Perseverance on Ch. 16, turned on its blue enforcement light, energized its search lights, and repeatedly used its whistle; and

Count 3: The Perseverance unlawfully interfered with an investigation by operating without navigational lights, failing to stop after being signaled and contacted by the USCG Cutter, Escanaba, and taking evasive action in an attempt to escape from the Escanaba's pursuit by speeding up and repeatedly changing course to head away from the Escanaba.

EA MacDonald assessed $110,000 for each count, totaling $330,000 in penalties. Further, EA MacDonald imposed a permanent revocation of Mr. Thuestad's operator's permit and proposed a forfeiture of $14,360.07 from the seized proceeds. It is unclear why Mr. Kvilhaug was charged individually despite the fact that K & T Fishing, Inc. owned the Perseverance in its corporate capacity and he was not personally involved in the incident.

On June 19, 1997, approximately two (2) days after NOAA authorized the seizure of the Perseverance, a representative of K & T Fishing, Inc. and NOAA signed an agreement as follows:

> K & T Fishing, Inc. hereby waives immediate institution of seizure and forfeiture proceedings in U.S. District Court, relating to the seizure of the F/V Perseverance, seized on or about June 18, 1997, through and including July 2, 1997.

> K & T Fishing, Inc. hereby reserves all right to challenge the validity of the seizure and forfeiture of the subject vessel.
>
> NOAA agrees to provide to K & T Fishing, Inc., within seven days, customary voluntary discovery and to request from the US Coast Guard tapes of radio transmissions to and from the USCGC Escanaba for the period from May 3rd, 1997 through and including May 5th, 1997. Also to be produced are videos of vessel sightings for said period.
>
> Prior notice of any court proceedings relating to the above will be provided to above named corporation by NOAA. Signed Waiver Agreement (June 19, 1997).

Mr. Kvilhaug intended to sell the Perseverance to his brother-in-law who had no financial interest in K & T Fishing, Inc., but is Mr. Kvilhaug's partner in J&M Fishing, Inc. His brother-in-law would have assumed all the liens on the vessel. However, according to Mr. Markey, NOAA GCEL rejected this arrangement, believing the relationship between brothers-in-law to be too close. Special Master Interview with Malvin Kvilhaug (Nov. 22, 2011). Faced with "undue financial pressure", Mr. Kvilhaug and Mr. Thuestad were forced to sell the vessel at a "fire sale." Application for Review, p. 8. Indeed, Mr. Kvilhaug states that since the Perseverance was tied up pending resolution of the case, K & T Fishing, Inc. was unable to generate any revenue to make the mortgage and insurance payments on the vessel, thus forcing its sale. Special Master Interview with Malvin Kvilhaug (Nov. 22, 2011).

The parties settled the two (2) cases on August 6, 1997. Malvin Kvilhaug and Kenneth Thuestad signed the Settlement Agreement on behalf of K & T Fishing, Inc., which admitted to the incursion violations on both dates. Malvin Kvilhaug and Kenneth Thuestad neither admitted nor denied personal liability. To account for "inability to pay financial information,"

EA MacDonald reduced the two (2) other counts to warnings against K & T Fishing, Inc., Malvin Kvilhaug and Kenneth Thuestad.

In addition, K & T Fishing, Inc. agreed to pay a $39,000 penalty with $19,000 suspended on the condition that Mr. Kvilhaug installed VMS units on three (3) vessels owned by different corporate entities: the Sandra Jane, Contender and Concordia. Mr. Kvilhaug individually signed a promissory note dated August 3, 1997 to pay the $20,000 penalty. EA MacDonald states that NOAA viewed the installation of the VMS units as a prudent measure to help deter other vessels from operating illegally inside a closed area. Further, he states that the Respondents could have chosen not to install the VMS units and instead pay NOAA the $19,000 suspended amount. Response by EA J. Mitch MacDonald, p. 10. K & T Fishing, Inc. also agreed to forfeit $71,933.97 from the seized proceeds stemming from the March 19, 1997 incident, and $14,360.07 from the May 3, 1997 incident.

In addition, K & T Fishing, Inc. agreed to sell the Perseverance to [redacted] another New Bedford fisherman, for $540,000. Letter from Richard T. Moses, Esq. to EA J. Mitch MacDonald (July 11, 1997). In order to do so, Mr. Kvilhaug said that he had to compromise with various lien holders on the Perseverance so that Mr. Ingrande could take good title to the vessel. Mr. Kvilhaug also agreed not to purchase any additional vessels during a four (4) year period. Meanwhile, Mr. Thuestad agreed to a five (5) year operator permit sanction from June 15, 1997 to June 15, 2002, after which he could request the termination of his sanction by submitting financial documents to NOAA. During the sanction period, he would effectively be barred from working in any capacity aboard any fishing vessel.

K & T Fishing, Inc. was subsequently dissolved with no remaining assets. Sometime in 1999, Mr. Thuestad and [redacted] declared Chapter 7 bankruptcy. In January 2008, Kenneth Thuestad died tragically in a waterfront accident while attempting to rescue a drowning fisherman.

Discussion

There are essentially three (3) issues in this case: 1) whether the seizure of the Perseverance at sea, prior to any Agency resolution of the NOVAs, was appropriate; 2) whether it was appropriate to hold Mr. Kvilhaug personally liable for violations committed by the Perseverance, which was owned by K & T Fishing, Inc., a corporation; and 3) whether the penalty was excessive and the settlement unfairly forced.

Vessel Seizure

Mr. Kvilhaug questions NOAA's decision to seize the vessel at sea rather than at the dock, calling the decision "flagrant." Special Master Interview with Malvin Kvilhaug (Nov. 22, 2011). Mr. Markey also argues that the vessel seizure was "unprecedented" and was meant to "force[] settlement" by "preventing the F/V Perseverance from generating any revenue while the case was pending." Application for Review, p. 5. EA MacDonald defends the legality of the seizure because it was made pursuant to 16 USC §1861(A). He asserts that NOAA was prepared to proceed to U.S. District Court seeking forfeiture of the Perseverance under 16 USC §1860(a). Response by EA J. Mitch MacDonald, p. 8. This became unnecessary when Messrs. Kvilhaug and Thuestad signed waivers in order to facilitate settlement discussions.

He relies also, among other cases, on Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), as legal support for the seizure. In Pearson Yacht, the Supreme Court held that

a seizure of a vessel, after authorities discovered contraband on board but before a hearing was granted, did not violate due process because seizure was necessary to further an important government interest. Id. at 678. In doing so, the court rejected the appellant's argument that he was entitled to a pre-seizure hearing. In the present case, EA MacDonald argues that the seizure was necessary to prevent the Perseverance from operating in closed areas in order to protect them from further poaching. Because the Perseverance was discovered inside the Closed Area II on two (2) occasions within 1.5 months of one another, I find that the seizure was justified under Pearson Yacht.

Individual Liability

Mr. Kvilhaug was charged individually in the NOVA despite the fact that 1) K & T Fishing, Inc. owned the Perseverance; 2) Mr. Kvilhaug did not operate, nor has he ever operated the Perseverance; and 3) his primary responsibilities were related to office matters. Special Master Interview with Malvin Kvilhaug (Nov. 22, 2011). He personally guaranteed and paid the $20,000 compromised settlement with NOAA. EA MacDonald asserts that Mr. Kvilhaug was charged individually as a responsible corporate officer because Mr. Kvilhaug was in a position of responsibility, authorized the trips in question, was in control of the corporation's activities, and could have benefitted financially from illegally retained catch from closed areas. According to EA MacDonald, Mr. Kvilhaug either authorized the illegal conduct or neglected to take any measures to prevent the conduct. Response by EA J. Mitch MacDonald, p. 12.

EA MacDonald relies, among other cases, on U.S. v. Park, 421 U.S. 658 (1975), to support the theory of individual liability for a corporate officer on these facts. In Park, the

Supreme Court held that a CEO could be held criminally responsible[7] for acts of the corporation by virtue of his position of authority. In reaching this conclusion, the court held that a corporate officer could be legally responsible under a strict liability statute (like the Magnuson Act) if he had the power to prevent the alleged violation. Id. at 671. In other words, the corporate officer needs to have a certain level of control in order to be found liable for corporate violations.

There is no indication, and NOAA has provided no evidence beyond mere assertions, that Mr. Kvilhaug was in a position of control over Mr. Thuestad. Mr. Kvilhaug owned 50% of the stock of K & T Fishing Inc. That is, however, insufficient to establish that Mr. Kvilhaug exercised any control over the actions of Mr. Thuestad absent credible evidence to the contrary. Further, Mr. Kvilhaug's role at K & T Fishing, Inc. was relegated primarily to office duties involving paperwork and permits. Mr. Kvilhaug had not fished on board the Perseverance, nor is there reason to believe he had the authority to dictate where Mr. Thuestad would fish. While Mr. Kvilhaug could have benefited financially from the illegal catch, that by itself does not constitute the kind of control of activities that is required for individual liability.

Messrs. Kvilhaug and Thuestad denied personal liability and only admitted to their corporation's liability with respect to the violations. Ordinarily, the assessment of individual liability for corporate violations absent evidence of control would constitute overbroad and

[7] EA MacDonald also cites to U.S. v. Hodges X-Ray, Inc., 759 F.2d 557 (6th Cir. 1985) for the proposition that corporate officers can be held legally responsible in civil matters as well as criminal matters. I make no distinction between criminal and civil violations.

overzealous enforcement authority within the meaning of the Secretarial Memorandum dated March 16, 2011.

However, I find there was consideration in return for Mr. Kvilhaug's acceptance of personal responsibility for payment of the compromised penalty. When Mr. Kvilhaug agreed to be held personally liable and to install VMS units on his other vessels, he obtained the suspension of a $19,000 penalty. Likewise, when Mr. Kvilhaug committed to pay the $20,000 penalty personally, he did so because, absent a settlement, Mr. Thuestad could have been liable for the entire assessed penalty of $410,000. Finally, I also find, from my interview with Mr. Kvilhaug, that he was partially motivated to pay the $20,000 penalty personally because he thought it would benefit his relationship with NOAA with respect to the operation of his other three (3) vessels. I find that there was adequate consideration for Mr. Kvilhaug's personal contribution to the settlement of this case.

Penalty Assessment

Mr. Markey argues that GCEL "charged an excessive penalty and imposed interim sanctions in a manner that forced the owners into an early and unfair settlement of the case." Application for Review, p. 7. Additionally, he alleges that NOAA "exaggerated" the counts in the second NOVA concerning the failure to stop for the USCG. Mr. Markey also alleges unequal treatment of his client compared to substantially similar cases. In particular, he notes the case of the Weymouth (NE 970061 FM/V). Though the USCG boarded the Weymouth at the same time as the boarding of the Perseverance on May 3, 1997, Mr. Markey points out that, despite the fact that the Weymouth had a history of NOAA violations, the case settled for only $23,000 and Weymouth Fishing Corp. was not forced to sell its vessel. Mr. Markey also provided me

with a list of closed area violations between June 1996 and May 1999 and none of the dispositions required that the owners sell their vessels. List of Other Closed Area Violations.

In response to this latter argument, EA MacDonald distinguishes the Weymouth case. The Weymouth did not commit a previous violation on March 19, 1997. The financial conditions in the Weymouth case were considerably different. Nevertheless, the $23,000 Weymouth penalty was higher than that applied to the Perseverance (i.e., $20,000 to the government; $19,000 suspended). In addition, the Weymouth was required to serve a little more than a 3 ½ year vessel and operator permit sanction during which time neither the vessel nor the operator was allowed to fish at all in federal waters. During the fourth year, the vessel's DAS were reduced by 50%. During the fifth year, the vessel's DAS were reduced by 25%. The Weymouth respondents could not purchase any additional vessels during the 3 ½ year period. The Weymouth was also required to install an operable VMS unit and report to the NMFS enforcement office on a continuous basis. Moreover, the Weymouth respondents received a 10-year probationary period. Finally, both the Weymouth and the Perseverance had prior enforcement history. Response by EA J. Mitch MacDonald, p. 11; see also Weymouth Settlement Agreement (Aug. 20, 1997).

With respect to the penalty assessment, EA MacDonald maintains that the penalties were reasonably related to the nature, circumstances, extent and gravity of the violation. Closed areas warrant substantial protection because strict enforcement is required to prevent overfishing and fisheries collapse. Further, EA MacDonald argues that VMS units were available, although not mandatory, at the time. Despite the Perseverance's history of prior violations, no VMS unit was ever installed. Failure to do so made it particularly difficult for

USCG to enforce closed area violations. Response by EA J. Mitch MacDonald, p. 15. Moreover, the two (2) violations occurred within 1.5 months of one another, despite K & T Fishing, Inc. already receiving a NOVA with an $80,000 penalty and three (3) year permit sanction for the first violation. Thus, EA MacDonald reasons that the original penalty was not significant enough to deter future illegal fishing activities. EA MacDonald also notes that, on both occasions, the Perseverance was operating without navigational lights. The second violation involved an investment of considerable resources because of the need to deploy two (2) USCG aircrafts and cutters. Accordingly, the penalty assessment and permit sanction were reasonably related to the nature and circumstances of the case. Id. at pp. 16-17.

Under the circumstances, the combined penalty assessments of $430,000 were excessive. I do not find, however, that the $20,000 settlement and resulting sale of the Perseverance were coerced or unfair. I am not persuaded that the Perseverance was deliberately treated differently than vessels in similar circumstances, such as the Weymouth. The fact is that the Perseverance was involved in two (2) closed area incursions within a 1.5 month span; was discovered on both occasions to be operating without her navigational lights in order to avoid detection; and, during the latter violation, attempted to evade a USCG cutter by refusing to answer the Ch. 16 hails while navigating away from the cutter. There is no reliable evidence that the USCG erred in plotting the Perseverance. Further, the owners of K & T Fishing, Inc., ably represented by counsel, signed the Settlement Agreement admitting liability. With respect to the sale of the vessel, it made prudent business sense to sell the Perseverance at the time because of the pending vessel and operator permit sanction. The Perseverance carried a substantial mortgage obligation and without the ability to scallop for an

extended period of time, it would have been difficult, if not impossible, to maintain the mortgage payments on the vessel. Special Master Interview with Malvin Kvilhaug (Nov. 22, 2011). Therefore, the sale of the vessel was the logical option because it allowed Messrs. Kvilhaug and Thuestad to eliminate the mortgage obligation and it served NOAA's enforcement purpose by removing a repeat violator from the fisheries.

Under the circumstances of this case, I find the settlement, seizure of the Perseverance at sea, and Mr. Kvilhaug's personal liability, to be reasonable.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 239

NE 0801382 FM/V

F/V Miss Shauna

██████████, Operator

Miss Shauna, LLC, Owner

Limited liability company's managing partner complains about a forced settlement in a case where he had obtained NOAA's approval for the vessel to continue fishing.

Findings of Fact

Paul Francis Weckesser lives in Acushnet, Massachusetts. He is a full-time welder and works primarily on fishing boats. He has a small welding business, Mass Fabricating & Welding, Inc., located on Green and Wood Pier in New Bedford, Massachusetts, near where the F/V Miss Shauna is docked. The Miss Shauna is a trip boat and has federal and state permits for scalloping. Mr. Weckesser is the managing partner of Miss Shauna, LLC which has owned the Miss Shauna since 2005. Either individually or jointly with his wife, Mr. Weckesser owns 100% interest in Miss Shauna, LLC. Mr. Weckesser has invested in fishing vessels since 1982, but he does not engage in fishing. He hires an operator for the vessel who in turn is responsible for finding the crew. Typically, someone returning from a trip on a larger fishing vessel would sign up for a trip on the Miss Shauna. At all times relevant to this complaint, ██████████ was the part-time captain on the Miss Shauna. Mr. Weckesser allows his captains to choose the dealer for the sale of their catch because he does not want the captains to think that Mr. Weckesser has a secret arrangement with any particular dealer. The captains typically offload at Tempest Fisheries Ltd.

On April 9, 2008 at 3:29 pm (EDT), ██████████ sent an email to NOAA terminating Miss Shauna's fishing trip early due to mechanical problems. According to this email, the

estimated landing date and time would be April 11, 2008 at 7 am and the reported amount of scallops on board were 12,800 lbs. There were two (2) separate unrelated mechanical problems aboard the Miss Shauna. Mr. Weckesser had just installed a new engine which was overheating as a result of a failure to change the pitch of the propeller for the new engine to enable the vessel to travel fast enough to cool the engine. This problem was resolved by towing at a lower RPM, towing only one (1) dredge into the tide, and resuming normal operations by fishing with two (2) dredges while towing with the tide. The Miss Shauna was able to steam home at 7-7.5 knots because she was not dragging at that time.

The Miss Shauna's second problem resulted from damage to the sump pump for the lazarette, causing water to accumulate in that location. This would not be a problem on a larger vessel, but the Miss Shauna has only ten (10) to eleven (11) inches of free board and filling the lazarette takes up roughly one third (1/3) of the boat, causing the vessel to lose floatation. Mr. Weckesser had a new pump delivered by the fishing vessel Hear No Evil which was going to fish near the Miss Shauna. According to VMS data, the Hear No Evil entered the Elephant Trunk Access Area ("ETAA") at 1 pm (EDT) on April 8, 2008. VMS data reveals that the Miss Shauna fished until 1:48 pm on April 9. VMS data further reveals that, after the Miss Shauna obtained the replacement pump, she travelled at a speed of six (6) knots or higher before exiting the ETAA, and at a speed of seven (7) knots or higher after exiting the ETAA. This speed is consistent with steaming home and inconsistent with fishing.

On April 10, 2008 at about 11:15 pm (EDT), nearly eight (8) hours before her estimated time of arrival, the Miss Shauna returned to port. With the help of the USCG, SAs Joseph D'Amato and Shawn Eusebio boarded the Miss Shauna at about 11:30 pm to confirm the

amount of scallops on board. Mr. Weckesser was not on board when the Miss Shauna returned to port, but was present for the offload. Before the offload occurred, stated to SA Eusebio that there were 326 bags of shucked sea scallops and that the weight was between 17,500 lbs. and 17,600 lbs. Mr. Weckesser stated that a bag typically weighs 54-54.5 lbs. SA D'Amato asked Weckesser and if there had been problems on the trip, to which they responded in the negative; did not mention the engine overheating or the pump issue; and did not refer to the trip termination. During the offloading of the vessel, SA Eusebio tallied the scallops while SA D'Amato and the USCG officer monitored the offloading. 326 bags of scallops were offloaded of which two (2) were not recorded by the dealer because the crew was to divide them amongst themselves for home consumption. The weight of the 324 recorded bags was 17,677 lbs. and of the two (2) unrecorded bags was 109 lbs., for a total of 17,786 lbs. (an average of 54.55 lbs. per bag).

After the offload, SA Eusebio asked to see the FVTR, which appeared to reflect that 12,800 lbs. of "KEPT POUNDS" were initially written on the FVTR and later changed to 17,624 lbs. SA Eusebio pointed this out to who responded that did not know what SA Eusebio was talking about. When SA Eusebio pointed out that the 12,800 lbs. corresponded to the amount reported in the trip termination email, "became speechless with mouth agape and eyes closed struggling to find a response." Offense Investigation Report by SA Shawn Eusebio, p. 10 (Apr. 18, 2008).

When pressed for a reason for the early trip termination email, and Mr. Weckesser cited the engine overheating problem and a damaged water pump in the vessel's lazarette. They explained that the overheating engine problem was resolved by towing at a

lower RPM, towing one (1) dredge into the tide and towing two (2) dredges with the tide. [REDACTED] explained that the Miss Shauna had obtained a new pump from the Hear No Evil. As of April 10, 2008, the reported aggregate weight of scallops on board was 10,040 lbs., not 12,800 lbs. as noted in the trip termination notice. [REDACTED] explained that [REDACTED] had used the wrong numbers and that it was a bad estimate. According to EA MacDonald, this was a false claim because bags used in scallop packing are of a standard size and [REDACTED] landing weight estimate just prior to the offload was very accurate. Furthermore, scallop packing is volumetric and an experienced operator would know how much weight is in each bushel of in-shell scallops. Response by EA J. Mitch MacDonald, p. 6.

Upon the completion of the offload, Mr. Weckesser went to the dealer's office to obtain the check for the landed catch. However, [REDACTED] of Tempest Fisheries had been directed to hold the proceeds until further instructions. By that time, [REDACTED] had sold the scallops which, as they were being offloaded, were being placed onto pallets for shipping to the buyer. When Mr. Weckesser asked [REDACTED] for the check, [REDACTED] said that [REDACTED] had not received any paperwork yet, but that Agent Eusebio had instructed [REDACTED] not to issue the check and NMFS would contact [REDACTED] to let [REDACTED] know what to do with the proceeds. Mr. Weckesser called NMFS to inquire and was told that the agents on site had reported that the Miss Shauna had filed a broken trip report declaration and false statements had been made. Mr. Weckesser states that he was absolutely bewildered.

