

National Marine Fisheries Service
Alaska Enforcement Division

ENFORCEMENT REPORT



January 01 – June 2, 2004

National Marine Fisheries Service
Office for Law Enforcement
P.O. Box 21767
Juneau, AK 99802-1767

This report can be viewed at:

<http://www.nmfs.noaa.gov/ole/Alaska/>



**To report fisheries violations,
call our National Hotline at
1-800-853-1964**



INTRODUCTION:

The Alaska Enforcement Division (AED) has opened 325 cases so far this year. This is close to the total last year at this time.

VESSEL MONITORING SYSTEMS (VMS)

AED has opened 27 investigations for vessels not operating VMS when required. VMS was used to detect 15 potential violations this year. These violations were for fishing in restricted areas and for transiting in no-transit areas.

During the spring Togiak herring fishery, numerous vessels violated the 12 nm no entry area surrounding Round Island and The Twins, in northern Bristol Bay. Regulations prohibit federally permitted vessels from transiting within this area. In order to ensure these areas were not violated during the summer salmon season, Kodiak enforcement officers worked with ADFG and Bristol Bay processors to widely publicize these closures among their tender fleets and harvesting vessels. Eight vessels which had VMS operating will be cited with a \$1000 Summary Settlement penalty. Twenty-two additional permitted vessels have been identified which likely transited the closed area, but did not operate VMS. Investigations are pending.

HIGHLIGHTS OF PRIORITY ISSUES:

1. OBSERVER-RELATED OFFENSES

Supporting the North Pacific Observer Program continues to be a high priority for AED. At the beginning of the year, special agents responded to several significant harassment cases. In one case, an observer was harassed as a result of changing his sampling to account for intentional sample bias. An Observer Program staff member who was placed aboard the vessel to validate the sampling methodology was also harassed. In a second case, special agents promptly responded to an observer who reported being sexually assaulted while working on a vessel. The vessel's owner and operator also responded quickly by initiating their own internal investigation and by cooperating fully with AED's investigation. The case has been forwarded to NOAA General Counsel for prosecution.

There have been 260 affidavits written this year by observers resulting in 93 enforcement cases. The rate of observer reporting continues to get better with increased emphasis on training observers and Observer staff. Increases were noted in affidavits regarding failure to notify, record keeping and reporting, marine casualty reporting, and failure to conduct drills. Overall, compliance has generally improved over the last several years. There has been a noticeable decrease in the number of affidavits involving egregious violations and blatant disregard for the regulations.

AED is investigating several incidents of significant data bias, harassment and sexual harassment of embarked NMFS certified fishery observers.

AED is investigating allegations that a vessel's crew deliberately tampered with their flow scales. An authorized dealer of the scale was visited to better understand how the scale works and to discover possible ways it can be tampered with. The investigation is continuing.

2. COOK INLET BELUGAS

The 2004 Cook Inlet Beluga Whale Enforcement Plan was completed and efforts began during April. We expect to dedicate more than 210 hours of outreach and education and made more than 3,000 contacts to increase the public and governmental agency awareness for the protection of Cook Inlet Beluga Whales. AED special Agents and officers have been conducting overt and covert patrols to detect and prevent occurrences of harassment or unlawful take of the Cook Inlet Belugas. Currently no unauthorized takes of beluga whales have been documented.

3. STELLER SEA LION PROTECTION MEASURES

Rookery no-transit incursion violations continue at a rate higher than expected. Outreach efforts continue and are necessary to keep this issue in front of industry. Kodiak agents and officers recently conducted outreach education efforts with marine shipping companies operating in Alaskan coastal waters to ensure they were aware of these regulations.

4. SEABIRD AVOIDANCE

Agents and officers continue to inspect vessels for compliance with seabird avoidance requirements. So far this year, we have found numerous vessels out of compliance with the requirement to maintain a seabird avoidance plan. Our officers have worked closely with fishermen to bring them back into compliance by assisting them with completing their plans.

The Summary Settlement Schedule for seabird avoidance violations was approved and will be posted on the AED website.

5. RECORD KEEPING AND REPORTING

During April, agents and officers conducted unannounced offload audits of groundfish and IFQ catcher/processor vessels in Dutch Harbor. Overall, compliance with recordkeeping and reporting requirements and accuracy of reporting was high.

The operator of a Kodiak shoreside processor was cited for failure to maintain required observer coverage levels for January - March 2004. The processor was required to

maintain 100% coverage for January and March, and 30% coverage for February. No coverage was maintained, for a total of 59 days lacking.

The operator of a Kodiak shoreside processor was cited for receipt and possession of unlawfully possessed groundfish, by failing to report numerous groundfish overages from vessels from which they purchased fish.

A trawler delivering to Kodiak shoreside processors was cited for failure to sort and discard Pacific halibut from their catch. In seven consecutive landings, over 18,100 pounds of halibut were delivered in a groundfish catch. The vessel operator was given numerous warnings prior to the citation. Additional trawl vessels with chronically high amounts of halibut being delivered to processors are being investigated.

The investigation is concluded concerning a crab cap violations. The value of unlawfully processed crab is estimated to be in excess of \$2 million. The case was submitted to GCAK for review.

Agents investigated and cited the operator of the pot vessel FOUR DAUGHTERS for directed fishing in the US EEZ for Pacific cod with no Federal Fisheries Permit, no LLP, no VMS, and closed area violations.

6. SUBSISTENCE HALIBUT

AED has received many complaints concerning persons selling subsistence halibut into the commercial market or selling more than \$400 of fish in a year. Other subsistence complaints and violations investigated are failure to mark subsistence gear, failure to have permit card on board, sell of subsistence caught halibut by non-permit holder, fishing and possessing too much gear on board the vessel, and false statements on permit applications.

One case involved two subsistence halibut fishermen using more hooks than allowed. The fishermen were using 226 hooks when they were only allowed 60.

A case involving an individual who falsely indicated he was eligible to receive a SHARC has been forwarded to NOAA General Counsel. The individual indicated on his SHARC application he met all of the requirements to be issued the card when in reality he did not.

Agents are also investigating two application fraud cases by local fishing guide/lodge owners.

7. IFQ SPECIFIC

Compliance monitoring and targeted pre-and post-season outreach and education efforts within the halibut CDQ fishery have resulted in increasing compliance rates every year. Outreach efforts with CDQ managers and CDQ halibut buyers will continue during the 2004 fishing season.

