



UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	)	
	)	
A.P. Bell Fish Co., Inc.,	)	Docket Number:
Kalije Belle, Inc., and	)	
Dwight L. Martin,	)	SE1003701FM
	)	F/V KALIJE BELLE
Respondents.	)	

**INITIAL DECISION AND ORDER**

**Date:** March 23, 2015

**Before:** Susan L. Biro, Chief Administrative Law Judge, U.S. EPA<sup>1</sup>

**Appearances:** Agency Counsel:

Cynthia S. Fenyk, Esquire  
Office of General Counsel  
Enforcement Section (Southeast)  
National Oceanic and Atmospheric Administration  
U.S. Department of Commerce  
263 13th Avenue South  
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Respondents' Representative:

Karen L. Bell  
Post Office Box 276  
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<sup>1</sup> The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011.

## I. PROCEDURAL HISTORY

On May 30, 2013, counsel for the National Oceanic and Atmospheric Administration (“NOAA” or “Agency”), on behalf of the Secretary of Commerce, instituted this action by issuing a two-count Notice of Violation and Assessment of Administrative Penalty (“NOVA”) to A.P. Bell Fish Company, Inc., Kalije Belle, Inc., and Dwight L. Martin (“Respondents”) in regard to the fishing vessel (“F/V”) Kalije Belle.

In Count 1, the NOVA charges Respondent Kalije Belle, Inc., as the vessel owner, and Respondent Dwight L. Martin, as the vessel operator, with violating the Magnuson-Stevens Fishery Conservation and Management Act (“Act”), 16 U.S.C. § 1857(1)(A), and Agency regulations at 50 C.F.R. § 622.7(gg), between January 19, 2010, and October 29, 2010, by failing to “timely provide 3-hour minimum advance notice of landing” as required by the Gulf grouper and tilefish Individual Fishing Quota (“IFQ”) program regulations set forth at 50 C.F.R. § 622.20(c)(3)(i). NOVA at 1. Imposition of a penalty in the amount of \$5,000 is proposed for this violation against those two Respondents, jointly and severally. NOVA at 2.

Count 2 of the NOVA alleges the same two Respondents in their same capacities, as well as Respondent A.P. Bell Fish Company, Inc., as a fish dealer, violated the same provision of the Act and its implementing regulation on or about June 8, 2010, by “fail[ing] to complete a landing transaction report and validate the dealer transaction report by entering the unique PIN for the vessel account when the transaction report is submitted,” as required by the Gulf grouper and tilefish IFQ program regulation set forth at 50 C.F.R. § 622.20(c)(1)(iii). NOVA at 1. The NOVA proposes the assessment of a \$15,020.90 penalty for the violation set forth in Count 2 against all three Respondents, jointly and severally. NOVA at 2.

By letter dated July 3, 2013, Karen L. Bell requested a hearing in response to the NOVA on behalf of Respondent Kalije Belle, Inc.,<sup>2</sup> and two other respondents in related actions.<sup>3</sup> On August 15, 2013, NOAA forwarded the related cases to the undersigned for processing of the hearing request pursuant to the applicable procedural rules.<sup>4</sup> On September 9, 2013, Ms. Bell

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<sup>2</sup> In these proceedings, a non-attorney representative is permitted to appear on behalf of a party. 15 C.F.R. § 904.5(a) (party is permitted to “appear in person or by or with counsel or other representative.”).

<sup>3</sup> This is one of three companion cases. The other two cases are: *Lisa M. Belle, Inc. and Peter D. Strelbel*, NOAA Docket No. SE1101642FM, F/V Lisa M. Belle, and *Karen J. Belle, Inc. and Laramie J. Williams*, NOAA Case No. SE1202106FM, F/V Karen J. Belle. In her July 3, 2013 letter, Ms. Bell requested that the three actions “be heard together.” In later correspondence to NOAA dated March 31, 2014, a copy of which was filed with this Tribunal, Ms. Bell indicated that she represented all Respondents in the three companion cases except for Peter Strelbel, whom she had not been able to contact.

<sup>4</sup> In the August 15, 2013 cover letter accompanying the forwarding of the three related cases to this Tribunal, NOAA indicated that “the hearing request is untimely in each case,” but did not file a motion seeking dismissal on that basis. 15 C.F.R. § 904.201(b) (if a written request for hearing is filed after the 30 day response period, “Agency counsel will promptly forward the

submitted a letter to this Tribunal indicating that she accepted this Tribunal's offer to participate in its Alternative Dispute Resolution ("ADR") Process. The case was then assigned to ADR and remained in such process until it was terminated by Order of the ADR Neutral on December 12, 2013. On December 19, 2013, the undersigned was appointed to preside over this matter at hearing.

An Order to Submit Preliminary Positions on Issues and Procedures (PPIP) ("PPIP Order") was issued on January 24, 2014.<sup>5</sup> In the PPIP Order, the Agency and Respondents were each ordered to submit an initial PPIP in accordance with 15 C.F.R. § 904.240. The parties timely complied with the PPIP Order, and the Agency subsequently supplemented its initial PPIP filing with two penalty worksheets, one for each count.

On April 2, 2014, the undersigned issued a Hearing Order setting forth additional prehearing filing deadlines and scheduling the hearing in this matter to begin at 9:00 a.m. on May 6, 2014, in Bradenton, Florida. Thereafter, the parties submitted a Joint Motion requesting that the hearing held in this case, and in two companion cases, be heard in seriatim, in a particular order. The Motion was granted by Order dated April 25, 2014.

The hearings in all three companion cases were sequentially held on May 6, 2014, at the Manatee County Judicial Center, Courtroom 8B, 1051 Manatee Avenue West, Bradenton, Florida 34205.<sup>6</sup> The instant case was the second of the three cases heard. For the sake of efficiency and with the parties' consent, incorporated into the hearing of this case was the testimony of NOAA Special Agent Paige Casey on the background of the IFQ program, and the testimony of Karen Bell in total, from earlier in the day in the matter styled *Karen J. Belle, Inc., and Laramie J. Williams*, NOAA Case No. SE1202106FM, F/V Karen J. Belle.<sup>7</sup> Tr. 8-9, 11-12. In addition thereto, during the hearing of this matter, the Agency offered into evidence 24 exhibits, all of which were admitted, and the testimony of one witness, Special Agent Kelly M. Kalamas of the NOAA Office of Law Enforcement.<sup>8</sup> Tr. 10-11, 12-34. Karen Bell appeared at hearing of this case as the representative of all three Respondents and testified on their behalf. Tr. 8-9, 35-49. Respondent Dwight L. Martin did not personally appear at the hearing.

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request for hearing along with a motion in opposition . . . to the ALJ . . . for a determination on whether such request shall be considered timely filed."). As such, NOAA's objections, if any, to the late filings were considered waived and the hearing requests were acted upon as though they were timely.

<sup>5</sup> The PPIP Order is mistakenly dated January 24, 2013, but the Certificate of Service correctly reflects its issuance and service on January 24, 2014.

<sup>6</sup> Citations herein to the transcript of the hearing in this case are made as follows: "Tr. [page]."

<sup>7</sup> Citations herein to the transcript of the hearing held in that case are made as follows: "KJB Tr. [page]."

<sup>8</sup> Citations herein to the Agency's exhibits are made as follows: "AE [number] at [page]."

Respondents offered 18 exhibits into evidence and all were admitted.<sup>9</sup> Tr. 44. The parties' Joint Set of Stipulated Facts, Exhibits, and Testimony dated April 23, 2014, was admitted into evidence as Joint Exhibit 1.<sup>10</sup> Tr. 9-10.

On May 20, 2014, an electronic copy of the hearing transcript was received by this Tribunal and on May 27, 2014, was forwarded to the Agency and Respondents' representative, Ms. Bell. On May 28, 2014, the Hearing Clerk received the certified copy of the transcript and that day the undersigned issued a Post-Hearing Scheduling Order ("Post-Hearing Order"), establishing a briefing schedule. On July 18, 2014, the Agency's Initial Post-Hearing Brief was filed ("A's Brief"). Respondents did not file a post-hearing brief and as such, the record in this matter closed on July 18, 2014.

## **II. THE LAW AND REGULATIONS APPLICABLE TO LIABILITY**

Finding that a "national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources," in 1976, Congress first enacted the Magnuson-Stevens Fishery Conservation and Management Act ("the Act").<sup>11</sup> Pub. L. No. 94-265, § 2(a)(6), 90 Stat. 331, 332 (1976) (codified at 16 U.S.C. § 1801 et seq.). The purpose of the Act is "to promote domestic commercial and recreational fishing under sound conservation and management principles" and "to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery."<sup>12</sup> *Id.* at §

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<sup>9</sup> Citations herein to Respondents' exhibits are made as follows: "RE [number] at [page]."

