

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
—BROWNSVILLE DIVISION—

United States District Court
Southern District of Texas
ENTERED

MAR 15 2010

JORGE GONZALEZ, et al.,
Plaintiffs,

V.

UNITED STATES DEPARTMENT OF
COMMERCE, NATIONAL OCEANIC
AND ATMOSPHERIC ADMINISTRATION
Defendant.

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CIVIL NO. B-06-105

Clerk of Court

Memorandum Opinion and Order

On June 30, 2006, the Plaintiffs filed their first Complaint in this Court, challenging four separate but related administrative actions concerning civil penalty assessments and permit sanctions issued by the United States Department of Commerce, National Oceanic and Atmospheric Administration ("NOAA" or "the Agency"). (Doc. No. 1.) On August 11, 2008, Plaintiffs filed their Second Amended Complaint after the actions had gone through the administrative process. (Doc. No. 20.)

On June 24, 2009, this Court issued an Order granting in part and denying in part the Defendant's Motion to Dismiss. (Doc. No. 33.) Specifically, the Court determined that two of the Agency's actions—the Notices of Violation and Assessment of Administrative Penalty ("NOVA") in cases SE001412FM and SE030369FM—were time-barred, and it therefore dismissed all claims arising from those NOVAs. (*Id.* at 15–19.) The remaining NOVAs, SE043022FM ("43022") and SE050027FM ("50027"), were not dismissed in the June 24, 2009 Order. (*Id.* at 20.)

On September 11, 2009, Plaintiffs filed an Opposed Motion for Leave to File Third Amended Complaint. (Doc. No. 34.) As pointed out by the Defendant's Response in Opposition (Doc. No. 36), the proposed Third Amended Complaint continues to assert claims that were previously dismissed by this Court. (See, e.g., Doc. No. 34-1 at ¶ 3.4 (alleging that "[t]he Office of Administrative Law Judge's final action . . . in Case No. SE030369 and . . . in Case No. SE001412FM . . . was incorrect."))¹ Therefore, on September 29, 2009, the Court granted the Motion for Leave to Amend with the caveat that such leave did not revive the dismissed claims. (Doc. No. 39.) Thus, Plaintiffs' Third Amended Complaint is the live pleading in this case. (Doc. No. 34-I.)

Now pending before the Court are the Plaintiffs' Motion for Summary Judgment (Doc. No. 35) and the Defendant's Motion for Summary Judgment (Doc. No. 42). Having considered the parties' motions, replies, and the administrative record, the Court hereby finds that the Defendant's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART and the Plaintiffs' Motion for Summary Judgment is also GRANTED IN PART and DENIED IN PART.

For the reasons discussed herein, the only claim for which Plaintiffs are entitled to summary judgment is the claim that the Defendant denied certain "non-violating" corporate Plaintiffs a hearing on the permit sanctions issued against them for other corporations' nonpayment of penalties. The Agency's decisions denying these Plaintiffs a hearing on the permit sanctions are therefore REVERSED, the corresponding sanctions are VACATED, and the

¹ The Court acknowledges that some attorneys, fearing that the removal of dismissed claims from an amended complaint might result in a claim of waiver on appeal, may repeatedly include dismissed claims in subsequent versions of their complaint.

matter is REMANDED to the Agency for additional administrative proceedings.

I. BACKGROUND²

A. The Dismissed Claims

With the exception of Plaintiff Gonzalez, all other Plaintiffs are Texas corporations that either now or at one time owned a shrimp trawler and that have as their sole officer/director/shareholder Plaintiff Gonzalez. Plaintiff Gonzalez is also a resident of Texas. On September 12, 2002, the Agency issued a Notice of Violation and Assessment of Administrative Penalty ("NOVA") against Plaintiff Rio Purificacion, Inc. in Case No. 1412. 1412/30369 AR Ex. 1.³ The two-count NOVA charged Rio Purificacion with violating both the Endangered Species Act and the Magnuson-Stevens Fishery Management and Conservation Act (the "Magnuson-Stevens Act") by failing to have installed turtle excluder devices and bycatch reduction devices on its vessel, the F/V RIO CONCHOS. *Id.* (citing 16 U.S.C. §§ 1538(a)(1)(G), 1857(1)(A) and implementing regulations). Plaintiff Rio Purificacion was assessed penalties totaling \$14,000. *Id.* Rio Purificacion did not timely seek a hearing, and this Court therefore found that NOVA 1412 became final agency action thirty days after the respondent (Rio Purificacion) was served with the NOVA, or on December 18, 2002. (Doc. No. 33 at 16.) Since Plaintiffs did not timely seek judicial review of NOVA 1412, this Court dismissed all claims arising from NOVA 1412. (*Id.* at 16-18.)

² A timeline summarizing the key events is appended to this opinion and order.

³ The Administrative Record for cases 43022 and 50027 will be referred to as "[Case No.] AR Vol. ___, Ex. ___." In NOVAs 1412 and 30369, the Administrative Record is combined in one volume, and therefore will be referred to as "1412/30369 AR Ex. ___."

On April 22, 2004, the Agency issued a NOVA against Plaintiff Rio San Marcos, Inc. in Case No. 30369. 1412/30369 AR Ex. 11. This NOVA charged Rio San Marcos with violating the Magnuson-Stevens Act when its vessel, the F/V RIO SAN MARCOS, was found fishing for shrimp in the Gulf Exclusive Economic Zone without a valid permit. *Id.* The penalty assessed was \$30,000. *Id.* Rio San Marcos did not seek a hearing within the thirty days provided by agency regulations, and therefore this Court determined that NOVA 30369 became final agency action thirty days after Rio San Marcos was served. (Doc. No. 33 at 19.) Plaintiffs did not seek timely judicial review of NOVA 30369, and therefore this Court dismissed all claims arising from NOVA 30369 as well. (*Id.* at 19.)

