



UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:

Lisa M. Belle, Inc., and
Peter D. Strebel,

Respondents.

Docket Number:

SE1101642FM
F/V LISA M. BELLE

INITIAL DECISION AND ORDER

Date: March 23, 2015

Before: Susan L. Biro, Chief Administrative Law Judge, U.S. EPA¹

Appearances: Agency Counsel:

Cynthia S. Fenyk, Esquire
Office of General Counsel
Enforcement Section (Southeast)
National Oceanic and Atmospheric Administration
U.S. Department of Commerce
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Representative of Respondent Lisa M. Belle, Inc.:

Karen L. Bell
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¹ 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 April 8, 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 Notice of Violation and Assessment of Administrative Penalty (“NOVA”) to Lisa M. Belle, Inc., and Peter D. Strebel, in regard to the fishing vessel (“F/V”) Lisa M. Belle.

The NOVA charges Respondent Lisa M. Belle, Inc. (“LMB”) as the vessel owner, and Respondent Peter D. Strebel 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(l), on or about April 11, 2011, by unlawfully fishing “in violation of the prohibitions, restrictions, and requirements applicable to seasonal and/or area closures, including but not limited to: prohibition of all fishing, gear restrictions, restrictions on take or retention of [sic] fish, fish release requirements, and restrictions on use of an anchor [sic] or grapple, as specified in § 622.34(k)(3) (Steamboat Lumps and Edges closure area)” NOVA at 1. On the alleged date of violation, “[p]roceeds in the amount of \$6,212.80 from the sale of 1,928 lbs. red grouper, 45 lbs. scamp, 11 lbs. kitty mitchell grouper, 2 lbs. vermillion snapper, and 18 lbs. porgy” were seized. *Id.* Imposition of a single penalty in the amount of \$13,500 is proposed for this violation.² NOVA at 2.

By letter dated July 3, 2013, Karen L. Bell,³ submitted a request for hearing before an Administrative Law Judge in response to the NOVA on behalf of LMB and two other corporate respondents in related actions, and requested on their behalf, that the three actions against them “be heard together.”⁴ Respondent Strebel did not submit a request for hearing.⁵ On August 15, 2013, NOAA forwarded the cases to the undersigned for processing of the hearing requests pursuant to the applicable procedural rules, set forth at 15 C.F.R. Part 904 (“Rules”).⁶

² NOAA included with its NOVA a Penalty Worksheet, outlining the Agency’s penalty calculations for the alleged violation.

³ 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.”).

⁴ The other two cases are styled *Karen J. Belle, Inc., and Laramie J. Williams*, NOAA Case No. SE1202106FM, F/V Karen J Belle, and *A.P. Bell Fish Co., Inc., Kalije Belle, Inc., and Dwight L. Martin*, NOAA Case No. SE1003701FM, F/V Kalije Belle.

⁵ While the applicable procedural rules provide that a hearing request by “one joint and several respondent” is considered a request by all, the NOVA in this case did not explicitly seek joint and several liability. 15 C.F.R. § 904.107(b).

⁶ 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 request for hearing along with a motion in opposition . . . to the ALJ . . . for a determination on

On September 9, 2013, Ms. Bell submitted a letter to this Tribunal explicitly indicating that she represented LMB and was accepting this Tribunal's offer to participate in its Alternative Dispute Resolution ("ADR") Process on behalf of both Respondents. *See*, Bell correspondence, Sept. 9, 2013. The case was then assigned to ADR by Order dated September 11, 2013, and the parties participated 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, 2014.⁷ 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 Agency and LMB timely complied with the PPIP Order, and LMB subsequently supplemented its initial PPIP filing.⁸ Subsequently, in a letter dated March 31, 2014 directed to NOAA, a copy of which was provided to this Tribunal, Ms. Bell indicated that she was representing all Respondents in the three companion cases, *except for Peter Strebel* stating, "I have not been able to reach Peter Strebel so I was unable to discuss this matter with him. Therefore I will not be representing him." Bell correspondence, Mar. 31, 2014.

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.

On April 9, 2014, NOAA filed a Motion to Allow Additional Discovery and to Compel Response to Attached Written Request for Admissions from Respondent Strebel. In the Motion, the Agency advised that Mr. Strebel "has not responded to the Agency in any fashion regarding the NOVA issued to and received by him." Mr. Strebel did not respond to the Motion and it was granted by Order dated April 15, 2014.⁹ Mr. Strebel did not comply with the Order and/or respond to the Agency's discovery requests.

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.

⁷ The PPIP Order is mistakenly dated January 24, 2013, but the Certificate of Service correctly reflects its issuance and service on January 24, 2014.

⁸ The initial PPIP submitted by Karen Bell on or about March 7, 2014, is unsigned and does not explicitly identify whether it is being submitted on behalf of one or both Respondents, however the text suggests it was prepared by Ms. Bell solely on behalf of LMB. In her "Motion to Supplement Positions on Issues and Procedures" filed on April 26, 2014, Ms. Bell identifies herself as representing only LMB.