Officers increased their after hour enforcement efforts. The efforts are designed to detect illegal activities that occur after the normal work day. Although no illegal activities have been documented, the efforts will continue.

8. MARITIME BOUNDARY FOREIGN FISHING VESSEL SEIZURES

AED Enforcement Officers conducted two weeks of joint aerial patrols with Canadian Dept. of Fisheries and Oceans officers, enforcing UN Resolutions prohibiting large scale driftnet fishing on the high seas South of the US EEZ off the Aleutians.

9. MARINE MAMMALS and ENDANGERED SPECIES

Many reports of persons shooting seals and sea lions have been received this year. Agents have investigated several of these complaints but could not respond to all of them because of lack of personnel in the areas where the shootings occurred.

COMMUNITY-ORIENTED POLICING AND PROBLEM SOLVING (COPPS)

AED Enforcement Officers participated in the 2004 Anchors Aweigh Boat Show in Anchorage, Alaska. This show provided an excellent COPPS opportunity that will enhance the 2004 beluga enforcement effort. Over 500 contacts were made consisting of boat owners, hunters, fishers, pilots, guides, Natives, lodge owners, and professional people. The focus for our COPPS effort was to establish contacts at the show that could provide us with 'eyes and ears' information in remote areas of Cook Inlet.

Over 2,500 contacts were made during the 2004 Great Alaska Sportsmen Show, held in Anchorage, Alaska. The show featured over 500 hunting, fishing, and recreational booths that provided information and products for outdoor activities in Alaska. Over 25,000 people attended the show with our booth averaging approximately 50 contacts per hour. Enforcement personnel staffed the booth and provided information on beluga conservation and protection.

An AED Enforcement Officer attended the Marine Expo in Valdez, Alaska. The Office for Law Enforcement booth presented information on IFQ, halibut sport fishing, and marine mammal laws. Over 250 people were contacted during the expo.

AED officers and agents staffed a booth at COMFISH. AED completed several broad based outreach efforts during COMFISH. VMS, seabird avoidance and permitting issues were the primary topics of interest. Officer and agents organized and presented a seminar on the most frequently observed violations and compliance concerns.

AED Officers and Agents participated in WhaleFest 2004 in Kodiak. Marine mammal approach, strandings, and collection of marine mammal hard parts regulations were the primary focus.

AED Officers and Agents addressed the annual meeting of Alaska Draggers Association, discussing applicable fishing regulations and changes for 2004.

AED Agents and Officers, working in conjunction with State of Alaska Public Safety and ADFG, will be conducting plant and vessel visits within the crab fleet during the fall of 2004. These efforts are to increase knowledge of crab fishing and regulatory issues, in anticipation of enforcing crab regulations under the crab rationalization program.

AED is coordinating with the Protected Resource Division in having a tide book published. The 2005 tide book will contain marine mammal viewing guidelines, NOAA Hotline numbers and touch on the Cook Inlet Beluga Whale Program.

AED Agents conducted several Marine Mammal viewing presentations to local tour operations in Juneau.

Agents and Officers staffed a booth at the Juneau Douglas High School career day. Freshman through seniors gathered at Centennial Hall in Juneau to interact with prospective employers and assist junior students in their ability to communicate with adults. Approximately one hundred contacts were made.

The Chief of the Office of Law Enforcement recognized the crew of the F/V Martina and the manager of Taku Smokeries for their recent efforts to recover and dispose of a derelict trawl net. The net was recovered in the Gulf of Alaska after becoming entangled in the vessel's longline gear. The efforts being recognized in Washington D.C. spoke highly of Alaskan fishermen.

6/8/04 from
Jeff Passer
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UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

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Jeff Passer.

IN THE MATTER OF)
) Docket No. AK 01-5112
REBECCA IRENE FISHERIES,)
LLC and MARK DECKER,)
jointly and severally,)
)
Respondents.)
_____)

INITIAL DECISION AND ORDER

This matter arises out of a Notice of Violation and Assessment [NOVA] together with a Notice of Permit Sanction [NOPS] issued by the National Oceanic and Atmospheric Administration [the Agency] to Respondents jointly and severally under the authority of the Magnuson Stevens Fishery Conservation and Management Act [the Act] 16 USC §1857 *et seq.*, and its conforming regulations 50 CFR Part 679, *et seq.*, and its procedural rules in 15 CFR § 904.1 *et seq.*

The NOVA asserted three separate violations between the dates of April 3, 2000 and October 11, 2001.

1 The first violation alleges that Respondents violated the Magnuson Act and 50 CFR 679.7(g)(2) by interfering with or biasing the sampling procedures employed by an observer by removing Halibut from the deck of the fishing vessel REBECCA IRENE's processing conveyor belt.

2 The second violation alleges the Respondents violated the Magnuson Act and 50 CFR 679.7(g)(4) by impeding an observer from collecting samples or otherwise performing the observer's duties by using physical and other similar means, such as installation a removable side panel adjacent to the fish conveyor incline belt in the

processing factory area, that enabled the crew to easily remove Halibut from the conveyor belt, so the fish would not be sampled by the on board observer thereby interfering and biasing the sampling procedures of the on board observer.

③ The third violation alleged the Respondents failed to minimize the catch of Halibut in violation of 50 CFR 679.21(b)(2)(i).

The Agency has proposed civil monetary penalties totaling \$360,000.00, *i.e.*, \$120,000.00 for each of the three alleged violations, which are the maximum allowed under the Act.

In addition the Agency has proposed the Respondents' fish permits be suspended for 90 days, split into two different 45 day time periods to correspond to the target fisheries in which Respondents presorted.

Both the Agency and Respondents filed Preliminary Positions on Issues and Procedures. A prehearing conference was held on January 27, 2003 and a Prehearing and Scheduling Order was issued setting the procedural parameters of discovery and the scheduling of discovery, motions and the hearing in this matter.

The Prehearing and Scheduling Order was amended on May 6, 2003 which extended the cut off of discovery and set the hearing for November 17, 2003 in Seattle, Washington.

The hearing was commenced on November 17, 2003 and continued until November 20, 2003. The record in this proceeding was ordered to remain open until certain additional discovery by the Agency could be conducted including the deposition of a material witness offered by the Respondent. At the conclusion of that discovery, the hearing was again opened to take the testimony of Respondents' remaining witness. The record was then closed on February 25, 2004.