B. NOVA 50027

On March 22, 2005, the Agency issued a NOVA against Plaintiff Gonzalez Fisheries, Inc. in Case No. 50027. 50027 AR Vol. 1, Ex. 1. According to the NOVA, Gonzalez Fisheries violated the Magnuson-Stevens Act because its vessel, the F/V AZTECA, was found to be fishing for shrimp in the Gulf Exclusive Economic Zone without a valid permit. *Id.* The NOVA also noted that 1,354 pounds of shrimp from the AZTECA had been seized and sold for \$5,912.65. *Id.* The Agency also assessed a civil penalty of \$30,000 for the violation. *Id.* On May 2, 2005, Gonzalez Fisheries submitted a timely request for a hearing. 50027 AR Vol. 1, Ex. 1; 15 C.F.R. § 904.102(a). Such request was processed, and the hearing ultimately took place before a U.S. Coast Guard Administrative Law Judge on March 21, 2006 in Ft. Myers, Florida. 50027 AR Vol. 4, Ex. 43. On December 4, 2006, the Administrative Law Judge issued a decision finding that Gonzalez Fisheries was liable for the shrimp fishing permit violation, under the doctrine of respondeat superior; that service of the NOVA upon Gonzalez Fisheries had been

proper; that the \$30,000 civil penalty assessed by the Agency was within the guidelines and appropriate; and that Gonzalez Fisheries had the ability to pay the penalty. 50027 AR Vol. 4, Ex. 38 at 14.

Prior to the hearing, Gonzalez Fisheries indicated in its Preliminary Positions on Issues and Procedures that it would be challenging the amount of the penalty assessed due to its inability to pay the full amount of the penalty. 50027 AR Vol. 1, Ex. 7 at 7. In support of its claim, Gonzalez Fisheries attached copies of tax returns for the company and for Mr. Gonzalez, the corporation's registered agent. 50027 AR Vol. 1, Ex. 7 Attachment. The Agency then made written requests for additional financial information, including tax returns from Mr. Gonzalez's other businesses and certain financial disclosure forms, from Gonzalez Fisheries' counsel. 50027 AR Vol. 1, Ex. 9 at 2-3; Ex. 10 at 4-5.

Since counsel for Gonzalez Fisheries did not provide the complete information sought, the Agency filed a Motion to Compel Production or Exclude Evidence/Testimony regarding the corporation's ability to pay. 50027 AR Vol. 1, Ex. 9. On November 30, 2005, the Administrative Law Judge granted the Agency's Motion based on consideration of the applicable legislative history, case law, and regulations. 50027 AR Vol. 1, Ex. 12. Specifically, the Administrative Law Judge found that "if the Respondent wants his ability to pay to be considered, he must present verifiable financial information to Agency counsel to the extent that Agency counsel determines is adequate to evaluate Respondent's financial condition." *Id.* at 5 (relying on 15 C.F.R. § 904.108). Further, the Administrative Law Judge determined that "since the Administrative Law Judge has no authority to rule on whether the financial information presented to Agency counsel is adequate," there was no need for the Administrative Law Judge

to “memorialize” the income tax statements that Gonzalez Fisheries had submitted. *Id.* at 6.

Ultimately, Gonzalez Fisheries did not submit “verifiable financial information in accordance with 15 C.F.R. § 904.108(c) and [the Administrative Law Judge’s] Order of November 30, 2005” and the Administrative Law Judge therefore determined that Gonzalez Fisheries did have the ability to pay the \$30,000 penalty. 50027 AR Vol. 4, Ex. 38 at 14.

On January 4, 2007, Gonzalez Fisheries submitted a Petition for Discretionary Review to the Agency Administrator. 50027 AR Vol. 4, Ex. 39. On May 1, 2007, the Administrator denied the Petition, determining that “the ALJ’s decision is supported by substantial evidence in the record, and no error of law occurred.” 50027 AR Vol. 4, Ex. 42. In its June 24, 2009 Order, this Court noted that Plaintiffs had “exhausted their administrative remedies and timely filed for review” and therefore considered Plaintiffs’ request for judicial review of Case No. 50027 properly filed and within its jurisdiction. (Doc. No. 33 at 19–20.)

C. NOVA 43022

On June 24, 2005, the Agency issued a NOVA against Plaintiff Rio San Marcos, Inc. in Case No. 43022. 43022 AR Vol. I, Ex. I. According to the NOVA, Rio San Marcos violated the Magnuson-Stevens Act because its vessel, the F/V RIO SAN MARCOS, was found to be fishing for shrimp in the Gulf Exclusive Economic Zone without a valid permit. *Id.* The Agency assessed a civil penalty of \$30,000 for the violation. *Id.* On July 7, 2005, Rio San Marcos submitted a timely request for a hearing. 43022 AR Vol. I, Ex. I; 15 C.F.R. § 904.102(a). Such request was processed, and the hearing ultimately took place before a U.S. Coast Guard Administrative Law Judge on August 22, 2006 in Brownsville, Texas. 43022 AR Vol. 2, Ex. 35. On February 12, 2008, the Administrative Law Judge issued a decision finding that Rio San

Marcos was liable for its vessel's shrimp fishing permit violations of the Magnuson-Stevens Act under the doctrine of respondeat superior; that the \$30,000 penalty assessed was appropriate; and that Rio San Marcos had not submitted "adequate verifiable financial information" and was "therefore presumed by law to have the ability to pay" the civil penalty. 43022 AR Vol. 1, Ex. 29 at 12.