In the early afternoon of April 11, 2008, SAs D'Amato and Eusebio met with Mr. Weckesser in his shop to get more information about the broken trip termination. Mr. Weckesser agreed that [REDACTED] should have acknowledged that 12,800 lbs. were initially

listed as "KEPT POUNDS." At some point, SA Eusebio went into the Tempest office and in Mr. Weckesser's presence gave [REDACTED] a document saying that NOAA was seizing the money. When Mr. Weckesser asked SA Eusebio what was going on, SA Eusebio told him that NOAA was seizing the money because of the false declaration made before returning to port. Mr. Weckesser left the Tempest Fisheries office and called his lawyer, John A. Markey, Jr., Esq.

On April 11, 2008, NOAA seized $126,885.60 in proceeds from the sale of 17,623 lbs. of scallops to Tempest Fisheries Ltd.

The Miss Shauna had submitted a daily VMS scallop catch report on April 11, 2008 at approximately 8:43 am which indicated a 3,000 lbs. catch rate on April 10, 2008. VMS data revealed that the Miss Shauna exited from the ETAA on April 9, 2008 at around 6:26 pm at a speed consistent with a vessel steaming. The vessel did not reenter the ETAA and the data does not indicate that it fished outside of the ETAA.

According to Mr. Weckesser, subsequent to [REDACTED] email notification but prior to the vessel's return to port on April 10, 2008, Mr. Weckesser called Linda R. Galvin, VMS Specialist at NOAA's OLE office, clearly identified himself as the owner of the Miss Shauna, and explained the situation. Special Master Interview with Paul Weckesser (Oct. 13, 2011). Mr. Weckesser said he told Ms. Galvin that [REDACTED] might have remedied the problem by fishing with one (1) drag and asked if the ship could continue to fish. Id. According to Mr. Weckesser, Ms. Galvin called him back about 15 minutes after his initial call and told him that she would disregard the broken trip notification because the vessel had not left the ETAA. Id. If the Miss Shauna had left the ETAA, Ms. Galvin would not have been authorized to disregard the notice. Id. Mr. Weckesser asked whether he needed to do anything else, to which Ms. Galvin

responded in the negative. Id. Consequently, the Miss Shauna continued fishing before returning to port because Mr. Weckesser believed that the broken trip declaration would be disregarded. Id.

EA MacDonald disputes that this call occurred as described by Mr. Weckesser. Response by EA J. Mitch MacDonald, p. 3. He bases his view on Ms. Galvin's written statement of April 16, 2008 of a call on April 11, 2008 and her notes from her call log concerning an April 16, 2008 telephone communication with Mr. Weckesser. Id.; Written Statement by VMS Specialist Linda Galvin (Apr. 16, 2008); Notes by VMS Specialist Linda Galvin (Apr. 16, 2008).

In her April 16, 2008 written statement, Ms. Galvin stated that she received a call on April 11, 2008 around 9 am from an anonymous caller who explained that a vessel fishing in the ETAA had sent in a broken trip email notification via VMS because of a mechanical problem that was subsequently resolved. Written Statement by VMS Specialist Linda Galvin (Apr. 16, 2008). The caller wanted to rescind the broken trip notification and continue scalloping. Id. She explained that Donald Frei administered the broken trip part of the Access Area program. Id. He asked whether Enforcement would consider his request to rescind the broken trip as falsifying government records and would "come after him." Id. Ms. Galvin explained that, if the information provided was accurate, NMFS would probably be able to work with him, but that this was a question for Donald Frei. Id. The 'fisherman' then asked whether having wrong weights reported on the catch reports was considered "falsifying government records." Id. Ms. Galvin found the whole conversation suspicious and transferred the call to Mr. Frei. Id. Later that day, Ms. Galvin spoke with Mr. Frei who had responded to the call and she believed that

Mr. Frei confirmed that the subject vessel was the Miss Shauna and the caller was Paul Weckesser. Id. Actually, Mr. Frei later reported that the caller was [redacted]

Ms. Galvin's notes indicate that at 8:25 am on April 16, 2008, Mr. Weckesser called and "asked about process -> EAR – then GCNE + NOVA." Id. EA MacDonald points out that Ms. Galvin was not authorized to disregard a broken trip notice because she was not responsible for administering the Access Area program. Id. According to VMS data, the Miss Shauna did not continue fishing after declaring a broken trip. Id.

On April 17, 2008, Mr. Frei provided an explanation to SA Eusebio in writing concerning the anonymous caller of April 11, 2008 who was transferred to him by Linda Galvin. Offense Investigation Report by SA Shawn Eusebio, pp. 18-19 (Apr. 18, 2008). The caller was the operator of the Miss Shauna, [redacted] who had just been boarded and who wanted to know whether it was a violation to declare a broken trip but then to continue fishing upon fixing a mechanical problem. Mr. Frei had responded that nothing in the regulations prevents a person from carrying on with fishing activities as long as (s)he had not exited the ETAA. According to Mr. Frei, the reported daily amount of 3,000 lbs. was suspect as it was at the end of the trip when the crew's energy was at its low.

On April 18, 2008, SA Eusebio issued EARs to the operator and the owner of the Miss Shauna, charging them in count one with filing a false trip termination declaration on April 9, 2008; in count two with filing a false scallop VMS catch declaration on April 11, 2008; and in count three with making false statements on April 11, 2008.

On July 24, 2008, EA Mitch MacDonald issued a NOVA to Miss Shauna, LLC and [redacted] [redacted] In count one, he charged them with a false statement in an email submitted through

the VMS system regarding the anticipated time of landing and the amount of scallops onboard the vessel. In count two, he charged them with submitting false daily scallops catch reports. In count three, he charged them with false statements to an authorized officer based on their representation that the Miss Shauna engaged in fishing after the broken trip declaration. EA MacDonald assessed a civil penalty of $35,000 for each count for a total of $105,000. Accompanying the NOVA was a NOPS suspending the vessel's permit for 270 days and imposing a forfeiture of one (1) access area trip in the fishing year in which the sanction is effective. The NOPS also imposed an operator permit sanction of 270 days for [redacted].

On March 13, 2009, the parties reached a Settlement Agreement. John A. Markey, Jr., Esq. signed it on behalf of the respondents. In the Settlement Agreement, the respondents admitted to the violations alleged in the NOVA/NOPS, agreed to pay a civil penalty of $55,000, and agreed to forfeit any interest in the seized proceeds from the sale of the scallops. Under the Settlement Agreement, the permit suspensions were reduced to a hundred and fifty (150) days for the operator and four (4) months for the vessel.

Discussion

Mr. Weckesser was not on the vessel at sea, but knows that the broken trip declaration email had been sent on April 9, 2008; that according to the email, the reported amount of scallops on board was 12,800 lbs.; and that the vessel had not left the ETAA. Special Master Interview with Paul Weckesser (Oct. 13, 2011). According to Mr. Weckesser, NOAA is correct that the vessel was not engaged in active fishing at that point. Id. However, there was still fish product and fishing activity on board as there was a deck load of scallops that the crew members were shucking that went into the washer. Id. Scallops in the washer get reported the

following day (in this case on April 10) because they do not get reported until they are in bags and their relative weight is known. Id. From what Mr. Weckesser understands, that accounts for an extra 3,000 lbs. Id. People aboard the vessel shuck scallops until they reach the demarcation line, at which time they shovel overboard anything over the fifty (50) bushel limit. Id.

SA Eusebio points out that the difference between the weight of the scallops aboard the Miss Shauna, 17,786 lbs., and that reported in the trip termination notification, 12,800 lbs., is 4,986 lbs., not 3,000 lbs. Response by SA Shawn Eusebio, p. 3. EA MacDonald also observes that the difference between the termination amount and the landed amount was approximately 5,000 lbs., not 3,000 lbs. Further, he states that, during settlement discussions, [REDACTED] represented that the 3,000 lbs. report submitted on April 11, 2008 was to make up for a missed report on April 8, 2008. Response by EA J. Mitch MacDonald, 9.

Mr. Weckesser states that he settled the case on advice of counsel because NOAA rarely loses a case submitted to a Coast Guard ALJ. Special Master Interview with Paul Weckesser (Oct. 13, 2011). Mr. Markey had asked for a third extension of the trial date in that he had to appear in bankruptcy court on March 18, 2008 and he had a one (1) week family vacation in April that had been scheduled six (6) months in advance. Id. Mr. Markey also wanted to obtain additional discovery. Id. For these reasons, Mr. Markey requested a week extension of the trial date, which was denied. Id. Mr. Markey has learned that the best way for him to advocate for a fishing vessel owner was to work with NOAA and to be as cooperative as one could be to get the best possible deal. Id. Mr. Markey did not feel he had many choices. Id. He felt that a sure $182,000 reflecting the seizure of approximately $127,000 and a $55,000 penalty was better

than what the penalty could be if he pursued the matter before an ALJ. Id. The ALJ is not bound by the NOVA assessment and may assess up to $130,000 per count. Mr. Weckesser thought that he could remortgage his house to pay the expenses incurred as a result of the seizure, but he could not afford to go forward, lose and pay a substantial penalty of potentially half a million dollars. Id.

It is Mr. Markey's position that the settlement was forced. Id. Mr. Markey suggested that, if the stakes were small enough, for example, where the potential penalty was $25,000-$40,000, and the client was a risk-taker, he could try the case, but Mr. Markey was much less comfortable given the amounts involved in this case. Id.

Mr. Weckesser never believed that he would be forced into a corner and would have to remortgage everything to pay for what he describes as a technical violation that supposedly was cleared up before the Miss Shauna returned to port. Id.

EA MacDonald responds that he assessed the penalty within the lower half of the penalty range ($5,000 to $80,000) for a first time false statement or false report violation. Response by EA J. Mitch MacDonald, p. 16. [REDACTED] had a prior warning for exceeding the Access Area possession limit. Id. According to EA MacDonald, the violations were not technical, but intentional. Id. at 17. He believes that the respondents engaged in a smuggling scheme to land more scallops than they intended to report and to launder the illegal landings through false reports. Id. EA MacDonald asserts that the changed FVTR shows that the respondents intended to report a landing of 12,800 lbs., but had to report the full amount in light of the SAs' presence at the time of the offload. These circumstances forced them to create a cover story which was full of inconsistencies and contrary to the evidence of their trip

activities. Id. He states that the respondents could have benefited from their illegal conduct by being able to "re-catch" the difference between the possession limit of 18,000 lbs. and the trip termination amount of 12,800 lbs. Id. According to EA MacDonald, since the almost 5,000 lbs. of scallops were worth approximately $35,000, this could have turned into a very lucrative scheme over time. Id. He points out that, instead of landing in the morning in the daylight hours, the Miss Shauna landed at night well before her scheduled arrival, which reduced the likelihood that the offload would be monitored. Id.

Under the circumstances of this case, I find that a $55,000 civil penalty is not excessive. VMS data reveals that, subsequent to the broken trip declaration, the Miss Shauna travelled at speeds in excess of sex (6) knots prior to exiting from the ETAA and in excess of seven (7) knots after exiting from the ETAA. Those speeds are consistent with steaming back to port and not with fishing. I find that Mr. Weckesser did not have a telephone conversation with Ms. Galvin prior to Miss Shauna's return to port. Although there is confusion whether the caller of April 11, 2008 identified himself as Mr. Weckesser or [redacted] this call took place after the vessel had returned to port and the scallops had been offloaded. I find too many inconsistencies between what Mr. Weckesser told me during his interview and what is revealed from NOAA's records.

Recommendation

I recommend that the Secretary take no further action in connection with this Application for Review.

Case 240A
NE950450 FM/V
F/V Caitlin
Terry L. Hopkins, Inc., Owner
Edison Love, President/Co-principal
Michael Love, Manager

Vessel owner complains about the rigidity of the regulations when his captain was assessed a $2,500 penalty for possessing an undersized cod end mesh net that appeared during a regular net haul-back.

Findings of Fact

Edison Love (Edison) is an 87 year old retired fisherman who started fishing immediately after being discharged from the Marine Corps when he was 24 years old. Edison retired in 1998. His son, Michael Love (Michael), is a 1987 graduate of the Maine Maritime Academy. He grew up in the fishing industry and has worked on various fishing vessels in Rhode Island and Maine. From 1995 to 1998, Michael took over management functions of his father's company. Currently, Michael owns the fishing vessel, Titan, and fishes for multispecies, shrimp, and lobsters.

Edison was the president and co-principal of Terry L. Hopkins, Inc. in Portland, Maine, which was the registered owner of the fishing vessel, Caitlin, a western rig stern trawler that Edison built in 1995. The company sold the vessel in 1998 during what Edison called a "government buyout." [redacted] operated the Caitlin in 1995.

On September 22, 1995, officers from the United States Coast Guard vessel, Reliance, led by Officer [redacted] boarded the Caitlin on a routine compliance and safety inspection. At the time, the Caitlin had on board approximately 9,300 lbs. of various

multispecies. During the inspection, Officer [redacted] and [redacted] crew discovered a cod end mesh net on deck that was not in use. The net was wet and had a dead fish and crab inside. The rings used to close the net had also been cut off. Officer [redacted] concluded, however, that "the net was definitely usable." Supplement to Offense Investigation Report by USCG [redacted], p. 3 (Sept. 24, 1995). [redacted] informed the USCG officers that [redacted] retrieved the net during one of the trawls, that it was under the regulation size of 6'', that [redacted] did not throw it back into the ocean because that would be illegal, and that [redacted] planned on discarding the net when [redacted] returned to port. The USCG officers measured two (2) runs of twenty (20) meshes, which averaged between 5.425'' and 5.4375''. According to Michael, [redacted] could have thrown the net into the ocean or kept the net onboard, but either choice would have resulted in a violation. [redacted] allegedly asked which violation would result in a lesser penalty. Special Master Interview with Michael and Edison Love (Nov. 16, 2011). Accordingly, [redacted] destroyed the net on board in order to continue fishing. Supplement to Offense Investigation Report by USCG [redacted] p. 3 (Sept. 24, 1995).

[redacted] and Terry L. Hopkins, Inc. received an EAR on September 26, 1995 for the undersized cod end mesh net violation. The case was recommended for further prosecution because the Caitlin had previously received a citation for negligent operation and for being inside a closed area on April 15, 1993 and June 7, 1993 respectively. Memorandum from D.G. Bruzdzinski, Jr. to NMFS Office of Law Enforcement (Oct. 23, 2005).

EA J. Mitch MacDonald issued a NOVA on June 19, 1996 to Terry L. Hopkins, Inc. and Timothy W. Hopkins for the mesh net violation. The NOVA documented one (1) count of possessing an undersized mesh net on September 22, 1995 and assessed a $2,500 penalty.

The Loves retained Pamela Lafreniere, Esq. (then known as Pamela Dagenais) who requested a hearing on the NOVA and filed the Preliminary Position on Issues and Procedures. She challenged the excessiveness of the penalty as well as the determination that the undersized mesh was available for "immediate use" as per the regulations. Ultimately, the case settled for $1,700 on November 12, 1996. Settlement Agreement. The Settlement Agreement stipulated that "the admissions in this settlement shall constitute a prior offense for six months from the date of the violation." Id.

Discussion

The Loves primarily challenge the rigidity of the regulations that resulted in assessment of a penalty for possessing an undersized cod end mesh net which he had accidently retrieved from the sea bed. In response, EA MacDonald points out that the Loves have not submitted a complaint that is enumerated and authorized in either the OIG September 2010 Report or the Secretarial Decision Memorandum dated March 16, 2011. I need not reach the question concerning my authority. The Loves, through competent counsel, negotiated and settled this case for $1,700. Although I question the rigid enforcement of the mesh net violation, the penalty assessment and subsequent settlement were not excessive, nor was the settlement coerced. Accordingly, no relief is warranted.

Recommendation

I recommend that the Secretary take no action in this Application for Review.

Case 240B
NE960028 FM/V
F/V Caitlin
Terry L. Hopkins, Inc., Owner
Edison Love, Co-principal
Michael Love, Manager

Vessel owner complains about an excessive penalty for failing to properly call into the DAS Notification System, despite having sufficient DAS available for use. The vessel did not call into the DAS program immediately after leaving port because it had planned on undergoing repairs at sea first.

Findings of Fact

Edison Love (Edison) is an eighty-seven (87) year old retired fisherman who started fishing immediately after being discharged from the Marine Corps when he was twenty-four (24) years old. He retired in 1998. His son, Michael Love (Michael), is a 1987 graduate of the Maine Maritime Academy. He grew up in the fishing industry and has worked on various fishing vessels in Rhode Island and Maine. From 1995 to 1998, Michael took over management functions of his father's company. Currently, Michael owns the fishing vessel, Titan, and fishes for multispecies, shrimp, and lobsters.

Edison was the president and co-principal of Terry L. Hopkins, Inc. in Portland, Maine, which was the registered owner of the fishing vessel, Caitlin, a western rig stern trawler that Edison built in 1995. The company sold the vessel in 1998 during what Edison called a "government buyout." [redacted] was captain of the Caitlin between 1995 and 1998.

On March 14, 1996, the Caitlin left the Portland, Maine port at 5:00 am without an initial intention of fishing, but rather to replace a tow wire in the winches. The process would

take between four (4) and five (5) hours and would require a slow jogging of the vessel. According to [redacted] it is customary to perform such repairs at sea in order to avoid various safety concerns that exist at the dock. Statement of [redacted] (Mar. 28, 1996).

While replacing the tow wire, the crew on the Caitlin discovered a crack in the flange, which required an additional four (4) to five (5) hours to weld because of inclement weather conditions. Id. During this time, [redacted] questioned whether the Caitlin would even be able to fish that day because the crew had to test whether the weld would hold after the repairs. Ultimately, [redacted] called into the DAS Notification system at approximately 6:30 pm – two (2) hours after the crew completed repairs on the vessel and approximately 13.5 hours after the Caitlin left Portland. Id.

While the Caitlin was undergoing repairs, she was headed away from shore and towards a predetermined fishing area. It took approximately two (2) more hours from the time [redacted] [redacted] called into the DAS Notification System, until the Caitlin reached the fishing grounds approximately 140 nautical miles southeast of Portland Head. Offense Investigation Report by SA William Papoulias, p. 1 (June 28, 1996). The crew set the first net at approximately 8:20 pm. Id. On March 16, 1996, a USCG Aircraft contacted the Caitlin, and someone on board allegedly informed the USCG aircraft that she had departed from Portland, Maine at 12:30 pm on March 14, 1996, with a DAS number of 0314182944462. Supplement to Offense Investigation Report by USCG Wallace Lathrop (Mar. 27, 1996). This contrasts with the actual DAS call-in time of 6:29 pm on March 14, 1996. [redacted] denied [redacted] ever told the USCG Aircraft that [redacted] had left Portland at 12:30 pm that same day. Statement of [redacted] (Mar. 28, 1996).

On March 24, 1996 at 1:03pm, called out of the DAS Notification system to signal the end of the fishing trip. Offense Investigation Report by SA Bill Papoulias, p. 5 (June 28, 1996). though, claimed that "at approximately fifteen miles off shore, I called out to the National Marine Fisheries in accordance with the DAS program." Statement of (Mar. 28, 1996). There is an issue of fact concerning who called out of the DAS system on this occasion. Nonetheless, the vessel did not return to port until approximately 6:00 pm that day. According to EA Juliand, this indicated that the Caitlin had called out of the DAS Notification System five (5) hours before it was lawful to do so. Response by EA Charles Juliand, p. 5. Upon the Caitlin's return to port, USCG officers and SA Bill Papoulias boarded the vessel because a discrepancy had been discovered concerning the Caitlin's DAS call-in time. explained to SA Papoulias about the Caitlin's repairs. SA Papoulias did not doubt that the Caitlin underwent repairs. However, SA Papoulias informed that was required to call into the system when left port. Offense Investigation Report by SA Bill Papoulias, p. 2 (June 28, 1996). The USCG questioned and each of the crew members for the next several hours and, according to refused to allow crew members to go home after a long time at sea. At around 12:30 am the next morning, the USCG and SA Papoulias made the decision to seize the entire catch, subsequently sold for $52,642.66. Id.

Edison comments that the seizure adversely affected the crew most significantly because many live paycheck to paycheck, and at the end of a long trip, they have families waiting for them to receive money for food, utilities, clothing and shelter. He did not believe that NOAA could "convince the children of these crewmembers that a late phone call is much

more serious than the food on their table." Edison Love Statement (Mar. 28, 1996). The Loves' former legal counsel, Michael X. Savasuk, argued that the seizure of over $50,000 in fish was "unduly harsh and inequitable enforcement of the law." Letter from Michael X Savasuk, Esq. to EA J. Mitch MacDonald (Mar. 27, 1996).

EA Charles Juliand was assigned to the case and he issued a NOVA and NOPS on October 18, 1996, charging [redacted] and Terry L. Hopkins, Inc. jointly and severally with two (2) violations:

Count 1: On March 14, 1996, the Caitlin unlawfully failed to comply with the DAS call-in requirement when it left port at 5:00am and did not call into the DAS Program until 18:29 hours - 13 hours and 29 minutes after leaving port, in violation of 50 CFR §650.9(b)(10); and

Count 2: On March 24, 1996, between 13:03 and approximately 18:00, the Caitlin unlawfully failed to comply with the DAS call-in requirement, that is, the Respondents arrived in port at approximately 18:00 hours to end a multispecies trip, "but Respondents called in to the DAS program, as required in §650.29, until 13 hours and 29 minutes later, on March 14, 1996 at 18:29 hours. Thus the Respondents violated 50 CFR §650.9(b)(10)."