<sup>10</sup> Although Mr. Martin did not personally sign the Stipulations, and Ms. Bell signed them only on the signature line for the two corporate Respondents, at hearing Ms. Bell represented that she represented Mr. Martin and, by her signature on the Stipulations, she intended to bind Ms. Martin to them as well. Tr. 9-10. Citations herein to the Joint Exhibit are made as follows: "JE 1, Stip. [number]."

<sup>11</sup> The title of the Act was initially "Fishery Conservation and Management Act of 1976," but was changed four years later to the "Magnuson Fishery Conservation and Management Act," by the Salmon and Steelhead Conservation and Enhancement Act of 1980, Pub. L. No. 96-561, § 238, 94 Stat. 3275, 3300 (1980). After the Act was further amended by the Sustainable Fisheries Act, Pub. L. No. 104-297, 110 Stat. 3559-621 (1996), it was again renamed to the "Magnuson-Stevens Fishery Conservation and Management Act" by the Department of Commerce and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-208, Title II § 211, 110 Stat. 3009, 3009x40. The Act was reauthorized and amended in 2007. Pub. L. No. 109-479, 120 Stat. 3575-665 (2007).

<sup>12</sup> A "fishery" is a stock of fish that can be treated as a unit for purposes of conservation and management, based on geographical, scientific, technical, recreational, and economic characteristics. 16 U.S.C. § 1802(13)(A). "Optimum yield" means the amount of fish which provides the greatest overall benefit to the Nation with respect to food production, recreation,

2(b)(3)-(4), 90 Stat. at 332-33. The Act mandates the establishment of eight Regional Fishery Management Councils, including a Gulf of Mexico Fishery Management Council (“Gulf Council”),<sup>13</sup> and requires each council to design fishery management plans “for each fishery under its authority that requires conservation and management.” 16 U.S.C. §§ 1852(a)(1)(E), (h)(1). Such management plans are required to “assess and specify” the “maximum sustainable yield” and “optimum yield” from the fishery as well as the “capacity and the extent” to which fishing vessels annually will harvest the optimum yield and fish processors will process that portion of such optimum yield harvested. 16 U.S.C. § 1853(a)(3)-(4).

In 1983, NOAA published its initial approval of the Gulf Council’s first Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (“Gulf FMP”), and also proposed initial regulations implementing the Gulf FMP. 48 Fed. Reg. 38,511 (Aug. 24, 1983) (later codified at 50 C.F.R. Part 622). Since then, numerous amendments and additions to the Gulf FMP and its regulations have been made. Most relevant here, in 2009, Amendment 29 to the Gulf FMP established the Gulf of Mexico Individual Fishing Quota (“IFQ”) program for groupers and tilefishes. AE 17 (74 Fed. Reg. 44,732 (Aug. 31, 2009) (to be codified at 15 C.F.R. Part 902, 50 C.F.R. Part 622)); *see* AE 15; AE 16.<sup>14</sup> The IFQ program went into effect on January 1, 2010. AE 15 at 6; AE 16 at 1; AE 17 at 1 (74 Fed. Reg. at 44,732).

Under the Gulf of Mexico IFQ program, fixed IFQ “shares,” or, percentages of the annual commercial quota for the fishery, were proportionally allotted in late 2009 (for fishing in 2010) to a closed set of eligible participants in that commercial fishery based upon their applicable historical landings. KJB Tr. 15, 21-22, 24-25; AE 15 at 1; AE 16 at 1-2. Each year the variable annual quota of allowable commercial catch of Gulf groupers and tilefish (in pounds gutted weight), as established by NOAA and the Gulf Council, is divided among the shareholders according to their shares, thereby establishing the annual “allocation” or total poundage of each type of fish each “IFQ shareholder or allocation holder is authorized to

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and protection of marine ecosystems; is prescribed on the basis of the maximum sustainable yield from a given fishery, as reduced by relevant social, economic, or ecological factors; and in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield of that fishery. 16 U.S.C. § 1802(33).

<sup>13</sup> The Gulf of Mexico Fishery Management Council consists of the States of Texas, Louisiana, Mississippi, Alabama, and Florida, and has authority over the fisheries in the Gulf of Mexico seaward of such States. 16 U.S.C. § 1852(a)(1)(E).

<sup>14</sup> The time period relevant to the allegations in this case is January 19 – October 29, 2010. During that time period, 50 C.F.R. § 622.20 was revised, but not the subsections relevant here. 75 Fed. Reg. 9,116 (Mar. 1, 2010). Updates to Title 50 of the Code of Federal Regulations are published every year to reflect revisions made as of October 1st. *See* GPO’s Federal Digital System for the C.F.R., located at <http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>. Because the period of violation here goes beyond the October 1, 2010, date of C.F.R. publication, the regulatory text applicable to this action can be found in either the 2009 or 2010 edition, and so unless otherwise indicated, those editions of Part 622 are the ones cited in this decision. 50 C.F.R. § Part 622 (2009-10 editions). The IFQ program for Gulf Groupers and tilefishes is now codified at 50 C.F.R. § 622.22 (2014).

possess, land, or sell” that year. 50 C.F.R. § 622.20(b)(2)(iii); 16 U.S.C. § 1802(23); KJB Tr. 21-30.

The IFQ program is designed to be administered online, and as such, each participant is required to have a Gulf “IFQ Online Account” in NOAA’s electronic share tracking system, accessible via a computer and the Internet.<sup>15</sup> 50 C.F.R. § 622.20(a)(3); AE 15 at 4, 6; AE 16 at 4. Vessels without an IFQ account are not permitted to land or possess the fish subject to the IFQ program, and dealers without an IFQ dealer endorsement are not allowed to receive fish subject to the program.<sup>16</sup> 50 C.F.R. § 622.20(c).

As a “[m]easure[] to enhance IFQ program enforceability,” the IFQ regulations require the “owner or operator of a vessel” landing fish subject to the IFQ to provide the National Marine Fisheries Service (NMFS) with “advance notice of landing.”<sup>17</sup> 50 C.F.R. § 622.20(c)(3)(i); AE 15 at 4. The advance notice “is intended to provide law enforcement officers the opportunity to be present at the point of landing so they can monitor and enforce grouper and tilefish requirements dockside.” AE 16 at 7; 79 Fed. Reg. 15,287, 15,288 (Mar. 19, 2014); Tr. 29. The regulation specifies that the advance notice is to be provided “at least 3 hours, but no more than 12 hours, in advance of landing” and must “report the time and location of [anticipated] landing, estimated grouper and tilefish landings in pounds gutted weight for each share category . . . , vessel identification number . . . , and the name and address of the IFQ dealer where the groupers or tilefishes are to be received.” 50 C.F.R. § 622.20(c)(3)(i); AE 15 at 4; AE 16 at 6-7. Each vessel landing IFQ fish “must have sufficient IFQ allocation in [its] IFQ vessel account, and in the appropriate share category or categories, at least equal to the pounds in gutted weight of all groupers and tilefishes on board (except for any overage up to the 10 percent allowed on the last fishing trip) from the time of the advance notice of landing through landing.” 50 C.F.R. § 622.20(c)(3)(i). The methods authorized by regulation for providing the notice include calling NMFS, electronically submitting the notice through the vessel’s on-board vessel monitoring system (VMS), or via computer through the IFQ website.<sup>18</sup> *Id.*; AE 15 at 4.

Further, the IFQ regulations mandate that:

The dealer is responsible for completing a landing transaction report for each landing and sale of Gulf groupers and tilefishes via the IFQ website at

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<sup>15</sup> At the beginning of each year, NOAA “deposits” each shareholder’s allocation into the shareholder’s online account, from which the shareholder may draw down allocation as it utilizes it through its vessels harvesting fish or by purchasing fish. KJB Tr. 20-21, 44-45.

<sup>16</sup> A “dealer” is defined by the regulations as “the person who first receives fish by way of purchase, barter, or trade.” 50 C.F.R. § 600.10. Qualified dealers of Gulf reef fish are given permits with a dealer endorsement. 50 C.F.R. § 622.20(b)(5).

<sup>17</sup> “Landing” means “to arrive at a dock, berth, beach, seawall, or ramp.” 50 C.F.R. § 622.20(c)(3)(i); AE 15 at 4.

<sup>18</sup> VMS systems are mandated on commercial vessels that are issued permits for Gulf reef fish. 50 C.F.R. § 622.9(a)(2)(i).

ifq.sero.nmfs.noaa.gov at the time of the transaction in accordance with reporting form and instructions provided on the website. This report includes, but is not limited to, date, time, and location of transaction; weight and actual ex-vessel value of groupers and tilefishes landed and sold; and information necessary to identify the fisherman, vessel, and dealer involved in the transaction. The fisherman must validate the dealer transaction report by entering the unique PIN number for the vessel account when the transaction report is submitted. After the dealer submits the report and the information has been verified by NMFS, the online system will send a transaction approval code to the dealer and the allocation holder.

