



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

OFFICE OF THE GENERAL COUNSEL

December 20, 2024

Jon Forsythe
[REDACTED]
[REDACTED]
[REDACTED]

Kari Marie Fisheries, LLC
9784 Marine View Drive
Mukilteo, WA 98275

Via Electronic Mail

Re: Kari Marie Fisheries, LLC and Jon Forsythe
Incident Number 2403867
Appeal of Written Warning

Dear Mr. Forsythe:

This appeal concerns a written warning issued by the National Oceanic and Atmospheric Administration (“NOAA”), Office of Law Enforcement (“OLE”) to Kari Marie Fisheries, LLC and Jon Forsythe (collectively “Respondents”). The written warning found that Respondents violated 50 CFR § 679.7(m)(1)(ii), a regulation pertaining to the Pacific Cod Trawl Cooperative (“PCTC”) Program, a limited access privilege program to harvest Pacific cod in the Bering Sea and Aleutian Islands Management Area trawl catcher vessel sector. Specifically, no person may “use a vessel to catch or receive a PCTC Program cooperative’s Pacific cod when that vessel was not listed on the Application for PCTC Program CQ [Cooperative Quota].”

Respondents appealed. For the reasons below, I vacate the written warning.

I. Standard of Review

NOAA regulations provide that a respondent may seek review of a written warning by submitting a written appeal to the NOAA Deputy General Counsel within sixty days of receipt of the written warning. *See* 15 CFR § 904.403(b). An appeal from a written warning “must present the facts and circumstances that explain or deny the violation described in the written warning.” *Id.* § 904.403(b)(1). On appeal, the NOAA Deputy General Counsel “may, in his or her discretion, affirm, vacate, or modify the written warning[.]” *Id.* § 904.403(c). The NOAA Deputy General Counsel’s determination constitutes final agency action for purposes of judicial review. *Id.*



II. Legal Framework

In 2023, NOAA’s National Marine Fisheries Service (“NMFS”) issued a rule to implement Amendment 122 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area, which established the PCTC Program, a limited access privilege program to harvest Pacific cod in the trawl catcher vessel sector.¹

Under this program, cooperatives must submit an Application for PCTC Program CQ (hereinafter “CQ Application”) by November 1st each year to obtain an annual CQ permit.² NMFS uses these CQ Applications “to issue CQ permits, establish annual cooperative accounts for catch accounting purposes, and identify specific harvester vessels for each cooperative.”³ NMFS further uses this collected information to review ownership and control information to ensure CQ use caps are not exceeded.⁴

To this end, the regulations prohibit any person from “us[ing] a vessel to catch or receive a PCTC Program cooperative’s Pacific cod when that vessel was not listed on the Application for PCTC Program CQ.” 50 CFR § 679.7(m)(1)(ii).

III. Factual Background

On March 4, 2024, Respondent Forsythe, operator and captain of F/V *Kari Marie*, tendered 48,455 pounds of Pacific cod harvested under the PCTC management program by the F/V *Equinox*.⁵ F/V *Equinox* is a registered vessel for the PCTC Program under cooperative USixty PCTC Association.⁶ That same day, Respondents delivered the Pacific cod to the Unisea processing plant in Dutch Harbor.⁷ F/V *Kari Marie* does not appear as a listed “PCTC Vessel” on NMFS’ PCTC Coop List.⁸

On March 13, 2024, Supervisory Enforcement Officer Phillip Null sent a single written warning to Respondents Kari Marie Fisheries, LLC and Jon Forsythe for unlawfully using an unlisted vessel to receive Pacific cod harvested under the PCTC program.⁹

On March 15, 2024, Respondents appealed via email. The email noted that “it was never [Mr. Forsythe’s] intention to violate any rules,” while recognizing that “ignorance is no excuse for

¹ See 88 Fed. Reg. 53,704 (Aug. 8, 2023).

² See 50 CFR § 679.131(a)(4); see also 88 Fed. Reg. at 53,709.

³ 88 Fed. Reg. at 53,709.

⁴ *Id.*

⁵ See Case File 2403867, Investigation Report, OLE Division Alaska at 5, 18.

⁶ *Id.* at 9–10.

⁷ *Id.* at 18.

⁸ See *id.*, Attachment #1.