In this NOVA, too, the Respondent (Rio San Marcos) submitted notice in its Preliminary Position on Issues and Procedures that it planned to contest the amount of the penalty proposed by the Agency due to its inability to pay. 43022 AR Vol. 1, Ex. 4 at 9. In support of its claim, Rio San Marcos submitted its own and its registered agent's tax returns for several years. See Attachment to 43022 AR Vol. 1, Ex. 4. The Agency in its Preliminary Position on Issues and Procedures contested Rio San Marcos's submissions regarding the ability to pay and argued that Rio San Marcos had not submitted full financial disclosures and had therefore not met its burden of proof. 43022 AR Vol. 1, Ex. 3. On May 4, 2006, based on the arguments made in the Agency's Preliminary Position on Issues and Procedures, the Administrative Law Judge issued an Order to Compel Discovery or Exclude Evidence. 43022 AR Vol. 1, Ex. 7. In its Order, the Administrative Law Judge ordered Rio San Marcos to file the financial information that Agency counsel would need to evaluate Rio San Marcos's financial condition at least 30 days before the first hearing date. *Id.* If Rio San Marcos failed to comply, the Administrative Law Judge determined that the inability to pay would not be considered. *Id.*

On July 21, 2006, Rio San Marcos submitted its First Supplemental Preliminary Position on Issues and Procedures along with its exhibit list in preparation for the hearing. 43022 AR Vol. 1, Ex. 14. In its filing, Rio San Marcos objected to the May 4, 2006 Order but it did not

submit the additional financial information requested by the Agency counsel. *Id.* Instead, Rio San Marcos maintained that its exhibits would be "adequate financial information for NOAA counsel to evaluate Respondent's financial condition." *Id.* On August 4, 2006, the Agency filed its Second Supplemental Preliminary Position on Issues and Procedures, noting that Rio San Marcos had "not provided to the Agency all information previously requested" and continuing its objection to "any attempt by the Respondent to introduce financial information at the hearing." 43022 AR Vol. I, Ex. 17.

On August 16, 2006, the Administrative Law Judge issued another Order to Compel Discovery or Exclude Evidence. 43022 AR Vol. I, Ex. 18. It ruled that "notwithstanding [Rio San Marcos] counsel's articulate and numerous arguments, the Administrative Law Judge must follow the law, statutes and the regulations." *Id.* at 9. Therefore, it concluded again that Rio San Marcos would have to submit "such verifiable financial information as Agency counsel determines is adequate to evaluate Respondent's financial condition" and that if it failed to do so, then "Respondent's inability to pay will not be considered by NOAA or by the Administrative Law Judge at the hearing and in the resulting Decision and Order by the Administrative Law Judge and Respondent will be presumed to have the ability to pay." *Id.* at 12. Plaintiff Rio San Marcos never did submit the complete financial information requested by Agency counsel, and therefore in its initial decision, the Administrative Law Judge decided that it was presumed by law to have the ability to pay the assessed civil penalty. 43022 AR Vol. I, Ex. 29 at 12.

On March 13, 2008, Rio San Marcos submitted a Petition for Discretionary Review. 43022 AR Vol. 2, Ex. 31. On July 10, 2008, the Agency's Administrator denied the petition "because Respondent's petition has not demonstrated the ALJ's decision contained significant

factual or legal errors warranting further review by the Administrator.” 43022 AR Vol. 2, Ex.

34. Like in NOVA 50027, this Court determined that Plaintiffs had properly exhausted their administrative remedies and timely filed their request for judicial review in NOVA 43022. (Doc. No. 33 at 19–20.)

D. The NOPS/NIDPs

Along with their allegations regarding the Agency’s actions related to the NOVAs, Plaintiffs also contest the issuances of two separate “Notice[s] of Permit Sanctions and/or Notice of Intent to Deny Permit” (“NOPS/NIDP”). (See Doc. No. 34-2 at ¶¶ 2.0, 3.2–3.3.) The first of these was issued on August 1, 2003 and addressed to all of the corporate plaintiffs: Rio Purificacion, Inc.; Leon Trawlers, Inc.; Ojos Negros, Inc.; El Grande Trawlers, Inc.; El Colonel, Inc.; Rio San Marcos, Inc.; Gonzalez Fisheries, Inc.; Chubasco, Inc.; and Ocho Hijos, Inc. (Doc. No. 1, Ex. B.) According to the NOPS/NIDP, all of the “federal fisheries/dealer permits issued to and/or applied for” by the corporate plaintiffs would be suspended thirty days from the receipt of the NOPS/NIDP for failure to pay a civil penalty assessed against Plaintiff Rio Purificacion, Inc. (*Id.* (citing 16 U.S.C. § 1858(g); 15 C.F.R. §§ 904.301, 904.302, 904.310).) The NOPS/NIDP also referenced NOVA 1412 and the \$14,000 penalty that Rio Purificacion, Inc. had not paid as of the date of the NOPS/NIDP. (*Id.*) Citing to federal regulations, the NOPS/NIDP further stated that the recipients of the NOPS/NIDP “do not have a right to a hearing to contest this permit sanction.” (*Id.* (citing 15 C.F.R. § 904.304(b)).)