Notice of Violation Assessment (Oct. 18, 1996).

EA Juliand assessed $25,000 per count for a total penalty of $50,000. Further, he suspended forty five (45) DAS for the 1997/1998 year. I note that Count 2 is defective as it stands because it is unclear what exactly was being charged, particularly because it appears that EA Juliand repeats many of the same facts from Count 1.

[redacted] admitted that on two (2) prior occasions, [redacted] had neglected to call out to the NMFS DAS program to signal the end of [redacted] trip until the following day. [redacted] asserts, however, that by forgetting to signal the end of [redacted] trip, [redacted] was not trying to cheat the

government by shaving DAS. Rather, ██ forgetfulness was detrimental to ██ because ██ lost DAS. Statement of ████████ (Mar. 28, 1996). Michael points out that the Caitlin possessed an abundance of DAS at that point such that "she would run out of gear before she ran out of DAS." Special Master Interview with Edison and Michael Love (Nov. 16, 2011). According to a letter written by SA Papoulias, though, the Caitlin had 19.83 DAS remaining prior to leaving for the fishing trip between March 14, 1996 and March 24, 1996.[1] Memo from SA William Papoulias to GCEL (July 1, 1996). Based on my calculations, had the Caitlin called into and out of the DAS Notification System at the required time, the Caitlin would have had roughly nine (9) DAS remaining at the conclusion of the fishing trip with sixteen (16) fishing days left in the fishing year, which ended on April 30, 1996. I find that the Caitlin had adequate DAS remaining for the rest of the fishing year.

On April 30, 1997, Michael Love and ████████ on behalf of Terry L. Hopkins, Inc., signed a Settlement Agreement and paid a $30,000 penalty. Further, they agreed to serve a ten (10) day multispecies permit sanction in the 1996/1997 fishing year. The Caitlin also relinquished the remaining DAS for the rest of the fishing year. ████████ also agreed to serve a ten (10) day operator permit sanction. Terry L. Hopkins, Inc. also forfeited the rights and claim to the $52,646.66 proceeds from the sale of the catch.

Upon consulting with Mr. Savasuk, Michael learned that they could face hundreds of thousands of dollars in penalties. Given this possibility, Michael said that "he could not write

[1] SA Papoulias calculated that the Caitlin had 19.83 DAS remaining as of March 9, 1996. Further, he noted that between March 9, 1996 and April 30, 1996, which was the end of the fiscal year, the Caitlin had fifty-two (52) total remaining fishing days in which to use all of her DAS allocation. However, he pointed out that, since the Caitlin did not take out a required twenty (20) day block, she only had thirty-two (32) total fishing days for the remainder of the fiscal year.

the [$30,000] check fast enough" because, at the time, the Loves were living in "terror." Special Master Interview with Edison and Michael Love (Nov. 16, 2011). Finally, Michael indicated that this, and the preceding case (supra, case 240A), made him feel "like a crook" even though they are honest tax payers who were not trying to hide any fish from the authorities. Id. [REDACTED] insisted that [REDACTED] did not try to shave their DAS in order to gain fishing days. Statement of [REDACTED] (Mar. 28, 1996).

Discussion

Michael argues that he settled because his legal counsel informed him that he could face hundreds of thousands of dollars in penalties if the case went before an ALJ. Edison argues that fishing vessels that leave port to go fishing are often unprepared to do so. He therefore did not believe that vessels are required to call in every time they leave the dock because they sometimes have to undergo repairs or stop at other docks for supplies or fuel. As such, he did not believe that the regulations are so strict as to require vessels to call into the DAS Notification program even without the initial intention of fishing.[2] Statement of Edison Love (Mar. 28, 1996). However, as EA Juliand notes, the intent is irrelevant because of how the statute is written.[3] Therefore, from a legal standpoint, the Caitlin was engaged in 'fishing' even

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[2] On April 15, 1996, a Permit Holder Notice, dated April 19, 1994 was attached to a letter sent to all multispecies permit holders, explaining the DAS Notification program requirements to sea scallop and multispecies permit holders. In relevant part, the letter states:

> "Vessel owners are required to call-in their vessel's intended departure on a fishing trip **before leaving the dock,** and, upon the vessel's return to port, call-in to terminate DAS. The trip termination call should not take place until the vessel **returns to the dock** upon completion of its trip. (emphasis in original).

[3] 16 U.S.C. §1802 (16) defines "fishing" as: (a) the catching, taking, or harvesting of fish; (b) the attempted catching, taking, or harvesting of fish; (c) any other activity which can reasonably be expected

while she was undergoing repairs. Further, EA Juliand argues that the penalties and permit sanctions were consistent with a careful application of the statutory factors, including nature, circumstances, extent, gravity of the prohibited acts, degree of culpability and history of prior offenses. He also asserts that the penalty and settlement were entirely reasonable considering all the relevant circumstances. Response by EA Charles Juliand, p. 6.

Here, there is no question that the Caitlin did not call into the DAS Notification System until 13 hours and 29 minutes after it was required to do so. [redacted] provided a reasonable explanation concerning why [redacted] initially did not call into the DAS Notification System when [redacted] left port. However, the justification is immaterial with respect to liability because the broad definition of "fishing" in the MSA includes "any operations at sea in support of, or in preparation for [catching fish]". 16 U.S.C. §1802 (16). Therefore, replacing a tow wire falls within this definition. Moreover, while the Caitlin was undergoing repairs, she was sailing towards the fishing grounds. As EA Juliand points out, sailing towards the destination fishing grounds without calling into the DAS Notification System is effectively engaging in "fishing related activity off the books." Response by EA Juliand, p. 4. Therefore, the Caitlin was in violation of the regulations as written.

The issue, then, turns to the $50,000 assessed penalty, $30,000 settlement, and $52,642.66 seizure. In the March 16, 2011 Secretarial Memorandum, the Secretary outlined the criteria for eligible cases for my review, including "cases in which GCEL attorneys charged

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to result in the catching, taking or harvesting of fish; or (d) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (a) through (c)…

excessive penalties in a manner that unfairly forced settlement." Secretarial Decision Memorandum dated March 16, 2011.

I find that the assessed penalty was excessive and unfairly forced a settlement. EA Juliand assessed $25,000 for each of the two (2) counts, totaling $50,000. I noted above that Count 2 constitutes a defective count because it is unclear what was being charged. I think it is likely that EA Juliand intended to charge that the Caitlin improperly called out of the DAS Notification system five (5) hours before she was legally entitled to do so, but that allegation is not clear in the NOVA. However, as he points out in this, and other cases for my review, intent is largely irrelevant. I should think that EA Juliand should be held to at least the same standard that he applies to fishermen.

I find that mitigating factors in this case suggest a lower penalty is warranted. A first time violation for a call-in violation ranges from a written warning to $35,000. The penalty schedule notes that the following factors "will be considered in choosing a penalty within, above, or below the ranges…", including: 1. Biological impact of the violation; 2. Willful nature of the violation; 3. Cooperation or lack thereof, attempted concealment or evasion; 4. Prior record; and 5. Impact on viability of the regulatory regime. Penalty Schedule.

First, there was no indication that the Caitlin landed an overage and therefore, the violation had no biological impact. I recognize that by not properly calling into and out of the DAS system, the Caitlin could have added additional days to fish. However, even if [redacted] [redacted] properly called into and out of the DAS Notification system for this fishing trip, the Caitlin would have had approximately nine (9) DAS available for the remaining sixteen (16) fishing days left in the season. I have previously concluded that the Caitlin had an adequate

amount of DAS remaining for the balance of the fishing year. Therefore, a more appropriate enforcement action may have been to deduct DAS from the Caitlin's remaining allocation.

Next, I note that there is at least a question of whether ████████ intentionally violated the call-in provision. There was a disagreement with respect to the interpretation of what constituted "fishing" activity for DAS call-in purposes. In fact, as noted in ████ ████ statement, ██ "told [NMFS Special Agent] the same story at least five (5) times" concerning why ██ did not initially call into the DAS system. Statement of ████████ (Mar. 28, 1996). SA Papoulias' stated in his Offense Investigation Report that he did not doubt that the Caitlin underwent repairs, but that ████████ should have called into the DAS system when ██ left the dock. However, ████████ called out of the DAS system five (5) hours before ██ returned to the dock. If ██ was indeed trying to conceal the fact that ██ called out early, common sense dictates that ██ would not have admitted that ██ called out of the DAS system fifteen (15) miles from shore in a written statement to enforcement. At best, there is inconclusive evidence that there was intent to violate the DAS call-in regulation, particularly because ████████ has consistently denied it.

I note also that ████████ and ██ crew were cooperative and did not impede the investigation. Further, there have been no major offenses documented against the Caitlin or ████████ Memo from SA William Papoulias to GCEL (July 1, 1996). There was a prior case involving possession of a mesh net, in which I questioned the unduly strict enforcement of that matter. See supra, Case 240A.

Fundamental fairness and common sense dictate that discretion and flexibility should have been applied, but they were largely absent, particularly because of the adverse impact the

seizure had upon the crew and their families. In light of the mitigating circumstances in this case, I find that the penalty was excessive, the settlement unfair, and relief is warranted.[4] I have determined that the penalty assessment of $50,000 was excessive. I have further found that the excessive assessment forced an unfair settlement of $30,000. Considering the totality of the circumstances of the case, which included paying a $30,000 penalty, forfeiting the catch worth $52,646.66, and forfeiting significant DAS, and other mitigating factors, I find that the settlement amount paid in this case should be reduced by one-half (1/2).

Recommendation

After considering the totality of the circumstances of this case, the gravity of the violation, and the various mitigating factors, I recommend that the Secretary remit $15,000 to Terry L. Hopkins, Inc. in connection with this Application for Review.

[4] EA Juliand's response includes assertions that Mr. Love's Application for Review "is replete with additional errors and/or false statements" and that I should "bring their illegal activity to the attention to the proper authorities" because Mr. Love has "perjured himself." Response by EA Charles Juliand, p. 5. I note that I arrived at this conclusion independent of the various immaterial factual inaccuracies in Mr. Love's Application for Review. The inaccuracies do not impact the fact that there was an excessive penalty and an unfair assessment relative to the violation(s) committed.

Case 241

NE 960033 FM/V
F/V Paul & Domenic
Gaetano G. Brancaleone, Operator
GGB, Inc., Owner

Vessel operator complains about an excessive penalty in a case involving an honest mistake and a misunderstanding of a confusing regulation.

Findings of Fact

Gaetano G. Brancaleone ("Mr. Brancaleone") is a retired commercial fisherman who lives in Gloucester, Massachusetts. He fished from 1961 until 1997. Together with his wife, they owned F/V Paul & Domenic through GGB, Inc. Mr. Brancaleone owned 51% of the GGB, Inc. stock and his wife was the president. He had the vessel built by Rhode Island Marine in 1978 and sold her in 1997. The Paul & Domenic was a 75' stern trawler trip boat and Mr. Brancaleone was the captain.

The issue in this case is whether Captain Brancaleone was legitimately confused concerning his fishing under Fleet DAS or Individual DAS at the time of the events charged in the NOVA. The following is a timeline of those events:

February 1, 1994: Captain Brancaleone applied for a Fleet DAS permit for the Paul & Domenic;

February 20, 1994: Paul & Domenic was issued a Fleet DAS permit;

March 24, 1994: Captain Brancaleone requested a review of his DAS allocation;

June 21, 1994: Captain Brancaleone appealed his DAS allocation to Joseph MacDonald, NMFS appeals hearing officer;

July 1, 1994: Jon C. Rittgers, NMFS Deputy Regional Director, wrote to Captain Brancaleone informing him that, as a result of an initial review of his appeal, his initial DAS allocation of 165 days had been

increased to 188 DAS and that therefore the number of DAS available to him for the 1994/1995 fishing year was 188 minus the regulatory reduction of 10%, or 169 DAS;

July 21, 1994: Captain Brancaleone wrote to Joseph MacDonald, requesting an oral hearing;

August 2, 1994; Peter D. Colosi, Jr., Division Chief, Fishery Analysis, wrote to Thomas Brancaleone informing him that the review of his application had been completed and that he had the results from Mr. Rittgers (see above). He enclosed a document asking Thomas Brancaleone to indicate whether he would like to continue with the Fleet DAS or renew his permit with Individual DAS;

February 17, 1995: Captain Brancaleone renewed his 1995 permit for Fleet DAS and was issued a permit on May 1, 1995;

March 14, 1995: Peter D. Colosi, Jr. wrote to Thomas Brancaleone informing him that his vessel had been permitted with Fleet DAS, which requires a vessel taking trips longer than twenty-four (24) hours to remain tied up for a day any time it makes a two (2) day trip. Otherwise, if Captain Brancaleone wanted to fish under the Individual DAS program, he had to check the appropriate block on the enclosed check-off sheet. Upon receipt of the notice of change, NOAA would issue an Individual DAS authorization to be kept on board the vessel.

June 19, 1995: The Paul & Domenic was identified in a Status Report as being in DAS appeal;

October 17, 1995: SA McCarron reviewed all DAS call in records for the first six (6) months of the 1995/1996 fishing year, including those of the Paul & Domenic. SA McCarron discovered that the Paul & Domenic had not completed the layover requirement for a Fleet DAS vessel for the three (3) fishing trips: from July 8, 1995 to July 17, 1995, from August 2, 1995 to August 8, 1995, and from August 12, 1995 to August 18, 1995;

October 31, 1995: Captain Brancaleone renewed his 1996 permit for Fleet DAS and was issued a permit on November 4, 1995;

November 15, 1995: SA McCarron interviewed Alison Verry, NMFS Fishery Management Specialist, about the status of Paul & Domenic's DAS appeal. Andrew A. Rosenberg, Regional Director, wrote to Captain Brancaleone informing him "that your appeal should be, and is hereby, approved for an Individual DAS allocation of 233 days." Letter by NOAA Regional Director Andrew Rosenberg (Nov. 15, 1995). Michele Murray, Secretary, GCEL, date stamped, copied, and mailed the letter and included a DAS selection sheet for the selection of Individual or Fleet DAS. Written Statement by Secretary Michele Murray (Apr. 1, 1996);

December 11, 1995: Peter D. Colosi, Jr. sent a letter to Captain Brancaleone requesting that he select either to continue fishing under Fleet DAS or to change his permit to Individual DAS;

December 21, 1995: NMFS received Captain Brancaleone's selection requesting a change to the Individual DAS program.

On March 18, 1996, SA McCarron interviewed Ms. Verry. He informed her that there was an investigation involving Captain Brancaleone. In the written statement that she provided on March 20, 1996, she wrote that she did not recall speaking with Captain Brancaleone either in person or over the telephone about the Fleet DAS or the regulations, nor did she recall sending him regulations explaining the Fleet or Individual DAS requirements. However, she remembered sending him a form letter on March 14, 1995 which explained the requirements of the Fleet DAS and Individual DAS programs. She did not send a final check-off sheet until December 11, 1995 by which time the appeals process was over.

As part of his investigation, SA McCarron interviewed Mr. Colosi on March 18, 1996. On March 20, 1996, Mr. Colosi submitted a written statement to SA McCarron, in which he stated that he had communicated with Captain Brancaleone regarding Paul & Domenic's appeal. On March 14, 1995, Mr. Colosi had sent Captain Brancaleone a letter, explaining the options and

requirements of the Fleet DAS and the Individual DAS programs. On December 11, 1995, Mr. Colosi had sent Captain Brancaleone a letter to notify him of the completion of his appeal and to request that Captain Brancaleone either select to continue fishing in the Fleet DAS category or renew his permit application to fish under the Individual DAS category. Following receipt of this letter on December 21, 1995, NMFS received Captain Brancaleone's election to fish under the Individual DAS category.

When SA McCarron and SA William Papoulias interviewed Captain Brancaleone on March 20, 1996, SA McCarron showed Captain Brancaleone the noncompliant trips and Captain Brancaleone's response was that he must have made a mistake. Captain Brancaleone offered to make up the time for the trips in question. He explained that he had not received a DAS selection sheet with the November 15, 1995 decision granting 233 days of Individual DAS allocation and that he believed he could begin fishing in this category. At the conclusion of the interview, the SAs provided Mr. Brancaleone with statement forms and a copy of the DAS report to take home and clarify why he had not complied with the DAS layover requirement.

On March 20, 1996, SA McCarron asked Mr. Colosi if he had informed Captain Brancaleone that the Paul & Domenic could automatically begin fishing in the Individual DAS category once the appeal was finalized. Mr. Colosi did not believe so, since this would be contrary to what the regulations stated.

In his April 3, 1996 statement, Captain Brancaleone wrote that there were a number of discrepancies between the Vessel DAS report and his own records. Further, he stated that he made every effort to comply with the rules and regulations and any noncompliance was the result of an honest mistake or a misunderstanding of the applicable requirements.

On April 3, 1996, SA McCarrron issued an EAR charging Captain Brancaleone in one (1) count with failure to comply with the layover day requirement on July 19, 1995, August 12, 1995, August 22, 1995, November 26, 1995, December 4, 1995, and December 8, 1995.

EA Charles R. Juliand issued a NOVA to GGB, Inc. and Captain Brancaleone on December 31, 1996. The NOVA charged them with one (1) count of failure to comply with the layover requirements on July 19, August 12, and August 22, 1995 and assessed a penalty of $20,000. [1] On December 31, 1996, EA Juliand also issued a NOPS suspending the Paul & Domenic's permit for nine (9) days of her available 1997/1998 DAS.

EA Juliand contacted Captain Brancaleone concerning this case. Captain Brancaleone was not represented by counsel. On two (2) occasions, Captain Brancaleone met with EA Juliand and EA MacDonald at NOAA's office to discuss the DAS issue. Captain Brancaleone remembers telling EA Juliand that this was absurd; that he should never have been penalized; and that he would never catch enough fish to pay the penalty. Special Master Interview with Gaetano Brancaleone (Nov. 10, 2011). He told the EAs that he was not breaking any laws; that he misunderstood the situation; and that one does not charge a person when there is a misunderstanding. Id.

EA Juliand's response was that Captain Brancaleone had to pay; that NOAA would take his permit, and that NOAA would sanction the vessel. Id. Captain Brancaleone believes this

[1] In the course of the investigation, SA McCarron identified three (3) additional trips that did not satisfy the layover requirements, but they were not charged in the NOVA. The dates for these trips were November 16, 1995 to November 23, 1995, November 26, 1995 to December 1, 1995, and December 3, 1995 to December 6, 1995. EA Juliand did not charge Captain Brancaleone with these alleged violations and combined the three (3) other trips into one (1) violation to simplify the prosecution of the case. Response by EA Charles Juliand, p. 4.

was said to intimidate him. EA Juliand does not remember the meetings, but his notes indicate that he met with someone with the phone number [redacted] and that person stated that he/she had committed a "foolish mistake," an "innocent mistake" and he/she had a "clean record." Response by EA Charles Juliand, p. 6; Notes by EA Charles Juliand (Jan. 15, 1997).

EA Juliand offered to settle the case for either $10,000 and three (3) DAS or $5,000 and fourteen (14) DAS. Id. In response to Captain Brancaleone's claim that NOAA was trying to intimidate him, EA Juliand wrote:

> [he] has no doubt that [he] would have told Mr. Brancaleone that (absent a settlement, an altered view of the facts or law, or presentation of financial documentation demonstrating an inability to pay the fine or serve the sanction time) the agency would be seeking the money and sanction time indicated in the NOVA and NOPS. That is simply a fact that was shared with every person who ever received a NOVA or NOPS and, subsequently, chose to discuss the matter with agency counsel. Fifteen year old, unsupported claims of "intimidation" based on nothing more than the fact that a civil administrative prosecution was ongoing should be rejected.
> Response by EA Charles Juliand, p. 6.

According to Captain Brancaleone, the vessel was in the process of being sold, but the NOVA amounted to a lien on Paul & Domenic pending resolution of his case. Special Master Interview with Gaetano Brancaleone (Nov. 10, 2011). While Captain Brancaleone was fishing on February 10, 1997, his wife went to NOAA with a blank check to pay the penalty so that the vessel could be sold. Id. Mrs. Brancaleone agreed to pay an $8,500 penalty without consulting Captain Brancaleone and signed a Settlement Agreement in which the respondents admitted the violations. Id. EA Juliand responds that Captain Brancaleone's wife was the President and a Director of GGB, Inc. at the time of the settlement and had the authority to bind the corporation. Response by EA Charles Juliand, p. 7. GGB, Inc. paid the settlement amount in full on February 12, 1997.

Discussion

Other than Captain Brancaleone's statement that he was targeted by NOAA, I find no objective, credible evidence that either occurred. On the contrary, I find that SA McCarron and EA Juliand acted professionally in pursuing this case. As for Captain Brancaleone's complaint that his wife agreed to and signed the Settlement Agreement without his knowledge or permission, I agree with EA Juliand that Captain Brancaleone's wife had apparent authority to resolve this case as President of GGB, Inc.

