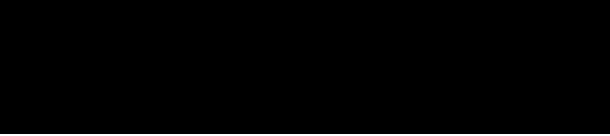




December 19, 2023

Via Electronic Mail

Julian David Gonzalez



Re: Case No. SE2203729–Julian David Gonzalez
Appeal of Modified Written Warning

Dear Mr. Gonzalez:

This appeal concerns a modified written warning issued on May 5, 2023, by the National Oceanic and Atmospheric Administration (NOAA), Office of Law Enforcement (OLE) to Julian David Gonzalez (Respondent) for fishing in violation of prohibitions, restrictions, and requirements applicable to seasonal and/or area closures under 50 C.F.R. § 622.13(b), and specifically, for possession of a queen snapper and a blueline tilefish while located in the East Hump Marine Protected Area (MPA). Respondent timely appealed the modified written warning via email dated June 5, 2023.

For the reasons discussed below, I affirm the modified written warning.

I. Standard of Review

NOAA procedural regulations provide Respondent with an opportunity to seek Agency review of a written warning issued by an authorized officer by submitting a written appeal to the NOAA Deputy General Counsel within sixty (60) days of the date of receipt of the written warning.¹ An appeal from a written warning must present the facts and circumstances that explain or deny the violation described in the warning.² On appeal, the NOAA Deputy General Counsel has discretion to affirm, vacate, or modify the written warning.³ The NOAA Deputy General Counsel's determination constitutes final agency action for purposes of judicial review.⁴

A written warning is the lowest sanction that NOAA issues for violations of the statutes and regulations that it is authorized to enforce. Nonetheless, a written warning may be considered a prior offense, and may be used as a basis for dealing more severely with a subsequent offense.

¹ 15 C.F.R. § 904.403(b).

² *Id.* § 904.403(b)(1).

³ *Id.* § 904.403(c).

⁴ *Id.*



II. Legal Framework

The National Marine Fisheries Service (NMFS) and the South Atlantic Fishery Management Council (Council) manage fisheries in the Exclusive Economic Zone of the South Atlantic pursuant to their authority under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. §§ 1801 et seq. The Council is responsible for drafting Fishery Management Plans (FMPs) for each fishery under its authority,⁵ and the Secretary of Commerce has the authority to “approve, disapprove, or partially approve of plans and amendments.”⁶ The Snapper-Grouper FMP for the South Atlantic manages 55 species of fishes, which include snappers, groupers, porgys, triggerfish, jacks, tilefishes, grunts, spadefishes, wrasses, and sea basses.⁷ Amendment 14 to the Snapper-Grouper FMP establishes eight Marine Protected Areas, including the East Hump MPA.⁸

The East Hump MPA is in deep waters of the Florida Keys, located approximately 13 nautical miles southeast of Long Key, and is about 50 square nautical miles in size.⁹ The East Hump is one of a series of seamounts in the Florida Keys known for productive fish habitat.¹⁰ The MPA is located in waters that are 194 to 296 meters (636 to 971 feet) deep, while the tops of the humps are 155 to 165 meters (509 to 541 feet) deep.¹¹ The purpose of the MPA is to protect a portion of the population and habitat of long-lived, slow growing, deepwater snapper-grouper from fishing pressure.¹²

Fishing for, or possession of, South Atlantic snapper-grouper are prohibited in the East Hump MPA. The prohibition on possession, however, does not apply to a person aboard a vessel that is in transit with fishing gear appropriately stowed.¹³

The Magnuson-Stevens Act makes it “unlawful . . . for any person to violate any provision of [the Magnuson-Stevens Act] or any regulation or permit issued pursuant to [the Magnuson-Stevens Act].”¹⁴ NOAA is authorized to enforce violations of the Magnuson-Stevens Act.¹⁵ Pursuant to NOAA regulations, a written warning may be issued in lieu of assessing a civil penalty or initiating criminal prosecution for a violation of the Magnuson-Stevens Act.¹⁶ A

⁵ 16 U.S.C. § 1853.

⁶ *Id.* § 1854(a)(3).