The second NOPS/NIDP was issued on October 25, 2005 and also addressed to all of the corporate plaintiffs. (Doc. No. 1, Ex. D.) It is identical in content, except that it refers to NOVA 30369 and the \$30,000 civil penalty assessed against Rio San Marcos, Inc. (*Id.*) Otherwise, it

provides notice of the same permit sanctions or suspensions, cites to the same statutes and regulations as the first NOPS/NIDP, and also contains the statement that the recipients "do not have a right to a hearing to contest this permit sanction." (*Id.* (citing 16 U.S.C. § 1858(g); 15 C.F.R. §§ 904.301, 904.302, 904.310, 904.304(b)).)

On May 10, 2006, counsel for the Plaintiffs which were Respondents in Case Nos. 50027, 43022, 30369, and 1412 filed a Respondents' Request for Reconsideration; For New Trial (Hearing Request); And Response In Opposition To Agency's Motion In Opposition to Hearing Request. 50027 AR Vol. 2, Ex. 27; *see also* 1412/30369 AR Ex. 7 (same document); 43022 AR Vol. 1, Ex. 8 (same document). In this filing, among other requests, Plaintiffs Rio San Marcos, Rio Purificacion, and Gonzalez Fisheries asked that a hearing be held on the NOPS/NIDPs. 50027 AR Vol. 2, Ex. 27 at 10, 15, 26–27. The Agency filed a response in opposition to the Request, in which it discussed how the Magnuson-Stevens Act provides for hearings on facts underlying penalties so long as they are timely requested, but that hearings on permit sanctions for failure to pay a final penalty are not available where a respondent has simply squandered his opportunity for a hearing on the underlying penalty. 50027 AR Vol. 2, Ex. 32; *see also* 1412/30369 AR Ex. 8 (same document); 43022 AR Vol. 1, Ex. 9 (same document). On May 31, 2006, an Administrative Law Judge from the Agency denied the Respondents' Request. 50027 AR Vol. 2, Ex. 34; *see also* 1412/30369 AR Ex. 9 (same document); 43022 AR Vol. 1, Ex. 10 (same document). In its Order, the Administrative Law Judge explained that the Respondents "had a previous opportunity to participate as a party in the an administrative hearing (on the underlying NOVAs [1412 and 30369])" and therefore did not have a right to hearings on the NOPS/NIDPs. 50027 AR Vol. 2, Ex. 34 at 9 (citing 15 C.F.R. § 904.304(b)).

In Plaintiffs' Response to Defendant's Motion for Summary Judgment and Reply in Support of their own Motion for Summary Judgment, they assert that "there still is confusion even after" this Court's June 24, 2009 Order because the Plaintiffs "understand the 'claims arising from the NOVAs in SE001412 and SE030369' would be the NOVA's and just that." (Doc. No. 43 at ¶ 4.1.) This "confusion" apparently stems from the fact that the NOPS/NIDPs were addressed to all of the corporate plaintiffs rather than solely to the plaintiffs that were assessed penalties in NOVAs 1412 and 30369. (*Id.* at ¶¶ 4.1, 4.4) Plaintiffs therefore continue to assert that the Agency's issuance of the NOPS/NIDPs should be reviewed by this Court. (*Id.* at ¶ 4.4.)

II. PLAINTIFFS' CLAIMS FOR RELIEF

The essential factual and legal conclusions that the Plaintiffs challenge are: (1) that they were untimely in seeking hearings regarding NOVAs 1412 and 30369; (2) that they did not have a right to a hearing on the NOPS/NIDPs; (3) the propriety of the Agency's issuance of the NOPS/NIDPs to all Plaintiff corporations based on the nonpayment of two individual corporations; and (4) the Administrative Law Judge determinations in NOVA cases 50027 and 43022 to deny the admission of certain income tax returns, and related determinations that the Respondent-Plaintiffs in NOVAs 50027 and 43022 had the ability to pay the fines that they were assessed.

Plaintiffs' Third Amended Complaint seeks judicial review of the Agency's actions related to all four of the NOVAs. They also assert a myriad of constitutional challenges centered on the factual and legal disputes listed above. Plaintiffs' legal claims are grouped and

summarized as follows for convenience:

A. Administrative Review Claims – Plaintiffs seek judicial review of the following

actions and findings by the Administrative Law Judges and the Agency:

1. Civil Penalty Assessments (Doc. No. 34-2 at ¶ 3.0, 3.25–3.26)
2. Permit Sanctions (*id.* at ¶¶ 3.0, 3.4, 3.5, 3.25–3.26)
3. Denial of Hearings with respect to NOVAs 1412 and 30369 (*id.* at ¶¶ 3.1–3.2, 3.6)
4. Denial of Hearings with respect to permit sanctions (*id.* at ¶¶ 3.3–3.4)
5. Finding that Respondents in NOVAs 1412 and 30369 were untimely in their request for hearings, because the Agency “interchangeably” used the different case numbers, caused some delays on its own, and issued “permit sanctions” after the administrative review deadline (*id.* at ¶ 3.7–3.9, 3.12–3.15, 3.22)
6. Finding that service was properly made (*id.* at ¶ 3.11, 3.17)
7. Finding that the requests for Hearings by one plaintiff apply to all corporate plaintiffs (*id.* at ¶ 3.16)
8. Hearings that reviewed penalties, but did not review permit sanctions or shrimp seizures (*id.* at ¶ 3.23)
9. Administrative law judge determinations that “restricted proof” and “blindly affirmed” the penalty assessments (*id.* at ¶ 3.24)
10. Finding that Agency proved by a preponderance of the credible evidence that each plaintiff was personally in violation of the Magnuson-Stevens Act (*id.* at ¶ 5.3(q))
11. Imposing permit sanctions allegedly without taking into account the mandatory factors of 16 U.S.C. § 1858(g)(2) (*id.* at ¶ 5.3(t))
12. Rejection of the permit applications from some Plaintiffs as pretextual (*id.* at ¶ 5.3(y))
13. Failure to process permit applications and issue permits (*id.* at ¶ 5.3(dd))