Captain Brancaleone complains that any penalty in this case would be excessive. This case involves "unduly complicated, unclear, and confusing fishing regulations." Report No. OIG-19887-2 (Sept. 2010). It is obvious from the numerous communications from NOAA personnel to Captain Brancaleone that his appeal for additional DAS was granted, but that the references to the Fleet and Individual DAS categories were confusing. Regional Director Rosenberg's November 15, 1995 letter informed Captain Brancaleone "that your appeal should be, and is hereby, approved for an Individual DAS allocation of 233 days." Letter by NOAA Regional Director Andrew Rosenberg (Nov. 15, 1995). I find that a reasonable person reading this letter would decide that s/he was entitled to continue fishing under the Individual DAS category. I suspect that because of this letter, EA Juliand decided not to charge the three (3) violations in November and December 1995. As a result, I conclude that he considered those trips in issuing a NOVA with a $20,000 assessed penalty. I find support for this conclusion form EA Juliand's notes which refer specifically to six (6) counts of failing to comply with the layover requirement. Notes by EA Charles Juliand (Jan. 3, 1997). I recognize that the Fleet and Individual DAS regulation "was published and explained in several permit holder letters during the relevant

time period." Response by SA Christopher McCarron. However, I find that the NOAA correspondence with Captain Brancaleone and the regulation itself, taken together, were not only confusing to Captain Brancaleone but to any other similarly situated individual. This confusion was the cause of the violation and pursuant to the Secretary's March 2011 Decision Memorandum, Captain Brancaleone is entitled to relief because of "unduly complicated, unclear, and confusing fishing regulations." Secretarial Decision Memorandum (Mar. 16, 2011); Report No. OIG-19887-2 (Sept. 2010). Furthermore, the violation was a first offense. I question EA Juliand's inflexible approach when common sense suggests that the dispute should have been resolved by a warning. For the reasons stated, I recommend that the Secretary remit the entire penalty of $8,500.

Recommendation

I recommend that the Secretary remit to GGB, Inc. the amount of $8,500 in connection with this Application for Review.

Case 244
SE 030103 FM
F/V Sea Nymph III
Fish Inc., Owner
Donald L. Braddick, Principal/Operator

Vessel owner/operator complains about an excessive penalty and seizure imposed for unintentionally landing several prohibited sharks, for landing an overage, for allegedly making a false statement and for impeding an investigation. He also asserts that he and his crew did not participate in shark finning as alleged by NOAA.

Findings of Fact

Donald Louis Braddick of Manteo, North Carolina is the director, officer and sole shareholder of Fish Inc., a corporation that owns the 37' fishing vessel Babalou, formerly known as the Sea Nymph III. His wife is the treasurer of the company. The Sea Nymph III fishes primarily for sharks. Fishing is Mr. Braddick's passion and his only source of income. Since 1990, Mr. Braddick has made Wanchese, North Carolina his home port. Mr. Braddick has been a full-time commercial fisherman since he graduated from high school in 1974. His father is also an active fisherman.

On April 15, 2003, Mr. Braddick and his crew were on board the Sea Nymph III fishing for sandbar sharks. He and his crew made three (3) previous shark landings at various dealers in South Carolina and North Carolina as early as March 26-27, 2003. The Sea Nymph III steamed back to port because the fishing season was coming to a close. Upon her return to port in Wanchese, North Carolina, at least six (6) USCG officials, accompanied by officers of the Dare County Sheriff's Office in Manteo, North Carolina, boarded the Sea Nymph III for a drug

inspection pursuant to a tip. The Sea Nymph III was on the USCG "hot list" as a possible drug smuggling vessel. Response by SA Joseph Wilson. The USCG spent approximately 1.5 hours inspecting the Sea Nymph III, but found no drugs onboard. At approximately 2:00 am on April 16, 2003, NOAA SAs John Barylsky and Joseph Wilson arrived at the scene after being contacted by the USCG about the boarding.

During the boarding, Mr. Braddick told SAs Barylsky and Wilson that he had made only a single trip before he was boarded. SAs Barylsky and Wilson later realized that Mr. Braddick mischaracterized four (4) trips, including the present one, as a single trip. Further, the SAs learned that Mr. Braddick had not completed any FVTRs onboard.

USCG Petty Officer [redacted] asked Mr. Braddick about a space next to the main fish hold. According to Officer [redacted] Mr. Braddick informed [redacted] that "he did not know [about the space] and there were no other holds on the boat." Subsequently, Officer [redacted] discovered a hidden compartment covered by a mat and carpet that contained a basket of fins along with some gag grouper and a single Cobia. Statement by USCG BM1 [redacted] (undated). There was no mention in any of the NOAA or USCG reports as to how many, or what types of fins, were inside the basket. SA Barylsky claims that the tote held approximately 100 lbs. of fins. Response by SA John Barylsky. However, this statement is not supported by any documentary evidence. Further, the amount of fins and fish discovered inside the compartment was later described as "minor." [redacted]

Mr. Braddick claimed that the compartment was actually a part of the hull and that the mats were there to prevent water from getting into the hull. Special Master Interview with Donald Braddick, (October 4, 2011). Both SAs Wilson and Barylsky contend that, based on their extensive enforcement experience, the compartment serves no integral structural purpose other than to hide contraband. Responses by SAs Joe Wilson and John Barylsky. Despite Mr. Braddick's assertion to the contrary, I am persuaded by the SAs' explanation that the compartment served no integral structural purpose. This finding is bolstered by the fact that during the boarding, Mr. Braddick tried to mislead Officer [REDACTED] about the hidden compartment.

[REDACTED], a crew member, provided a sworn written statement that [REDACTED] was responsible for placing the basket of shark fins inside the hidden compartment and did so for convenience sake. Statement of [REDACTED] (April 16, 2003). As SA Wilson points out, this explanation is not believable because there was ample room in the hold to store the basket. Response by SA Joseph Wilson. At the time of the incident, Mr. Braddick claimed he was not aware of the fins inside the hidden compartment. However, during my interview of him, he described that the hidden basket contained fins from a large shark that the crew had trouble pulling onto the deck.[1] In order to facilitate the process, his crew had to forcibly remove the pectoral fins from this shark. Ultimately, he stated that the Sea Nymph III rolled and the crew lost the shark overboard, but they were able to keep the fins. Special Master

[1] It appears that USCG Officer [REDACTED] confirmed at least part of this statement in [REDACTED] written report. Specifically, Officer [REDACTED] wrote that "I asked [Mr. Braddick] if he knew [the fins in the basket] were there and he said no. We then took count of the fins and noticed some of the fins were too large for any of the sharks that were taken out of the hold." Statement by USCG BM1 [REDACTED] (undated).

Interview with Donald Braddick (Oct. 14, 2011). I find that the conflicting statements suggest that Mr. Braddick was aware of the hidden compartment, despite his earlier claim to the contrary.

The USCG and NOAA SAs worked together to unload and count the shark carcasses and shark fins onboard. In all, SA Barylsky and two (2) USCG officials counted 187 total shark carcasses, in addition to what they believed to be 462 pectoral fins. Law enforcement officials discovered seven (7) dusky sharks among the 187 shark carcasses onboard and one (1) unidentified albino shark. The dusky shark is a prohibited species. According to Mr. Braddick, sandbar sharks can easily be confused with dusky sharks. Despite substantial precautions to avoid landing a prohibited species, Mr. Braddick and his crew unintentionally landed a few juvenile dusky sharks. Id. After the law enforcement officials finished counting the sharks and fins, the ship's crew and law enforcement personnel reloaded the Sea Nymph III to await the opening of the fish dealer.

In total, the Sea Nymph III had forty-four (44) unaccounted for shark carcasses based on the eighty-eight (88) excess pectoral fins on board (2 pectoral fins per shark). SA Wilson calculated the excess fins based on the total number (187) of shark carcasses on board, multiplied by two (2) for the number of pectoral fins per shark (total 374 fins). He then subtracted 374 from the total number of fins found (462) on the Sea Nymph III, resulting in the eighty-eight (88) excess fins.

SA Wilson interviewed ██████ who informed SA Wilson that at least a dozen (12) carcasses fell overboard as a result of a hard roll on the vessel's starboard side. ██ did not tell Mr. Braddick of this incident because a) ██ was apparently the only person who witnessed the

carcasses fall overboard; and b) [redacted] did not want to be fired. Statement of [redacted] (Apr. 16, 2003). However, USCG Officer [redacted] allegedly overheard Mr. Braddick instructing [redacted] to tell the boarding officials that the carcasses fell overboard. Offense Investigation Report by SA Joseph Wilson, p. 13 (May 8, 2003). [redacted] disputed that Mr. Braddick ever told [redacted] to make that statement. [redacted] provided a sworn written statement to that effect after SA Barylsky warned [redacted] about a possible false statement charge if [redacted] was caught lying. In a subsequent written statement, [redacted] clarified that Mr. Braddick told [redacted] that, "Maybe [redacted] should tell [USCG] now…" about the shark carcasses falling overboard. 2nd Statement of [redacted] (Apr. 16, 2003).

ASAC Paul Raymond authorized the seizure of the whole catch. Law enforcement officials ultimately seized 317 lbs. of shark fins, 4,345 lbs. of shark carcasses and the prohibited dusky shark fins. The shark fins were sold for $6,075.50 and the shark carcasses for $870.80, for a total of $6,946.30. Law enforcement officials retained the four (4) dusky shark fins as evidence. Law enforcement officials also seized the entire catch because, among other things, the Sea Nymph III exceeded her possession limit; exceeded the 5% shark fins to carcass ratio; the captain gave a false statement as to the amount of product onboard; there was a "hidden" compartment with fin totes; and Mr. Braddick did not fill out the required FVTRs. [redacted]

Mr. Braddick explained that on April 16, 2003, he had been working for three (3) straight days. As a result, he did not fill out the FVTRs as required because he wanted a "fresh clean head" in order to fill out the forms. The Sea Nymph III crew did not receive compensation because of the seizure and Mr. Braddick lost not only the value of the seized catch, but also the

approximate $4,000 cost of the trip. Special Master Interview with Donald Braddick (Oct. 14, 2011).

On April 21, 2003, several NOAA Special Agents, a shark species specialist and several biologists from the Nova Southeastern University's Oceanographic Center and Guy Harvey Research Institute, including [redacted] gathered to identify the shark fins obtained from the Sea Nymph III using scientific methods, including DNA testing. Based on the shark fins, the specialist identified seven (7) dusky sharks; 187 sandbar sharks; thirty-six (36) tiger sharks; and four (4) scalloped hammerheads, totaling 234 sharks, from the fins obtained from the Sea Nymph III on April 16, 2003. Statement of Shark Species Specialist [redacted] (April 21, 2003); Offense Investigation Report by SA Joseph Wilson, p. 18 (May 8, 2003).

On June 13, 2003, Mr. Braddick received a NOVA from EA Robin Jung charging Fish Inc. and the Sea Nymph III with four (4) counts of violations as follows:

Count 1: On March 29, 2003; April 7, 2003; and April 16, 2003, the Sea Nymph III unlawfully landed shark fins without corresponding carcasses ($12,000 penalty assessment);

Count 2: On April 16, 2003, the Sea Nymph III unlawfully possessed seven (7) dusky sharks and fins ($5,000 penalty assessment);

Count 3: On April 16, 2003, Donald L. Braddick made false statements to authorized officers ($5,000 penalty assessment); and

Count 4: On April 16, 2003, Donald L. Braddick did impede, interfere with, obstruct or delay any authorized officer's taking of any fish ($5,000 penalty assessment).

The penalty assessment totaled $27,000. Also, EA Jung assessed a sixty (60) day vessel permit sanction on the Sea Nymph III and Fish, Inc. I note that Count 1 of the NOVA did not

specify the exact number of shark fins landed without the corresponding carcasses. Further, Count 3 did not specifically identify Mr. Braddick's false statements nor did Count 4 identify how Mr. Braddick interfered with the taking of fish. However, the evidence indicates that Count 3 corresponds with Mr. Braddick's alleged false statement concerning his knowledge of the hidden compartment and his alleged conversation with Mr. Echeveria concerning the sharks washing overboard. Count 4 relates to having the hidden compartment onboard the Sea Nymph III.

According to Mr. Braddick, his busy fishing schedule precluded him from being physically available to engage in settlement negotiations with EA Jung. That burden fell to his wife. During settlement discussions, EA Jung allegedly informed Mrs. Braddick that NOAA was prepared to charge additional counts; that the Braddicks would lose at trial; and that NOAA could take their house. Mr. Braddick was aware of the perceived low success rate for fishermen before an ALJ. That, along with the looming penalty payment, ultimately convinced Mr. Braddick to settle the case on July 18, 2003 for $16,000: $12,000 initial payment followed by another $4,000 payment. He also agreed to relinquish his claim to the value of the seized shark fins and carcasses worth a total of $6,946.30.

it would appear that Mr. Braddick had no prior NOAA violations.

Though SA Barylsky claims that Mr. Braddick is a repeat offender with respect to shark fishing regulations, he has provided no evidence to support this accusation. Response by SA John Barylsky.

Discussion

Mr. Braddick argues that he would never intentionally violate the regulations because he could not jeopardize his only source of income. He believes the penalty imposed was excessive given the relative value of the unlawful fish. He also believes that a warning or a lesser fine would have been more appropriate. He claims that he suffers lingering financial hardships today as a result of paying his penalty. Special Master Interview with Donald Braddick (Oct. 14, 2011).

EA Jung, who has retired, did not provide a response concerning the penalty assessment and settlement. However, SA Barylsky points out that there is strong evidence that Mr. Braddick violated the law because 1) he failed to properly fill out required logbooks; 2) he exceeded the 4,000 lbs. trip limit; 3) he possessed prohibited shark species; 4) he possessed shark fins in excess of the 5% fin to carcass ratio; and 5) he made false statements to law enforcement personnel who were investigating the matter. As such, he feels that $16,000 settlement as appropriate and fair in this case. Response by SA John Barylsky.

The Secretarial Decision Memorandum of March 16, 2011, outlined cases eligible for my review, including cases in which GCEL charged an excessive penalty that unfairly forced settlement. In this case, Mr. Braddick was assessed a $27,000 penalty, and settled for $16,000. Though I question the exact number of shark fins found inside the hidden compartment, the discrepancy between the shark fins and carcasses is too significant for Mr. Braddick to overcome. Indeed, even taking into consideration [redacted] assertion that as many as a dozen (12) shark carcasses fell off the side of the boat during a hard roll, it still does not account for the discrepancy. Further, NOAA, through the Nova Southeastern University's

Oceanographic Center and Guy Harvey Research Institute, used scientific testing and expert analysis of the shark fins to determine the precise number and species offloaded from the Sea Nymph III. This confirms further that there was a significant discrepancy between the shark fins and the number shark carcasses offloaded.

Additionally, the fact remains that Mr. Braddick had a concealed compartment installed in the Sea Nymph III, and he possessed illegal shark fins inside that compartment. His explanation that the hidden compartment comprises part of the hull is unconvincing. I find that he was aware of the basket of shark fins in the compartment, particularly because the Sea Nymph III is only a 37' vessel. He also tried to mislead the various enforcement officers during the investigation. Finally, it is undisputed that Mr. Braddick was in possession of seven (7) prohibited dusky sharks. I understand that it may be difficult to distinguish between a dusky and sandbar shark given their similarity in appearance. However, Mr. Braddick had thirty (30) years of fishing experience when this violation occurred, and he admitted to SA Barylsky that he could readily identify a dusky shark. Offense Investigation Report by SA Joseph Wilson, p. 7 (May 8, 2003). Given Mr. Braddick's demonstrated knowledge and intent with respect to these violations, a $16,000 settlement was justified. Therefore, I do not find that relief is warranted.

Recommendation

I recommend that the Secretary take no action concerning this Application for Review.

Case 245

NE 980217 FM/V

F/V Corey & Leah

David E. Aripotch, Owner/Operator

Vessel owner complains about an excessive penalty in a case involving summer flounder landings in excess of the allowable limit.

Findings of Fact

David E. Aripotch lives in Montauk, New York and has been a full time commercial fisherman since 1974. From that date, he worked on gillnetting and dragging fishing vessels. About 1977, he built a 28' gillnet vessel, which he used for about three (3) years before selling her to purchase the 35' vessel Old Squaw. He gillnetted and dragged with Old Squaw until 1986 when he sold her to purchase a 65' dragger named Bay of Isles which he owned until 1991. In 1991, Mr. Aripotch bought a dragger that he renamed the Cory & Leah which he owned for seventeen (17) years until he sold the vessel in 2008. In 2008, he bought a 75' vessel that he renamed the Catlin & Maread and uses as a dragger to this date. Mr. Aripotch has owned these vessels individually. He has been operator of the vessels, but for a period of time hired [redacted] [redacted] to operate the Corey & Leah on a part-time basis while Mr. Aripotch attended to personal matters.

On March 5, 1997, SA Frank Italia served an administrative inspection warrant ("AIW") on Carter Fish Co. at Fulton Fish Market in New York City. Records seized pursuant to the warrant included fish purchases from the Corey & Leah between April 1, 1996 and January 6, 1997. SA Italia obtained dealer reports from NOAA's Statistical Division that had been submitted by other dealers, Mika Co., Slavin Co. and Life Co., who had purchased fish from the

Corey & Leah for the same period. There were twenty (20) instances of inaccurate and false landing reports. ASAC Mark Micele also reviewed these documents and in December 1998 instructed SA Herrmann to interview Mr. Aripotch.

According to the OIR, Mr. Aripotch refused, on advice of counsel, to participate in an interview because he was then being investigated by New York authorities on charges of exceeding state landing limits. SA John J. Herrmann contacted [REDACTED] of the New York Department of Environmental Conservation and learned that the state was investigating Mr. Aripotch for exceeding the summer flounder landing limits on eight (8) occasions in 1996. These were criminal misdemeanor charges and, if convicted, Mr. Aripotch could serve jail time.

According to Mr. Aripotch, SA John Herrmann contacted him three (3) times within a few days and kept saying that NOAA SAs knew that there was mafia activity at the Fulton Fish Market (New York). Special Master Interview of David Aripotch (Nov. 30, 2011). SA Herrmann kept repeating that if Mr. Aripotch knew anything else, or knew anyone who was doing anything illegal, he could help himself by talking to the SAs. Id. Mr. Aripotch responded that he did not know anything and that he only knew what he did. Finally, Mr. Aripotch lost his temper and stated that SA Herrmann was requesting he testify about something he knew nothing about. Id. At that point, Mr. Aripotch told SA Herrmann that he should talk to Mr. Aripotch's lawyer, Stephen M. Ouellette, Esq. Id.

SA Herrmann contacted Mr. Ouellette who told the SA that Mr. Aripotch would not consent to an interview.

SA Herrmann then compared information for twenty-seven (27) landing dates from the Corey & Leah FVTRs and the thirty (30) corresponding dealer reports. For eight (8) of the trips,

two (2) dealers purchased flounder; and for one (1) trip, four (4) dealers purchased flounder. For each of these trips, one (1) dealer purchased the legal landing limit for flounder and the other dealers purchased the overages. There were twenty (20) instances of inaccurate and false reporting. The New York landing limit of summer flounder for the period between April 1, 1996 and January 6, 1997 was 11,700 lbs. Mr. Aripotch landed 29,051 lbs. (a 17,351 lbs. overage) and sold the total for $55,859.00. Attachment 1; "Corey & Leah Landing", Offense Investigation Report by SA John Herrmann (Jan. 12, 1999). Assuming an average price paid for the entire catch, the value of the 17,351 lbs. overage was $33,313.92.

On January 12, 1999, SA Herrmann issued an EAR charging Mr. Aripotch with eighteen (18) counts of submitting inaccurate reports and two (2) counts of submitting inaccurate and false reports.

On June 30, 2000, EA MacDonald issued a four (4) count NOVA charging Mr. Aripotch with submitting twenty-six (26) false FVTRs as follows:

Count one: one (1) false FVTR – assessed penalty of $5,000;

Count two: six (6) false FVTRs – assessed penalty of $20,000;

Count three: eight (8) false FVTRs – assessed penalty of $25,000;

Count four: eleven (11) false FVTRs – assessed penalty of $35,000.

The total assessed penalty was $85,000. Accompanying the NOVA was a NOPS which suspended Mr. Aripotch's vessel and operator permits for 240 days. Mr. Ouellette filed an appeal on behalf of Mr. Aripotch.

On December 14, 2000, Mr. Aripotch signed a Settlement Agreement in which he agreed to pay a penalty of $61,000 and to serve a hundred and twenty (120) day vessel and

operator permit sanction. On January 2, 2001, the parties modified the Settlement Agreement, reducing the permit sanction to ninety-three (93) days, in exchange for which Mr. Aripotch would make his vessel available for nine (9) days for research. According to Mr. Aripotch, he had to borrow money to pay the settlement amount. Special Master Interview with David Aripotch (Nov. 30, 2011). According to EA MacDonald, no issue was raised with respect to ability to pay, no financial information was presented at the time of the settlement negotiations, and there was no discussion of any pressure on Mr. Aripotch to reveal mafia connections at the Fulton Fish Market. Response by EA J. Mitch MacDonald, pp. 2-3.