⁷ 50 C.F.R. pt. 622, subpart I.

⁸ 74 Fed. Reg. 1621 (Jan. 13, 2009); 50 C.F.R. § 622.183.

⁹ 74 Fed. Reg. at 1630; 50 C.F.R. § 622.183(a)(1)(i)(h).

¹⁰ *Id.*; *Florida Keys Humps Are Like Mecca To Avid Sport Fishermen*, Florida Keys Vacation, <https://www.florida-keys-vacation.com/Florida-Keys-Humps.html>.

¹¹ 74 Fed. Reg. at 1630.

¹² 74 Fed. Reg. at 1621.

¹³ 50 C.F.R. § 622.183(a)(1)(i); *id.* § 622.183(a)(1)(ii) (“Fishing gear appropriately stowed means — . . . (D) Terminal gear (i.e., hook, leader, sinker, flasher, or bait) used with an automatic reel, bandit gear, buoy gear, handline, or rod and reel must be disconnected and stowed separately from such fishing gear. A rod and reel must be removed from the rod holder and stowed securely on or below deck.”).

¹⁴ 16 U.S.C. § 1857(1)(A).

¹⁵ 16 U.S.C. § 1861(a). In this case, the violation was documented by an officer for the Florida Fish and Wildlife Conservation Commission (FWC) and referred to NOAA for charging.

¹⁶ 15 C.F.R. § 904.400.

written warning does not, itself, impose a penalty, but as noted above may be used as a basis for dealing more severely with a subsequent offense.¹⁷

III. Factual Background

On May 28, 2022, Florida Wildlife Commission (FWC) Officers Bret Swensson and Ryan Trueblood observed the fishing vessel *Seacurity* actively fishing within the boundaries of the East Hump MPA.¹⁸ As they approached the vessel, Officer Swensson noticed a fishing rod with an electric reel on it engaged in bringing the line back into the vessel. Once the reel stopped, the line was brought into the vessel by hand and had several hooks baited with squid and a large weight attached to the bottom, which he noted in his report is consistent with bottom fishing for snapper-grouper species. Officer Swensson then boarded and inspected the contents of a cooler that contained one blueline tilefish and one queen snapper, several mahi mahi, and a blackfin tuna. Officer Swensson explained to Respondent that the vessel was inside of the East Hump MPA, which was closed to bottom fishing for snapper-grouper species. Officer Swensson noted in his report that the two GPS units on the vessel did not display the East Hump MPA, but the Respondent had the Navionics App on his phone which, when opened, displayed the MPA and identified the vessel coordinates within the MPA boundaries. Officer Swensson's report contains a photograph of the fish in the cooler and a photograph of one of the vessel's GPS units depicting the vessel's position coordinates. Officer Swensson informed the Respondent he would be referring the matter to NOAA. Officer Swensson did not confiscate the fish.

Officer Swensson filled out an FWC incident summary report on May 28, 2022,¹⁹ and transmitted it to NOAA on June 8, 2022.²⁰ On February 13, 2023, NOAA Office of Law Enforcement Officer Russell Kiefer reviewed the June 8, 2022 incident report and conducted a check for prior violations by Respondent and found none.²¹ NOAA issued a written warning to Respondent on February 15, 2023. Respondent timely appealed by email dated February 21, 2023.²²

In his appeal, Respondent argued, among other things, that “[a]s per your warning, you stated that we violated part (50-CFR 622.13(n)). Yet you did not attach such statute [sic].”²³ On April 24, 2023, upon review of the appeal, the NOAA Deputy General Counsel found that NOAA failed to provide the statutory and regulatory basis for the written warning and issued a final decision remanding the written warning to NOAA to modify the order in accordance with the decision.

¹⁷ *Id.* § 904.401; see also NOAA Office of General Counsel – Enforcement Section, *Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions* (Jun. 24, 2019), <https://www.gc.noaa.gov/documents/Penalty-Policy-FINAL-June242019.pdf>.

¹⁸ FWC Incident Summary Report, Incident # FWC22ON0045220, at 3 (May 28, 2022),

¹⁹ *Id.*

²⁰ FWC/NOAA Federal Case File Check List (June 8, 2022).