B. Constitutional Claims

1. Fifth Amendment

a. Due Process

- i. Plaintiffs contest the constitutionality of the agency's issuing and enforcing permit sanctions for separate and distinct potential permit holders based on one Plaintiff corporation's alleged non-payment of a penalty assessment (*id.* at ¶¶ 3.21, 5.0, 5.3(b), 5.3(i), 5.3(w), 5.3(x))
- ii. Plaintiffs contest the constitutionality of imposing fines on and denying permits to Respondents when service was not effectively made upon them (i.e., for NOVA's 1412 and 30369) (*id.* at ¶ 3.11 5.3(f))
- iii. Plaintiffs contend that 15 C.F.R. § 904.304(b) (denying a hearing on a permit sanction when there was an opportunity to have a hearing on the underlying facts) conflicts with 16 U.S.C. § 1858(g)(5), which provides that no permit sanctions shall be imposed "unless there has been a prior opportunity for a hearing on the facts underlying the violation for which the sanction is imposed" (*id.* at ¶ 5.1)
- iv. Plaintiffs contend that the agency has unconstitutionally deprived them of the right to work (*id.* at ¶ 5.3(l))
- v. Plaintiffs contend that the discretion of only one person to impose penalties and permit sanctions (in this case, agency lawyer Karen Raines) is arbitrary and capricious (*id.* at ¶ 5.3(n))
- vi. Plaintiffs contend that 16 U.S.C. § 1857(1)(A) and 50 C.F.R. § 622.7(a) unconstitutionally allow for liability of a corporation owning a shrimping boat for the actions of a boat captain not under the corporation's "control" (*id.* at ¶¶ 5.3(a), (m))
- vii. Plaintiffs contend that the statute allowing for a \$30,000 fine is vague and overbroad (*id.* at ¶ 5.3(d))
- viii. Plaintiffs contend that the regulation placing the burden to show ability to pay a fine on the respondent is unconstitutional (*id.*

at ¶ 5.3(o))

ix. Plaintiffs contend that the agency unconstitutionally failed to consider the evidence they submitted concerning their ability to pay and that Plaintiffs were unconstitutionally denied the opportunity to present such evidence (*id.* at ¶ 5.2, 5.3(p), 5.3(r)).

x. Plaintiffs contend that they should have been able to contest the penalty assessments, shrimp seizures, and permit sanctions because the permits are property interests and the permit sanctions amount to liberty deprivations (*id.* at ¶¶ 3.20, 5.3(z)).

xi. Plaintiffs broadly contest the imposition of permit sanctions because they dispute the validity of the procedural and substantive action underlying the permit sanction process (*id.* at ¶ 5.3(h)).

xii. Plaintiffs contest the imposition of the NOPS without providing a hearing or other review as a violation of due process and 16 U.S.C. § 1858(g)(5) (*id.* at ¶¶ 5.3(k), (s), (v), (bb)).

xiii. Plaintiffs contend that the Agency's failure to process permit applications of March 31, 2003 violated due process (*id.* at ¶ 5.3(cc)).

b. Equal Protection

i. Plaintiffs contend that Mr. Gonzalez's various corporations have not been treated equally, i.e., corporations not owing money to the agency are being denied shrimp permits because of money owed by other distinct corporations (*id.* at ¶ 8.0(a), (c)).

ii. Plaintiffs contend that equal protection has been denied them because the agency has rejected Plaintiffs' offers of "reasonable compromises" (*id.* at ¶ 8.0(b)).

c. Fifth Amendment Taking of Private Property

i. Plaintiffs raise the issue of their "right to work" in the context of a claim for an unlawful taking (*id.* at ¶ 10.0(a)).

ii. Plaintiffs raise the issue of depriving corporations of shrimp permits for the unpaid fines of other distinct corporations in the context of a claim for an unlawful taking (*id.* at ¶ 10.0(b)).

iii. Plaintiffs raise the issue of not being issued permits in the context of a claim for an unlawful taking (*id.* at ¶ 10.0(c))

d. Double Jeopardy

Plaintiffs claim that the agency's issuing of both a NOVA fine and a permit denial for the same alleged violation constitutes double jeopardy (*id.* at ¶¶ 5.3(c), 5.3(j))

2. Sixth Amendment/Seventh Amendment⁴

a. Plaintiffs contend that the unavailability of a jury trial of alleged violations of agency regulations (i.e., the NOVAs) violates their right to a jury trial (*id.* at ¶ 13.0(a))

b. Plaintiffs contend that the unavailability of a jury trial concerning the permit sanctions (i.e., the NIDPs) also violates their right to a jury trial (*id.* at ¶ 13.0(b))