The parties were offered the opportunity, pursuant to the Administrative Procedures Act, to file proposed findings of fact and conclusions of law. Instead, the parties waived such filings and instead chose to file closing arguments or briefs.

No ex-parte communications were had with this judge.

A transcript of the proceedings, consisting of five separate volumes, was ultimately prepared and provided to the parties.

The parties have timely filed their closing arguments and reply briefs. Thus, the record is now complete and ripe for a decision on the merits.

INTRODUCTION AND BACKGROUND

In this enforcement action, the Agency seeks to impose a civil money penalty and permit sanction against Rebecca Irene Fisheries, LLC who is the owner and operator of the F/V REBECCA IRENE for violations of the Magnuson Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 et seq. (MSFCMA) and its implementing regulations.

The F/V REBECCA IRENE participates as a trawl vessel in the Federal groundfish fisheries off of the coast of Alaska, and is referred to as a head & gut vessel because of the methods used on board the vessel for processing harvested target species. Gov't Exh. 10 and 11.

Trawl vessels engaging in directed fishing for groundfish in the Gulf of Alaska (GOA) or the Bering Sea and Aleutian Island (BSAI) management areas of the Exclusive Economic Zone (EEZ) off the coast of Alaska are subject to strict regulations with respect to fishing activities that affect Pacific Halibut. First, a vessel operator is required to minimize the vessel's catch of Pacific Halibut. 50 C.F.R. 679.21(b)(2)(i). Second, a vessel that has caught Pacific Halibut must, after allowing for sampling by an observer,

sort its catch immediately after retrieval of its gear, and then immediately return all Halibut and other prohibited species to the sea, with a minimum of injury and regardless of its condition. 50 C.F.R. 679.21(b)(2)(ii).

Pacific Halibut is an incidental bycatch of other fishing activities, essentially a prohibited species catch (PSC) and thus the National Marine Fisheries Service [NMFS] imposes limits on how much Halibut may be caught while conducting any trawl fishing for groundfish in either the GOA or the BSAI. In the BSAI, the limit on Halibut that may be caught while conducting any trawl fishery for groundfish is the amount of Halibut equivalent to 3,675 metric tons of Halibut mortality. 50 C.F.R. 679.21(e)(1)(v). This PSC limit is then apportioned among the following fishery categories: Midwater Pollock, Yellowfin Sole, Rock Sole/Flathead Sole/other flatfish, Greenland turbot/Arrowtooth, Flounder/Sablefish, Rockfish, Pacific cod, and Pollock/Atka mackerel/other species. 50 CFR. 679.21(e)(3)(i).

As a further refinement of the annual allocation, the NMFS also makes a seasonal apportionment of the Pacific Halibut bycatch allowances. 50 CFR. 679.21(e)(5).

When the Regional Administrator determines that the Halibut bycatch allowance for any of the fishery categories has been or will be caught, NMFS then closes the entire BSAI to directed fishing for the species in that particular fishery category. 50 CFR. 679.21(e)(7)(v). The Rocksole fishery most often closes because the PSC limit has been exceeded. The effect of a PSC closure is that vessels can no longer fish for remaining target species that may have been available for harvest under the amount allocated as total allowable catch (TAC). TR-II, p. 90. In other words, when a Halibut PSC closure occurs in the head and gut Rocksole fishery, then all fishing for Rocksole in the closed area must cease and the rest of the Rocksole allocated to that particular sector of the fleet is left in the

water. With regard to the Rocksole fishery, I am told it is virtually always closed due to hitting the Halibut cap, rather than hitting the Rocksole total allowable catch.

The catch data that are used by the Agency to make its decision regarding PSC closures are provided by NMFS certified observers.

The purpose of the Groundfish Observer Program is to allow observers to collect Alaska fisheries data deemed by NMFS to be necessary and appropriate for management, compliance monitoring and research of the groundfish fisheries. 50 CFR. 679.50(b). Observer data are a key component of the NMFS fishery management regimen, and are used to determine not only prohibited species catch information, but also groundfish quota management and to provide data for fishery population assessments. The accuracy of observer data is extremely important to ensure the quality and integrity of management decisions.

The level to which fishing vessels are required to carry an observer depends upon the target fishery, the size of the vessel and the area being fished. 50 CFR. 679.50(c). When an observer is on board a vessel, that does not mean that all of the hauls are sampled. The North Pacific Groundfish Observer Program Manual provides observers with directions on sampling protocol, including how to use a random sample table, a table of numbers which is used to identify which hauls the observer should sample.

An observer's samples are normally taken at two separate times while the haul is being processed, rather than continuously throughout the haul. The time it takes to actually retrieve the samples from the conveyor belt is short. Whatever falls into the observer's sample basket, including Halibut, is identified, counted, weighed and reported daily to NMFS.

Vessel operators and crew are required to allow observers free and unobstructed

Laina Shill was the observer deployed between June 27 and August 31, 2001. TR-II, p. 8. While conducting her normal basket sampling duties, Ms. Shill was unable to see whether the aft plastic panels on the incline belt #1 were in place and whether any member of the crew who may be standing behind those panels. Ms. Shill documented seven occasions when she noted crewmembers were removing Halibut from the haul before she had a chance to conduct her sampling. TR-II, p. 23-24. Ms. Shill complained to crew members and Captain Decker on two occasions, July 20 and 23, 2001, when she happened to look up from her sampling duties to see one of the crew grab a Halibut from the conveyor belt and throw it onto the discard belt. TR-II, p. 25-26. Ms. Shill noted these instances in her logbook.³ Gov't Exh. 8. Ms. Shill prepared a sketch of the processing factory during her deployment on the REBECCA IRENE so that she could better understand what to expect and to serve as a reference in her notes. Gov't Exh's. 4 and 19 (demonstrative). TR-II, p. 13. When Ms. Shill was performing her sampling duties in the factory, she would stand at the sampling gate to collect the fish off of the conveyor belt, and she would then process those samples in the area near the sump pump. TR-II, p. 15.

She recalled that 6-8 tows would be made per day (TR-II, p. 16) and that she would sample roughly half of the tows. *Id.* The filling of the baskets took her approximately five minutes. TR-II, p. 17.