⁹ The Order on the Motion was issued although the full time allowed for filing a response had not yet expired in light of the upcoming hearing date and Mr. Strebel's failure to participate in any way in the proceeding up to that point. The service issue discussed further herein was unidentified at the time.

Thereafter, NOAA and LMB submitted a Joint Motion requesting that the hearing held in this case, and in the 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 34205.¹⁰ The instant case was the third of the three cases heard. Tr. 7. During the hearing of this matter, the Agency offered into evidence 19 exhibits, all of which were admitted, and the testimony of one witness, Special Agent Paige Casey of the NOAA Office of Law Enforcement.¹¹ Tr. 13-14. For the sake of efficiency and with the parties' consent, incorporated into the hearing of this case was the testimony of NOAA Special Agent Casey on her training and experience given 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.¹² Tr. 15.

Karen Bell appeared at the hearing as LMB's representative and testified on its behalf. Tr. 7, 27-38. Mr. Strebel did not appear at the hearing. Tr. 7-8. LMB offered 12 exhibits into evidence and all were admitted.¹³ Tr. 32. In addition, the Joint Set of Stipulated Facts, Exhibits and Testimony signed by LMB and the Agency, dated April 24, 2014, was admitted into evidence as Joint Exhibit 1.¹⁴ Tr. 13. The Agency's Written Request for Admissions to Respondent Strebel was admitted as Joint Exhibit 2.¹⁵ Tr. 8-12, 14.

On May 20, 2014, an electronic copy of the hearing transcript was received by this Tribunal and on May 27, 2014, the pdf was forwarded to the Agency and LMB via e-mail. On May 28, 2014, a printed copy of the transcript was forwarded to Mr. Strebel by staff of the undersigned. The Hearing Clerk received the certified copy of the transcript on that day, and the undersigned immediately issued a Post-Hearing Scheduling Order ("Post-Hearing Order"), establishing a briefing schedule. On July 25, 2014, the Agency's Initial Post-Hearing Brief was filed ("A's Brief"). LMB did not file a post-hearing brief, and as such, the record in this matter closed on July 25, 2014.

¹⁰ Citations herein to the transcript of the hearing in this case are made as follows: "Tr. [page]."

¹¹ Citations herein to the Agency's exhibits are made as follows: "AE [number] at [page]."

¹² Citations herein to the transcript of the hearing held in that case are made as follows: "KJB Tr. [page]."

¹³ Citations herein to Respondent LMB's exhibits are made as follows: "RE [number] at [page]."

¹⁴ Citations herein to the Joint Exhibits are made as follows: "JE [number]."

¹⁵ The issue of whether to deem the requests for written admissions as admitted by Mr. Strebel due to his failure to respond to them was taken under advisement at the hearing and is discussed further below. Tr. 9-10.

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”).¹⁶ 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.”¹⁷ *Id.* at § 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”),¹⁸ 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).

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). 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)).

¹⁶ 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).

¹⁷ 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, 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).

¹⁸ 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).

Regulations implementing the Act in effect at the time of the alleged violation provide, in pertinent part, that:

(k) *Closure provisions applicable to the . . . Steamboat Lumps, and the Edges.*—

* * *

(3) Within the . . . Steamboat Lumps during November through April, and within the Edges during January through April, all fishing is prohibited, and possession of any fish species is prohibited

50 C.F.R. § 622.34(k)(3) (2010).¹⁹

And that,

. . . it is unlawful for any person to do any of the following:

* * *

(I) Fish in violation of the prohibitions, restrictions, and requirements applicable to seasonal and/or area closures, including but not limited to: Prohibition of all fishing . . . restrictions on take or retention of fish . . . as specified in . . . § 622.34

....

50 C.F.R. § 622.7(I) (2010).²⁰

III. FACTUAL BACKGROUND

Respondent Lisa M. Belle, Inc. (“LMB”), is a corporation organized under the laws of the State of Florida, and the owner of the commercial fishing vessel Lisa M. Belle (U.S. documentation number 642164).²¹ JE 1, Stip. 5; AE 10 at 1-2; AE 11; AE 12 at 1. At all times

¹⁹ The Steamboat Lumps and the Edges marine protected areas in the Northern Gulf of Mexico are defined as bounded by rhumb lines connecting, in order, a certain set of navigational points. 50 C.F.R. §§ 622.34(k)(1)(ii), (iii); *see also*, Tr. 21-25.

²⁰ The alleged violation in this case took place in April 2011. 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>. Therefore, the regulatory text applicable to this action can be found in the 2010 edition of the C.F.R., and so unless otherwise indicated, that is the edition of the regulations at Part 622 that are cited in this decision. 50 C.F.R. Part 622 (2010).