50 C.F.R. § 622.20(c)(1)(iii).<sup>19</sup>

In addition, to cover the government's actual costs related to the "management, data collection, and enforcement" of the Gulf fishery management plan, as the Act mandates, the implementing regulations require dealers to withhold from the "ex-vessel value" of the harvested fish as documented in the landing transaction report a "cost recovery fee" of three percent. 16 U.S.C. § 1854(d)(2); 50 C.F.R. § 622.20(c)(2); AE 15 at 5, 7; AE 16 at 6. The escrowed cost recovery fees are then submitted quarterly by the dealer to NMFS via the dealer's IFQ account using pay.gov. *Id.*

Finally, Section 307 of the Act makes it "unlawful . . . for any person . . . to violate any provision of [Chapter 38. Fishery Conservation and Management] or any regulation or permit issued pursuant to this chapter." 16 U.S.C. § 1857(1)(A). The Act defines "person" to include individuals and corporations. 16 U.S.C. § 1802(36). At all times relevant hereto, Agency regulations established that "it is unlawful for any person to . . . [f]ail to comply with any provision related to . . . the IFQ program for Gulf groupers and tilefishes as specified in § 622.20." 50 C.F.R. § 622.7(gg) (2009) (now restated and codified as 50 C.F.R. § 622.13(ii)) (78 Fed. Reg. 22,950 (Apr. 17, 2013); 78 Fed. Reg. 57,534 at 57,536 (Sept. 19, 2013)). Violators of that provision may be subject to penalties up to \$140,000 for each violation. 16 U.S.C. § 1858(a); 73 Fed. Reg. 75,321 (Dec. 11, 2008) (Commerce Department Final Rule adjusting for inflation of civil monetary penalties) (codified at 15 C.F.R. § 6.4(e)(14)).

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<sup>19</sup> The term "fisherman" is not specifically defined in the Act or its implementing regulations. 16 U.S.C. § 1802; 50 C.F.R. §§ 600.10, 622.2. However, the Act defines the term "fishing" as: "(A) the catching, taking, or harvesting of fish; (B) the attempted catching, taking, or harvesting of fish; (C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or (D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C)." 16 U.S.C. § 1802(16). Regulations implementing parts of the Marine Mammal Protection Act, 16 U.S.C. §§ 1371, 1387, however, simply define a "fisherman" as "the vessel owner or operator." 50 C.F.R. § 229.2. Similarly, other NMFS regulations state that the term "[c]ommercial fisherman means any citizen of the United States who owns, operates, or is employed on a commercial fishing vessel." 50 C.F.R. § 296.2. As such, it appears that the term "fisherman" is generally defined quite broadly.

### **III. FACTUAL BACKGROUND**

The A.P. Bell Fish Company, Inc. (“A.P. Bell”) is a “good-sized” family business that has been engaged in acquiring and selling seafood in Cortez, Florida, for over 90 years. KJB Tr. 27, 33, 38, 40; AE 21 at 1; AE 22. In addition to having a fish house that purchases and processes fish as a dealer, A.P. Bell owns and controls at least 12 subsidiary corporations, each one of which owns a single commercial fishing vessel used to acquire fish. KJB Tr. 26-27, 37-42; AE 22; JE 1, Stips. 5, 21. One of those subsidiary corporations is Respondent Kalije Belle, Inc., which owns the fishing vessel Kalije Belle (U.S. documentation number 575344). JE 1, Stip. 8; AE 1; 18 at 1. Respondents’ representative Karen Bell actively manages the day to day business operations of the various Bell family corporations and is the registered agent of A.P. Bell. KJB Tr. 12, 34, 45-46; AE 2 at 2-3; AE 21.

At all (or most) times relevant hereto, A.P. Bell held a Federal Fisheries Reef Fish Dealer Permit (SERO Dealer Number 275) with a Gulf of Mexico IFQ Dealer Endorsement (AE 22),<sup>20</sup> and the F/V Kalije Belle held a Gulf of Mexico Reef Fish Commercial Federal Fisheries Permit (Number RR-194) (AE 20). JE 1, Stips. 9, 21. Both A.P. Bell and Kalije Belle, Inc. participate in the Gulf IFQ program and maintain online IFQ accounts in the system.<sup>21</sup> AE 14.

Pursuant to authorization granted by the vessel’s owner, Respondent Kalije Belle, Inc., and the vessel’s Gulf of Mexico Reef Fish Fishery Permit, Respondent Dwight L. Martin operated the fishing vessel Kalije Belle during a series of nine fishing trips in 2010 approximately spanning the dates of January 16-30, February 16-March 1, March 17-31, April 22-May 10, May 26-June 8, July 2-17, August 17-31, September 13-26, and October 15-29. JE 1, Stips. 7-10; AE 5-13. Any proceeds or losses resulting from these fishing trips were to be shared between Kalije Belle, Inc., Captain Martin, and crew. AE 10.

At the conclusion of the last trip on October 29, 2010, Florida Fish and Wildlife Conservation Commission (FWCC) Officer Louis S. Hinds, IV, observed the Kalije Belle in the process of offloading a large catch of approximately 6,500 pounds of red grouper at the A.P. Bell fish house in Cortez, Florida, at approximately 9:00 a.m. JE 1, Stip. 5; AE 1 at 1; AE 2 at 1-2. Upon inquiry, Mr. Martin identified himself to Officer Hinds as the captain of the vessel and acknowledged that he had not submitted an advance notice of landing (ANOL) for the red grouper caught during that fishing trip. JE 1, Stip. 6; AE 1 at 1; AE 2 at 2. He further acknowledged that he “never had called to report a grouper landing for the F/V KALIJE BELLE.” JE, Stips. 1, 11-19; AE 1 at 1; AE 2 at 2; AE 3 (Mr. Martin’s statement to Agent

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<sup>20</sup> A.P. Bell’s Dealer Permit was in effect from April 1, 2009 through March 31, 2010, and was renewed effective May 27, 2010, with an expiration date of March 31, 2011. JE 1, Stip. 21; AE 22. It would appear that A.P. Bell’s permit was technically not effective from March 31 – May 27, 2010, however, no party contests the fact that A.P. Bell was permitted to deal Gulf fish at all times relevant to this matter.

<sup>21</sup> In support of its case, NOAA offered into evidence a series of computer generated Allocation Ledger IFQ Activity reports for Shareholder “Kalije Belle Inc” from what appears to be NMFS’ online IFQ system. AE 14. In that Ledger, there are transactions recorded from “A P Bell Fish Co Inc” (marked with “D,” presumably indicating “dealer”).



Kalamas). When informed of Officer Hinds' findings, Karen Bell conceded that Capt. Martin "should have called in the I.F.Q.," but asked "why someone from NMFS did not contact the fish house to warn them prior to his landing." AE 1 at 2; AE 2 at 2.

FWCC Officer Hinds immediately referred the matter to NOAA Special Agent Kelly Moran Kalamas. AE 1. That morning around 11:30 a.m., Agent Kalamas arrived at the fish house and further interviewed Capt. Martin. AE 2 at 3. The Captain advised the Agent that for fifteen years he had been fishing commercially and selling his catch to A.P. Bell. *Id.*; AE 3. For the prior eight years, he had been the captain of the Kalije Belle. AE 2 at 3. Mr. Martin stated he generally fishes for grouper, although on occasion had harvested red snapper, and on those latter occasions had complied with the IFQ snapper program ANOL requirements. *Id.*; AE 3. However, Mr. Martin advised the Agent that he was unaware that the same IFQ ANOL requirements applied to grouper, claiming no one at A.P. Bell had informed him of that fact. *Id.*; RE 1.

Agent Kalamas then briefly interviewed Walter T. Bell, who acknowledged being the owner of Kalije Belle, Inc., but referred the Agent to his daughter Karen Bell, indicating that Ms. Bell handled all matters relating to the vessel and acted as his authorized representative in regard thereto. AE 2 at 3-5, 8; AE 19 at 1; AE 20 at 13, 16; AE 21 at 1. Subsequently, the Agent spoke to Ms. Bell who acknowledged that she had been personally made aware of the ANOL requirements approximately a month earlier by another NOAA Special Agent. AE 2 at 4; AE 4 at 2 (Ms. Bell's statement to Agent Kalamas). Ms. Bell characterized the failure to provide the ANOL for the Kalije Belle as an "oversight" by the captain due to his erroneous impression that it was not required for grouper. AE 2 at 3-4; AE 4 at 2 ("How he missed this step I do not know."). However, Ms. Bell assured the Agent that all the other IFQ process "steps" "were and have been taken." AE 4 at 2. Furthermore, upon request, Ms. Bell provided Agent Kalamas with copies of the weighout slips and trip tickets for the Kalije Belle for 2010. AE 2 at 4.