Discussion

Mr. Aripotch takes issue with being held responsible for overages landed by his part-time captain on three (3) of the occasions charged in the NOVA; he complains that some of the overages being characterized as summer flounder were not summer flounder; and he feels that an excessive assessed penalty and settlement resulted from his inability to provide information concerning alleged illegal activities at the Fulton Fish Market. Mr. Aripotch further claims that he was targeted because he had been a vocal industry advocate and fisheries advisory committee member on both the MAFMC and NEFMC. He believes that an excessive penalty was assessed as an example to other fishermen in the Montauk area.

As to Mr. Aripotch's first argument, I agree with EA MacDonald's assertion that Mr. Aripotch is liable for his captain's actions because he is the vessel's owner. Response by EA J. Mitch MacDonald, p. 3. Mr. Aripotch next argues that some of the landings were charged as summer flounder but were not summer flounder. EA MacDonald responds that Mr. Aripotch did not question Carter Fish Co.'s records at the time of the case and, had he done so, his

allegations could have been investigated. Id. Mr. Aripotch is about eleven (11) years too late to raise this issue.

EA MacDonald disputes the claim that the penalty was excessive. Id. However, according to his notes, Mr. Aripotch falsely reported landing about 20,502 lbs. of summer flounder worth approximately $60,000 that were equal to approximately 2.5% of the state's quota. Response by EA J. Mitch MacDonald, p. 4. This calculation is contrary to Attachment 1 to the Offense Investigation Report dated January 12, 1999. Notes by EA J. Mitch MacDonald (Undated); Attachment 1; "Corey & Leah Landing", Offense Investigation Report by SA John Herrmann (Jan. 12, 1999).

As previously pointed out in the OIR, the flounder overage was 17,351 lbs. and with an average actual sale price of $1.92 per lbs. equals $33,313.92, which is a little more than one-half of the penalty paid by Mr. Aripotch.

I find that EA MacDonald overstated the amount and value of the overage by almost double. The penalty schedule reflects a penalty range of $5,000 to $50,000 for first-time violations of this type of offense and in this case, the assessed penalties ranged between $5,000 and $35,000. Response by EA J. Mitch MacDonald, p. 5. Each count included a different number of false reports and the assessed penalty for each false report ranged between $3,125 and $5,000. Id. For deterrence purposes, EA MacDonald states that the penalty assessed was set higher than the value of the illegally landed catch. Id.

With respect to Mr. Aripotch's claim that he was targeted for his involvement with the Council, EA MacDonald responds that he did not know Mr. Aripotch had participated in Council meetings at the time he assessed the penalty. Id. He commends and respects fishermen who

take the time to advocate their interests before the Council. Id. According to EA MacDonald, Mr. Aripotch's case was handled in the same manner as others with similar charges, and the penalty was assessed to deter him and others from landing illegal fish and filing false reports to hide the illegal landings. Id.

I make the following observations on reviewing the totality of the facts in this case: this was Mr. Aripotch's first offense; he forfeited ninety-three (93) DAS which is a substantial permit sanction; the value of the overage was $33,313.92 and not $60,000 as noted by EA MacDonald; the original assessment was $85,000 plus 240 DAS, which would put Mr. Aripotch out of the fishing business if he was forced to pay that amount and serve the permit sanction; and he paid a $61,000 penalty.

EA MacDonald has justified the penalty assessment in this case as follows:

> The total [assessed penalty] was gauged to be greater than the value of catch involved in the illegal reporting and was intended to remove all ill-gotten gains and deter Mr. Aripotch and others from landing overages and attempting to hide them through false reporting. Removing one's financial benefit from illegal activities is the starting point of effective enforcement. Response by EA J. Mitch MacDonald, p. 5.

Since EA MacDonald overestimated the value of the summer flounder overage, I find that EA MacDonald assessed an excessive penalty that unfairly forced settlement and under the circumstances of this case, I believe that fundamental fairness requires that Mr. Aripotch be given some relief.

For the reasons stated in this Discussion, I find that an appropriate settlement amount would be 1.5 times the value of the overage or $49,970.88 rounded to $50,000. This amount

removes “all ill-gotten gains” and is a sufficient deterrent to further violations. Therefore, I recommend that $11,000 of the $61,000 penalty paid be remitted to Mr. Aripotch.

Recommendation

I recommend that the Secretary remit the sum of $11,000 to Mr. Aripotch.

Case 246
NE 043031 FM/V
F/V Miss Vertie Mae
[redacted] Operator
Trawler Miss Vertie Mae, Inc., Owner

Corporate vessel owner complains about an excessive penalty in a case involving a simple mistake.

Findings of Fact

Yvonne Michelle Peabody is vice president and her father is president of Peabody Corp., a family business, which operates an offloading facility for seafood (scallops and other fish) in Newport News, Virginia. Stockholders of Peabody Corp. are her father at 14%, her mother at 14%, and her two (2) brothers and herself at 24% each. Peabody Corp. has been in business since 1996, but the family has owned fishing vessels since 1966. In 1996, the family owned five (5) vessels and now owns eight (8) through separate corporations. F/V Miss Vertie Mae and F/V Lauren & Mathew are owned by Trawler Miss Vertie Mae, Inc., stockholders of which are father and mother at 50% each.[1] The Miss Vertie Mae was acquired around 1986, fishes for scallops and on occasion fishes for flounder. In 2004, [redacted] Ms. Peabody's first cousin, was the operator of the Miss Vertie Mae.

On April 20, 2004, Virginia Marine Police Officer [redacted] inspected the Miss Vertie Mae as it completed offloading scallops. The captain introduced himself as [redacted]. When asked for the vessel documents and the FVTR, [redacted] responded that they were at the office at Peabody Corp. [redacted] looked for [redacted] permit, could not find it and said that it must

[1] These stockholders have provided written authorization for Ms. Peabody to pursue the corporation's application for relief from prior NOAA enforcement action.

have been misplaced. ███ then explained that ███ permit had expired in August, 2003 and ███ had filed an application to renew the permit but had not received any response. Officer Morris asked the captain how many trips ███ had made since the expiration of the permit, to which ██████████ responded that there had been only a few.

Officer ████ reviewed prior FVTRs and determined that there were five (5) trips in 2004 during which ██████████ had operated the Miss Vertie Mae: 1/19/04, 2/3/04, 2/9/04, 2/26/04, and 3/26/04. Officer ████ called SA R. Logan Gregory who instructed him to issue an EAR. Officer ████ told ██████████ that SA Gregory had authorized seizure of the entire catch and that ██████████ cannot make any trips until he renewed his permit. Officer ████ issued an EAR to ██████████ charging ███ with six (6) counts of fishing without a valid operator's permit.

Following a conversation with Officer ████ on April 20, 2004, SA Gregory spoke with Vincie Susano in the NOAA Fisheries, Northeast Region permits office. Vincie Susano checked for a permit application through the prior day and then checked that day's mail, but did not locate a permit renewal application. ██████████ spoke with SA Gregory on the telephone and stated that ███ had sent NOAA a renewal application prior to the expiration of ███ permit. ███ had been boarded twice by the USCG (January 29, 2004 and March 15, 2004) who had checked ███ operator's permit, seen that it was expired and told ███ to renew it as soon as possible. Letter by ██████████ (July 29, 2004). This information had not appeared on the boarding report and the Peabodys remained unaware that the permit had expired. Id.

On April 20, 2004, Ms. Peabody spoke with SA Gregory over the telephone and stated that she had just found out that ██████████ did not have a valid operator's permit. SA

Gregory explained that not only did [redacted] not have a valid permit, but there was also no renewal application on file. Ms. Peabody's understanding from the telephone call was that the agent would come to Peabody Corp., discuss the matter and try to work something out. Prior to SA Gregory and SA Sara M. Block's arrival, Ms. Peabody received a telephone call from a gentleman at another fish packing facility who informed her that the catch had been seized. When SA Gregory and SA Block arrived at Peabody Corp. and observed Ms. Peabody upset, SA Gregory stated that he had told her about the seizure and SA Block confirmed that she had heard him say that. At some point, [redacted] came into the office and explained to SA Gregory that [redacted] had applied for a permit renewal, but that [redacted] had never called the permit office to find out the status of [redacted] application. [redacted] had assumed that NOAA had sent out the new permit, but that it had gotten lost in the mail. [redacted] had operated fishing vessels for the Peabody family and other owners but never told anyone that [redacted] permit had expired. Because [redacted] had been employed for a long time and was family, [redacted] was trusted and Ms. Peabody did not ask to look at [redacted] permit.

On April 20, 2004, NOAA agents seized the proceeds ($79,443.60) from the sale of 18,000 lbs. of scallops.

On April 21, 2004, SA Gregory had a telephone conversation with Coast Guard Officer [redacted] who had boarded the Miss Vertie Mae on January 29, 2004. Officer [redacted] did not recall there being any problems with the operator's permit during the boarding. [redacted] stated that, had there been a problem, [redacted] would have made a call to check on the status of the permit, but [redacted] had no recollection of having to do so in this case.

On April 21, 2004, SAs Gregory and Block met with USCG Officer ███ who had boarded the Miss Vertie Mae on March 15, 2004. ███ did not remember there being a problem with the operator's permit. ███ explained that ███ would have made a call if a valid permit was not produced.

On July 29, 2004, ███ sent a letter to EA Juliand. In it, ███ explained that he had been aware that ███ permit was expired, had tried to renew it, but for some reason ███ permit had not been renewed. ███ had told the Peabodys that ███ had an operator's permit and they believed ███ because ███ had been employed steadily by them up until that point. The USCG had boarded ███ on 01/29/04 and 03/15/04, had seen ███ expired permit, and had told ███ to renew it, but had not issued ███ a violation.

The parties reached a Settlement Agreement during the months of August and September of 2004. The respondents (who were not represented by counsel) admitted the violations alleged in the EAR and agreed to forfeit the proceeds ($79,443.60) from the sale of the seized scallops (18,000 lbs.) without a penalty or permit sanction.

Discussion

Ms. Peabody believes that the seizure was excessive because all that was involved was a simple mistake that did not harm the resource. Her position is that $80,000 for an expired permit is a lot of money. The Peabody family would rather settle for the seizure than deal with a permit sanction because a permit sanction does not allow people to work. In their particular case, the whole family depends on the ability to fish. In addition to Ms. Peabody, her father, mother and brothers, she has two (2) nieces and three (3) nephews who work in the family business.

EA Juliand points out that [redacted] admitted to having multiple opportunities to renew [redacted] permit following the Coast Guard's oral warnings and prior to the April 20, 2004 incident. Response by EA Charles Juliand, p. 5. Ms. Peabody believes that the mistake was a simple one and EA Juliand believes that the solution to prevent the mistake was simple: vessel owners should require all captains to produce valid operator's permits. Id. He states that fishing without a permit is not a trivial mistake. Id. The seizure was made in accordance with NOAA's seizure policy. Id. EA Juliand further points out that the seizure occurred after the sixth illegal trip made in 2004 and that if a six (6) count NOVA had issued rather than a pre-NOVA settlement, fines and permit sanctions would have been assessed in addition to the seizure. Id. at 6.

The problem in this case, as with many similar cases, is that owners are responsible for the illegal acts of their captains and in most cases, pay the consequences. I agree with EA Juliand that the settlement was fair since both the vessel and [redacted] had prior violation histories and since the repetitive nature of [redacted] continual operation of a scallop vessel without a permit was inexcusable. [redacted] made several trips without a valid operator's permit and EA Juliand seized the catch from this trip only without assessing a monetary penalty for this and the other trips made by [redacted] without a valid operator's permit. Therefore, I find that the seizure of the entire catch was a reasonable resolution and I recommend no relief in this case.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 247
NE 940069 FM/V
F/V Stella Del Mare
Vitale, Inc., Owner
Leonardo Vitale, Operator

Fisherman denies violations but settled because it was the only way he could sell his fishing vessel.

Findings of Fact

Leonardo Vitale started as a commercial fisherman in 1974 and retired in 2010. In the early to late 1970's, Captain Vitale owned and operated the fishing vessel Madonna Delle Grazie which he sold sometime between 1978 and 1980 when he built the 95' trip boat, Stella Del Mare ("Stella") with a partner. In 1982-1983, Captain Vitale acquired the partner's interest in the Stella Del Mare which was then owned by Vitale, Inc. Captain Vitale was the operator of the Stella which engaged in fishing for groundfish and lobsters. Captain Vitale's son, Francesco, worked as a fisherman on his father's boat. In 1997, when this case was concluded, Captain Vitale sold the Stella. Captain Vitale's son and wife then purchased the Angela & Rose, which is a 50' day boat owned by RMV, Inc. and operated by Francesco Vitale. Both the Stella and Angela & Rose were/are moored in Gloucester.

On May 11, 1994 USCG Officer [redacted] was notified by the Massachusetts Environmental Police ("MEP") that the Stella was suspected of landing scrubbed lobsters. On May 13, 1994, Officer [redacted] observed the Stella returning to Gloucester Harbor and dispatched a USCG vessel to escort the Stella to a dock for a dockside boarding. Officer [redacted] notified the operator, Captain Vitale, that his fishing vessel was going to be boarded to inspect his fish and lobsters for compliance with state and federal laws. Twenty-two (22) to twenty-

four (24) USCG and MEP officers boarded the Stella. According to Captain Vitale, it was bedlam on board the Stella with two (2) dozen law enforcement officers searching the boat for berried/illegal lobsters and six (6) to eight (8) crewmen, including Captain Vitale, who were attempting to offload fish and lobsters. It was later determined that 7,000 lbs. of groundfish and 1,968 lobsters (1,833 were female; 85 male) were offloaded. Officer states in report that told Captain Vitale to tell his crew not to throw anything overboard; that observed crew members throwing three (3) lobsters overboard; that discovered a brush near a wash down hose on the main deck where observed a few clumps of lobster eggs embedded deep in the brushes; that found two (2) berried lobsters; that before one (1) of the lobsters that had been thrown overboard could sink, observed it to be fully berried with bands on the claws; that one of the crew intentionally bumped from behind; that, just prior to departure, three (3) more berried lobsters were discovered; that the Stella's dock was awash in loose lobster eggs; that the bottom 2" to 3" of all 4x8' lobster tanks contained lobster eggs; and that scooped two (2) handfuls of eggs from one tank. Offense Investigation Report by USCG Officer (July 6, 1994).

When I interviewed Captain Vitale, he vehemently denied that he or his crew scrubbed lobsters; denied that his crew threw lobsters overboard; stated that the brush contained only one (1) egg and that occurred because when the lobsters are hauled on deck, mud, lobster eggs and other stuff comes up with the lobsters and the crew uses the brushes to clean the deck after the haul back; that some eggs land on deck when illegal lobsters are returned to the sea; insisted that officer while on board, could not have seen a lobster thrown off the Stella because of the 7' between the outside edge of the working deck to the inside edge of the top of

the rail[1]; argued that Officer [redacted] could not have scooped two (2) handfuls of eggs from the bottom of a tank 4' below deck; and vehemently denied that the boarding officers found five (5) berried lobsters on board. Captain Vitale opines that, if the USCG had found everything discussed in Officer [redacted] report, he would have been arrested and/or his catch seized. Special Master Interview with Leonardo Vitale (Nov. 3, 2011).

On May 26, 1994, Officer Ahlgren reported that the Massachusetts State Lobster Hatchery and Research Station had positively determined that the five (5) lobsters removed from the Stella had been scrubbed. Offense Investigation Report by USCG Officer [redacted] p. 2 (July 6, 1994). On August 31, 1994, that same organization determined that, of the one hundred and eighty-two (182) female lobsters examined, thirty-one (31) of them had their eggs illegally removed by either the hosing or the brushing method. Report by Massachusetts State Lobster Hatchery and Research Station (Aug. 31, 1994).

Although the alleged violations occurred on May 13, 1994, no action by either federal or state authorities was commenced until May 9, 1995, when the Commonwealth filed an application for a criminal complaint charging Captain Vitale with possession of thirty-one (31) female egg-bearing lobsters. Commonwealth v. Vitale, 44 Mass.App.Ct. 908 (1997). On May 31, 1995, a show cause hearing was held, probable cause was found and a criminal complaint issued against Captain Vitale for this offense. Subsequently, Captain Vitale was found guilty after a bench trial of possessing thirty-one (31) berried lobsters. Captain Vitale appealed.

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[1] Captain Vitale's recollection that Officer [redacted] was on board when [redacted] made the observation of an upside down lobster is contrary to Officer [redacted] contemporaneous report which states that he and Captain Vitale were "walking to the boat." Offense Investigation Report USCG Officer [redacted] p. 3 (July 6, 1994).

Two (2) years following the violation, EA Carol S. Messing issued a NOVA charging Captain Vitale as operator and Vitale, Inc., as owner of the Stella, in count 1 with possessing five (5) berried female lobsters; and in count 2 with unlawfully throwing lobsters overboard after being told by an authorized officer that nothing, including lobsters, was to be thrown overboard. EA Messing assessed a penalty of $5,000 on count 1 and $20,000 on count 2 for a total assessment of $25,000.

Captain Vitale was represented by Bruce Nichols, Esq. in negotiating a settlement with EA Juliand. On July 28, 1997, Captain Vitale signed a Settlement Agreement stating that he neither admitted nor denied the violations "… but in the interest of settlement agreed not to contest the matter…" and agreed to pay a penalty of $2,600 on count 1 and $6,500 on count 2 for a total payment of $9,100. Captain Vitale states that, at the time of the settlement, the Stella was for sale and that he had to settle the case if he wanted to sell his vessel. On December 29, 1997, the Massachusetts Appeals Court reversed the District Court's decision finding Captain Vitale guilty of possessing thirty-one (31) berried lobsters because the criminal case had not been commenced within the applicable statute of limitations.

Discussion

I find that the Stella possessed thirty-one (31) berried (female) lobsters. The Massachusetts State Lobster Hatchery and Research Station confirmed that fact. It was also the finding of a judge at the Massachusetts criminal trial. The fact that this case was later reversed is not relevant on the subject because the dismissal was based on the applicable statute of limitations. As a result of my interview of Captain Vitale, I am convinced that to this day he does not believe that the Stella had berried lobsters on board or that the crew threw lobsters

overboard. Nevertheless, I find the facts are to the contrary. Captain Vitale was responsible for the vessel and its crew. Under the circumstances, I do not find that the penalty was excessive or that a settlement was coerced.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 248

NE 970071 FM/V; NE 980095 FM/V
F/V Perception
F.V. Perception, Inc., Owner
[REDACTED] Operator

Corporate vessel owner complains about an excessive permit sanction in a case where high civil penalties were sufficient to punish the behavior that gave rise to this case.

Findings of Fact

William Grimm has been a commercial fisherman since about 1981-1982. Prior to that, he was a captain of a fishing party boat for about ten (10) years. He lives in Montauk, New York and has always operated fishing vessels out of Montauk. Initially, he worked as a crewman on the fishing vessel Donna Lee, which was a 65' day/trip trawler, and after two (2) to three (3) years he became its captain. At that time, he fished for multispecies (groundfish, squid, whiting). At some point, Mr. Grimm purchased a 50% interest in the Donna Lee through a corporation. After about two (2) years, he obtained a 100% interest in the vessel, which he retained until 1987-1988 when the vessel was sold and when Mr. Grimm had the fishing vessel Perception built. The Perception is an 83' overall, steel, stern trawler, with two (2) dredges (double stern ramp). At that time, Mr. Grimm engaged mostly in squid fishing. The Perception is owned by F.V. Perception, Inc. At one point, the corporate name changed to M.V. Perceptions Corp. and then recently back to F.V. Perception, Inc., but the vessel has always been owned by that corporation. Mr. Grimm and his wife each own a 50% interest in F.V. Perception, Inc. Mr. Grimm now fishes for multispecies (groundfish, squid, whiting).

On December 9, 1996, SA James M. MacDonald inspected fish dealers at random at the Fulton Fish Market in New York City. Offense Investigation Report by SA James MacDonald, p. 5

(May 19, 1998 unsigned). He pulled out an invoice from between two (2) cartons of fish on a fish pallet at the dealer Seahorse Distributors, Inc. ("Seahorse"). Id. The invoice reflected that the F/V Cory & Leah, the F/V Magpie, and the Perception had each landed twenty (25) cartons of fish. Id. at 6. The fifty (50) cartons from the Perception and the Cory & Leah were labeled with tags on the outside. Id. The other cartons were labeled with tags with the writing "XO" in pencil and SA MacDonald concluded that these cartons must be from the Magpie. Id. Subsequent investigation revealed that Seahorse was sending cash in an envelope to the bookkeeper of Montauk Inlet Seafoods, Inc. ("Inlet"), owner of a pack-out dock in Montauk, New York, for the fishing vessel Magpie.

