



Julian David Gonzalez



operations@customprotectionsecurity.com

Via Electronic Mail

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

Dear Mr. Gonzalez:

This appeal concerns a written warning issued 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). On February 21, 2023, Respondent submitted a timely appeal of the written warning via email to the NOAA administrative appeals email address. Among several other arguments, Respondent asserts that he was not fishing in the MPA and was in possession of fish legally caught outside of the area. Respondent also argues that NOAA failed to include in the written warning a copy of the statute he was charged with violating. Pursuant to my authority to modify a written warning, I remand the written warning back to OLE to modify the written warning in accordance with my decision below. If Respondent wishes to appeal the modified written warning issued pursuant to my decision, **Respondent must submit a new appeal within 60 days of receiving 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

¹ 15 C.F.R. § 904.403(b).

² 15 C.F.R. § 904.403(b)(1).

³ 15 C.F.R. § 904.403(c).

⁴ *Id.*



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.

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 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 OLE is authorized to enforce violations of the

⁵ 16 U.S.C. § 1852(a)(1)(C).

⁶ 16 U.S.C. § 1854(a)(3)

⁷ 50 C.F.R. part 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.*; <https://www.florida-keys-vacation.com/Florida-Keys-Humps.html>.

¹¹ 50 C.F.R. § 622.183(a)(1)(i).

¹² 74 Fed. Reg. at 1621.

¹³ *Id.* § 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).

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 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 Trueblood¹⁸ observed the fishing vessel *Seacurity* actively fishing within the boundaries of the East Hump MPA.¹⁹ 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 June 6, 2022. On February 13, 2023, NOAA Office of Law Enforcement Officer Russell Kiefer reviewed the June 6, 2022 incident report and conducted a check for prior violations by Respondent and found none. NOAA issued a written warning to Respondent on February 15, 2023. Respondent timely appealed by email dated February 21, 2023.

¹⁵ See 16 U.S.C. § 1861. In this case, the violation was documented by an officer for the Florida Fish and Wildlife Conservation Commission (FWC) and referred to NOAA OLE for charging. In accordance with section 1861(h) of the Magnuson-Stevens Act, FWC officers are deputized to enforce the Magnuson-Stevens Act under a Cooperative Enforcement Agreement between NOAA and Florida. https://floridadep.gov/sites/default/files/Coop_enforcement_agreement071299.pdf (last visited March 31, 2023); 16 U.S.C. § 1861(h).

¹⁶ 15 C.F.R. § 904.400.

¹⁷ 15 C.F.R. § 904.401; for more information about when Written Warnings may be appropriate, see also NOAA Office of General Counsel – Enforcement Section, Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions (Jun. 24, 2019), available at <https://www.gc.noaa.gov/documents/Penalty-Policy-FINAL-June242019.pdf> (last visited March 31, 2023).

¹⁸ The FWC officers are authorized to enforce NOAA's regulations in federal waters under a 1999 cooperative agreement with Florida entered into pursuant to 16 U.S.C. § 1861(a). The agreement is available at https://floridadep.gov/sites/default/files/Coop_enforcement_agreement071299.pdf (last visited March 31, 2023).

¹⁹ The information in this paragraph is from FWC Officer Swenson's Incident Report # 098036 dated June 6, 2022, which is Attachment 1 to NOAA OLE Incident Report # 2203729, dated February 13, 2023.

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. 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. Even almost one year later the top 3 GPS manufacturers have yet to indicate your so-called restricted 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. As per your warning, you stated that we violated part (50-CFR 622.13(n)). Yet you did not attach such statute [SIC].²⁰

IV. Discussion

The written warning issued by OLE Assistant Director Manny Antonaras did not satisfy NOAA’s requirement that a written warning “state the factual and statutory or regulatory basis for its issuance.”²¹ Specifically, the written warning omitted the statutory basis in the following sentence: “This letter serves as formal notification of the issuance of a Written Warning under the (Major Statutes) (hereafter, “Act”).” Additionally, the written warning letter omitted the regulatory citation for the following: “Specifically, you were in possession of a queen snapper and a blueline tilefish while located in the East Hump Marine Protected Area.” This sentence should have cited to 50 CFR 622.183(a)(1), which provides the specific prohibitions for fishing or possession of snapper-grouper in the East Hump MPA, and the exception to the prohibition on possession for vessels when transiting the MPA with fishing gear appropriately stowed.²²

While the failure to identify and cite to the Magnuson-Stevens Act and the East Hump MPA regulations may have been an innocent oversight, the omission was not a wholly harmless error. A written warning must provide this information to the respondent as a matter of his/her basic due process right to be informed of the nature and cause of the violations of which s/he is accused.²³

In this matter, the written warning appears to have provided enough information to allow Respondent to raise several arguments in his defense, so I find the omissions in the notice do not

²⁰ Email from Gonzalez to NOAA, Re: GONZALEZ INCIDENT # SE2203729 APPEAL, February 21, 2023.

²¹ 15 C.F.R. § 904.402

²² *Id.* § 622.183(a)(1)(i); *id.* § 622.183(a)(1)(ii).

²³ *See, e.g.*, U.S. Const. 6th Am. (“In all criminal prosecutions, the accused shall enjoy the right to . . . to be informed of the nature and cause of the accusation.”) The issuance of a written warning is a civil, not criminal matter, but a written warning may be used to impose more serious penalties, including criminal, in any future violations.

warrant overturning the written warning. Instead, I remand to OLE to modify the written warning in accordance with this decision. Should the Respondent wish to appeal the written warning, as modified, he must submit a new appeal within 60 days of receipt. The modified written warning will constitute a new agency action.

V. Conclusion

Based on the foregoing, I hereby remand this written warning to OLE to modify in accordance with this decision letter. If Respondent wishes to appeal the modified written warning, he **must submit a new appeal within 60 days of receipt** of any modified written warning. This determination constitutes final agency action.

Sincerely,

GUSTAFSON.KRISTEN
.LYN.1521761314
Kristen L. Gustafson
Deputy General Counsel
NOAA Office of General Counsel

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GUSTAFSON.KRISTEN.LYN.1521761314
Date: 2023.04.24 11:14:33 -04'00'

cc: Stacey Weinstock, NOAA Office of Law Enforcement
Adam Dilts, Chief Oceans and Coasts Section, NOAA Office of General Counsel
Jonelle Dilley, Attorney-Advisor, Oceans and Coasts Section, NOAA Office of
General Counsel