3. Eighth Amendment

a. Plaintiffs again raise the issue of denying permits to corporations for the actions of other distinct corporations, alleging that such action constitutes cruel and unusual punishment (*id.* at ¶ 9.0(a))

b. Plaintiffs contend that the permit sanctions themselves constitute cruel and unusual punishment (*id.* at ¶ 9.0(b))

c. Plaintiffs contend that the \$30,000 fines imposed for the NOVAs constitute cruel and unusual punishment (*id.* at ¶ 9.0(c))

4. Separation of Powers

a. Plaintiffs contend that to the extent that one person (in this case, Karen Raines) has the discretion to issue the initial permit sanctions, absent any judicial review, this violates the separation of powers between the executive and the judicial branches, making 16 U.S.C. § 1858 of the Magnuson-Stevens Fishery and Conservation Management Act unconstitutional (*id.* at ¶ 12.0(a))

⁴ Plaintiffs have labeled these as Sixth Amendment claims, but the Court considers them as Seventh Amendment claims because the Sixth Amendment right to a jury trial applies in the context of criminal proceedings, and these are civil proceedings.

b. Plaintiffs raise the issue of depriving corporations of shrimping permits for the unpaid fines of other distinct corporations, claiming such action violates the separation of powers, as well as the Supremacy Clause (*id.* at ¶ 12.0(b))

B. Other Claims

1. Tortious Interference

Plaintiffs contend that the agency is tortiously interfering with Plaintiffs' business relations because prospective buyers of Plaintiffs' boats are scared away due to the permit sanctions, which attach to vessels regardless of ownership (*id.* at ¶ 14.0)

2. Compensable/Civil Rights Claim

Plaintiffs contend that the Agency's action was "arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with the law," that it resulted in violations of their rights to apply for permits, have permits, and have the permits "properly processed," and seek as a remedy the return of their permits and lost shrimping revenues (*id.* at ¶ 15.0)

3. Civil Rights Claims

Plaintiffs contend that the permit sanctions were arbitrary and capricious state action "tantamount to discriminatory denials" (*id.* at ¶ 16.0)

III. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

In their motion for summary judgment, Plaintiffs seek summary judgment on the claims relating to the NOVAs this Court did not previously dismiss.⁵ (Doc. No. 35.) Plaintiffs again focus on the issues of whether they were entitled to hearings pursuant to the Magnuson-Stevens Act; whether certain tax returns should have been considered as relevant to their ability to pay in NOVAs 50027 and 43022; and whether the issuance of the NOPS/NIDPs, without a finding that

⁵ As noted above, this Court previously dismissed all claims arising from NOVAs 1412 and 30369. (Doc. No. 33.)

the corporate veil should be pierced, was appropriate given the separate corporate personalities of the nine corporate plaintiffs. (Doc. No. 35 at 1–10.) They further reassert the constitutional claims that the permit sanctions imposed by the Agency constitute a taking; that the penalty assessments, shrimp seizure, and permit sanctions violated the Eighth Amendment; that an unconstitutional violation of Separation of Powers occurred because the Agency allegedly made judicial determinations without judicial review; and that the Agency's proceedings were unconstitutional because they allegedly lacked objectivity. (*Id.* at 10–16.) In support of their argument that the penalty assessments were an abuse of discretion, they argue “there was no rational relationship between the violations and monetary penalties, considering the financial statements of the plaintiffs.” (*Id.* at 16.) Finally, Plaintiffs also reassert the argument that their property rights—their claims to the shrimping permits—were adversely affected because of the NOPS/NIDPs, which Plaintiffs contend were arbitrary and capricious. (*Id.* at 17–20.)

IV. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Agency seeks summary judgment against the Plaintiffs on all of the Plaintiffs' alleged claims. (Doc. No. 42.) It argues that this Court lacks jurisdiction over the claims related to the NOPS/NIDPs because they are unripe, time-barred, and exempt from judicial review, and/or because Plaintiffs were not entitled to administrative hearings regarding the NOPS/NIDPs. (*Id.* at 13–22.) With respect to the decisions of the Administrative Law Judges in NOVA's 50027 and 43022, the Agency argues that consideration of a sister corporation's violation history was appropriate and did not require a finding of piercing the corporate veil; that the evidence concerning ability to pay was properly excluded based on the governing statutes and

regulations; and that the decisions to not consider the constitutionality challenges and seizure claims were appropriate. (*Id.* at 22–40.) Finally, the Agency argues that this Court does not have subject matter jurisdiction with respect to the Plaintiffs' takings claims, and that Plaintiffs have failed to state claims concerning their double jeopardy and separation of powers claims. (*Id.* at 40–42.)

A. The NOPS/NIDPs

The Agency argues that Plaintiffs have failed to state a claim for relief regarding the NOPS/NIDPs. According to the Agency, the Plaintiffs have not submitted completed permit applications. (Doc. No. 42 at 14.) Five of the Plaintiffs' applications—for the F/V EL MISTER (El Colonel, Inc.), F/V EL GRANDE (El Grande Trawlers, Inc.), F/V LEON (Leon Trawlers, Inc.), F/V MARIA BONITA (Ojos Negros, Inc.), and F/V RIO SAN MARCOS (Rio San Marcos, Inc.)—were all returned because the applications did not include the date of birth of the corporate shareholder or the annual business report. (*Id.*) Additionally, the Agency asserts that four of the Plaintiffs did not even submit applications—it never received applications for the F/V Chubasco (Chubasco, Inc.), F/V AZTECA (Gonzalez Fisheries, Inc.), F/V CONQUISTADOR (Ocho Hijos, Inc.), or F/V RIO CONCHOS (Rio Purificacion, Inc.). (*Id.* at 14–15.) The applications that the Agency had returned were never resubmitted, and because they were still incomplete, they were deemed abandoned. (*Id.* at 15.) Therefore, the Agency argues that the Plaintiffs' applications were never rejected and therefore the Plaintiffs' claims related to permit sanctions are not yet ripe because the Agency has not yet rendered a final decision on the permit applications. (*Id.* at 16.)