On December 11, 1996, SA MacDonald spoke with Inlet's bookkeeper, [redacted] Id. [redacted] told him that [redacted] had never seen the Magpie and did not know who her owner and operator were; that the Magpie had shipped fish through Inlet about four (4) times in the past two (2) months; that the fish had been on the dock when Inlet employees arrived in the morning; and that the first time this had happened there had been a note indicating that payment would be mailed from Seahorse to Inlet in an envelope which should be taped to the wall in Inlet's dockhouse and someone representing the Magpie would pick it up. Offense Investigation Report by SA James MacDonald, p. 7 (May 19, 1998 unsigned). As a result of a follow-up search for the Magpie, SA MacDonald determined that it was a fictitious vessel. Id.

On April 28, 1997, SA MacDonald sent a letter to Mr. Grimm requesting the Perception's fish sales records from May 01, 1996 to the present. Offense Investigation Report by SA James MacDonald, p. 3 (July 28, 1997). A review of thirty-two (32) sales receipts revealed that the vessel sold fish to an unpermitted dealer, Seahorse Fish Co. Id. On May 29, 1997, SA

MacDonald found among the Perception's sale records sales receipts that indicated multispecies landings. He requested a DAS report for the vessel. Id. The report showed that there was noncompliance with the DAS call in requirements on three (3) occasions. Id. On July 8, 1997, SA MacDonald interviewed William Grimm who stated that sometimes he had another person operate the vessel, but that he always handled the sale of fish himself. Id. at 4. He admitted that he had never tried to establish whether dealers to whom he sold fish were federally permitted. Id. He knew that there were DAS requirements pertaining to multispecies fishing, but on occasion some would 'slip in' with his catch and not get discarded at sea. He never targeted multispecies without first calling into the DAS system. Id.

On July 10, 1997, SA MacDonald issued Mr. Grimm an EAR charging him in two (2) counts with sale of summer flounder to an unpermitted dealer and in three (3) counts with failure to comply with DAS requirements. On July 28, 1997, he reissued the EAR with a more accurate citation to the regulations that had been violated.

At one point, SA MacDonald began to put pressure on different people at the Inlet dock and ████ to give him information about the Magpie. Special Master Interview with William Grimm (Nov. 16, 2011). They did not know anything about the Magpie. Id.

On April 21, 1998, SA MacDonald interviewed Mr. Grimm in the presence of EA MacDonald and Mr. Grimm's then lawyer, Stephen Ouellette. Offense Investigation Report by SA James MacDonald, p. 7 (May 19, 1998 unsigned). Mr. Grimm stated that, following the 1996 closure for summer flounder fishing, the Perception had landed summer flounder on eight (8) occasions. In the first two (2) instances, ████ operated the vessel and called Mr. Grimm to ask what ██ should do with the several cartons of summer flounder. Mr. Grimm told

[redacted] to land the fish at Inlet as usual and that he, Mr. Grimm, would figure something out. Mr. Grimm instructed [redacted] to falsify the NMFS Vessel Log to conceal the landings.

Subsequently, there were six (6) instances when the Perception landed summer flounder under the fictitious name of Magpie. Mr. Grimm explained that, when he received SA MacDonald's April 27, 1997 letter requesting sales receipts, he intentionally did not include the eight (8) landings that had occurred after the closure of the summer flounder season and destroyed those records. Mr. Grimm admitted that, in a previous interview on July 8, 1997, he lied to SA MacDonald by telling him that he knew nothing about the Magpie.

At some point, the catch was seized from the Fulton Market and sold for $1,287.21.

On November 23, 1998, EA MacDonald issued William Grimm a five (5) count NOVA with a total assessed penalty of $95,000. In count one, EA MacDonald charged Mr. Grimm with the sale of summer flounder to an unpermitted dealer on January 2 and 6, 1997 and assessed a penalty of $10,000. In count two, EA MacDonald charged him with landing summer flounder for commercial purposes under the fictitious vessel name Magpie on November 6, 19, and 28, 1996 and December 1, 4, and 8, 1996 and assessed a penalty of $25,000. In count three, EA MacDonald charged him with submitting a FVTR under the fictitious vessel name Magpie on November 6, 19, and 28, 1996 and December 1, 4, and 8, 1996 and falsely omitting various regulated northeast multispecies and assessed a penalty of $25,000. In count four, EA MacDonald charged him with failure to comply with the DAS requirement of calling into the system before leaving port and out of the system upon returning from fishing on September 9, 1996, November 6, 19, and 28, 1996, December 1, 4, 8, and 12, 1996, and January 15, 1997 and assessed a civil penalty of $25,000. In count five, Mr. Grimm was charged with making a false

statement to an authorized officer by withholding records on May 6, 1997 and by telling SA MacDonald on July 8, 1997 that he knew nothing about illegal landings for which he was assessed a civil penalty of $10,000. Accompanying this NOVA was a NOPS imposing two (2) year vessel and operator permit sanctions.

The parties reached a settlement in the August-September, 1999 time frame. Mr. Grimm agreed to pay $48,500 and [redacted] agreed to pay $6,000. Mr. Grimm and [redacted] agreed to serve operator permit sanctions of one hundred and twenty (120) days. Under the agreement, the Perception would serve a vessel permit sanction of one hundred and twenty (120) days. Mr. Grimm has paid the penalties assessed against him and [redacted] totaling $54,500.

Discussion

Mr. Grimm asserts that the permit sanction was excessive. NOAA picked the best four (4) fishing months for the vessel to be tied up. Special Master Interview with William Grimm (Nov. 16, 2011). In the application for review of his case, Mr. Grimm stated that the ultimate cost to him and his company because of the vessel and operator permit sanctions was approximately $500,000 in gross sales. This amount did not include the penalty or the cost to [redacted] of [redacted] inability to fish for 120 days. Mr. Grimm opined that the penalties were high, but finds them to be reasonable since he had landed summer flounder after the season had closed, covered up the landings and lied to a NOAA SA. Id.

In my interview of Mr. Grimm, I explained to him that I do not have the authority to review the permit sanction and, since he acknowledged that the penalty was fair under the circumstances, there is nothing I can recommend to the Secretary for relief in this matter.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 249
NE 043114 FM/V
F/V Potpourri
Barbara Curtis, Owner
Alan Edward Curtis, Operator

Fishing vessel captain complains about an excessive penalty in a case involving an honest mistake.

Findings of Fact

Alan Edward Curtis is a lobsterman who lives in New Bedford, Massachusetts. He is a third generation fisherman who started fishing for scallops full time when he was fifteen (15). He became a full-time lobsterman last year and one (1) of his daughters fishes with him on his lobster boat, Szela. He began his fishing career as a deck hand and worked his way up to being a captain and owning fishing vessels. His mother, Barbara Curtis, purchased the fishing vessel Potpourri in 2004. The Potpourri was a 60', single dredge vessel used for scalloping, and was principally moored in New Bedford. From 2004 to 2007, Captain Curtis operated the Potpourri along with other vessels. After the Potpourri sank in about 2007 in Buzzard's Bay, he continued to operate other people's vessels. He bought the F/V Sea Farer in 2008 and sold her in 2010. He now owns the lobster boat Szela through Curtis Lobster, Inc. The Szela is moored in New Bedford. At one time, Captain Curtis fished out of Cape May, New Jersey for about two (2) months and then out of Ocean City, Maryland. When he was in Ocean City, Captain Curtis offloaded mostly at his own dock in front of the Wedge Restaurant and also at Southern Connection Seafood and Crystal Lights.

After offloading 400 lbs. at Southern Connection Seafood on November 19, 2004 and moving to a different location, the crew shucked scallops for about an hour at the stern of the

vessel during which time three (3) plastic totes (baskets) of scallops were carried to the port side of the cabin. The shucked scallops, about 3/4 of a tote, were washed and then carried off the vessel to the front of the building. Investigative Report by Maryland Dept. of Natural Resources Police Cpl. ██████ (Nov. 24, 2004). Captain Curtis and a crew member left in a pick-up truck shortly thereafter and proceeded to the Harborside Restaurant. Id. Cpl. ████ ██ of the Maryland Department of Natural Resources (DNR) contacted SA Steven Niemi concerning suspicious activity on the Potpourri. Offense Investigation Report by SA Steven Niemi, p. 6 (Aug. 19, 2005).

On November 23, 2004, Cpl. ██ contacted SA Niemi to inform him that the Potpourri was returning from a fishing trip. Id. SA Niemi arrived on site and videotaped the Potpourri offload seven (7) white bags of scallops at Southern Connection Seafood, then change locations to moor at her dock in front of the Wedge Restaurant. Id. SA Niemi observed a man standing on the shore and a tan Dodge pick-up truck parked near the landing site. Id. Captain Curtis appeared with a black bucket which contained a white bag and passed it to the man on the shore who placed it on the ground. Id. Captain Curtis then passed an orange culling basket containing a white bag and the man also placed it on the ground. Both white bags were consistent with scallops bags. Id. The man put the culling basket in the pick-up truck and a woman put the black bucket in the pick-up truck. Id. Captain Curtis then drove away in the pick-up truck. Id.

About 15 minutes later, Cpl. ██ again saw Captain Curtis near the Wedge restaurant near the Potpourri. SA Niemi stopped Captain Curtis as he was attempting to leave the fishing

area in the Dodge pick-up truck. SA Niemi saw a black bucket with a bag of scallops inside it together with the culling basket filled with a full bag of scallops.

Captain Curtis agreed to meet SA Niemi at the Maryland DNR Police office for an interview which was videotaped and recorded with Captain Curtis's assent. Offense Investigation Report by SA Steven Niemi, p. 8 (Aug. 19, 2005); Supplement to Offense Investigation Report by SA Steven Niemi, p. 1 (Aug. 16, 2005). Captain Curtis was advised that he was not required to stay or to answer questions, and that he was not under arrest. Id. The interview lasted 35 minutes. Captain Curtis stated that the scallops came from a broken trip made a day before the most recent landing on November 23, 2004 and that his girlfriend had brought the scallops to the landing site that morning. Id; Special Master Interview with Alan Curtis (Nov. 22, 2011). Upon being informed that he had been video recorded when taking scallops from his vessel and putting them in a truck, Captain Curtis changed his story. DVD of SA Steven Niemi Interview with Alan Curtis (Nov. 23, 2004). He explained that he had the scallops aboard the Potpourri during the trip from November 22 to November 23, 2004, but that they had been from a previous broken trip. Id. Captain Curtis had come back from fishing in the middle of the night, had some welding work done and then went back out fishing. Id. Forgetting the scallops already on the vessel from the prior broken trip, Captain Curtis fished and caught 400 lbs. of scallops on this trip. Special Master Interview with Alan Curtis (Nov. 22, 2011). He offloaded the 400 lbs. of scallops (the legal limit) at Southern Connection Seafood and gave the overage of approximately 100 lbs. to a friend to sell. His friend did not sell the scallops and returned them to Captain Curtis.

Captain Curtis initially identified the person he gave the scallops to as a 'restaurant guy', but then later as a 'fisherman'. DVD of SA Steven Niemi Interview with Alan Curtis (Nov. 23, 2004). Captain Curtis stated that, when he landed overages in the past, he kept them on board for the next trip. Id. He stated that he had not sold scallops to anyone other than Southern Connection Seafood, but later admitted that a recent overage had probably been sold to a restaurant and he and the crew had split the money. SA Niemi investigated this matter further and discovered that a plastic tote about 3/4 full of possible scallops had been driven to Harborside Bar and Grill. Offense Investigation Report by SA Steven Niemi, p. 11 (Aug. 19, 2005). After the conclusion of the investigation, SA Niemi and Cpl. [REDACTED] spoke with [REDACTED] who admitted that [REDACTED] had agreed to sell about 100 lbs. of scallops for Captain Curtis, but later changed [REDACTED] mind and gave the scallops back to Captain Curtis. Investigative Report by Maryland Dept. of Natural Resources Police Cpl. [REDACTED] (Nov. 24, 2004).

An internal document transmitted from SA Niemi to NOAA General Counsel states that Captain Curtis admitted that he sold scallops to local restaurants on several occasions. Captain Curtis denies making such an admission. Special Master Interview with Alan Curtis (Nov. 22, 2011). However, Captain Curtis's recorded interview reveals that he sold scallops to restaurants 'back home' and admitted to the previously mentioned sale of scallops to a restaurant. DVD of SA Steven Niemi Interview with Alan Curtis (Nov. 23, 2004).

The 499.5 lbs. catch from the November 23, 2004 landing was seized and sold to Southern Connection Seafood for $2,773.50. Captain Curtis signed a Waiver of Claim to and

Abandonment of Seized Item. Offense Investigation Report by SA Steven Niemi, p. 12 (Aug. 19, 2005).

SA Niemi issued an EAR on December 6, 2004, charging Captain Curtis with possessing or landing over 400 lbs. of scallops (count one) and making a false statement to an authorized officer (count two).

On February 16, 2006, EA MacDonald issued a NOVA to Captain Curtis and Barbara Curtis. The NOVA charged the respondents in three counts at $10,000 each for a total of $30,000. Count one alleged unlawful possessing and landing an overage (99.5 lbs.) on November 23, 2004; count two alleged that on January 7, 2005, the respondents unlawfully submitted a false FVTR which indicated that the Potpourri had landed 400 lbs. on November 23, 2004; and count three charged that Alan Curtis had made a false oral statement to SA Niemi when he had told the agent that the overage of almost 100 lbs. came from a previous broken trip and had been stored in his house. There was an accompanying NOPS, charging Captain Curtis and Barbara Curtis with the same counts as in the NOVA and suspending the vessel and operator permits for ninety (90) days.

On July 16, 2007, EA MacDonald wrote to Captain Curtis and Barbara Curtis informing them that the vessel and operator permits would be suspended for 90 (ninety) days effective 7 (seven) days after receipt of the letter. This resulted from their failure to settle the case in a timely manner and their failure to pay the assessed civil penalty of $30,000. Captain Curtis contacted EA MacDonald to resolve the problem. Captain Curtis asked what EA MacDonald could do for him. EA MacDonald responded that he could reduce the fine in half and Captain

Curtis agreed to that and said that he will send some money when he has it. EA MacDonald allowed Captain Curtis to go fishing that day.

Captain Curtis signed a Settlement Agreement on his own behalf and on behalf of Barbara Curtis on July 23, 2007 and EA MacDonald signed it on July 26, 2007. The Respondents admitted the violations and agreed to pay a compromised penalty of $15,250 in accordance with a payment plan. They agreed further that, beginning on July 31, 2007, the vessel and operator permits would be suspended until the penalty was paid in full, but the suspension would be lifted in one (1) month increments after receipt of each scheduled payment. In other words, Captain Curtis was allowed to keep fishing if he made timely payments in accordance with the Settlement Agreement.

Captain Curtis made an initial payment of $1,000, which allowed him to fish, and a subsequent payment of $500. When he sold the Sea Farer with a permit, which he had transferred from the Potpourri, he paid the balance owed to NOAA. At the time, Captain Curtis suffered from severe depression and EA MacDonald worked with him and let him fish.

Discussion

Captain Curtis does not have any complaints about EA MacDonald who he stated helped him. However, Captain Curtis insists that he did not intentionally break the law, but that he made an honest mistake and that the $15,000 penalty and the loss of the trip proceeds were excessive.

EA MacDonald insists that the violation, in combination with prior illegal landings just days before and Captain Curtis's admissions of landing overages, reveals a practice or pattern of landing illegal scallops and hiding them through false FVTRs. Response by EA J. Mitch

MacDonald, p. 6. According to EA MacDonald, Captain Curtis's false statements to a federal agent make it more likely that the illegal landings were intentional. Id. EA MacDonald points out that Captain Curtis's multiple false statements and reluctant admissions reduce his credibility. Id.

SA Niemi points out that landing scallops is a lucrative source of extra cash for some fishermen because of scallop prices. Response by SA Steven Niemi. Landing overages and selling them "on the side" has been a problem in scallop ports for years. Id. The penalties in this case were gauged to remove the incentive to engage in a pattern of landing overages and filing false FVTRs to hide the overages. Response by EA J. Mitch MacDonald, p. 7.

Captain Curtis does not dispute that he had an overage, but insists that he did not go fishing to intentionally break the law and that the overage was as a result of a broken trip. Special Master Interview with Alan Curtis (Nov. 22, 2011). However, given the evidence, I find that Captain Curtis acted intentionally. Accordingly, I find that the settlement is fair and reasonable.

Recommendation

I recommend that the Secretary take no action in connection with this Application for Review.

Case 250A

NE 990200 FM/V and NE 000093 FM/V
F/V Dona Maria and F/V Sister Alice
Reposa Fisheries, Inc., Owner, Sister Alice
Dona Maria Inc., Owner, Dona Maria
Clarke Reposa, Sr., Principal/Operator
Todd Chappell, Operator

Vessel owner/operator complains that NOAA imposed excessive penalties on him after NOAA alleged he improperly attributed landings from one of his vessels to another. An ALJ upheld liability against the vessel owner/operator for providing various false statements and submitting inaccurate FVTRs.

Findings of Fact

Clarke Anthony Reposa, Sr. has been a commercial fisherman since he was eighteen (18) years old in 1967. He has owned several commercial fishing vessels in the past, but currently owns only one (1) vessel, the 65’ Matty and Maren, which he purchased in 2009. Mr. Reposa is the principal shareholder of Reposa Fisheries, Inc., a Rhode Island corporation which was the registered owner of the fishing vessel Sister Alice. At all times relevant to this complaint, was the captain of the Sister Alice, which held a federal multispecies permit. Mr. Reposa “junked” the Sister Alice in 2007. Mr. Reposa is also the principal of Dona Maria Inc., a Rhode Island corporation which was the registered owner of the fishing vessel Dona Maria, which is a federally-permitted multispecies vessel operated by Mr. Reposa. The Dona Maria sank in 2008.

From July 3 to 6, 1999, Mr. Reposa was on a fishing trip for whiting aboard the Dona Maria. Because he was targeting whiting, he did not call into the NMFS DAS program.

Accordingly, he was not permitted to land multispecies. On July 6, 1999, Mr. Reposa offloaded approximately 33,000 lbs. of whiting from the Dona Maria at Town Dock Fisheries, Inc. located in Narragansett, Rhode Island. Prior to landing, Mr. Reposa filled out, and eventually submitted to NMFS, an FVTR for the three (3) day trip. The FVTR reflected that he caught approximately 33,000 lbs. of whiting, and no other species of fish. However, according to NOAA, Mr. Reposa also landed at least 560 lbs. of northeast multispecies on this trip. In addition, the dealer report reflected that Mr. Reposa failed to list approximately 15 lbs. of red hake and 455 lbs. of squid on the FVTR. In the Matter of: Clarke A. Reposa, Sr. et al., 2003 WL 21734021 (NOAA) *8 (hereinafter "Initial Decision and Order"). Mr. Reposa admitted that he sometimes overlooks lesser amounts of species when filling out the FVTR. Special Master Interview with Clarke A. Reposa (Dec. 14, 2011).

From July 5 to 6, 1999, ██████ was fishing for multispecies aboard the Sister Alice on two (2) separate trips. ██████ had previously called into the NMFS DAS program for both trips, which permitted ██ to land multispecies. ██████ filled out an FVTR for each of the two (2) trips and eventually submitted them to NMFS. In total, ██████ indicated that █ landed 26,000 lbs. of skate and 1,500 lbs. of multispecies, which included 100 lbs. of cod, 700 lbs. of blackback flounder and 700 lbs. of yellowtail founder. The Sister Alice sold the fish to Seair Seafood, Inc., but the dealer report reflected that the Sister Alice landed only 330 lbs. of blackback flounder, 190 lbs. of Atlantic cod, 40 lbs. of pollock and 80 lbs. of monkfish in addition to 755 lbs. of yellowtail flounder. This was the only time in 1999 that the Sister Alice sold directly to Seair Seafood. Initial Decision and Order, p. 12.

On July 6, 1999, Sergeant [redacted] of the Rhode Island Department of Environmental Management (DEM) received an anonymous tip that the Dona Maria had offloaded approximately seventeen (17) totes of multispecies that day despite not being enrolled in the NMFS DAS program. As a result, Sgt. [redacted] and NMFS initiated an investigation into the matter. On July 10, 1999, [redacted] provided Sgt. [redacted] with the two (2) FVTRs that [redacted] had filled out for [redacted] July 5-6, 1999 fishing trips aboard the Sister Alice. Id. at 13.

On August 12, 1999, SAs Christopher McCarron and Louis Jachimczyk interviewed [redacted] who told the SAs that the FVTRs accurately reflected the fishing trips [redacted] took on July 5 and July 6, 1999. Based on the interviews with [redacted], Mr. Reposa, the Seair dealer, together with a review of the various landing documents, SA McCarron issued an EAR to [redacted] and Reposa Fisheries, Inc. on May 16, 2000. The EAR charged [redacted] with making false statements on July 8, 1999 by submitting false FVTRs and with interfering with an investigation on August 12, 1999 by informing the SAs that the FVTRs were accurate upon submission.