Ms. Shill determined when to take a break by application of a table provided for that purpose by the North Pacific Groundfish Observer Program. She would notify the skipper of the haul number that she would need to sample. TR-II, p. 16. When conducting her sampling of a haul, Ms. Shill used random numbers to choose the two times during the

³ Captain Decker's response to Ms. Shill's complaint was that the crew members had been unaware that she would be sampling. TR-II, p. 26-27.

haul when she would collect fish. She would process fish in between those times when she was filling her baskets. TR-II, p. 17.

Ms .Shill's service on the REBECCA IRENE was her one and only deployment as an observer. TR-II, p. 8.

Respondent Mark Decker⁴ admitted he and the crew of the REBECCA IRENE engaged in presorting of Halibut. He explained the various techniques he used to affect observer sampling. One was to determine when the observer would not be sampling. He claimed he would manipulate the vessel's fishing activity so that he was able to determine which tows the observer would sample. TR-I, p. 36. In addition, out of a professed concern for the observer's need for uninterrupted sleep and efficiency, Mr. Decker said he would coax the observer to tell him the random sample schedule. TR-I, p. 37. When he knew that an observer would be resting and therefore not sampling certain tows, and if there were areas close by that had good target species but also high Halibut bycatch, he would "attack it for the fullest". TR-I, p. 37. When asked why he would choose to stay fishing in an area even though they were catching a lot of Halibut, he explained: "It all came down to money, how much money we were putting in the coffer." TR-I, p. 39. And that "[t]he money was being made extending the fishery and being able to stay in a protective fishing area." TR-I, p. 90.

Other techniques for interfering with or biasing the observers' samples would occur while the observer was conducting his or her sampling duties. The presorting occurred both on deck and in the factory. TR-I, p. 39. After the observer had left the deck to go down into the factory, or when the observer's back was turned, Mr. Decker and the crew on deck would slide the Halibut away so that it wouldn't go into the tank. TR-I, p. 40-41.

⁴ Mr. Decker appeared as a witness for the Agency even though he is named as a Respondent in this proceeding.

He and the deck crew would attempt to remove as many Halibut as possible. TR-I, p. 41-42.

Captain Decker relied particularly on Steve Haggard to make sure the presorting occurred in the factory. TR-I, p. 40-41. Mr. Decker testified that he expected his crew to keep as many Halibut from the observer as possible. TR-I, p. 39. Mr. Decker testified that he was particularly interested in biasing the observer's samples when the fishing activity was lucrative and they didn't want to move from that spot. TR-I, p. 38. Although experienced observers were not so easy to deceive, Mr. Decker testified that most of the observers on board the REBECCA IRENE during 2000 and 2001 were first-time observers. TR-I, p. 39.

DISCUSSION

Counts I, II and III.

There is overwhelming evidence in this record which supports the conclusion that the F/V REBECCA IRENE's Captain, Mark Decker, and crew, between April 3, 2000 and October 11, 2001, engaged in presorting of Halibut from its target species catch in order to bias the on board observer's reports to NMFS. This presorting was accomplished by devious means which clearly demonstrate an overall intent to bias and thus evade the Observer regulations and intent to avoid minimizing the catch of Halibut which was a prohibited species to Respondents.

The on board observer is there because of the North Pacific Groundfish Observer Program (NPGOP). The program is one adopted by the North Pacific Fishery Management Council (Council) and implemented by the Alaska Region of NOAA Fisheries. NPGOP observers are trained to perform a variety of functions including the collection of data on the quantity and composition of catch and bycatch, fishing effort, biological characteristics of catch species, fishery interactions with marine mammals and seabirds, and compliance with federal fisheries regulations. The observers file reports electronically on a weekly and/or daily basis, and their data is used to make near real time in season management decisions. NOAA fishery managers use observer collected information in their decisions concerning fishery closures.

In some fisheries, the catch of each participating vessel is monitored by the observers on board and the fishery will be immediately closed when certain limits are reached. These limits can include harvesting limits on catch, bycatch, or prohibited species catch (PSC). Certain PSC species are taken in very small quantities, and observers must make special efforts to account for them. In the case of Pacific Halibut taken when the species is in a PSC status, regulations require that Halibut be handled in certain prescribed ways to avoid injury to the fish during discard. Observers are required to document the use of such handling procedures and the condition of Halibut upon discard.

Observers also monitor the vessel's compliance with a number of other regulations. These regulations include those designed to reduce discard or, in some cases, encourage retention, of specific species, prevent the discharge of oil and prevent dumping of general waste. Observers also monitor compliance for gear type, time, or area based management restrictions.

The information provided by NPGOP observers is part of an essential information gathering process. Such information is crucial to and relied upon by NOAA and Council decision makers in managing the sustainable marine resources in the North Pacific.

Consequently, any successful effort to bias the Observer sampling and reporting has a substantial adverse effect on fulfilling the goals of the Magnuson Act.

Respondent Rebecca Irene Fisheries LLC as a limited Liability Company contends that it did not have any knowledge that Respondent Mark Decker and his crew were engaged in the wrongful presorting of Halibut from the vessel's target species. In particular, Respondent argues that as a Limited Liability Company [LLC] the acts of Respondent Mark Decker cannot be imputed to it especially in the absence of knowledge of his wrongdoing.

This argument is interesting but unpersuasive. A limited liability company is a relatively new business form that enjoys favorable Federal tax treatment of a partnership and the flexibility offered by a professional corporation's limited liability of owners. This business form also avoids the pitfalls of a limited partnership, the sub-chapter S corporation and the professional corporation. Regulations governing this business form generally address such matters as the terms of articles of organization; members and membership; management; limited liability of its members; operating agreement; capital contributions and allocation of profits, losses and distributions; limited life; and use by professionals. But the fundamental purpose of its organization is to enjoy favorable Federal tax treatment and not necessarily to avoid liability of the entity itself for wrongdoing by its employees or servants. One of the most important features of an LLC is that, like shareholders of a corporation, its members are not personally liable for obligations of an LLC beyond their investments.

However, my reading of the LLC statutes convinces me that the LLC itself would remain liable for any negligent or wrongful act committed by one of its members or employees when the act or negligence was in the course of acting for or on behalf of the LLC. Individual members would be personally liable only for their own negligence, wrongful act or misconduct or for that committed by a person under his or her direct supervision and control.