Subsequent investigation undertaken by the Agent discovered nine fishing trips that were conducted by the vessel Kalije Belle in 2010 in federal water areas where reef fish were harvested from the Gulf of Mexico. AE 2 at 5, 8; JE 1, Stip. 7. On each of the nine trips, the vessel harvested between approximately 2,000-7,000 pounds of grouper. AE 2 at 5-7; AE 5-13. Neither Kalije Belle, Inc., nor Capt. Martin provided advance notice of landing for these nine trips to NMFS. JE 1, Stips. 8, 11-19.

In addition, as part of the investigation, Agent Kalamas examined the NMFS "SERO [Southeast Regional Office] IFQ Database," in regard to the nine trips made by the Kalije Belle in 2010 and the landing reports made in regard thereto, finding only one discrepancy. AE 2 at 7. Specifically, she found that no landing transaction report was submitted for the IFQ species of red grouper and gag grouper harvested aboard the Kalije Belle during the fishing trip that ended on or about June 8, 2010. JE 1, Stip. 20; AE 2 at 7; AE 9; AE 23. The fish offloaded for that trip were sold to A.P. Bell for \$10,010.90. JE 1, Stip. 20. As a result of the failure to complete the landing report, the pounds of IFQ catch landed was not deducted from the vessel's IFQ allocation in its account, and the cost recovery fee was not collected or submitted to NMFS. JE 1, Stip. 22; AE 2 at 7; AE 14 at 1, 3.

#### **IV. BURDEN OF PROOF**

To prevail on its claims that Respondents violated the Act and the Gulf IFQ regulations, the Agency must prove the violation by the preponderance of the evidence. *Vo*, 2001 NOAA LEXIS 11, at \*16-17 (NOAA 2001) (citing 5 U.S.C. § 556(d); *Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100–03 (1981)). “Preponderance of the evidence means the Agency must show it is more likely than not a respondent committed the charged violation.” *Nguyen*, 2012 NOAA LEXIS 2, at \*10 (NOAA 2012) (citing *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 (1983)). A sanction may not be imposed “except on consideration of the whole record . . . and supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. § 556(d); *see also* 15 C.F.R. § 904.251 (“All evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing.”); 15 C.F.R. § 904.270 (stating that the exclusive record of decision consists of the official transcript of testimony; exhibits admitted into evidence; briefs; pleadings; documents filed in the proceeding; and descriptions or copies of matters, facts, or documents officially noticed in the proceeding). Direct and circumstantial evidence may establish the facts constituting a violation of law. *Vo*, 2001 NOAA LEXIS 11, at \*17.

#### **V. DISCUSSION OF LIABILITY – COUNT I**

##### **A. Elements of Violation**

To establish liability for violation of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A), and 50 C.F.R. § 622.7(gg) (2009), for failing to comply with 50 C.F.R. § 622.20(c)(3)(i) as alleged in the NOVA, NOAA must prove that: Respondents Kalije Belle, Inc., and Dwight L. Martin are “persons” under the Act and owners or operators of a vessel that landed IFQ Gulf groupers or tilefish and who failed to provide NMFS with advance notice of landing after January 1, 2010, when the relevant regulations went into effect. 16 U.S.C. § 1857(1)(A); 50 C.F.R. §§ 622.7(gg), 622.20(c)(3)(i).

##### **B. Discussion and Conclusions**

The Act imposes strict liability for this violation. *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999) (quoting *Whitney*, 6 O.R.W. 479, 483 (NOAA 1991); *Alba*, 2 O.R.W. 670, 673 (NOAA App. 1982) (“Scienter is not an element of a civil offense under [the Act]. 16 U.S.C. § 1857. Because conservation-related offenses under the MFCMA are strict liability offenses, Respondent’s protests as to his state of mind are irrelevant . . . .”)); *Roche v. Evans*, 249 F. Supp. 2d 47, 59 (D. Mass. 2003).

Respondents Kalije Belle, Inc., and Dwight L. Martin have stipulated that they are “persons” within the meaning of the Act, and that they were the owner and operator, respectively, of the fishing vessel Kalije Belle during the nine trips made by the vessel at issue in this proceeding between January 16, 2010, and October 29, 2010. JE 1, Stips. 4, 7-8. The nine trips were made by the vessel pursuant to its “federal fisheries permit for the Gulf of Mexico

Reef Fish Fishery, permit no. RR-194.”<sup>22</sup> JE 1, Stip. 9. Fish covered by the IFQ program, specifically groupers, were harvested during each of those trips. AE 5-13. It is uncontested that “[a]n ANOL [advance notice of landing] was not provided for the F/V KALIJE BELLE to indicate where or when the vessel would land its harvest of IFQ species at the conclusion of [each of] the [nine] trips[s] . . . .” JE 1, Stips. 11-19.

The duty to comply with this part of the Gulf IFQ grouper program is imposed equally upon both the vessel operator, Captain Martin, and the vessel owner, Kalije Belle, Inc., as the language of the regulation assigns the responsibility to make the ANOL on the “owner or operator.” 50 C.F.R. § 622.20(c)(3)(i) (“The owner or operator . . . is responsible for ensuring that NMFS is contacted . . .”). The record here shows both are at fault, as neither gave the required ANOL, although both were capable of doing so. JE 1, Stips. 11-19. *Cf.*, Tr. 41 (Ms. Bell about the failure to make the 2010 ANOLs: “I don’t refute that [Captain Martin] didn’t do it. [ ] I would take more responsibility, I guess, for not being sure he was aware.”). As such, imposition of joint and several liability upon the Respondents is appropriate under the facts in this case.

Therefore, it is hereby found that Respondents Kalije Belle, Inc., and Dwight L. Martin, are liable, jointly and severally, for violating the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A), and 50 C.F.R. § 622.7(gg), by failing to provide NMFS with advance notice of landing of IFQ Gulf groupers on nine occasions between January 19, 2010, and October 29, 2010, as required by 50 C.F.R. § 622.20(c)(3)(i).<sup>23</sup>

## **VI. DISCUSSION OF LIABILITY – COUNT II**

### **A. Elements of Violation**

To establish liability for violation of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A), and 50 C.F.R. § 622.7(gg) (2009), for failing to comply with 50 C.F.R. § 622.20(c)(1)(iii) as alleged in the NOVA, NOAA must prove that: Respondents Kalije Belle, Inc., Dwight L. Martin, and A.P. Bell Fish Co., Inc., are “persons” under the Act; that A.P. Bell was a permitted “dealer” that received IFQ Gulf groupers or tilefish on or about June 8, 2010, and failed to complete a landing transaction report; and that Kalije Belle, Inc., and Dwight L. Martin were fishermen who failed to validate the dealer transaction report on that date by entering the unique PIN number for the vessel account when the transaction report was submitted. 16 U.S.C. § 1857(1)(A); 50 C.F.R. §§ 622.7(gg), 622.20(c)(1)(iii).

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<sup>22</sup> The tickets for the trips indicate the area fished as “Tampa, Federal Waters,” “Tampa, Offshore Waters,” “Fort Myers, Charlotte Harbor,” or “Fort Myers, Federal Waters.” *See, e.g.*, AE 5 at 1; AE 7 at 1; AE 8 at 1; AE 11 at 1.

<sup>23</sup> NOAA has charged this Count as a single violation, even though the charging documents assert, and the evidence proffered shows, that there was a failure to make nine ANOLs.

## **B. Discussion and Conclusions**

As noted above, the Act imposes strict liability for this violation. *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999) (quoting *Whitney*, 6 O.R.W. 479, 483 (NOAA 1991); *Alba*, 2 O.R.W. 670, 673 (NOAA App. 1982) (“Scienter is not an element of a civil offense under [the Act]”).

Respondents A.P. Bell Fish Co., Inc., Kalije Belle, Inc., and Dwight L. Martin, have each stipulated that they are “persons” within the meaning of the Act. JE 1, Stip. 4. Further, they have stipulated that “[a] landing transaction report was not submitted for the offload of IFQ species of red grouper (3,370 lbs) and gag grouper (34 lbs) harvested aboard the F/V KALIJE BELLE during the trip ending on or about June 8, 2010 that were sold to A. P. Bell Fish Co., Inc. for \$10,010.90.” JE 1, Stip. 20; AE 9. Because no landing transaction report was submitted by the dealer, A.P. Bell Fish Co., Inc., a validating unique PIN number could not be entered into the IFQ system “when the transaction report [was] submitted,” by the fishermen, who were Dwight L. Martin as the operator of the vessel, and Kalije Belle, Inc., the vessel owner. Notably, Ms. Bell testified at the hearing that she was not even aware of any PIN, and Captain Martin did not and “doesn’t have a pin.”<sup>24</sup> Tr. 50.