²¹ NOAA Investigative Report, Incident # 2203729 (February 13, 2023).

²² Email from Gonzalez to NOAA, GONZALEZ INCIDENT # SE2203729 APPEAL (February 21, 2023).

²³ *Id.*

NOAA issued a modified written warning on May 5, 2023,²⁴ and Respondent timely appealed the modified written warning via email dated June 5, 2023.²⁵

In his appeal, Respondent explains he and his companions were in the area because they saw “a Chug with 25 Cubans in need of assistance” about 20 minutes before Respondent’s vessel was boarded.²⁶ Respondent then lists eight reasons why the written warning should be vacated:

- 1-We were in over 600 feet of water and were never anchored.
- 2-No one ever viewed us fishing in the so-called restricted area. They only boarded and viewed what was onboard at such time.
- 3-No one from NOAA was onboard the FWC vessel at the time of our illegal boarding.
- 4-We were in Federal waters at the time of boarding.
- 5-FWC officer reviewed our 2-Garmin GPS’s which showed that we had been fishing in the Marathon Humps earlier and that is where any fish on board were LEGALLY obtained.
- 6-FWC reviewed our recently updated Garmin GPS’s as well as our Simrad GPS as well as our Navionics maps and there were ZERO indications on any of the maps as to any restrictions on fishing in that area.
- 7-We were having lunch and preparing to troll some birds diving in the area for some Mahi or Tuna above the surface.
- 8-FWC explained to us that they are having issues enforcing the rules as they were not clear.²⁷

In addition to the enumerated arguments, Respondent reasserts his former argument that NOAA failed to include a copy of the statute in the written warning. Respondent also requests discovery²⁸ and “the FWC’s sworn and signed testimony to serve as an agency for NOAA in federal waters,” and he asserts that he is “submitting this appeal under protest as I do not have the requested evidence to properly/legally defend myself.”^{29, 30}

²⁴ Written Warning (Modified), In the matter of Julian David Gonzalez, Incident Number 2203729 (May 3, 2023) (Modified Written Warning).

²⁵ Email from Gonzalez to NOAA, Re: INCIDENT # SE2203729 (June 5, 2023).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Respondent also requested discovery in emails dated May 10, 2023 and May 30, 2023. These emails were sent after NOAA issued the revised written warning (May 3, 2023), but before Respondent appealed the revised written warning (June 5, 2023).

²⁹ Email from Gonzalez to NOAA, Re: INCIDENT # SE2203729 (June 5, 2023).

³⁰ Via email dated April 24, 2023, Respondent requested “a hearing before an independent judge” and noted he “had a Federal Agent on my boat that day [who] can testify to the facts.” NOAA did not address the request for a hearing in its July 12, 2023 order denying discovery because the request for a hearing was not properly before NOAA, as the request was submitted immediately after NOAA issued its final decision on appeal and before OLE issued a modified written warning. Additionally, in Respondent’s June 5, 2023 appeal email, he re-phrases the request for a hearing as follows: “If you do the correct thing and just drop this warning i [SIC] thank and praise you. If not I request a formal hearing before a judge and give me my day in court.” Respondent has the opportunity to seek judicial review of NOAA’s final agency decision on the modified written warning, and as such, NOAA does not need to address the request for a hearing in this decision.

On July 12, 2023, NOAA denied the request for discovery, but construed the request as a request for records under the Freedom of Information Act (FOIA),³¹ and granted Respondent an additional 15 days to submit additional defenses, following NOAA's issuance of a final written determination of the FOIA request. Respondent submitted additional arguments on November 1, 2023:

[A]fter reviewing the footage of the body cams and pictures from the FWC officers iPad it is clear that there is absolutely no way that I could've known that this area was restricted to deep dropping. I consulted two Federal Judges that I have worked with in the past and they basically just laughed at the fact that this is still an issue. The officers never saw us with lines in the water and our GPS does not show us going back and forth which is typical in deep dropping.³²

IV. Discussion

Procedural Arguments

As an initial matter, Respondent presents three procedural arguments. First, Respondent again argues that NOAA failed to include a copy of the statute in the written warning. Second, Respondent requests body camera footage of the boarding and argues that, without it, he lacks evidence to legally defend himself. Third, Respondent argues that NOAA was not present during the violation, the FWC officer did not have jurisdiction in Federal waters to enforce NOAA's laws, and that individual FWC officers must provide sworn and signed testimony in order to have authority in federal waters.