Even if the Court were to consider that the Agency's return of the incomplete permit

applications constituted final action ripe for review, the Agency argues that Plaintiffs' claims of malfeasance for failure to properly process the applications are time-barred. (*Id.* at 16-17.)

Assuming *arguendo* that the return of the permits were to constitute a final denial of the permits, Plaintiffs would have had to challenge such action within 30 days. (*Id.* at 17-18 (citing 16 U.S.C. § 1855(f)(1)(B)).) Those applications were returned on April 11, 2003, and no application for judicial review was sought until June 30, 2006. Therefore, the Agency contends that Plaintiffs' claims regarding Agency action on the permit applications are time-barred.

With respect to the NOPS/NIDPs, the Agency reasserts its position that the NOPS/NIDPs were not final agency action because Plaintiffs never submitted complete permit applications. (*Id.* at 18.) Even if they were construed as final agency actions, however, they are barred from judicial review by statute. (*Id.* at 19 (citing 16 U.S.C. § 1858(b) (barring district court review of permit suspensions resulting from nonpayment of penalty or fine)).)

Finally, the Agency posits that the Plaintiffs were not entitled to administrative hearings on the NOPS/NIDPs because the Agency's regulations do not provide as such. (*Id.* at 19.) Specifically, the regulations allow for permit suspension if a permit holder has failed to pay a civil penalty. (*Id.* (citing 15 C.F.R. § 904.310(a)(1)).) Additionally, there is no opportunity for a hearing if the permit holder being sanctioned or whose permit is being suspended had a previous opportunity to participate as a party in a proceeding, regardless of whether the permit holder actually took advantage of the opportunity, and also regardless of whether or not a hearing was actually held. (*Id.* at 19-20 (citing 15 C.F.R. § 904.304(b)).) Since Mr. Gonzalez would have had an opportunity for a hearing on the underlying violations in NOVAs 1412 and 30369, the Agency concludes that no hearing was necessary in the NOPS/NIDPs issued under those cases.

numbers. (*Id.* at 20.)

B. The ALJ Decisions in NOVAs 50037 and 43022

The Agency maintains that the Administrative Law Judges' determinations were supported by the evidence after sufficient administrative hearings. With respect to the "imputation" allegation—that the Agency improperly considered the violations of sister corporations—the Agency explains that such practice is based on long-standing enforcement policies. (Doc. No. 42 at 23.) In support, the Agency directs the Court to its civil penalty schedule, which explicitly provides that the Agency may impute, for the purposes of the penalty schedule, violations involving a vessel that is owned or controlled by the same person who controls the vessel in question. (*Id.* (citing 50027 AR Vol. 5-44, Ex. 49 at ii (Magnuson-Stevens Act Penalty Schedule revised 6/13/2003); 43022 AR Vol. 3-36, Ex. 10 at ii (same document)).) The Agency also discusses a legal opinion letter in support of its contention that consideration of the violation history of sister corporations may have bearing on the factors relevant to the ultimate determination of a civil penalty, such as "degree of culpability" and "other matters as justice may require," and is thus within the discretion and authority of the Agency. (*Id.* at 24–27 (citing July 2, 2004 Letter from NOAA Office of Assistant General Counsel for Enforcement & Litigation to Rep. Barney Frank, Doc. No. 42-5).) Given the relevancy of the prior offenses of sister corporations, the Agency contends that considering them did not amount to piercing the corporate veil. (*Id.* at 27.)

Moreover, even if it were necessary to make a determination regarding piercing the corporate veil, the Agency submits that the facts support a finding that the corporate veil should be pierced in this case. (*Id.* at 27–33.) Relying on facts in the administrative record, the Agency

argues that Mr. Gonzalez's authority, ownership, knowledge, and share of the proceeds from shrimp harvested by the Plaintiff corporations' vessels are sufficient to support a finding that the corporate veil should be pierced. (*Id.*) If this Court were not able to make such a finding based on the facts, the Agency argues that the case must be remanded to the Agency for development of the record and a determination by the Administrative Law Judge. (*Id.* at 44.)

With respect to the ability to pay arguments, the Agency argues that the Administrative Law Judges properly excluded the evidence submitted by Plaintiffs concerning their ability to pay. (*Id.* at 33-38.) Under the regulations implementing the Magnuson-Stevens Act, respondents bear the burden of proving inability to pay, and to do so they must submit "verifiable, complete, and accurate financial information" to the Agency. (*Id.* at 33 (citing 15 C.F.R. § 904.108(c)).) If a respondent does not submit the appropriate information, the respondent will be presumed to have the ability to pay the penalty assessed. (*Id.*) In reviewing the Agency's and the Respondent-Plaintiffs' actions in NOVA's 50027 and 43022, the Agency notes that Respondents had "multiple opportunities" to submit the financial information required under federal regulations, but Respondents did not avail themselves of these opportunities and therefore did not comply with the requirements of the federal regulations. (*Id.* at 37) Therefore, exclusion of the tax return data was proper, and the Agency concludes that the Plaintiffs were not denied due process. (*Id.* at 37-38.)