This is corroborated in *United States v Dotterweich*, 320 U.S. 277; 64 S Ct 134; 88 L Ed 48 (1943), where the United States Supreme Court held that criminal liability for violation of the Federal Food, Drug, and Cosmetic Act (FDCA), which prohibited "[t]he introduction or delivery for introduction into interstate commerce of any . . . drug . . . that is adulterated or misbranded", could attach to the corporate defendant's president and general manager "solely on the basis of his authority and responsibility as president and general manager of the corporation".

Justice Frankfurter noted that the statute made "any person" violating § 301(a) of the FDCA guilty of a misdemeanor, and that the statute further defined "person" to include a "corporation".⁵ Because a corporation can only act through individuals, the reasoning goes, the corporation's guilt can be imputed to its individual employees because "the historic conception of 'misdemeanor' makes all those responsible for it equally guilty.

The rule in *Dotterweich* was reaffirmed in *United States v Park*, 421 U.S. 658; 95 S Ct 1903; 44 L Ed 2d 489 (1975), in which the Court sustained the conviction under the FDCA of the defendant who was the "chief executive officer" of a retail food chain

⁵ The Magnuson Stevens Fishery and Conservation Act, in Section 307(1); 16 USC § 1857(1) makes it unlawful for "any person" to violate any provision of this Act or any regulation or permit issued pursuant to this Act. Person is defined in the Act to include a corporation, partnership, association, or other entity. See 16 USC § 1802(31).

corporation. The Court approved the practice of "holding criminally accountable the persons whose failure to exercise the authority and supervisory responsibility reposed in them by the business organization resulted in the violation complained of. . . ." 421 U.S. 671. The Court proffered a justification for such criminal accountability by elucidating Justice Frankfurter's phraseology: "those corporate agents vested with the responsibility, and power commensurate with that responsibility, to devise whatever measures are necessary to ensure compliance with the Act bear a 'responsible relationship' to, or have a 'responsible share' in, violations". 421 U.S. 672.

While this matter is not a criminal proceeding, and since only one individual member [*i.e.*, Mark Decker] of Rebecca Irene Fisheries, LLC is charged in this matter, the reasoning of the Supreme Court in United States v Dotterweich, *supra* and in United States v Park, *supra* have equal force here. I am particularly persuaded by the knowledge of Respondent Rebecca Irene Fisheries' principal management, Iquique, LLC, of an earlier incident of presorting of fish by a sister fishing vessel UNIMAK. Illustrative of that knowledge is shown by a memorandum issued by UNIMAK's management to the Captain and crew informing them of the illegality of presorting and ordering that such conduct would not be allowed. Given that the management of the UNIMAK and REBECCA IRENE are the same, concern for and attention to the possibility of presorting occurring on the REBECCA IRENE should have been obvious.

Moreover, Respondent Mark Decker was and continues to be a principal in the ownership of Respondent Rebecca Irene Fisheries, LLC. His acts can be imputed to the principal, Rebecca Irene Fisheries, LLC.

In light of the United States Supreme Court decisions interpreting Federal regulatory legislation analogous to the Magnuson Act, I must conclude that the Magnuson

Act imposes both vicarious and direct liability. First, the statute imposes vicarious liability because it dispenses with the requirement that a personal *actus reus* be proved, and only when the principal's "servant" or "agent" performs any of the prohibited acts. Second, when the corporate "agent" who "performs" the prohibited act is charged with a violation of the statute, direct liability is imposed -- that is, the Agency or government is required to prove an *actus reus* on the part of that "servant" or "agent". However, the element of *actus reus* may be established by a showing of a failure to act by one with the responsibility, and power commensurate with that responsibility, to devise whatever measures are necessary to ensure compliance with the statute.

Additionally, it has been well established that absent vessel owners who enjoy the profit and reward of the fishing done by its vessels are responsible for the wrongdoing or violations by the vessel's master or crew of the fishing regulations under the Magnuson Act. See *United States v. Kaiyo Maru Number 53*, 503 F. Supp 1075 (DC. Alaska, 1980), affirmed in 699 F. 2d 989 (9th Cir. 1983); *In the Matter of Ronnie and Charlotte Boggess*, 4 O.R.W. 260 (NOAA 1985), and *In the Matter of Miller Seafoods, Inc.*, 3 O.R.W. 55 (NOAA 1982). It is not necessary that the owner exercise detailed control over the operations of the vessel in order for it to be held liable for the illegal activities of its master and crew. It is sufficient that the owner of the vessel, and the major beneficiary of its operations, authorized the fishing expedition which was illegally conducted. Since it acquires a share of the vessel's production, so must it bear a major responsibility, along with the captain, for the latter's unlawful acts. To hold otherwise would be to allow vessel owners to escape responsibility for the transgressions of the captains that they hire, authorize to operate their boats, and have the authority to fire. Such a holding would substantially inhibit the effective enforcement of the Magnuson Act and the applicable

regulations.

Rebecca Irene Fisheries' continuing authority and legal control over the fishing vessel and an unequivocal right to hire and fire the captain is sufficient to conclude that Respondent Rebecca Irene Fisheries maintained an agency relationship with Mark Decker. This agency relationship has been held to be sufficient to support liability. See, *In the Matter of Jody Domingo and Elden Domingo*, 2000 NOAA LEXIS 1, 3 (3/29/2000), and cases cited therein.

Therefore, I find there is substantial, reliable and probative evidence in the whole record, which supports finding Respondent Rebecca Irene Fisheries, LLC liable and responsible for the alleged violations asserted against it in Counts I and II of the agency NOVA.

Flowing from this finding, there naturally arises the question of whether the facts also support a finding that Respondents conduct also was deceptive and failed to minimize the catch of a prohibited species as asserted in Count III.

Respondent Mark Decker admits to taking action which had as its purpose of avoiding the minimization of the Halibut catch. The efforts were to maximize the catch of the target species in fishing grounds known to have large quantities of Halibut as a likely by catch. I must therefore conclude the failure to minimize the catch of Halibut was knowingly engaged in by Respondents.

Finally, the Respondents' deliberate efforts to disguise the presorting activity and to deceive the on board observer, including the use of the sliding panel on the sorting belt demonstrates a violation of 50 CFR 679.21(b)(2)(i) as alleged in Count III.