The case was assigned to EA J. Mitch MacDonald, who issued a NOVA on October 25, 2000 to [redacted] and Reposa Fisheries, Inc. jointly and severally. The NOVA alleged three (3) violations:

Count 1: On July 8, 1999, [redacted] provided Sgt. [redacted] with false FVTRs indicating that he landed 700 lbs. of black back flounder, 100 lbs. of cod and no pollock or monkfish on July 5 and July 6, 1999. In fact, dealer reports show that [redacted] landed 330 lbs. of blackback flounder, 190 lbs. of Atlantic cod, 40 lbs. of Pollock, and 80 lbs. of monkfish.

Count 2: On August 12, 1999, [redacted] made false statements to NMFS officers when he told them that the FVTRs he previously submitted were accurate.

Count 3: On August 16, 1999, [redacted] unlawfully submitted false FVTRs from the Sister Alice trip on July 5 and July 6, 1999, to NMFS.

EA MacDonald assessed $15,000 for each count, totaling $45,000. In addition, he assessed a 75 day vessel permit sanction.[1] EA MacDonald did not charge [redacted] for interfering with an investigation. Mr. Reposa retained Leonard L. Bergersen, Esq. to contest the charges against his company and his captain. Mr. Bergersen promptly requested a hearing before an ALJ.

During the course of discovery, NOAA apparently learned additional facts that indicated that the Dona Maria landed multispecies on July 6, 1999 without calling into the DAS program. This new information prompted EA MacDonald to issue a NOVA to Mr. Reposa individually on November 7, 2001, alleging:

Count 1: On July 6, 1999, Clarke Reposa, while aboard the Dona Maria, landed 330 lbs. of blackback flounder, 190 lbs. of Atlantic cod and 40 lbs of Pollock without calling into the DAS program; and

Count 2: On August 6, 1999, Clarke Reposa submitted an inaccurate FVTR to NMFS when he failed to include 330 lbs. of blackback flounder, 190 lbs. of Atlantic cod, 40 lbs. of Pollock and 80 lbs. of monkfish.

The NOVA totaled $40,000 for the two (2) counts. Mr. Bergersen timely requested a hearing on this matter on December 7, 2001. These two (2) cases were consolidated with

[1] On February 2, 2001, EA MacDonald also issued a NOVA to David Barbera of Seair Seafood, Inc. for making false statements and interfering with an investigation concerning this same series of events. See infra, Case 250B.

another case involving David Barbera and Seair Seafood, Inc., See infra, Case 250B, and the consolidated cases were assigned to ALJ Thomas E. McElligott. ALJ McElligott held an evidentiary hearing between June 3, 2002 and June 7, 2002. NOAA offered testimony from five (5) witnesses and forty-eight (48) exhibits were admitted into evidence, with an additional exhibit introduced and entered following the hearing. Initial Decision and Order, pp. 28-30. Meanwhile, Mr. Reposa and Reposa Fisheries, Inc. presented nine (9) witnesses and nineteen (19) exhibits were admitted into evidence, with an additional exhibit introduced and admitted after the hearing. Id. at 31-2.

On June 11, 2003, ALJ McElligott issued an Initial Decision and Order whereby he found, by a preponderance of the evidence, that [redacted], Mr. Reposa and Reposa Fisheries, Inc. were liable for the charges against them.[2] With regard to [redacted] false statement charges, ALJ McElligott noted that:

> The accuracy of the FVTRs and dealer reports is crucial to the preservation of the fishery resources because it provides for the collection of reliable data essential to effectively assess the stock of fish and provide for sound conservation management to ensure that the stock is adequate for future fishermen. [citation omitted].
>
> …
>
> Based on [redacted] years of experience as a fisherman and the number of totes allegedly delivered to the dealer, Respondent [redacted] is expected to be able to provide a reasonably accurate estimate of the weight and identification of fish contained in [redacted] catch. Lobsters, Inc., 2001 NOAA Lexis 8, at *24 n. 8. This is especially true given the fact that this is Respondent [redacted] livelihood.
> Initial Decision and Order, p. 18.

[2] ALJ McElligott later issued a Modified Decision on August 13, 2003, whereby he added the ninety (90) day vessel permit sanction on the Sister Alice and changed the structure of [redacted] operator permit sanction.

With respect to the charges against Mr. Reposa for landing multispecies without calling into the DAS program and falsifying FVTRs to cover it up, ALJ McElligott found by a preponderance of the evidence that Mr. Reposa likely landed multispecies on July 6, 1999 while aboard the Dona Maria, and attributed the multispecies to the Sister Alice. [redacted] then submitted FVTRs for the Sister Alice that included the multispecies from the Dona Maria. ALJ McElligott based his determination on the fact that the contemporaneous financial statements revealed that Mr. Reposa received direct payments from the Sister Alice landing, which is contrary to the common practice of Mr. Reposa's accounting firm, Markarian & Meehan (M & M). Id. at 21. M & M's standard operating procedure is to deposit payments for fish before settling obligations with the captain and crew. Additionally, he found that the landing in question was the largest by Sister Alice over a three (3) year period. Id. Finally, contradictory testimony of [redacted] Reposa and [redacted] convinced ALJ McElligott that Mr. Reposa landed the multispecies aboard the Dona Maria. Id.

Based on the evidence presented, ALJ McElligott upheld the two (2) counts charged against Mr. Reposa and the three (3) counts charged against [redacted] and Reposa Fisheries, Inc. ALJ McElligott notably dismissed as not credible testimony from the only eye-witness NOAA provided. This witness purported to have witnessed the Dona Maria offloading multispecies at Town Dock Fisheries on July 6, 1999.[3] Id. at 20.

[3] Indeed, it would appear that NOAA SAs Kevin Flanagan and James MacDonald did not speak to this witness, [redacted] until April 23, 2002, almost three (3) years after the violation occurred. [redacted] was a former employee of Town Dock Fisheries where the Dona Maria landed her catch on July 6, 1999. [redacted] allegedly witnessed Mr. Reposa offload his catch that day, even specifying that [redacted] helped Mr. Reposa offload 3-7 totes of multispecies. Supplement to Offense Investigative Report by SA Kevin Flanagan (Apr. 29, 2002).

Consequently, ALJ McElligott reaffirmed NOAA's penalty imposition of $45,000 jointly and severally against [redacted] and Reposa Fisheries, Inc. for submitting false FVTRs and making a false statement; and $40,000 against Mr. Reposa individually for landing multispecies on the Dona Maria and submitting false FVTRs. Furthermore, ALJ McElligott upheld the permit sanctions against [redacted], the Sister Alice and the Dona Maria. Id. at 25.

Mr. Reposa, through Mr. Bergersen, filed a timely appeal in the United States District Court in Rhode Island on November 19, 2004. Respondents Clarke Reposa, Sr., Reposa Fisheries, Inc. and [redacted] argued, *inter alia,* that there was insufficient evidence to determine that Clarke Reposa, Sr. landed multispecies and not [redacted] Further, Respondents argued that the monetary penalties and permit sanctions were excessive in light of the fact that Respondents demonstrated an inability to pay.

The case was assigned to United States Magistrate Judge David L. Martin (D. RI). The parties filed cross-motions for summary judgment and Judge Martin held a hearing on November 28, 2005. Based on the hearing and the review of the lengthy record, Judge Martin issued a Report and Recommendation on June 13, 2006 which granted NOAA's motion for summary judgment.[4] In the Report and Recommendation, Judge Martin determined that there was indeed sufficient evidence to determine that Mr. Reposa, and not [redacted] landed

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[4] Judge Martin reviewed the record in accordance with the Administrative Procedures Act, which obligates him to uphold final agency decisions unless the record was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). The Agency decision needs to be supported by "substantial evidence in the record" and Agency determinations are "presumed valid and courts must afford great deference to the administrative decision making process." See Northern Wind, Inc. v. Daley, 200 F.3d 13, 17 (1st Cir. 1999). Finally, courts must give "substantial deference to an agency's interpretation of its own regulations." Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).

multispecies, which Mr. Reposa subsequently attributed to [redacted] catch. He agreed with ALJ McElligott that the contemporaneous financial statements submitted during the course of the hearing contradicted [redacted] claim that [redacted] landed the multispecies. Furthermore, Judge Martin found that ALJ McElligott had sufficient evidence to not place much weight on the testimony from respondents and their various witnesses. [redacted] Reposa and [redacted] provided inconsistent testimony. Additionally, other witnesses were equally not credible because they either were not disinterested witnesses, had inconsistent testimony, or had a felony criminal record.[5] Report and Recommendation, pp. 12-22.

Moreover, Judge Martin upheld the $45,000 and $40,000 penalties assessed against Reposa Fisheries, Inc., [redacted] and Clarke Reposa, Sr. respectively. Judge Martin concluded that ALJ McElligott did not abuse his discretion because the Plaintiffs "committed serious offense", had "willfully violated the Act" and then they had "attempted to cover their wrongdoings." Id. at 44. Accordingly, he found that the monetary penalties and permit sanctions imposed were appropriate relative to the violations. Id. at 51.

[5] Mr. Bergersen contends that NOAA's only direct witness was ultimately discredited at the hearing. In contrast, Mr. Reposa provided testimony from three (3) witnesses, one of which was [redacted] the former assistant dock foreman at Town Dock. ALJ McElligott discredited [redacted] testimony because, *inter alia*, he believed [redacted] was not a disinterested witness based on the fact that Mr. Bergersen met with [redacted] on the eve of the hearing and even provided [redacted] with transportation to the hearing. Report and Recommendation. However, Mr. Bergersen explained that he discovered [redacted] existence only after the government's direct witness testified. As such, it was necessary for him to obtain a subpoena in order to compel [redacted] testimony. Since he did not have an opportunity to interview [redacted] prior to the hearing, he had to meet with [redacted] that evening. Mr. Bergersen drove [redacted] to the hearing because [redacted] did not have an alternative mode of transportation. Finally, he noted that the felony records of the other two (2) witnesses should not undermine their credibility as their testimony pertained to their observations as fishermen. Special Master Interview with Clarke A. Reposa (Dec. 14, 2011).

Prior to a U.S. District Court Judge adopting Judge Martin's Report and Recommendation, the parties settled on August 28, 2006. Clarke A. Reposa, Sr., on behalf of Reposa Fisheries, Inc. agreed to pay both the $45,000 penalty stemming from the Sister Alice violation, and the $40,000 penalty stemming from the Dona Maria violation. Payments for both cases would be spread out over six (6) months with a sizeable balloon payment in the end. In addition, Mr. Reposa also agreed that the Sister Alice would serve a three (3) month vessel permit sanction from December 1, 2006 to February 28, 2007. He also agreed that the Dona Maria would serve a one (1) month vessel permit sanction in July 2007, 2008 and 2009 for a total of three (3) months over three (3) years. Finally, [redacted] and Mr. Reposa agreed to serve three (3) month operator permit sanctions.

EA MacDonald was amenable to renegotiating the payment schedule to accommodate Mr. Reposa. However, he remained firm about the imposed penalty. EA MacDonald wrote:

> [Clarke Reposa]'s cases involved one of the most time-consuming and costly hearings in my experience at the Agency. Once the Agency has earned a hard fought judgment or settlement after having been required to proceed through such an arduous hearing process and appeal to District Court, it cannot renegotiate its agreements.
> Letter from EA J. Mitch MacDonald to Clarke A. Reposa, Sr. (Feb. 27, 2008).

On January 15, 2009, Mr. Reposa paid $67,466.93 to NOAA in order to satisfy the final agreed payment in connection with these violations. Mr. Reposa continues to deny that he ever landed the multispecies in question without first calling into the DAS program. His

decision to settle the cases was motivated by economic conditions, as well as by the belief that the assessed permit sanctions would have effectively put him out of business.[6]

Discussion

Mr. Reposa argues that the penalties charged were excessive and that the charges were unfairly and untimely brought. Further, he alleges that NMFS SAs acted egregiously towards him on multiple occasions, including attempted license seizure during the pendency of proceedings in this case. Application for Review. Mr. Reposa, through his lawyer, maintains that the ALJ findings were fundamentally flawed from the beginning. Furthermore, Mr. Bergersen contends that NOAA acted improperly because there was close to a two (2) year lag between the investigation and subsequent charges against Mr. Reposa. Mr. Bergersen also claims that [redacted] was a surprise witness, without notice to Mr. Bergersen, until immediately before the hearing. He believes that NOAA was targeting Mr. Reposa's individual assets all along, and waited until it had an optimal case before charging the Dona Maria and Mr. Reposa. Special Master Interview with Clarke A. Reposa, Sr. (Dec. 14, 2011).

In response, EA MacDonald notes that NOAA charged Mr. Reposa only when it had gathered sufficient evidence to do so. Response by EA J. Mitch MacDonald, p. 8. Moreover, EA MacDonald argues that an ALJ made independent findings of fact and upheld the assessed penalties. Further, a U.S. Magistrate Judge after thoroughly reviewing the evidence and

[6] Mr. Bergersen described the entire legal proceedings as "a massive horror show that continued to get worse." Among other things, he takes issue with the "anonymous" tip that NOAA received concerning the Dona Maria's illegal landing of multispecies. He believes that the tip came from a confidential informant, who was not subject to cross examination. As such, he believes that the evidence was "fatally prejudicial" from the beginning. Special Master Interview with Clarke A. Reposa, Sr. (December 14, 2011).

testimony, including the ALJ's consideration of whether the proposed penalties were reasonable and appropriate, upheld the ALJ's decision. As such, the decision was sound and should not be overturned. Id.

Because an ALJ made an independent finding of fact, and a U.S. Magistrate Judge upheld the findings and penalty assessments, I am inclined to adopt the findings of fact contained in ALJ McElligott's decision and affirmed by Judge Martin. The ALJ and the U.S. Magistrate Judge both had access to all the evidence, witness testimony, and transcripts. As Judge Martin's Report and Recommendation notes, deference should also be given to the hearing officer with respect to the findings of fact.[7] Accordingly, Judge Martin concluded that substantial evidence supported the imposition of the assessed penalty jointly and severally against Reposa Fisheries, Inc., [redacted], and Mr. Reposa individually, as well as the independent finding of Mr. Reposa's ability to pay. The finding and penalty imposition should, therefore, not be disturbed.

Recommendation

I recommend that the Secretary take no action concerning this Application for Review.

[7] "Reviewing courts have long recognized…that a witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression. This is because a cold transcript contains only the dead body of the evidence without its spirit. It cannot reveal the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration." Report and Recommendation, p. 21, fn. 19 (quoting Zhang v. United States Immigration & Naturalization Serv., 386 F.3d 66, 73 (2nd Cir. 2004)).

Case 250B
NE 2000092 FM/V
Seair Seafood, Inc., Dealer
David F. Barbera, Owner

Fish dealer complains that NMFS agents "psychologically terrorized" him in order to turn him into an "informant" because he unknowingly bought some illegally-landed fish. He complains that NOAA assessed an excessive penalty when he refused to do so. After a hearing, an ALJ found fish dealer liable for obstructing an investigation, and upheld a $15,000 penalty for throwing away an index card he used to write down a purchase order.

Findings of Fact

David Frank Barbera of Wakefield, Rhode Island is currently a fish salesman at Town Dock Corporation located in Narragansett, Rhode Island. He has over twenty (20) years of experience in the fishing industry. In the Matter of: Clarke A. Reposa, Sr. et al., 2003 WL 21734021 (NOAA) *9 (hereinafter "Initial Decision and Order"). From approximately 1985 to 1999, Mr. Barbera was the sole stockholder and principal of Seair Seafood, Inc., a Rhode Island corporation located in Narragansett, Rhode Island. Seair Seafood rented space from Town Dock, but it did not have dock access. Thus, according to Mr. Barbera, Seair purchased 95% of its fish from Town Dock or from other wholesalers/dealers. Mr. Barbera estimated that he purchased the remaining 5% from fishing vessels that delivered fish in trucks. At all times relevant to this complaint, Seair Seafood possessed a federal multispecies dealer permit. Seair Seafood ceased doing business as of July 31, 1999, and Mr. Barbera cancelled its dealer permits shortly thereafter, because Town Dock terminated its lease with Seair. Since closing the fish

dealership, Mr. Barbera has worked as a fish salesman in various dealerships in the Narragansett area before settling into his current position.

On July 6, 1999, Mr. Barbera received a telephone call from someone at sea telling him that the Sister Alice was going to provide Seair with a shipment of fish. He did not know the person's identity, but Mr. Barbera recorded the order on a 3x5 index card. It was Mr. Barbera's business practice to record information on a stack of index cards that he kept in his pocket while in the fish house, including telephone numbers, customer orders and weigh outs. Mr. Barbera used the index cards because he would often be covered in "fish juice" and he did not want to damage invoices or customer records. Based on the index cards, he customarily filled out invoices at the end of the day when he had an opportunity to remove his dirty clothes. The cards were not meant to be permanent records, but rather contained information that he used to complete required business records. Afterward, Mr. Barbera would throw out the index cards. In fact, Mr. Barbera testified that he would write down an order on a piece of cardboard if that was the only available surface. Special Master Interview with David Barbera (Dec. 14, 2011).

[REDACTED], as captain of the Sister Alice, made two (2) multispecies fishing trips between July 5, 1999 and July 6, 1999. The Sister Alice sold the catch from the two (2) trips directly to Seair Seafood, Inc. It was the first time in over a three (3) year period that the Sister Alice had sold directly to Seair Seafood, Inc. Initial Decision and Order, p. 12. Around the same time, the Dona Maria, operated by Clarke A. Reposa, landed a purported 33,000 lbs. of whiting on July 6, 1999, at Town Dock Fisheries, Inc. After a lengthy investigation into this landing, NOAA alleged that Mr. Reposa also landed several hundred lbs. of multispecies fish during this

same trip. Mr. Reposa had not called into the NMFS DAS Program, and therefore was not permitted to land multispecies. NOAA also alleged, and it was later proven by a preponderance of the evidence before an ALJ, that Mr. Reposa attributed this by-catch to the Sister Alice's total landings on July 5 and July 6, 1999. See supra, Case 250A. The ALJ made no finding that Mr. Barbera was aware of Mr. Reposa's actions. Additionally, I find Mr. Barbera's testimony that he was unaware of Mr. Reposa's actions to be credible.

On July 6, 1999, Sergeant [redacted] of the Rhode Island Environmental Police received an anonymous tip that the fishing vessel, Dona Maria, had landed multispecies at Town Dock Fisheries without first calling into the DAS Program, and then delivered the shipment to Seair Seafood, which is located behind Town Dock. As a result, Sgt. [redacted] went to Seair Seafood, Inc. the next day to speak to Mr. Barbera. Mr. Barbera had a 5-10 year relationship with Breachway Seafood, Inc., another federal registered fish dealer. Mr. Reposa was a co-owner of Breachway, but Mr. Barbera rarely, if ever, interacted with Mr. Reposa. Instead, Mr. Barbera worked primarily with [redacted] of Breachway.

Mr. Barbera was initially under the impression that a shipment of fish came from Breachway on July 6, 1999 and he told Sgt. [redacted] that he sold the shipment to South Pier Fish Co. Sgt. [redacted] then went to South Pier Fish co. seeking further information. After Sgt. [redacted] left, Mr. Barbera called [redacted] and informed [redacted] of the fish weigh out from the Sister Alice because he thought the shipment came from Breachway. [redacted] informed Mr. Barbera that the shipment did not come from Breachway because it had stopped doing business with the Sister Alice several years earlier. Therefore, it became clear to Mr. Barbera

that the shipment of fish must have originated from the Sister Alice directly, and not from Breachway. Offense Investigation Report by Christopher McCarron, p. 4 (Aug. 5, 1999).

When Sgt. returned, Mr. Barbera told that he did not have any paperwork completed for the Breachway transaction because Breachway used his business to do weigh-outs. Sometime later, Sgt. telephoned SA Christopher McCarron, who advised that Mr. Barbera had to produce paperwork associated with the Sister Alice landing. Witness Statement of Sgt. (Jan. 7, 2000). He did not specify what paperwork. Initial Decision and Order, p. 10. When Sgt. approached Mr. Barbera again, Mr. Barbera clarified for Sgt. that the shipment actually came from the Sister Alice directly. Witness Statement of Sgt. (Jan. 7, 2000). According to Mr. Barbera, Sgt. told him not to fill out the log because the fish did not come from the Sister Alice. Special Master Interview with David Barbera (Dec. 14, 2011).

Mr. Barbera was admittedly confused. Sgt. allegedly informed Mr. Barbera further that he would get in trouble if he filled out the log, stating, "I wouldn't do that if I were you." Regardless, Mr. Barbera filled out and made a copy of the Sister Alice invoice and provided it to Id. He also provided Sgt. with the dealer report at request and discarded the index card several days later. Initial Decision and Order, p. 10. At no time did request a copy of the 3x5 index card.[1] Special Master Interview with David Barbera (Dec. 14, 2011); see also Witness Statement of Sgt. (January 7, 2000).