⁹ *Id.* at 20–21.

breaking the law.”¹⁰ The email further explained that “the management at Unisea set up the delivery” and it “was those same managers that handled all the registrations and paperwork for [Mr. Forsythe’s] vessel to tender for Unisea.”¹¹ For these reasons, Respondents requested the written warning be vacated.¹²

IV. Discussion

Respondents’ primary explanation is a lack of knowledge about the PCTC regulations. However, “[a]s a general matter, proof of either scienter or *mens rea* is not required to justify the imposition of a civil penalty unless the regulation at issue specifically makes such proof an element of the violation.” *Roche v. Evans*, 249 F. Supp. 2d 47, 57 (D. Mass. 2003) (citing *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999)). Here, there are no explicit mental state requirements in the regulations associated with the PCTC Program or the MSA more broadly. *Cf. id.* (noting “a person is strictly liable for violation of conservation-related regulations adopted under the Magnuson-Stevens Act” and rejecting defendant’s defense that he unintentionally entered a prohibited area). Thus, Respondents’ lack of intent or knowledge would not be a valid defense.

However, upon review of the record and the PCTC Program, I am choosing to exercise discretion in this case and vacate the written warning. *See* 15 CFR § 904.403(c).

Based on the record, regulations, and publicly available documents, it is unclear why, in this case, the F/V *Kari Marie* was left off any CQ Application. While this may have been an oversight of the cooperative applicant, it is also unclear whether tender vessels are adequately accounted for under the PCTC Program’s CQ Application materials. As noted above, no person may use a vessel to “catch or receive” PCTC Program Pacific cod unless listed in a CQ Application. Thus, any vessel expected to catch or receive Pacific cod should be listed on the CQ Application to avoid potential violation of this regulatory provision. However, the CQ Application requests identification of vessels that “may be used . . . to harvest CQ,” without explicit reference to tender vessels.¹³ While the regulations require a CQ Application to generally include “Vessels with FFPs on which the CQ issued to the PCTC Program cooperative will be used,” *see* 50 CFR § 679.131(a)(4), the preamble to the final rule explains that the CQ Application should include

¹⁰ *Id.* at 25.

¹¹ *Id.*

¹² *Id.*

¹³ *See* Application for PCTC Program Cooperative Quota at 8 (June 14, 2023), available at <https://www.fisheries.noaa.gov/s3/2023-07/Application-for-PCTC-Program-Cooperative-Quota.pdf>. Block C of the CQ Application requests “Identification of PCTC Program Cooperative Member Vessels.” Related instructions are, in whole:

Provide a list of any vessels that may be used by the PCTC Program cooperative to harvest CQ during the year for which CQ is applied. This list may not be modified during the year for which the CQ permit is issued. Please list vessel name, Alaska Department of Fish and Game (ADF&G) vessel registration number, U.S. Coast Guard (USCG) documentation number, and FFP number on which the vessel is currently named.

Likewise, the preamble to the CQ Application explains that a CQ permit will list “the vessels that are authorized to harvest fish under that CQ permit.” *Id.* at 1.

“[a] list of trawl CVs [catcher vessels] eligible to harvest a portion of that cooperative’s CQ.”¹⁴ There is no explicit discussion of tender vessels in the *Federal Register* notice of the final rule; however, the Final Regulatory Impact Review/Environmental Assessment for Amendment 122 states: “It is uncertain if tender activity would be a component of the PCTC program. If tendering is allowed under the program, there would need to be monitoring requirements developed for tendered PCTC catch to enable NMFS to account for the harvest by each cooperative.”¹⁵

Absent additional clarity as to why the F/V *Kari Marie* was left off any CQ Application in this case—either because a PCTC cooperative failed to list it, or the application process does not explicitly request it—I choose to exercise my discretion and vacate this specific written warning. Future enforcement of this regulatory provision against tender vessels would benefit from additional explanation about how this regulatory scheme applies to such vessels.

V. Conclusion

For reasons discussed above, I exercise my discretion pursuant to 15 CFR § 904.403(c) to vacate the written warning.

Sincerely,

GUSTAFSON.KRISTEN.LYN.1521761314

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cc: Phillip Null, NOAA Office of Law Enforcement
Adam Dilts, Chief, Oceans & Coasts Section, NOAA Office of the General Counsel
Katherine Clements, Attorney-Advisor, NOAA Office of the General Counsel

¹⁴ 88 Fed. Reg. at 53,709.

¹⁵ See NMFS, Alaska Region, Final Regulatory Impact Review/Environmental Assessment for Amendment 122 at 423 (January 2023), available at <https://www.fisheries.noaa.gov/s3/2023-08/Final-Am-122-BSAI-PCTC-Program-EA-RIR.pdf>.