Lastly, the Respondent argues that Count II should be dismissed because it is inappropriate, asserting that it relies upon the same facts essential to Count I. In short, the

claim is that Count II is duplicitous or multiplicitous citing United States v. UCO Oil Company, 546 F2d 833 (9th Cir. 1976).cert. Denied, 430 U.S. 966, (1977).

The Agency says that such a claim is applicable only in a criminal prosecution, not an administrative proceeding, and in any event, the criminal law allows these two counts to coexist also citing UCO Oil.

UCO Oil is not helpful. The defendant there was charged with 30 counts of false statement under only one statute, 18 USC § 1001. The 30 false statements were found in a single document. Thus, the defendant was alleged to have made 30 separate statements not one statement based on the single document. The Court upheld the indictment.

Here, as the Agency points out, there are two separate regulations encompassed in Counts I and II. However, what the Agency does not discuss is that the facts giving rise to their violation are the same in both counts. So, the question is, can the same set of facts give rise to violations of two or more regulatory provisions or statutes?

Duplicity in the criminal law is defined as the combining of two or more distinct offenses into a single count. See United States v. Parker, 991 F2d 1493 (9th Cir. 1993). The defendants in Parker were convicted of (1) smuggling psittacine bird eggs from Australia, in violation of 18 USC § 545 (2) conspiracy to smuggle these eggs, in violation of 18 USC § 371 (3) aiding and abetting their smuggling, in violation of 18 USC § 2 and (4) unlawful sale of the hatched baby birds, in violation of 16 USC §§ 3372(a)(1) and 3373(d)(1)(B). The defendants raised numerous challenges to their convictions and sentences among which was a claim the indictment was duplicitous. The Court made clear the duplicitous claim would fail because the violations were triggered by separate underlying law or regulation even though the defendants engaged in a combination or series of acts which gave rise to the distinct violations.

Here there are a series of act but two separate regulatory provisions. The facts allow for a finding of distinct and separate violations.

Thus, I will not dismiss Count II on a theory that it is duplicitous. However, I will consider the Respondent's claim in determining the sanction.

SANCTION

When determining the amount of the penalty, the Secretary is to take into account the nature, circumstances, extent and gravity of the prohibited acts, and with regard to the violator, the degree of culpability, and history of prior offenses, and such other matters as justice may require. 18 U.S.C. § 1858(a).

In the period of time of the alleged violations, April 3, 2000 to October 11, 2001, the Captain and crew of the F/V REBECCA IRENE intentionally engaged in a systematic and but not extensive presorting of their fish catch for the purposes of interfering with, and biasing the sampling of on board observers. The Agency argues for a very heavy civil money penalty totaling \$360,000.00, *i.e.*, \$120,000.00 for each of the three counts of the NOVA. . This is the maximum penalty provided in the Magnuson Act.

The Agency also requests an order suspending Respondent Rebecca Irene's fishing permits during two separate 45 day periods so as to inflict a penalty which would be meaningful and not simply the cost of doing business.

The Agency's argument for such a heavy penalty is bottomed on the claim that the presorting by Respondent's Captain and crew was extensive and persistent throughout the year and half time period. I am not persuaded that such is the case. There is a lack of evidence of such. Of the eleven observers deployed during that time period, only three observers, Laina Shill, Katrina Dunder, and Monica Benten had documented some sort of

interference or presorting by the crew of the REBECCA IRENE Gov't Exh. 1; TR-II, p. 161. Thus, contrary to the Agency's claim there is a shortage of evidence of extensive or persistent presorting during all of the relevant time period.

Nevertheless, the presorting engaged in by the Captain and crew was systematic and deceitful. In that respect, Respondent Mark Decker appeared as a witness for the Agency and willingly testified describing in detail the efforts he and certain members of the crew took to presort Halibut from their target species. Captain Decker also made abundantly clear he had no means to pay any civil money penalty.

Given these circumstances and the obvious "state's witness" relationship between Captain Decker and the Agency, I can only conclude the Agency is looking to Respondent Rebecca Irene Fisheries LLC as the source for payment of any imposed civil money penalty.

Consequently, I will concentrate on the various arguments and defenses raised by Rebecca Irene which predominately deal with the size or amount of any penalty.

Respondent argues the civil penalty is excessive given the Agency's penalty schedule, that it has no ability to pay such a heavy price⁶, and together with the proposed suspensions would drive the Respondent out of business.

Injury to the Halibut Fishery

Respondent emphasizes that among the circumstances I am to consider are those that show the injury to the fishery was minimal or non-existent. In particular, Respondent says that the Agency's claim of injury is belied by the testimony of its own official,

⁶ Respondent makes much of a claim that the Agency had an obligation to show that it had the ability to pay. To the contrary, the Agency correctly points out that a respondent has that obligation under the statute and implementing regulations. Regardless, the Respondent did present evidence of its financial condition and the impact of the proposed civil penalty and permit sanctions would have on Respondent's continued viability.

Andrew Smoker, that there was even a surplus of Halibut at the end of the seasons. See Respondent's Brief page 24 citing Transcript Vol II, p. 83, 128-129, 134-135. They also point out their own expert's opinion supporting that conclusion. See Respondent's Brief at page 24 citing Transcript Vol V, pp 6-9, 27-28 and Respondent's Exh. 35.

On one hand, the Agency's witness Andrew Smoker offered his opinion on the health and injury to the Halibut fishery resulting from the presorting activity of Respondents. His opinion is derived from data generated by the observer reports. Indeed he says the observer data is the only source of such information and the Agency has no alternatives. TR-II, p. 144-146.

But, Mr. Smoker testified “. . . if the data are corrupted, we're left with . . . no satisfactory way to understand what really occurred.” TR II, p. 147 cited in Agency Reply Brief at page 15. The Agency then says if the data is corrupted as suggested, then it is prevented from making an accurate determination of injury. See Agency Reply Brief at page 15.

Yet Mr. Smoker offers an opinion which essentially says the Rebecca Irene was *solely* responsible for injury to the Halibut fishery.

On the other hand, Respondent relies heavily upon the testimony of Steven Hughes who opines that no such injury occurred but instead the Halibut stocks were not endangered by the Rebecca Irene's presorting. Indeed he claims there was a surplus for the year 2001 of 155 metric tons.

He also opines that the target fisheries were not extended as the Agency contends, at most 1.4 days. See Respondent's Brief at page 26-27. This conflicts with the Agency's contention that the fishery was extended by 6.67 days.