First, NOAA's regulations do not require that NOAA provide a copy of the statute that is the subject of the warning, but require instead that a written warning "state the factual and statutory or regulatory basis for its issuance."³³ NOAA's modified written warning dated May 5, 2023 satisfies this requirement by providing the statutory citation for the Magnuson-Stevens Act, 16 U.S.C. § 1857, which makes it unlawful for any person to violate any provision of the Act or regulation or permit issued under the Act.³⁴ The modified written warning also identifies and quotes two regulatory provisions violated: 50 C.F.R. § 622.183(a)(1)(i), prohibiting fishing or possessing South Atlantic snapper-grouper in a MPA and establishing the East Hump MPA; and 50 C.F.R. § 622.13(n), which prohibits fishing in violation of area closures.³⁵ The modified written warning also provides the factual basis for the violation of these provisions:

[W]hile in the East Hump Marine Protected Area (MPA), you were observed by law enforcement personnel actively fishing with gear used to target South Atlantic snapper-grouper species and were in possession of a queen snapper and a blueline tilefish, both of

³¹ 5 U.S.C. § 552; 15 C.F.R. § 4.4.

³² Email from Gonzalez to NOAA, Re: Written Warning Appeal SE2203729 – Order (November 1, 2023).

³³ 15 C.F.R. § 904.402 (requiring a written warning "State that it is a 'written warning;' State the factual and statutory or regulatory basis for its issuance; Advise the respondent of its effect in the event of a future violation; and Inform the respondent of the right of review and appeal under § 904.403.").

³⁴ Modified Written Warning at 1.

³⁵ *Id.*

which are South Atlantic snapper-grouper species, with your vessel not in transit and your vessel's fishing gear not stowed.³⁶

I find that this modified written warning fulfills the requirements to provide the basis for the violation.

Second, as explained above, NOAA denied Respondent's request for discovery, including the request for body cam footage, because there is no right to discovery under NOAA's regulations governing appeals of written warnings.³⁷ However, NOAA converted the request into a FOIA request, and NOAA released the body camera footage to the Respondent. NOAA then provided Respondent time to submit additional defenses after reviewing the footage, and Respondent submitted additional defenses on November 1, 2023. As such, I find that this argument is now moot.

Third, FWC Officer Swensson was authorized to enforce NOAA's regulations in federal waters under a cooperative enforcement agreement signed by NOAA and the State of Florida in July 1999.³⁸ Section 1861 of the Magnuson-Stevens Act specifically authorizes the Secretary of Commerce, as delegated to NOAA, to enter into agreements with state agencies to authorize the deputization of state law enforcement officers to carry out enforcement duties under the Act.³⁹ There is no requirement under the statute or the cooperative enforcement agreement that individual FWC officers must provide "sworn and signed testimony to serve as an agency for NOAA in federal waters," as alleged by Respondent.⁴⁰ Furthermore, in this case, NOAA issued the written warning pursuant to its authorities under the Magnuson-Stevens Act after receiving FWC Officer Swensson's investigation report. I find that this written warning was properly issued by NOAA under the jurisdiction of the Magnuson-Stevens Act.

Merits Arguments

Respondent's arguments on the merits can be summarized as follows: (1) Respondent was not actively fishing in the MPA; (2) Respondent possessed snapper-grouper species caught outside of the MPA; and (3) Respondent's GPS units did not display the MPA, so there was no way he could have known the area was restricted.

First, Respondent's claim that he was not actively fishing in the area is not supported by the record. Officer Swensson's written investigation report indicates that he observed baited gear in the water prior to boarding Respondent's vessel which, when retrieved, had several hooks baited with squid and a large weight attached to the bottom, typically used for bottom fishing for snapper-grouper species. Officer Swensson's body camera footage at the time of boarding confirms the Officer's report, including capturing a member of the fishing group actively bringing a line onboard with what appears to have the baited gear described in Officer

³⁶ *Id.*

³⁷ 15 C.F.R. § 904.403.