Each of the three Respondents’ failure to act as legally required resulted in the violation of the singular regulatory provision in 50 C.F.R. § 622.20(c)(1)(iii) (“The dealer is responsible for completing a landing transaction report . . . [and] [t]he fisherman must validate the dealer transaction report . . .”). Therefore, A.P. Bell Fish Co., Kalije Belle, Inc., and Dwight L. Martin are found to be jointly and severally liable for violating the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A), and 50 C.F.R. § 622.7(gg), by failing to follow program procedure by submitting a dealer landing transaction report and validating that report in regard to the landing of IFQ grouper on or about June 8, 2010, as required by 50 C.F.R. § 622.20(c)(1)(iii).

## **VII. CIVIL PENALTY ASSESSMENT**

As indicated above, the Act provides, in pertinent part, that “[a]ny person who is found . . . to have committed an act prohibited by section 1857 of this title shall be liable to the United States for a civil penalty.” 16 U.S.C. § 1858(a). The maximum civil penalty authorized by the statute is \$140,000 per violation. *Id.*; 15 C.F.R. § 6.4(e)(14) (2010) (providing for inflation adjustment). Further, the Act provides that in determining the amount of the penalty, the following factors “shall” be taken into account:

the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require. In assessing such penalty the Secretary may also consider any information provided by the violator relating

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<sup>24</sup> About the PIN procedure, Ms. Bell testified that “Gulf-wide that’s not how it’s done.” Tr. 50.

to the ability of the violator to pay, *Provided*, That the information is served on the Secretary at least 30 days prior to an administrative hearing.<sup>25</sup>

16 U.S.C. § 1858(a); *see also*, 15 C.F.R. § 904.108(a).

The Agency has proposed a \$5,000 civil penalty for Count 1, and a \$15,020.90 civil penalty for Count 2. There is no presumption that the Agency's proposed penalty is appropriate, nor that the Agency's penalty analysis is accurate. *Nguyen*, 2012 NOAA LEXIS 2, at \*21 (NOAA 2012); *see also* 15 C.F.R. § 904.204(m). An Administrative Law Judge is not required "to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document." *Nguyen*, 2012 NOAA LEXIS 2, at \*21; Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631 (June 23, 2010) (to be codified at 15 C.F.R. § 904.204(m)).

### **Count 1 – Failure to Submit Advance Notice of Landing**

For Count 1, failure to submit an advance notice of landing (ANOL) for the nine fishing trips taken by the vessel between January and October 29, 2010, the Agency has proposed imposing a single civil penalty of \$5,000, jointly and severally, upon Respondents Kalije Belle, Inc., and Dwight L. Martin.

NOAA utilized a penalty policy in determining its proposed penalty, entitled Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions (Mar. 16, 2011) ("Penalty Policy" and "PP").<sup>26</sup> A's Brief at 12 ("NOAA's Penalty Policy incorporates the relevant statutory provisions in determining the penalty assessed, and improves consistency at a national level, provides greater predictability for the regulated community and the public, and promotes transparency in enforcement."). The Penalty Policy categorizes "[f]ailing to comply in a timely fashion with log report, reporting, record retention, inspection, or other requirements, including failure to submit affidavits or other required forms in a quota fishery" as a Level I or Level II in "offense level," depending whether the adverse impact to the regulatory program is significant and whether there is economic gain from the violation. PP at 35 n.20. NOAA does not assert that Respondents' Count 1 violation fits within that or any other specific category of violation listed in the Penalty Policy, but it did assign a Level II offense level to the count, and characterizes Respondents' culpability as "negligent." AE 24 at 5 (the Agency's Penalty Assessment Worksheet for Count 1). In the Penalty Policy's matrix for Magnuson-Stevens Act violations, the range of penalties suggested for Level II offenses when the respondent is

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<sup>25</sup> In her answer letter dated July 3, 2013, Ms. Bell indicated her intention to file separate financial statements for the vessel and captain, alleging that they "lack the ability to pay the assessed civil penalties." However, no evidence in support of an inability to pay claim was submitted by any Respondent before or at the hearing, and the parties stipulated that Respondents Kalije Belle, Inc., and A.P. Bell did not submit all the financial information that the Agency requested from them. JE 1, Stip. 29. Therefore, all Respondents are "presumed to have the ability to pay the civil penalty." 15 C.F.R. § 904.108(c).

<sup>26</sup> The Penalty Policy is available to the public at:  
[http://www.gc.noaa.gov/documents/031611\\_penalty\\_policy.pdf](http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf).

“negligent” is \$4,000 – \$6,000. PP at 25. After choosing a Base Penalty within that range of \$5,000, the Agency made no adjustments based its consideration of the following factors: history of compliance, commercial/recreational fishing, activity after violation/cooperation, proceeds of unlawful activity, or economic benefit from noncompliance. AE 24 at 5.

Respondents indicate, by their submission of Respondents’ Exhibit 5, a document entitled, “Southeast Region Fix-It Notice Violations,” that the violation or violations at issue here, if proven, is in the “Fail to submit information” category of violations, and therefore warrants a remedy of “Send[ing] in the information” within 30 days. RE 5 at 1-3. Respondents also submitted to the record Exhibit 6, a document described as an excerpt from the Penalty Policy (although it appears to be from a Southeast Region-specific document, not the Penalty Policy) entitled, “Southeast Region Magnuson-Stevens Act Penalty Schedule.” RE 6. The penalty range of “\$500 - \$50,000, Permit Sanctions 0-45 days” is circled and “Kalije” written underneath, signifying that Respondents believe the present violation falls there in the matrix, which is a combination of “Violations regarding the method of fishing/gear” and a violator’s “First” violation. However, it’s not clear where in that vast range between \$500 and \$50,000 (or permit sanction) Respondents are arguing the penalty here should fall, nor is it clear if they intend both Counts to be treated as violations falling within the same category.

At hearing, Special Agent Kalamas testified credibly to the nature, circumstances, extent and gravity of the subject violation of the Gulf grouper IFQ regulations. The Agent has 21 years of experience working with NOAA, with her current primary responsibilities being enforcement of the Act and the federal fisheries regulations in the area of Cortez, Florida, and elsewhere. Tr. 12-13. She claimed that one of the major concerns regarding the enforcement of the IFQ program was the “accountability of the program.” Tr. 18. As such, NOAA put in place as series of accountability measure including “the operating VMS unit [and] the advance notification of landing.” Tr. 19. “The advance notification of landing provides enforcement the opportunity to meet the vessel, monitor the offload, [and] ensure that the proper allocation is deducted from the account. Essentially it helps to prevent the unreported fish from coming into the system,” the Agent explained. Tr. 15-16, 29. Consistent therewith, she stated that the investigation of the Kalije Belle’s landings that she conducted after October 2010 revealed not only nine incidences of missing ANOLs, but that one of the Kalije Belle’s trips that ended in June 2010 was not reported at all, meaning that neither an ANOL nor a dealer landing transaction report was submitted. Tr. 16, 18, 20-21. As a result, no allocation was ever deducted from the shareholder’s account for the “5,400 pounds of grouper” harvested on the trip.<sup>27</sup> *Id.* That was significant, she opined, because “[t]he IFQ [program] is designed with all the accountability measures to ensure the sustainability of the species. You can think of it as almost like a pie and everybody has a slice. If you’re not reporting your slice, you can essentially go out and fish that trip again and again and again and those fish are never reported.” Tr. 17. “[Y]ou can considerably overfish the TAQ, the total allowable quota,” she warned, noting that the regulations do not provide for deducting any pounds of fish you catch in excess of your limit one year from your next year’s allocation. Tr. 17, 32. Moreover, “if you have 10 fishermen that each one are bringing in a thousand pounds that we never know about, the species [can] get depleted, [] lower[ing] the TAC [total allowable catch]” for everyone. Tr. 31. The lowering of

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<sup>27</sup> This figure was disputed at the hearing, and is discussed at more length below in the penalty analysis for Count 2. Tr. 16-18, 19-22, 43-44; RE 7-9; AE 9.

the TAC, she indicated, was a concern for all commercial fishermen, suggesting that the non-reporting can negatively affect the economic viability of other fishery businesses. Tr. 31-32.

In addition, Agent Kalamas stated that the failure to submit an ANOL prevents enforcement agents from having the opportunity to be present while boats offload, where they can monitor whether there are any prohibited species on board, whether the fish harvested meet size requirements, etc. Tr. 33.