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Mr. Hughes also admits that the underlying data upon which he relied could be corrupted or biased to such an extent that the validity of stock assessments could be affected. See TR-IV pp. 147-148 cited in Agency Reply Brief at page 15.

Clearly the opinions of these experts are diametrically opposed.

So, whose opinion am I to accept? If the data are corrupted as the Agency suggests, then the opinion of each expert could be considered speculative.

An opinion of an expert need not be certain to offer it. United States v. Spencer, 439 F2d 574 (2nd Cir. 1971)(handwriting expert). The data relied upon by Mr. Smoker and Mr. Hughes appear to be of the kind relied upon by experts in their field. However, I am not certain of its quality or reliability. See, Fed. Rules of Evidence, Rule 703 and 5 USC § 557 (evidence in an administrative hearing must be substantial, probative and reliable).

I am unable to confidently rely upon either of the opinions of Mr. Smoker or Mr. Hughes. Therefore, I am unable to determine, with what little information remains, the effect upon the health of the Halibut fishery as a consequence of the presorting of the Rebecca Irene.

But, what I am able to conclude is that there is a lack of substantial, probative and reliable evidence showing that the presorting was extensive and consistent throughout the time period of the alleged violations. Had there been such evidence, a conclusion would have been more likely drawn that there was substantial injury to the fishery. Attempting to extrapolate such a conclusion from what each expert admits is flawed data, all of which was derived from only a handful of observer data, results in too much speculation for me to find such an injury.

History of Violations

I have not been presented with evidence of a history of violations by the Respondent, Rebecca Irene Fisheries, LLC. At most the Agency has shown that the management company employed by the Respondent manages other fishing vessels one of which [F/V UNIMAK] engaged in presorting. The Agency appears to claim that this sister vessel's conduct should be imputed to Respondent Rebecca Irene for purposes of determining the civil money penalty. I will impute that only for the purposes of showing that the management of the vessel (Iquique LLC) knew or should have known there was a likelihood that other fishing vessel crews would be prone to engage in presorting such that measures were needed to prevent such from occurring. In this respect, the Respondent argues that management memorandum to the Captain and crew of the UNIMAK was just such a measure. However, I am not persuaded by that claim. There is no indication that the memo was circulated among the other vessels' Captains and crew, let alone the REBECCA IRENE.

Ability to Pay

The Respondent Rebecca Irene argues that imposition of such a \$360,000.00 monetary penalty and two 45 day permit suspensions would put the company out of business. See Respondent's Brief page 28.

Respondent points to the expert financial testimony of Kent W. Mordy. In his report [Respondent Exh. 8B] he concludes that the proposed monetary penalties together with the permit sanctions would cost the Respondent \$2,016,316.00, a sum which it cannot pay because of its precarious financial condition, large existing debt and inadequate earning capacity.

This conclusion is disputed by the Agency contending, Mr. Mordy did not opine that the cost of \$2,016,316.00 would result in driving Respondent out of business; his actual opinion is that Respondent would need to borrow \$1.4 million which would have to be guaranteed by its shareholders or provide other acceptable collateral due to Respondent's poor financial condition, heavy existing debt and low earning capacity. Agency Reply Brief p. 10. Moreover, the Agency says Mr. Mordy's opinion is not trustworthy because it is based on flawed assumptions regarding certain costs.

The Agency says these flawed assumptions are: (1) a crew cost of \$1.4 million during the period of the two suspensions; (2) interest expense of 8 percent; (3) failure to consider the F/V ARICA as uncompensated collateral for a loans.

The Respondent says that the shareholders cannot be required to bail out the Respondent with loan guarantees because this effectively pierces the corporate veil. Additionally, the interest rate to a necessitous borrower would be as much as 8%, *i.e.*, 4% over prime is obvious. Finally, the impact of a permit sanction may be considered citing *In the Matter of Mark G. Crowell*, 1995 NOAA LEXIS 9. See Respondent's Reply Brief at pp 9-10.

I have not been presented with any evidence that Respondent has paid crew members while the F/V Rebecca Irene was not fishing. And, when the season commenced I have not seen evidence that obtaining a crew was difficult. Consequently, I cannot assume as does Mr. Mordy that the Respondent would incur a cost of \$1.4 million during the proposed 90 day permit suspensions.

I can accept the likelihood that Respondent may have to incur a higher interest rate due to the fact it may very well be considered by a lender to be a necessitous borrower.

I cannot determine one way or the other whether the F/V ARICA is an appropriate collateral given that it is a separate entity. Moreover, its owners may not be willing to place it as collateral. This may be true even if Iquique, LLC is the managing entity for both.

Consequently, I do see some financial difficulties for Respondent but do not agree that they are insurmountable.

Other Matters as Justice May Require

I am concerned that the violation charged in Count II arises from the same set of facts which are essential to a violation of Count I. The unlawful and intentional conduct alleged in Counts I and II encompass the same behavior and circumstances giving rise to the violations. In order to bias the on board observer's reports the Captain and crew had to engage in deceptive conduct including use of a sliding or removable panel on the conveyor belt. So, while that allows for separate charged violations, *i.e.*, the absence of duplicity, I will consider this in determining the civil penalty.

Count II is centered on the use of the sliding panel as an "impediment" to the observer's faithful performance of her duties. Captain Decker and his crew's use of the panel was ingenious. After all, the evidence shows that it was installed as a movable panel principally to allow access to the belt to clear clogging and to service the belt. Its location was such that the observer's view of the area was obscured. Nevertheless, it was the principal means of accomplishing the presorting alleged in Count I. In other words, a mere allegation of biasing and interfering with an observers duties without more would be a bit vague and potentially subject to a more definite statement request.

Thus, the aggregation of the maximum penalties appears to be unwarranted punishment for essentially the same wrongful conduct. Nevertheless, this conduct demands a price which cannot be written off as the cost of doing business.

This is also a case where the Respondent Rebecca Irene LLC as the owner⁷ did not personally participate in the violations found proven. Its responsibility is based upon its relationship as owner of the F/V REBECCA IRENE and its management's judgment in hiring Captain Decker and placing him in a position where he violated the statute and regulations cited.⁸ Indeed management was well aware of the illegality of presorting but did little to guard against, let alone remind Captain Decker and his crew of that illegality as it did to the captain and crew of the F/V UNIMAK. See Resp. Exh. 36. I don't see where that warning was issued to the crew of the F/V Rebecca Irene or to any other crew of any other managed vessel. Indeed both management and owner enjoyed the fruits of that illegality.