³⁸ NOAA and State of Florida, *COOPERATIVE ENFORCEMENT AGREEMENT* (1999), https://floridadep.gov/sites/default/files/Coop_enforcement_agreement071299.pdf.

³⁹ 16 U.S.C. § 1861(h).

⁴⁰ Email from Gonzalez to NOAA, Re: INCIDENT # SE2203729 (June 5, 2023).

Swensson's report. I find that there is sufficient evidence that Respondent was fishing for snapper-grouper species in the MPA.

Second, the written warning states that Respondent was in possession of snapper-grouper species in the MPA, which is prohibited by the regulations. Respondent does not contest in his appeal that he was in possession of snapper-grouper in the MPA, and photographs and body camera footage provide sufficient evidence for possession. Respondent argues that the fish were caught outside of the MPA, as evidenced by his GPS. Respondent does not submit any supporting evidence from his GPS. Officer Swensson's report does not discuss examining Respondent's GPS for this purpose, and the body camera footage does not contain any discussion between Respondent and Officer Swensson about where the fish were caught. This argument also is irrelevant—the only defense for possession of snapper-grouper in the MPA is if a vessel is transiting the area with fishing gear appropriately stowed. Respondent does not allege that he was in transit or that his gear was properly stowed. Respondent states in his appeal that at the time of the boarding, they had stopped for lunch and were preparing to troll. This does not satisfy the definition of “in transit,” which means “direct, non-stop progression through the MPA.”⁴¹ Officer Swensson's report and the body camera footage of baited gear being brought in from the water at the time of the boarding additionally demonstrate that the gear was not properly stowed.⁴² I find that Respondent was in possession of snapper-grouper in the MPA.

Third, Respondent's assertion that his onboard GPS units did not display the MPA is not a defense. Holders of fishing permits are responsible for knowing the regulations, including the location of any areas closed to fishing.⁴³ The coordinates of the MPA are provided in the regulations. Officer Swensson verified that Respondent's phone displayed the MPA on the Navionics App, contrary to Respondent's allegation in his appeal. While lacking knowledge or intent is not a legal defense to a violation of a fishery regulation, NOAA considers these factors when assessing a penalty.⁴⁴ Violating an area-based gear restriction is typically assessed with a more serious Level II or Level III penalty.⁴⁵ Issuance of a written warning is the lowest form of penalty, and is appropriate in light of Respondent's onboard GPS units not depicting the MPA, as well as Respondent's lack of prior offenses and cooperation during the boarding.

⁴¹ 50 C.F.R. § 622.183(a)(1)(ii).

⁴² *Id.* (“Fishing gear appropriately stowed means — . . . (D) Terminal gear (i.e., hook, leader, sinker, flasher, or bait) used with an automatic reel, bandit gear, buoy gear, handline, or rod and reel must be disconnected and stowed separately from such fishing gear. A rod and reel must be removed from the rod holder and stowed securely on or below deck.”).

⁴³ A person is strictly liable (i.e., liable without proof of intent that the person knowingly or intentionally violated the law) for violation of conservation-related regulations adopted under the Magnuson–Stevens Act. *See, e.g., Stansell v. Revolutionary Armed Forces of Colombia*, 45 F.4th 1340, 1355 (11th Cir. 2022), quoting *N. Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999); *Roche v. Evans*, 249 F. Supp. 2d 47, 57 (D. Mass. 2003).

⁴⁴ 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(a).

⁴⁵ NOAA Office of General Counsel – Enforcement Section, *Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions* (June 24, 2019), at 24, 30-31, <https://www.noaa.gov/sites/default/files/2023-06/Penalty-Policy-FINAL-June24-2019.pdf>.

V. Conclusion

Based on the foregoing, I affirm the modified written warning. This determination constitutes final agency action.

Sincerely,

GUSTAFSON.KRISTE
N.LYN.1521761314

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Kristen L. Gustafson
Deputy General Counsel
NOAA Office of General Counsel

cc: Jonelle Dilley, Attorney-Advisor, Oceans and Coasts Section, NOAA Office of General Counsel