In addition to her own testimony, Agent Kalamas confirmed the accuracy of the testimony given earlier in the day in a companion proceeding by NOAA Special Agent Paige Casey, which was incorporated herein, stating that there was no part of Agent Casey's testimony with which she disagreed. Tr. 11, 19. Special Agent Casey had testified that the IFQ Gulf grouper program began in January of 2010, and is "virtually the same" as the Gulf red snapper program which began three years before, in January of 2007. KJB Tr. 15. When the IFQ Gulf grouper program began, the regulations were published in the Federal Register, there were "several rounds of public workshops," and NOAA issued fishery bulletins on it to all permitted dealers and vessel owners. KJB Tr. 17-18. The program, Agent Casey advised, was prompted by derby-style fishing, poor market conditions and a need to preserve the species for long-term sustainability.<sup>28</sup> KJB Tr. 15. At the time the IFQ went into effect, Gulf grouper had been harvested at too high a rate for sustainability, and as a result of this overfishing, the stocks had become depleted. KJB Tr. 24, 31. Thus, the commercial fishing industry was anxious to ensure that the IFQ program was being enforced, and that law enforcement would be able to track all the fish that were caught through an accountable system. KJB Tr. 15-16. To this end, a number of measures were put in place, including generally requiring that everyone participating in the program have a federal permit with an IFQ fishing or dealer endorsement as well as a vessel monitoring system. KJB Tr. 16. In addition, the program requires vessels notify NOAA before they go out regarding where they intend to fish, what species they will be targeting, and what gear they will be using. *Id.* Then, before the vessels return to shore, they are required to provide advance notice to NOAA regarding when and where they are going to land, to whom they are going to sell their fish, and the approximate weight of the fish on-board. *Id.* To prevent the catch limits being violated, the IFQ Gulf Grouper program provides that a vessel have "sufficient allocation" in its vessel account at the time of the advance notice. KJB Tr. 16-17.

Further, Agent Casey explained that the aggregate total catch limit for the fishery is established yearly based upon biological data indicating the level of harvesting that can occur while avoiding overfishing. KJB Tr. 22-23. Without a strictly enforced catch limit, she opined, Gulf grouper would be depleted, effectively ending commercial fishing for them, which has occurred with other species. KJB Tr. 24.

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<sup>28</sup> "Derby style" fishing or harvesting, also termed "the race for fish," "consists of a short duration of increased effort where harvest is maximized prior to reaching" an annual catch limit. 77 Fed. Reg. 16,991, 16,992 (Mar. 23, 2012). The vessels "would go out pretty much in whatever weather conditions they had to go out in to catch those fish as quickly as they could so they could meet that limit . . . before NOAA shut down the fishery and said, we've reached out limit. No more fishing." KJB Tr. 27-28.

On behalf of Respondents, Ms. Bell admitted at hearing that she was personally aware of the Gulf Grouper ANOL requirement implemented in January 2010. Tr. 38. Further, she stated, “we try to convey all the information [about the new programs] to the captains . . . .” Tr. 36, 41. However, at the time the Gulf grouper IFQ regulations went into effect, Ms. Bell recalled with a tone of regret, Glen Brooks, a co-owner of boats with her Uncle Calvin, was primarily dealing with fleet operations, and further that Captain Martin “doesn’t hang around the dock, which I guess is partially why he wasn’t aware that this requirement had changed . . . .” Tr. 36, 39, 41. Ms. Bell asserted that she was unaware that they “missed [telling] this particular captain” about the requirements until the Agent’s investigation in October 2010. Tr. 36, 39. Nevertheless, describing Captain Martin as a “professional,” she expressed discomfort at placing the blame for the error on him, stating that “from my perspective, . . . I would take more responsibility . . . for not being sure he was aware. . . . But I just think it was just a mistake,” “he just didn’t know.” Tr. 41-42, 49, 53; *see also*, RX 1. Consistent therewith, upon becoming aware of the error, Ms. Bell stated that she did not fire, sanction or yell at Captain Martin. Tr. 40-41. She also said that Mr. Brooks “is no longer working with us” and that she has updated her web access to receive a notice every time a vessel submits an ANOL. Tr. 43, 54.

Moreover, Ms. Bell credibly asserted that if she had personally known that the captain was not submitting the notices, she would have inquired of him before or after each trip to assure he was compliant. Tr. 39-40. “[T]here wasn’t an intentional trying to hide fish,” noting that there was a large amount of red and gag grouper allocation left unused in all of the company accounts at the end of the year. Tr. 36-37, 46, 48. “[T]here was no double-dipping,” and Respondents did not “abuse[] the right to harvest” she stated emphatically. Tr. 37, 46, 48.

In addition, Ms. Bell raised in her testimony her frustration with the fact that a NOVA was issued, instead of a warning, and that the NOVA was issued after nine instances of non-reporting. Tr. 35-37; 46. She explained that the captains submit outbound declarations through the VMS system before they go out fishing, stating the fishery they intend to work. Tr. 45-46. “And I would think after two or three missed, missed inbound declarations [ANOLs], somebody [at NOAA] would question it.”<sup>29</sup> Tr. 46. As such, she felt that a timely “phone call would have remedied” the problem, especially as it was a “new protocol” at the time “[a]nd people are human, people make mistakes.” Tr. 35-36, 46-47; *see also*, RX 1. In addition, she recalled that in 2010 she did not recall receiving e-mail copies of the ANOLs that the boats were submitting though VMS, the captains “generally don’t speak with us when they’re offshore by e-mail or anything,” and the landing reports were not required to be or weren’t being matched up to ANOLs, suggesting she had no way at the time to become aware of the missing ANOLs. Tr. 38, 51. Further, Ms. Bell pointed out that presently NOAA has a prompt formal check system in place, and that she receives a phone call and letter if she submits a landing transaction report where no ANOL has been made.<sup>30</sup> Tr. 24, 45; RX 2. For these reasons, she had felt a warning would have been sufficient instead of the present enforcement action for civil penalties. Tr. 49.

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<sup>29</sup> At hearing, Agent Kalamas admitted that both the VMS and IFQ systems allows NOAA to monitor vessels and IFQ program filings in real-time and thus it had the ability to see the *Kalije Belle* “coming and going” without any ANOLs being filed. *Id.* at 22-23, 29, 34.

<sup>30</sup> Respondents’ Exhibit 5, as described above, is entitled “Southeast Region Fix-It Notice Violations,” with an edition date of June 28, 1999. It appears to show that for certain “[f]ail[ure] to submit information” violations, the remedy is to “[s]end in the information” within 30 days.



Upon consideration of all the foregoing, it is noted as follows:

First, while Ms. Bell's frustration with NOAA not contacting her until after Captain Martin failed to submit nine ANOLs in a row is certainly understandable, it is noted that to their benefit Respondents are not charged here with nine violations, but only one. Moreover, it is common knowledge that government resources are not unlimited, and so, as Agent Kalamas credibly observed, "it's not feasible for [NOAA] to monitor every single boat and every single fishing trip and to call every single owner" to aid regulatory compliance. Tr. 23.

Second, as pointed out in the Agency's Initial Post-Hearing Brief, the duty to know and comply with the law falls squarely on Respondents. A's Brief at 8 (citing *Taormina*, 6 O.R.W. 249 (NOAA App. 1990); *O'Neil*, 1995 NOAA LEXIS 20, at \*7 (NOAA 1995) ("[C]ommercial fishing is regulated and those engaged in it for profit activities are required to keep abreast of and abide by the laws and regulations that affect them."); *Sprinkle*, 4 O.R.W. 635 (NOAA 1986). See also, *Peterson & Weber*, 6 O.R.W. 486, 1991 NOAA LEXIS 34, at \*9 (NOAA 1991) ("When one engages in a highly regulated industry, that person bears the responsibility of knowing and interpreting the regulations governing that industry."). Moreover, publication of regulations in the Federal Register gives legal notice of their contents regardless of actual knowledge. *O'Neil*, 1995 NOAA LEXIS 20, at \*8 (noting that this legal presumption is now codified at 44 U.S.C. § 1507).

Third, formulation of the IFQ regulations for Gulf Grouper and tilefish, which went into effect in January 2010, was a very public process, the Agency advises. A's Brief at 8. Respondents stipulated that "[o]n October 19, 2009, NOAA mailed to all Gulf reef fish commercial permit holders and posted on its internet homepage Southeast Fishery Bulletin FB09-057 as announcement of matters involving the IFQ program in the Gulf of Mexico . . . and availability of workshops to address how to manage IFQ accounts and other online activities." JE 1, Stip. 23. Also, in December 2009, NOAA mailed and posted instructions on providing the requisite ANOL for the Gulf IFQ program. JE 1, Stip. 25. Additional informational Bulletins regarding the program were similarly mailed and posted in late 2009 and early 2010. JE 1, Stips. 24, 26-27. Ms. Bell testified at hearing that until approximately 2011, she maintained a notebook of the Agency Bulletins that her fishermen could review. Tr. 49. Thus, Captain Martin's failure to be aware of the regulatory requirements, while an oversight, is not a significant mitigating factor. He was responsible for being aware of the ANOL requirement and the corporate Respondent was responsible for making sure he was aware and complying in regard to the catches, the proceeds of which were to be shared between them. JE 1, Stip. 10.