In considering the amount of the penalty to be imposed, I therefore find that the amount of \$240,000.00 civil penalty would be reasonable under the circumstances.

I now turn to the proposed permit sanction. The Agency requests that two separate 45 day periods of suspension be imposed for two different fishing seasons. This proposal suffers from the same compounding effect as the proposed civil money penalty. Consequently, I will impose a 60 day permit suspension for the season which is the most productive for the target species involved here.

IT IS THEREFORE ORDERED, that a civil money penalty in the amount of \$240,000.00 is hereby assessed against the Respondents Rebecca Irene Fisheries, LLC and

⁷Here I refer only to the Limited Liability Company and not to Mark Decker who is nominally an owner.

⁸Compare to *In the Matter of Ronnie and Charlotte Boggess, Respondents*, 4 O.R.W. 260; 1985 NOAA LEXIS 33; (NOAA 1985).

Mark Decker jointly and severally.

IT IS FURTHER ORDERED that the relevant fishing permits for the F/V REBECCA IRENE are suspended for 60 days commencing on January 1 of the year after which this decision becomes a final order of the Agency.

IT IS FURTHER ORDERED, that any petition for review of this decision must be filed within 30 days of this date with the Administrator of the National Oceanic and Atmospheric Administration as provided in 15 CFR § 904.1 *et seq.*

Dated: May 26, 2004



Edwin M. Bladen
Administrative Law Judge

NPFMC ENFORCEMENT COMMITTEE REPORT
June 8, 2004

The Council's Enforcement Committee met with the following persons in attendance: Roy Hyder (Chair); Jeff Passer (NOAA Enforcement); Al McCabe (USCG); Garland Walker (NOAA GC); Sue Salveson (NOAA SF); Herman Savviko (ADFG); Chris Oliver (NPFMC staff).

Other attendees included: Greg Busch and Andy Schroeder (USCG); Jim Balsiger; Rachel Baker; Jon McCracken; David Witherell; Bubba Cook; Bill Wilson; Ben Muse; Melanie Brown; Jon Kurland; Dave Wood; Teresa Kandianis; Joe Childers; Bill Karp

A summary of the discussions follows, with recommendations as noted:

Aleutian Islands Pollock allocations

The Committee reviewed the Executive Summary of the analysis focusing on key issues associated with monitoring and enforcement. The Committee concurs with the required provisions as recommended in the analysis (3.2 – increased monitoring alternative), including the provision to disallow mixing of AI Pollock with BS or GOA Pollock by catcher vessels, regardless of observer coverage levels on these vessels (noting that observer coverage does not alleviate a host of other monitoring issues associated with mixing fish). Regarding the key issue of observer coverage for vessels under 60' (in the event the Council chooses to allow under 60' vessels to participate at the outset), the Committee recommends that a 30% coverage requirement be applied. Discussion by the Committee noted that some information is necessary relative to harvests by these vessels, for both management and enforcement aspects of the fishery, given that up to 50% of the harvest could be taken by these vessels in the future. However, 100% coverage is likely unnecessary to obtain such information, particularly given the costs and other factors associated with a 100% requirement. The 30% requirement would be applied relative to days fished in the AI Pollock fishery (as opposed to all fisheries in which these vessels might participate). Additional safety benefits of an observer requirement were also noted by the Committee. Existing VMS requirements for pollock-endorsed vessels are presumed to apply.

Enforcement Precepts paper

The Committee reviewed an enforcement precepts paper in April, which contained general provisions related to enforceability of regulations. This paper is intended to advise managers and analysts when developing management programs, relative to monitoring and enforcement aspects. NOAA Enforcement and USCG representatives recommended, and the Committee concurred, that they update the precepts paper to include recommendations from the Committee's April report. The revised paper also will include an addendum that provides a succinct overview of issues typically associated with traditional enforcement measures, e.g. closed areas, closed seasons, trip limits, gear restrictions, etc. The revised precepts paper will be widely distributed to Council and agency staff, and will be presented to the Council, SSC, and AP at the October Council meeting.

HAPC alternatives

The Committee reviewed changes made to the boundaries of some proposals, either in the staff discussion paper or via the Council Committee for proposal #8. Generally, the Committee reiterates its earlier recommendations that proposed areas should be geographically defined, they

should not be of irregular shape, and that they should specify which gear types are and are not allowed. The enforcement community recognizes that multiple factors were considered in the development of HAPC #8, of which minimum size of the HAPC is but one factor. While the small size of HAPC #8 may diminish the effectiveness of its enforcement, other positive factors such as use of straight lines, clear management measures and diminished incentives to set gear in the modified proposal for HAPC #8. The diminished incentives worked out through industry participation, which excluded a large portion of the original proposal, was an integral component of the overall acceptability and appears consistent with the Council's intent to avoid core fishing areas.

An attached matrix of enforcement issues relative to each of the 23 original proposals is intended to provide the Council a summary reference document. As proposals are further developed or modified, this matrix will be updated.

Retention pools

The Committee again reviewed issues associated with the concept of retention pools as a mechanism to comply with requirements of Amendment 79 (minimum groundfish retention standards). Regarding terminology, the Committee recognized that 'retention pools' as proposed, in reality are a form of cooperative, and pose many of the same issues relative to requirements/agreements necessary to effect individual or collective accountability. The Committee concurs that participation in such a retention pool would require compliance with the scale and observer requirements proposed under Amendment 79. As an analysis of alternatives for retention pools is developed, the Committee may have additional comments.

Observer role in enforcement

The Committee generally discussed the issue of the observer's role relative to enforcement (vs scientific sampling for example), noting increased concerns relative to some duties and reports generated by observers. As with previous discussions by the Enforcement Committee (and in discussions by the Observer Committee), it was recognized that many observer duties relative to compliance monitoring are the result of regulations and requirements developed through Council management programs, and that observer sampling duties are often difficult to differentiate as to 'enforcement' uses vs scientific uses. It was also noted that some tasks specifically required by observers (such as MARPOL or marine mammal interactions or safety violations) do fall outside the duties directly associated with fishery management and science. After additional discussion the Committee determined that no further action by the Committee is necessary at this time.