Finally, the Agency argues that the Administrative Law Judges were correct in declining to consider the Plaintiffs' arguments regarding constitutionality and the seizure and sale of shrimp in connection with NOVA 50027. (*Id.* at 38-39.) This is because the Administrative Law Judges have no authority to make rulings on constitutional issues under the relevant federal

regulations and because the shrimp seizure claim is not yet ripe. (*Id.*)

C. This Court's Jurisdiction over the Takings, Eighth Amendment, and Separation of Powers Claims

The Agency contends that this Court has no jurisdiction over the takings claims because they are related to the shrimp seizure and, to the extent that some claims are not, the United States Court of Federal Claims has exclusive jurisdiction over non-tort claims such as these, where the Plaintiffs seek damages against the United States in excess of \$10,000. (Doc. No. 42 at 40.) Additionally, because the penalties assessed by the Agency fall within the range authorized by Congress and are not punitive, the Agency argues that Plaintiffs cannot show the penalties to be excessive or punishment within the meaning of the Double Jeopardy Clause. (*Id.* at 40–41.) Finally, the Agency urges summary judgment on the separation of powers claims because the administrative review followed by the Agency in Plaintiffs' cases was the very review established by the Agency pursuant to express Congressional "authorization to assess civil penalties and adjudicate challenges thereto." (*Id.* at 42.)

V. CONTESTED ISSUES IN THE REPLY MEMORANDA

In their replies, the Plaintiffs and Agency continue to contest two main issues. First, Plaintiffs and the Agency disagree with respect to the hearing requirements under the Magnuson-Stevens Act. Plaintiffs contend that they are entitled to hearings on the permit sanctions (NOPs/NIDPs) and shrimp seizures. (Doc. No. 43 at ¶ 2.4.) The Agency maintains that the specific hearings requested by the Plaintiffs are not required under federal regulations. (Doc. No. 44 at 11–12.) Second, the Plaintiffs and Agency disagree with respect to the Plaintiffs'

possession of federal shrimping permits. The Plaintiffs state "all nine (9) corporate plaintiffs had held federal shrimp permits for many years since each respective shrimp vessel of such plaintiff began fishing for many years with the federal shrimp permits." (Doc. No. 43 at ¶ 3.1.) In support of their statement that the Plaintiff corporations also submitted applications for permits, the Plaintiffs attach copies of the alleged applications and the affidavit of Raul Garcia, who attests that "as far as [he] recall[s]," the copies of the applications would have been signed and submitted with the required fees. (Doc. No. 43, Ex. A at ¶ 3.) The Agency, however, contends that only five original applications were received, but that these were returned as incomplete and Plaintiffs never held any federal shrimping permits. (Doc. No. 44 at 1-2.) It relies on the affidavit of "legal-instruments examiner specialist Cheryl Franzen," who performed searches on all of the Plaintiff corporations' vessels and submitted the results in sworn affidavits that were offered into evidence "at two different times." (Doc. No. 44 at 4-5 (citing 43022 AR Vol. 3-36, Exhs. 8 and 59; 43022 AR Vol. 2-35 (Transcript) at 14-17, 223-225).)

On February 11, 2010, this Court issued an Order that the Plaintiffs clear up this second matter by submitting copies of any and all federal shrimping permits previously held by the Plaintiff corporations' vessels, or, if such permits were no longer available, sworn affidavits from individuals who received the permits and who knew the reasons why the permits are no longer available. (Doc. No. 46.) Copies of the permits and/or affidavits were ordered to be filed by February 26, 2010. (*Id.*) As of the writing of this opinion and order, the Plaintiffs have not filed any of the documents requested, and therefore the Court presumes that the Defendant is correct in stating that none of the Plaintiffs' vessels ever possessed valid federal shrimping permits. (*Id.*)

VI. LEGAL STANDARDS GOVERNING REVIEW

A. Administrative Review

In cases as this one, where Plaintiffs seek judicial review of a civil penalty under the Magnuson-Stevens Act, “[t]he findings and order of the Secretary shall be set aside by [the district] court if they are not found to be supported by substantial evidence, as provided in section 706(2) of title 5.” 16 U.S.C. § 1858(b). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 217 (1938); *Greenspan v. Shalala*, 38 F.3d 232, 238 (5th Cir. 1994). “It is more than a mere scintilla and less than a preponderance.” *Ripley v. Chater*, 67 F.3d 552, 555 (5th Cir. 1995). In reviewing the factual findings, the Court considers the entire record “upon which such violation was found or such penalty imposed.” 16 U.S.C. § 1858(b). Questions of law and constitutional interpretation are *de novo*, 5 U.S.C. § 706, but courts owe “substantial deference to an agency’s interpretation of its own regulations.” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Girling Health Care, Inc. v. Shalala*, 85 F.3d 211, 215 (5th Cir. 1996) (quoting *Thomas Jefferson Univ.*)).

Other agency actions or sanctions, to the extent they are reviewable, are reviewed for abuse of discretion “where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy.” *Butz v. Glover Livestock Comm’n Co., Inc.*, 411 U.S. 182, 185 (1973).

B. Summary Judgment Standard

Summary judgment is appropriate if the “pleadings, the discovery and disclosure materials on file, and any affidavits, show that there is no genuine issue as to any material fact