Fourth, the Agency argues in its Brief that Respondents did not have sufficient allocation in their particular IFQ accounts for the pounds landed on the trip ending June 8, 2010. A's Brief at 10 (citing AE 14 and RE 10). While this appears to be technically true, Ms. Bell testified regarding her process at the time of transferring shares from a holding account to each shareholder/vessel account to cover the allocation required, during the hearing of the Karen J.

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RX 5. There was no discussion of the document at hearing and therefore it is not possible to determine the document's relevance to this penalty determination, or whether it represents current remedies employed by the Southeast Region today, etc.

Belle, Inc., matter. KJB Tr. 40, 46. Further documentary evidence submitted at hearing by Respondents indicates that at the end of the 2010 calendar year, the Kalije Belle, Inc., shareholder account had 22,048 pounds of Red grouper, 1,646 pounds of gag grouper, and 93 pounds of “other shallow water grouper” allocation remaining. RX 10-12. As such, it appears that while technical violations may have occurred, no actual harm was done to the fishery, in that the Respondent corporations as a group did not exceed their yearly allocation totals. RX 10-12.

Moreover, to Respondents’ credit, in eight of the nine instances where an ANOL was not submitted, a landing report was made and the fish were deducted from the shareholders’ allocation. Tr. 15-16. Further, the record clearly suggests that the violation was not intentional, but a result of negligence, as NOAA set forth in its Penalty Worksheets, and Ms. Bell appeared very sincere in taking responsibility for the violation and in regard to assuring better compliance in the future. Tr. 53-54; AE 24 at 5. Moreover, the record reflects that both Ms. Bell and Mr. Martin were honest and cooperative when the agents spoke to them about the present events and compliance issues generally, and they provided documentation upon request. AE 1; AE 2; AE 3; AE 4. Finally, there is no evidence of any prior history of offenses. AE 24 at 5.

Based upon the foregoing analysis of the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to Respondents Kalije Belle, Inc., and Dwight L. Martin, their degree of culpability, history of prior offenses, and such other matters as justice may require, I find that imposition of a civil penalty in the amount of \$5,000, to be appropriate for the violation charged in Count 1.

### **Count 2 – Failure to Submit Landing Transaction Report**

For Count 2, failure to submit a dealer landing transaction report and validate the report in connection with the fishing trip ending on or about June 8, 2010, the Agency has proposed imposing a civil penalty of \$15,020.90 jointly and severally upon Respondents A.P. Bell, Kalije Belle, Inc., and Dwight L. Martin. Again, there is no presumption that the Agency’s proposed penalty is appropriate, nor that the Agency’s penalty analysis is accurate. *Nguyen*, 2012 NOAA LEXIS 2, at \*21 (NOAA 2012); *see also* 15 C.F.R. § 904.204(m). An Administrative Law Judge is not required “to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document.” *Nguyen*, 2012 NOAA LEXIS 2, at \*21; Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631 (June 23, 2010) (to be codified at 15 C.F.R. § 904.204(m)).

As stated above, the Penalty Policy categorizes “[f]ailing to comply in a timely fashion with log report, reporting, record retention, inspection, or other requirements, including failure to submit affidavits or other required forms in a quota fishery” as a Level I or Level II in “offense level,” depending whether the adverse impact to the regulatory program is significant and whether there is economic gain from the violation. PP at 35 n.20. NOAA does not assert that Respondents’ Count 2 violation fits within that or any other specific category of violation listed in the Penalty Policy, but just as with Count 1, NOAA assigned a Level II offense level to Count 2, and characterizes Respondents’ culpability again as “negligent.” AE 24 at 6 (the Agency’s Penalty Assessment Worksheet for Count 2). In the Penalty Policy’s matrix for Magnuson-Stevens Act violations, the range of penalties suggested for Level II offenses when the

respondent is “negligent” is \$4,000 – \$6,000. PP at 25. After choosing a Base Penalty within that range of \$5,000, the Agency made no adjustments based its consideration of the following factors: history of compliance, commercial/recreational fishing, or activity after violation/cooperation. However, as the Agency stated in its PPIP, “[a]s directed by the Penalty Policy, the economic benefit of IFQ species sold without reduction from allocation held by F/V Kalije Belle was added to the base penalty for count two.” A’s PPIP at 12. NOAA proposes the addition of \$10,010.90 to the \$5,000 base penalty. AE 24 at 6.

Again, Respondents indicate, by their submission of Respondents’ Exhibit 5, a document entitled, “Southeast Region Fix-It Notice Violations,” that the violation or violations at issue here, if proven, is in the “Fail to submit information” category of violations, and therefore warrants a remedy of “Send[ing] in the information” within 30 days. RE 5 at 1-3. And on Respondents’ Exhibit 6, entitled, “Southeast Region Magnuson-Stevens Act Penalty Schedule,” the penalty range of “\$500 - \$50,000, Permit Sanctions 0-45 days” is circled and “Kalije” written underneath, signifying that Respondents may believe the present violation falls there in the matrix, which is a combination of “Violations regarding the method of fishing/gear” and a violator’s “First” violation. However, again it is not clear what Respondents intend, as it was not discussed during the hearing, and Respondents did not submit a post-hearing brief.

At hearing, Agent Kalamas testified with regard to the nature, circumstances, extent and gravity of the subject violation of the Gulf grouper IFQ regulations. As background, she explained that a dealer acquiring Gulf grouper and tilefish is required to submit a “landing transaction report” through the IFQ system, identifying, inter alia, the species of fish acquired and the value thereof. Tr. 25-28. Moreover, the fisherman who brought in the catch are required to validate the landing transaction report by entering a unique PIN number. *Id.* Only after the PIN number is entered will the system process the landing report and issue a “dealer transaction code.” Tr. 27-28. Both the confirmation code issued after submission of the ANOL and the confirmation code issued after submission of the landing report are required, the Agent asserted, “to be able to sell your fish and have it be deducted from the IFQ.” Tr. 25. Further, the dealer is responsible for collecting the IFQ cost recovery fee from the fisherman at the time of transfer and paying over such sums quarterly to NMFS via the IFQ system. Tr. 16.

Upon investigation, the Agent testified, she discovered that the requisite landing transaction report was not submitted by A.P. Bell, as the fish dealer, in regard to the Gulf grouper it purchased from the fisherman Captain Martin upon the vessel Kalije Belle on June 8, 2010, and therefore, obviously, the unique PIN number was not entered by the fisherman validating the report. Tr. 16, 18. As a result, no deduction from allocation was entered for the fish harvested and no cost recovery fee was withheld from the proceeds of the fish and paid over to the NMFS by the Respondents. Tr. 16, 24, 28. Moreover, because an ANOL had not been submitted for this landing either, an enforcement agent may not have been at the dock at the time of the landing to monitor the amount, size and type of fish offloaded to assure the legality of the fish harvested. Tr. 29-30, 33.

On behalf of Respondents, Ms. Bell acknowledged that the dealer transaction report was not made for the trip ending on June 8, 2010, stating that she created the “state trip ticket” and entered the catch into the log book, but “I just didn’t enter them into the IFQ program.” Tr. 36;

*see also*, RX 2. As explanation for the oversight she offered the following: “The [BP] oil spill had just happened. For us, it was huge. We thought the entire Gulf was going to die. We were flooded with things about Alaska. And it was a very scary time. And so all I can figure is it was a relatively new program. It was June, May and June, and I just lapsed on that one particular part.” Tr. 36; *see also*, Tr. 22; RX 2. Further, Ms. Bell argued that actual amount of IFQ fish unreported was only approximately 3,470 pounds, not 5,400 as suggested by the Agent referring to the state report. Tr. 18, 20-21, 37. In addition, she said that if the landing report been submitted, there would have been more than sufficient allocation in pounds of fish in their account to cover the deduction, noting that her family’s companies do not lease out its allocation to others. Tr. 28, 36-38. Further, she suggested that the entry of the PIN number, or the log-in number validating the transaction report is done by her and/or her companies, rather than the boat captain, noting “[h]e doesn’t have a pin.”<sup>31</sup> Tr. 50.

The parties’ testimony as reiterated above in regard to Count 1, regarding the general operations and purposes of the IFQ program, will not be repeated here, but is relevant, and has been considered in this analysis as well.

Upon consideration of the foregoing discussion, it is noted as follows:

First, a dealer’s failure to submit a landing transaction report is a very significant violation, particularly under the circumstances here where no ANOL was submitted either. Through the IFQ system, NOAA/NMFS is clearly attempting to monitor the fishery stock from harvest to harbor, by mandating reporting every step of the way in the commercial fishing process, and enforce the quota program so the playing field is level for commercial fisherman and so that there is still fish in the region to catch in the future. The failure to submit the landing report, along with the ANOL, essentially makes the harvest invisible and unknown to NMFS, thereby completely defeating the purpose of the IFQ system. The violation here prevented not only the allocation from being deducted from any of the A.P. Bell shareholders’ accounts, but also resulted in the cost recovery fee not being paid to NMFS to support the IFQ system.

