

UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION  
WASHINGTON, D.C. 20230

In the Matter of:

Matthew James Freitas, et al.,

Respondents.

Docket Number:

PI0904338  
(Consolidated Cases)<sup>1</sup>

**ORDER DENYING RESPONDENTS' PETITION FOR ADMINISTRATOR REVIEW**

This is a fisheries enforcement matter involving civil charges brought against Respondents – the captains, fishing masters, and corporate entity owner of five U.S. flagged purse seine vessels – by the National Oceanic and Atmospheric Administration (NOAA or Agency). The Agency charged Respondents with violations of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFCIA) and regulations promulgated by the Agency under the WCPFCIA that implemented internationally agreed upon measures to limit the use of fish aggregating devices (FADs).<sup>2</sup> Several of the Respondents were charged additionally with violations of the Marine Mammal Protection Act (MMPA) and associated implementing regulations.<sup>3</sup> Respondents denied the charges, and the matter went before an Administrative Law Judge (ALJ).

Early in the proceedings, Respondents challenged the process the Agency used in promulgating the final rule underlying the FAD-related regulations. Specifically, Respondents challenged the validity of the Agency's decision to waive of the 30-day delay between publication of the final rule in the Federal Register and its effective date. The ALJ, precluded by regulation from ruling on issues related to the validity of regulations promulgated by the Agency, certified the issue for interlocutory review by the NOAA Administrator. The Administrator accepted review of the issue and issued an order (the Interlocutory Order), dated November 15, 2012, upholding as valid the Agency's waiver of the 30-day delay.

After the issuance of the Interlocutory Order and following a series of administrative hearings in which the Agency and Respondents presented evidence and testimony with respect to the charges, the presiding ALJ issued an Initial Decision and Order (Initial Decision), finding all

<sup>1</sup> This matter involves five consolidated civil penalty cases, identified by the following docket numbers: PI0904338, PI1000365, PI1000367, PI1000369, and PI0904339. The cases were consolidated on December 13, 2010 by order of the Chief Administrative Law Judge.

<sup>2</sup> 16 U.S.C. § 6901 *et seq.*; 50 C.F.R. §§ 300.222(w) and 300.223(b).

<sup>3</sup> 16 U.S.C. § 1361 *et seq.*; 50 C.F.R. Part 216.

counts proven by the Agency and assessing monetary penalties against the Respondents in the total amount of \$953,053.93. Separately, the ALJ also "strongly recommended" that the NOAA Administrator condition all permits held by the corporate entity owners of the five fishing vessels involved in the case<sup>4</sup> to prohibit the hiring and/or retaining of the named fishing masters<sup>5</sup> for a minimum period of time ranging from one to five years.

Following an unsuccessful request to the ALJ for reconsideration of the Initial Decision, Respondents filed the Petition for Administrator Review that is the subject of this order.<sup>6</sup>

### **DECISION ON DISCRETIONARY REVIEW**

Under NOAA civil procedure regulations, a party seeking review of an initial decision issued by an ALJ must petition the NOAA Administrator within 30 days after the date the decision was served.<sup>7</sup> Although the Administrator has broad discretion in determining whether to grant the petition and may deny it without explanation,<sup>8</sup> past Administrator decisions have established two criteria to guide the decision of whether to grant discretionary review: (1) whether the initial decision contains significant factual or legal errors that warrant further review by the Administrator; and (2) whether fairness or other policy considerations warrant further consideration by the Administrator. Types of cases that fall within these criteria include, but are not limited to, those in which:

- The initial decision conflicts with decisions of one or more other NOAA administrative decisions or federal court decisions on an important issue of federal law;
- The ALJ decided an important federal question in a way that conflicts with prior rulings of the Administrator;
- The ALJ decided a question of federal law that is so important that the Administrator should pass upon it even absent a conflict; or
- The ALJ so far departed from the accepted and usual course of administrative proceedings as to call for an exercise of the Administrator's supervisory power.

---

<sup>4</sup> Respondents Sea Quest LLC, Sea Honor LLC, Pacific Ranger LLC, Ocean Conquest LLC, and Ocean Encounter LLC.

<sup>5</sup> Respondents Chang Wen Wu, Yen Hsing Tsai, Su Tien Shih, Wu Chia Pin, and Ho-Ching Chang.

<sup>6</sup> The ALJ denied Respondents' petition for reconsideration by order dated December 6, 2013. In addition to denying Respondents' petition, the denial order also alters the Initial Decision to make minor errata corrections. See Order Denying Respondents' Petition for Reconsideration (December 6, 2013), at p. 1, n. 2 and p. 10.

<sup>7</sup> See 15 C.F.R. § 904.273(a); see also 15 C.F.R. § 904.273(d) (setting forth mandatory requirements regarding the format and content of a petition for review).

<sup>8</sup> See 15 C.F.R. § 904.273(c) ("Review by the Administrator of an initial decision is discretionary and is not a matter of right.") and 15 C.F.R. § 904.273(i) ("The Administrator need not give reasons for denying review.")

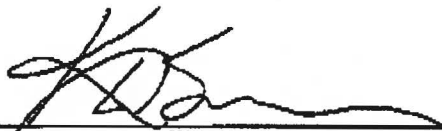
Applying these criteria to the issues presented in Respondents' petition, I find no significant factual or legal errors in the Initial Decision and no fairness or other policy considerations warranting further consideration. I therefore deny Respondents' petition.

I find it appropriate, however, to clarify the Agency's position regarding the ALJ's recommendation to condition the Respondent vessel owners' permits to prohibit the hiring and/or retaining of the Respondent fishing masters. Based on my review of the existing record, I have decided against adopting this recommendation, and I modify the Initial Decision to vacate the portion of the order that sets forth the ALJ's recommendation on this one point. All other parts of the Initial Decision, including the order awarding monetary civil penalties, remain unaffected by this modification.

### CONCLUSION

This Order constitutes the final administrative decision in this matter. This Order, and the civil penalty imposed by the ALJ, will become final on the date the Order is served on Respondents, and becomes effective for purpose of judicial review on the date of service.

14 April 2014  
Dated

  
\_\_\_\_\_  
Kathryn D. Sullivan, Ph.D.  
NOAA Administrator and Under Secretary of  
Commerce for Oceans and Atmosphere

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the attached Order Denying Respondents' Petition for Discretionary Review was sent to the individuals listed below on this 17<sup>th</sup> day of April, 2014:

**Via Registered or Certified Mail, Return Receipt Requested and Facsimile Transmission:**

James P. Walsh, Esq.  
Gwen L. Fanger, Esq.  
Davis Wright Tremaine LLP  
505 Montgomery Street, Suite 800  
San Francisco, CA 94111-6533  
Fax: (415) 276-6599

Alexa A. Cole, Esq.  
Charles L. Green, Esq.  
NOAA Office of General Counsel  
US Department of Commerce  
1315 East West Highway  
SSMC3 - Suite 15405  
Silver Spring, MD 20910  
Fax: (301) 427-2211

**Via U.S. Mail and Facsimile Transmission:**

Hon. Parlen L. McKenna  
Administrative Law Judge  
United States Coast Guard  
Coast Guard Island, Bldg. 54A  
Alameda, CA 94501-5100  
Fax: (510) 437-2717

ALJ Docketing Center  
United States Coast Guard  
40 South Gay Street  
Baltimore, MD 21202-4022  
Fax: (410) 962-1746

April 17, 2014  
Dated

Chauncey Kelly  
Chauncey Kelly  
National Oceanic and Atmospheric Administration