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[1] According to SA Flanagan, "The 3x5 index card would have contained some basic information, such as vessel name and date, along with some fish weights recorded with specific detail. This information is critical to running a successful seafood business since the price per pound is dependent on the species sold." Response by SA Kevin Flanagan. EA MacDonald further writes, "The Agents realized the importance of the tally as the investigation progressed. By the time the document was sought, it had

On August 27, 1999, SA McCarron called Mr. Barbera and asked that he bring a copy of the Sister Alice check to the Wakefield Government Center Building, and Mr. Barbera obliged. Supplement to Offense Investigation Report by SA Kevin Flanagan (August 30, 1999). SAs McCarron and Flanagan met Mr. Barbera, and Mr. Barbera stated that the two (2) SAs proceeded to "drill" him with questions for about an hour concerning what happened the day of the Sister Alice purchase. Special Master Interview with David Barbera (Dec. 14, 2011). Both agents maintain that the conversation was cordial. Responses by SAs Christopher McCarron and Kevin Flanagan. Mr. Barbera stated that he was the one who alerted the SAs to the 3x5 index card he used to record information on the Sister Alice landing after questioning by the SAs. According to SA McCarron, though, Mr. Barbera revealed the 3x5 index card only after questioning. Response by SA Christopher McCarron.

At some point during the interview, Mr. Barbera asked the SAs whether he needed a lawyer. The SAs allegedly responded that he did not need a lawyer, that they believed he was being taken advantage of by Mr. Reposa, and that they wanted Mr. Barbera to assist them by providing them with some information. Special Master Interview with David Barbera (Dec. 14, 2011). SA McCarron's standard response when someone has asked him whether a lawyer is necessary is: "That's up to you. Just let me know what you would like to do." Response by SA Christopher McCarron. When Mr. Barbera did not want to cooperate further, SA McCarron asked Mr. Barbera whether he would like to take a polygraph test at the local police station. Mr. Barbera felt like it was a threat. Special Master Interview with David Barbera (Dec. 14,

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been destroyed despite Mr. Barbera's obligation to maintain the document." Response by EA J. Mitch MacDonald, p. 4.

2011). Mr. Barbera claimed the agents stood next to him, but he refused to go along. SA McCarron denies that either agent stood up, or that they told Mr. Barbera that they would take him to the police station. Response by SA Chris McCarron. Nonetheless, Mr. Barbera told the SAs that he was uncomfortable with the situation. Id. I cannot conclusively determine what was said during this interview, but I can conclude that Mr. Barbera was uncomfortable and that the interview was primarily focused on the Sister Alice landing.

On May 16, 2000, SA McCarron issued an EAR to Mr. Barbera for interfering with an authorized officer on July 7, 1999, making false statements on August 26, 1999 and submitting a late dealer report on August 30, 1999. Offense Investigation Report by SA Christopher McCarron, p. 8 (Aug. 5, 1999). There is no indication that Mr. Barbera made a false statement on August 26, 1999. Moreover, Mr. Barbera noted that Sgt. [REDACTED] actually confiscated his dealer report on July 7, 1999. Special Master Interview with David Barbera (Dec. 14, 2011).

After Mr. Barbera received the EAR, but before he received a NOVA, EA J. Mitch MacDonald called Mr. Barbera's house several times in an attempt to speak with him to get his side of the story. [REDACTED] answered the telephone on more than one of these occasions. [REDACTED] recalled that EA MacDonald wanted to help [REDACTED] and to "keep him out of jail." Id. EA MacDonald responds that his conversation(s) with [REDACTED] [REDACTED] were brief and pleasant and that he called Mr. Barbera to speak about his participation in the [Sister Alice] transaction. EA MacDonald denies that he told either Mr. [REDACTED] Barbera that he was seeking to keep him out of jail. Response by EA J. Mitch MacDonald, p. 5. Mr. Barbera also recalls that NOAA EA MacDonald told him that Mr. Reposa was using him as a puppet and that Mr. Barbera should testify against Mr. Reposa. EA MacDonald denies making

either statement. Id. On February 22, 2001, EA MacDonald and SA McCarron spoke to Mr. Barbera by telephone. It was clear to Mr. Barbera that EA MacDonald and SA McCarron were "after" Mr. Reposa. Mr. Barbera declined to assist NOAA and even asked, at one point, whether he needed a lawyer present. The response allegedly was no, and that they were simply having a discussion. Special Master Interview with David Barbera (Dec. 14, 2011). Later, Mr. Barbera got upset and started crying on the phone after SA McCarron requested copies of business, bank, and phone records. Response by SA Christopher McCarron. Mr. Barbera did not ultimately provide these documents to NOAA.

On February 2, 2001, EA MacDonald issued a NOVA to Mr. Barbera and Seair Seafood, Inc., alleging two (2) violations:

Count 1: On or about July 7, 1999, David Barbera unlawfully made false statements to Rhode Island EPO [redacted] by telling [redacted] that he purchased fish from Breachway Seafood, Inc. when the fish was purchased from the Sister Alice and that he did not have paperwork completed yet, even though he had completed a tally sheet and a receipt.

Count 2: On or about July 7, 1999, David Barbera unlawfully interfered with an authorized officer when he did not make records immediately available for inspection and on July 10, 1999, he unlawfully destroyed a tally sheet when he was required to keep the record for one (1) year.

EA MacDonald assessed a $15,000 penalty for each count, totaling $30,000.

EA MacDonald subsequently sent Seair Seafood, Inc. and Mr. Barbera a letter, dated February 14, 2001, informing them that NOAA would decline to prosecute Count 3 of the EAR. Instead, EA MacDonald elected to issue a written warning for the failure to comply with record and reporting requirements. Letter from EA J. Mitch MacDonald to David Barbera (Feb. 14, 2001).

Mr. Barbera hired counsel, A. Harry Cesario, to contest the NOAA charges against him and his company. Mr. Cesario timely requested a hearing before an Administrative Law Judge. Contemporaneously, Clarke A. Reposa, Reposa Fisheries, Inc., and Todd Chappell also timely requested a hearing before an ALJ in two (2) related cases. See supra, Case 250A. The three (3) cases were later consolidated and assigned to ALJ Thomas E. McElligott, who held an evidentiary hearing from June 3 to June 7, 2002. NOAA offered testimony from five (5) witnesses and presented forty-eight (48) exhibits that were admitted into evidence with an additional exhibit introduced and entered following the hearing. Meanwhile, Respondents collectively presented nine (9) witnesses and nineteen (19) exhibits that were admitted into evidence, with an additional exhibit introduced and admitted after the hearing.

In his Initial Decision and Order, dated June 11, 2003, ALJ McElligott concluded that NOAA failed to prove by a preponderance of the evidence that David Barbera of Seair Seafood, Inc. made false statements concerning the purchase of flounder on July 6, 1999. Initial Decision and Order, p. 13. ALJ McElligott noted that, when Mr. Barbera originally told Sgt. [REDACTED] that he purchased the fish from Breachway, Mr. Barbera was under the good faith belief that he was dealing with Breachway based on their long-standing relationship with one another. Similarly, ALJ McElligott ruled that there was insufficient evidence to prove that Mr. Barbera tried to mislead Sgt. [REDACTED] when, upon request for specific documents, he told [REDACTED] that he did not have any paperwork associated with the Sister Alice transaction. ALJ McElligott reasoned that it was more likely that Mr. Barbera was anticipating an invoice from Breachway. Consequently, he did not have the requisite paperwork when it was requested. Id. at 16.

Furthermore, ALJ McElligott concluded that Mr. Barbera did not interfere with an investigation when he did not immediately provide Sgt. ████ with the documents upon which the dealer report relied. He noted that the language of 50 CFR §648.7 (d)[2] is couched in the past tense and that Mr. Barbera was under no obligation to provide Sgt. ████ with any documents that had not yet been submitted to NMFS. Id. at 19. However, with regard to Count 2 of the NOVA, ALJ McElligott found that NOAA had proven that Mr. Barbera destroyed the 3x 5 index card that constituted a "record upon which the dealer reports are based." He wrote:

> By discarding the index card, respondent Barbera impeded the investigation and destroyed the only piece of evidence that could have been used to corroborate or contradict his testimony concerning what was written on the index card. This activity cannot and will not be tolerated. Id. at 20.

ALJ McElligott upheld NOAA's $15,000 penalty assessment on Count 2 of the NOVA and dismissed Count 1 of the NOVA. Id. at 24. ALJ McElligott also declined to impose a permit sanction on Seair Seafood, Inc. because Mr. Barbera had ceased business operations and cancelled the federal dealer permits. Id.

Though Mr. Barbera wanted to appeal his case to the NOAA Administrator, Mr. Cesario advised him that it was in his best interest not to do so because of the prohibitive cost and the low likelihood of success. Mr. Barbera hand-wrote a letter of appeal to the NOAA Administrator for discretionary review. Mr. Reposa separately appealed to the NOAA

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[2] 50 CFR §648.7 (d):

> All persons required to submit reports under this section, upon the request of an authorized officer…must make immediately available for inspection copies of the required reports that have been submitted, or should have been submitted, and the records upon which the reports were based.

Administrator for discretionary review of ALJ McElligott's ruling. However, on October 21, 2004, Admiral Conrad Lautenbaucher, Jr., the NOAA Administrator, issued an Order Denying Discretionary Review. 2004 WL 3106012 (NOAA). Mr. Barbera did not appeal his case beyond the NOAA Administrator. His counterparts, however, proceeded to appeal their case to the United States District Court in Rhode Island. See supra, Case 250A.

This was Mr. Barbera's first, and only, NOAA violation. Mr. Barbera has paid the $15,000 assessed penalty.

Discussion

Mr. Barbera believes that NOAA assessed an excessive penalty for a "prior undefined offense" and that SAs Flanagan and McCarron "psychologically terrorized [Mr. Barbera] over an extended period of time to turn me into an informant and force a settlement." Application for Review.

In response, EA MacDonald argues that this case does not meet the standard outlined in the Secretarial Decision Memorandum dated March 16, 2011 in that it did not involve an excessive penalty charged in a manner that unfairly forced settlement. Further, EA MacDonald argues that there was no conduct exhibited in this case that was specifically enumerated in the September 2010 OIG report that prejudiced the outcome of the case. Finally, he writes that the civil penalty was assessed in good faith, the case proceeded to a hearing, and was fairly presented by both parties to an ALJ. Response by EA J. Mitch MacDonald, p. 9.

EA MacDonald is correct that this case does not involve an excessive penalty that was charged in a manner that unfairly forced settlement. However, I find that this case demonstrates conduct specifically enumerated in the September 2010 report in that it was

"broad and powerful enforcement authorit[y] [that] led to overzealous or abusive conduct." This case should never have escalated to the point of a NOVA and subsequent ALJ hearing. In fact, Mr. Barbera was not even subject to NOAA's initial investigation. Indeed, it would appear that NOAA issued an EAR and NOVA because its officers believed, wrongly, that Mr. Barbera was somehow working in concert with Mr. Reposa. I base my finding of overzealous conduct on the following:

First, the facts substantiate that Mr. Barbera did not have any recognizable relationship with Mr. Reposa. Therefore, there was no incentive for Mr. Barbera to obstruct an investigation for the benefit of Mr. Reposa, or to assist him in covering up an illegal landing. See supra, Case 250A. Second, Mr. Reposa has conveyed to me, and I find him credible, that the use of the 3x5 index cards was consistent with his general business practice at Seair Seafood. The 3x5 index cards were a necessary part of his business and Mr. Barbera did not destroy the index card for the purpose of impeding NOAA's investigation. Rather, Mr. Barbera simply discarded the index card that he thought had no significance after he created the appropriate invoice and dealer reports at Sgt. [REDACTED] request. Under 50 CFR §648.7(e), dealers are required to retain records on which dealer reports are based. However, Mr. Barbera has testified that on occasion he would write down orders on a piece of cardboard if that was available and throw out the cardboard when he was able to create a more permanent record of the transaction. I think it is at most an open question whether the 3x5 index card even constituted a record upon which a dealer report is based. When an invoice is prepared from the index card, that invoice then becomes the record upon which the dealer report is based.

Third, Sgt. did not specify what documents was requesting on July 6, 1999 when asked Mr. Barbera for information pertaining to the Sister Alice landing. Mr. Barbera used the 3x5 index card to fill out the requested invoice and dealer report at Sgt. request and in his presence. I do not doubt that Mr. Barbera would have provided Sgt. with the index card had simply asked for it.

Fourth, based on my interview with Mr. Barbera and others involved in the consolidated cases, the target of this entire investigation was Mr. Reposa, the Sister Alice, and the Dona Maria. NOAA personnel do not deny that that is the fact. Thus, Mr. Barbera was linked to an investigation involving an unfamiliar party and subsequently paid a significant penalty after an ALJ found against him on one (1) count of “destroying” an index card in a manner consistent with his normal business practice.

Fifth, NOAA tried to extract information from Mr. Barbera. It was only after he was unable to provide any useful information about Mr. Reposa, or refused to provide any corroborating evidence in the form of his personal phone and financial records, that Mr. Barbera, eighteen (18) months after the alleged violations took place, received a NOVA for these questionable violations. The evidence strongly suggests that NOAA enforcement demonstrated broad and powerful authority that led to overzealous and abusive conduct against Mr. Barbera who had no record of NOAA violations and who was not initially the subject of a NOAA investigation.

The question presented is whether the $15,000 civil penalty assessment that was subsequently upheld by an ALJ is appropriate. The ALJ held that Mr. Barbera was not liable for the interference charge, but was liable for destroying the 3x5 index card. The ALJ upheld the

$15,000 penalty because that penalty was based on NOAA's initial penalty assessment. When this case was decided in 2001, the ALJ was bound by a presumption that NOAA's assessment of civil penalties was valid. That presumption has been removed and I am not bound by it.[3] Accordingly, I find that the a totality of the circumstances involved in this case, including Mr. Barbera's innocent business practice, a substantial reduction from the $15,000 penalty assessed, and ultimately paid, by Seair Seafood is appropriate. I conclude that the minimum penalty of $5,000 is appropriate in this case and Mr. Barbera is entitled to relief (the corporation being long ago dissolved).

Recommendation

I recommend that the Secretary remit the sum of $10,000 to Mr. Barbera.

[3] Effective as of June 23, 2010, NOAA published a final rule (75 Fed. Reg. 35631) that amended the procedures governing the agency's administrative proceedings for the assessment of civil penalties; suspension, revocation, modification, or denial of permits; issuance and use of written warnings; and release or forfeiture of seized property. The principal change removed the requirement that an Administrative Law Judge state good reason(s) for departing from the civil penalty or permit sanction assessed by NOAA in its charging document. This revision eliminated any presumption in favor of the civil penalty or permit sanction assessed by NOAA.

Case 251
NE 041022
F/V Leslie Ann
Leslie Ann, Inc., Owner
Stephen P. Jordan, Operator

Fisherman complains that the penalty was excessive for an unintentional failure to renew his permit.

Findings of Fact

Stephen P. Jordan has been a commercial fisherman for the last thirty two (32) years. For twenty two (22) years, he owned the fishing vessel Leslie Ann, a 56' trip boat with a multispecies permit. He sold the Leslie Ann and her corresponding permit in 2010. Mr. Jordan currently works as a captain and operator of a 65' fishing vessel, the Jamie and Ashley, which operates out of Gloucester, Massachusetts, and works full time, seven (7) days on and seven (7) days off, as a pilot boat captain for Portland Pilots.

Mr. Jordan's multispecies permit for 2003-2004 was to expire on April 30, 2004. In February 2004, Mrs. Jordan assembled the paperwork that was required to be filed with Mr. Jordan's renewal application for a multispecies permit for 2004-2005, had Mr. Jordan sign the application on February 12, 2004 and thought she had mailed the original to NOAA and kept a copy of the application for her files. Offense Investigation Report by SA James MacDonald, p. 3 (May 21, 2004).

On April 29, 2004, Mr. Jordan called into the DAS program to get a sailing number. Unknown to Mr. Jordan, his 2003-2004 multispecies permit was to expire two (2) days later on April 30, 2004, while he was at sea. Mr. Jordan returned to port on May 5, 2004 and, when he called the DAS center to end his trip, he was told he was not in the system and could not land

his catch. Mr. Jordan then called NOAA SA James MacDonald and related his problem. Id. SA MacDonald asked Mr. Jordan if he had a permit and he answered in the affirmative. SA MacDonald then gave Mr. Jordan permission to land his catch. Id.

On May 6, 2004, SA MacDonald was able to confirm that Mr. Jordan's permit had lapsed. Since Mr. Jordan had landed his catch without a permit, SA MacDonald seized the catch which was later sold for $20,439.39. Id. This was Mr. Jordan's largest catch of the year. Special Master Interview with Stephen Jordan (Sept. 14, 2011). Later, SA MacDonald was able to confirm that Mrs. Jordan had the original renewal application signed by Mr. Jordan which she had neglected to mail. Offense Investigation Report by SA James MacDonald, p. 3 (May 21, 2004). There is no fee for renewing the permit. SA MacDonald issued an EAR to Mr. Jordan charging him with fishing without a valid permit and for making a false statement (he had told SA MacDonald that he had a valid permit).

On June 18, 2004, Mrs. Jordan received a call from EA J. Mitch MacDonald, who asked whether they could try to settle the matter without going through a formal process. Response by EA J. Mitch MacDonald, p. 2. EA MacDonald offered to give the vessel owner the sum of $5,439 from the seized catch proceeds with NOAA keeping the balance of $15,000.00 as a penalty. This corresponded approximately to the amount of time Mr. Jordan fished on his trip without a permit (i.e., 73% of the trip without a permit/27% of the trip with a permit. Id. Mrs. Jordan declined the offer and, although she did not hire a lawyer, she requested the help from her cousin's friend, Jeffrey Peters, who is a lawyer. In July and August 2004, Mr. Peters communicated with EA MacDonald in an attempt to resolve the case. As part of these discussions, Mr. Peters sent EA MacDonald a settlement sheet for the voyage in question which

showed expenses of approximately $8,500. Letter from Jeffrey Peters, Esq. to EA J. Mitch MacDonald, with Enclosures (July 14, 2004).

Subsequently, on August 13, 2004, EA MacDonald issued a NOVA to Mr. Jordan wherein he charged him in Count I with fishing without a valid permit for which he assessed a penalty of $12,000 and dismissed Count II, which was the false statement charge. On this same date, EA MacDonald emailed Mr. Peters a settlement agreement which reflected their settlement discussions. Email from EA J. Mitch MacDonald to Jeffrey Peters, Esq. (Aug. 13, 2004). Mr. Jordan signed a Settlement Agreement with NOAA in which he agreed to pay NOAA a penalty of $10,219.00 from the seized proceeds with the balance of $10,220.49 returned to Leslie Ann, Inc. Mr. and Mrs. Jordan were told by Mr. Peters that this was the best he could do. He recommended settlement which the Jordans accepted rather than risk losing the entire catch.

EA MacDonald points out several remedies available to the Jordans, but each involved considerable expense (appeal to an ALJ; force a seizure action in the U.S. District Court) and the risk of losing the benefit of the offered settlement. The Settlement Agreement treats this violation as a "written warning" in connection with any penalty/sanction to be assessed against Leslie Ann, Inc. during a period of five (5) years from the date of the agreement. EA MacDonald states that he "included the written warning consideration for prior violation purposes in the settlement agreement so that in any future consideration of this as a prior, it would necessarily incorporate my assessment that this was not an intentional act." Response by EA J. Mitch MacDonald, p. 3.

Discussion

EA MacDonald argues that Mr. Jordan entered into a Settlement Agreement that mutually resolved his violation of fishing without a valid permit. Although renewal permits are relatively easily obtained, they must be applied for properly, and vessels are required to keep valid permits onboard. 50 CFR §648.4; EA MacDonald further argues that the Settlement Agreement allowed Mr. Jordan to receive a portion of his catch that exceeded the time he fished for, caught, and harvested fish without a permit; and that "this settlement was an attempt to balance the Agency's need to maintain the effectiveness of its permitting system and credit fishermen who have paid in lost opportunity while waiting for permits while simultaneously accounting for the respondent's inadvertence." Response by EA J. Mitch MacDonald, p. 4.

The question presented in this Application is whether EA MacDonald "charged excessive penalties in a manner that unfairly forced settlement." Secretarial Decision Memorandum (Mar. 16, 2011). Under the circumstances of this case, I find that the assessed penalty of $12,000 and seizure of the catch proceeds of $20,439.39 for a total of $32,439.39 was excessive. Further, I find that Mr. Jordan was forced to settle this case because he needed proceeds from the catch, his largest catch of the year, to pay for the trip. This was an unintentional violation that did not threaten the resource and it had the potential of costing Mr. Jordan a $12,000 penalty and the value of the catch at $20,439.39 for a total loss of $32,439.39 merely because his wife forgot to mail his signed renewal application. According to NOAA's applicable penalty schedule, the minimum penalty for a first violation is $5,000. I cannot think of a more appropriate case to be settled for the minimum penalty as a first

offense. Therefore, considering the need to enforce the fishing regulations but also the unintentional nature of this violation, I find that Mr. Jordan should pay the minimum penalty for a first violation under NOAA's penalty schedule or $5,000. Therefore, I recommend that the Secretary remit $5,219.00 to the vessel owner.

Recommendation

I recommend that the Secretary remit $5,219.00 to Leslie Ann, Inc.