On the other hand, it appears that this singular failure to file a landing transaction report was an aberration, in that Respondents filed and verified other landing transaction reports in 2010 even for those trips as to which no ANOL was submitted. Ms. Bell’s explanation that her attention was diverted by the BP oil spill disaster that occurred in the Gulf of Mexico in April 2010, and went on gushing for several months, is compelling, in light of her family’s commercial fishing business off the coast of Florida, and importantly, the perception of Gulf seafood in the

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<sup>31</sup> Assuming the PIN procedure is being carried out, the fact that the related Respondent corporations act as both the fisherman and the fish dealer for the purposes of submitting and validating the landing transaction report seems to undermine the system of checks and balances built into the IFQ system, however, Ms. Bell suggested that the practice was common, and, “Gulf-wide,” that’s “how it’s done.” Tr. 50. It also suggests that Captain Martin had no ability to validate the transaction even if he was aware of the obligation to do so, although no specific argument regarding his potential non-liability on that basis was made by him or on his behalf, nor is that suggestion supported by a preponderance of the evidence.

market at that time.<sup>32</sup> Also, A.P. Bell's Trip Ticket and Settlement Sheet both reflect that the correct amount of fish not reported was approximately 3,400 pounds, not 5,400 as the Agent testified and indicated in her report. AE 2 at 7; AE 9; RX 7-9, Tr. 43-44; JE 1, Stip. 20 (indeed, the parties stipulated that 3,370 pounds of red grouper and 34 pounds of gag grouper were harvested on that trip). Further, it appears that the cost recovery fee would have amounted to only \$300.33 for that June trip, and that it was collected after all, albeit not reported or submitted to NMFS, as required. AX 9 at 2. There is no history of similar adjudicated violations. In light of these factors, the proposed penalty seems somewhat excessive; although not completing landing transaction reports is a serious offense. I find it appropriate to factor in Respondents' proceeds from unlawful activity, but to halve that figure (approximately). Therefore, \$5,000 added to the base penalty of \$5,000, for a total of \$10,000, seems the most appropriate civil penalty for this violation given the particular circumstances of this case.

### ORDER

Wherefore, having been found liable for Count 1 of the NOVA for the violation alleged therein, a penalty in the amount of **\$5,000** is hereby assessed and imposed jointly and severally upon Respondents Kalije Belle, Inc., and Dwight L. Martin.

Further, having been found liable for Count 2 of the NOVA for the violation alleged therein, a penalty of **\$10,000** is hereby assessed and imposed jointly and severally upon Respondents A.P. Bell Fish Co., Inc., Kalije Belle, Inc., and Dwight L. Martin.

**Once this Initial Decision becomes final under the provisions of 15 C.F.R. § 904.271(d), you will be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein. The Rules concerning the finality of this Initial Decision and how to challenge this Initial Decision can be found at 15 C.F.R. §§ 904.271-273, a copy of which is pasted below.**

**PLEASE TAKE NOTICE**, that any petition for reconsideration of this Initial Decision must be filed with the undersigned within **20 days** after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. *Id.* Within **15 days** after a petition for reconsideration is filed, any other party to this proceeding may file an answer in support or in opposition. The undersigned will rule on any petition for reconsideration.

**PLEASE TAKE FURTHER NOTICE**, that any petition to have this Initial Decision reviewed by the NOAA Administrator must be filed with the Administrator within **30 days** after the date this Initial Decision is served and in accordance with the requirements set forth at 15 C.F.R. § 904.273.

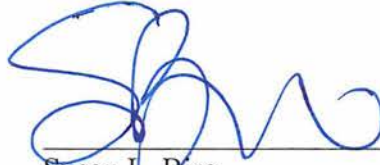
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<sup>32</sup> In a letter to NOAA counsel dated November 13, 2013, Ms. Bell describes her state at the time of the spill stating, "I was personally stressed to no end as I felt the Gulf was going to be ruined along with our fishermen, our fish house, our historic fishing village and the Gulf seafood industry as a whole." RE 2. She notes that they "ended up freezing 80,000 pounds of grouper in June as no one would buy Gulf product." *Id.*

**PLEASE TAKE FURTHER NOTICE**, that this Initial Decision becomes effective as the final Agency action **60 days** after service, unless the undersigned grants a petition for reconsideration or the Administrator reviews the Initial Decision. 15 C.F.R. § 904.271(d).

**PLEASE TAKE FURTHER NOTICE**, that upon failure to pay the civil penalty to the Agency within **30 days** from the date on which this decision becomes final Agency action, the Agency may request the U.S. Department of Justice to recover the amount assessed, plus interest and costs, in any appropriate district court of the United States or may commence any other lawful action. 15 C.F.R. § 904.105(b).

**SO ORDERED.**



Susan L. Biro  
Chief Administrative Law Judge  
U.S. Environmental Protection Agency<sup>33</sup>

Dated: March 23, 2015  
Washington, DC

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<sup>33</sup> As stated above, the Administrative Law Judges of the U.S. EPA are authorized to hear cases pending before the Agency pursuant to an agreement effective September 8, 2011.

TITLE 15 -- COMMERCE AND FOREIGN TRADE  
SUBTITLE B -- REGULATIONS RELATING TO COMMERCE AND FOREIGN  
TRADE  
CHAPTER IX -- NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,  
DEPARTMENT OF COMMERCE  
SUBCHAPTER A -- GENERAL REGULATIONS  
PART 904 -- CIVIL PROCEDURES  
SUBPART C -- HEARING AND APPEAL PROCEDURES  
DECISION

15 CFR 904.271-273

§ 904.271 Initial decision.

(a) After expiration of the period provided in § 904.261 for the filing of reply briefs (unless the parties have waived briefs or presented proposed findings orally at the hearing), the Judge will render a written decision upon the record in the case, setting forth:

(1) Findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law, or discretion presented on the record;

(2) An order as to the final disposition of the case, including any appropriate ruling, order, sanction, relief, or denial thereof;

(3) The date upon which the decision will become effective; and

(4) A statement of further right to appeal.

(b) If the parties have presented oral proposed findings at the hearing or have waived presentation of proposed findings, the Judge may at the termination of the hearing announce the decision, subject to later issuance of a written decision under paragraph (a) of this section. In such cases, the Judge may direct the prevailing party to prepare proposed findings, conclusions, and an order.

(c) The Judge will serve the written decision on each of the parties, the Assistant General Counsel for Enforcement and Litigation, and the Administrator by certified mail (return receipt requested), facsimile, electronic transmission or third party commercial carrier to an addressee's last known address or by personal delivery and upon request will promptly certify to the Administrator the record, including the original copy of the decision, as complete and accurate.

(d) An initial decision becomes effective as the final administrative decision of NOAA 60 days after service, unless:

(1) Otherwise provided by statute or regulations;

(2) The Judge grants a petition for reconsideration under § 904.272; or

(3) A petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative under § 904.273.

#### § 904.272 Petition for reconsideration.

Unless an order or initial decision of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or initial decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of such order or initial decision. The filing of a petition for reconsideration shall operate as a stay of an order or initial decision or its effectiveness date unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the administrative proceeding may file an answer in support or in opposition.

#### § 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.



(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse, modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

(c) Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for discretionary review, or review is timely undertaken on the Administrator's own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

(d) A petition for review must comply with the following requirements regarding format and content:

(1) The petition must include a concise statement of the case, which must contain a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;

(2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;

(3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations, and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;

(4) A copy of the Judge's initial decision must be attached to the petition;

(5) Copies of all cited portions of the record must be attached to the petition;

(6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and

(7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content

requirements in paragraph (d) of this section without further review.

(f) No oral argument on petitions for discretionary review will be allowed.

(g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.

(h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.

(i) If the Administrator issues an order denying discretionary review, the order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.

(j) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be briefed and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an

Administrator's decision to remand the initial decision to the Judge is not final agency action.

(1) An initial decision shall not be subject to judicial review unless:

(1) The party seeking judicial review has exhausted its opportunity for administrative review by filing a petition for review with the Administrator in compliance with this section, and

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section.

(m) For purposes of any subsequent judicial review of the agency decision, any issues that are not identified in any petition for review, in any answer in support or opposition, by the Administrator, or in any modifications to the initial decision are waived.

(n) If an action is filed for judicial review of a final agency decision, and the decision is vacated or remanded by a court, the Administrator shall issue an order addressing further administrative proceedings in the matter. Such order may include a remand to the Chief Administrative Law Judge for further proceedings consistent with the judicial decision, or further briefing before the Administrator on any issues the Administrator deems appropriate.