²¹ The NOVA identifies the vessel as “Lisa M. Belle” including a period after the “M,” and so that is how it will be identified here, even though the period is absent from the vessel’s name in other documentation in the record. *See, e.g.*, AE 10; AE 12; AE 15.

relevant hereto, LMB held a commercial federal fisheries permit for Gulf of Mexico Reef Fish (no. RR-405). JE 1, Stip. 6; AE 12 at 1, 3. Pursuant to said permit, and with permission granted by Respondent LMB, Respondent Peter D. Strebel operated the Lisa M. Belle during a fishing trip conducted off the coast of Florida beginning on April 9, 2011, and ending on April 12, 2011. JE 1, Stips. 5-7; AE 16; AE 17; AE 18. The parties' arrangement was that "any proceeds or any losses" from the trip would be shared between Respondents and the crew. JE 1, Stip. 7. During the trip, the vessel harvested fish using bottom longline gear, or hook and line gear. JE 1, Stip. 9. At the end of the trip, on April 12, 2011, a total of 1,928 pounds of red grouper, 18 pounds of porgy, 11 pounds of kitty, 45 pounds of scamp, and 2 pounds of beeliners snapper, were offloaded from the vessel. JE 1, Stip. 8.

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 Collieres*, 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 REQUESTS FOR ADMISSIONS / SERVICE ON STREBEL

As a preliminary matter at hearing, the Agency moved to admit the Agency's Request for Admissions that were served on Respondent Strebel, and moved for a ruling that the admissions stated therein were deemed "conclusively established" as facts in this proceeding, in light of his lack of response thereto, as provided by 15 C.F.R. § 904.243(b) and (c).²² Tr. 8-9. The

²² Rule 904.243 provides, in pertinent part, that:

(a) Request. If ordered by the Judge, any party may serve on any other party a written request for admission of the truth of any relevant matter of fact set forth in the request, including the genuineness of any relevant document described in the request.

* * *

(b) Response. Each matter is admitted unless a written answer or objection is served within 20 days of service of the request

(c) Effect of admission. Any matter admitted is conclusively established unless the Judge on motion permits withdrawal or amendment of it for good cause shown.

undersigned admitted the exhibit as Joint Exhibit 2, took the Agency's motion pursuant to Rule 904.243(b) under advisement, and after further consideration, hereby **DENIES** that motion, as explained below.

It is black letter law that only by valid service of process, entry of an appearance, or the waiver thereof, can a tribunal obtain jurisdiction over a party to an action. *Goldey v. Morning News*, 156 U.S. 518, 521 (1895) ("It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person . . . except by actual service of notice . . . upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise . . ."); *United States v. New York & O.S.S. Co.*, 216 F. 61, 66 (2d Cir. 1914) ("Jurisdiction of the person is obtained . . . by the 'service of process, or by the voluntary appearance of the party in the progress of the cause.'") (citing *Cooper v. Reynolds*, 77 U.S. 308, 316-17 (1870)).

Further, a tribunal is obliged to consider the issue of jurisdiction sua sponte, and it may be raised at any stage of the proceedings. *Derouselle v. Wal-Mart Stores*, 934 F. Supp. 214, 215 (W.D. La. 1996) ("because federal courts are courts of limited jurisdiction, the trial court is bound to assess for itself, even when not otherwise suggested, whether it possesses jurisdiction.") (citing *Birmingham Post Co. v. Brown*, 217 F.2d 127, 129 (5th Cir. 1954) and *Yocum v. Parker*, 130 F. 770, 771 (8th Cir. 1904) ("The question of jurisdiction is self-asserting in every case. It arises although the litigants are silent. Even their consent cannot authorize cognizance if fundamental grounds of jurisdiction are absent.")); see *Turner v. Bank of North-America*, 4 U.S. 8 (1799).

The Rules set forth at 15 C.F.R. Part 904 that are applicable to this matter provide that:

(a) Service of a NOVA (§ 904.101) . . . may be made 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. Service of a notice under this subpart will be considered effective upon receipt.

* * *

(c) Whenever this part requires service of a NOVA . . . such service may effectively be made on the agent for service of process, on the attorney for the person to be served, or other representative.

15 C.F.R. § 904.3(a), (c).

The record in this case indicates that on or about April 8, 2013, the Agency attempted to serve Respondent Peter D. Strebel with a copy of the NOVA by certified mail at "2803 Heritage Lane, Bradenton, FL 34209," presumably his "last known address." AE 19 at 1. The mailing was subsequently returned to the Agency as "undeliverable." *Id.* at 4. Thereafter, on June 10, 2013, the Agency re-sent the NOVA by certified mail to Mr. Strebel at "6213 38th Avenue West, Bradenton, FL 34209-7612." *Id.* No explanation is provided in the record for the use of this alternative address. A "green card," date stamped by the United States Postal Service June 14, 2013, and returned in response to such second mailing, indicates that the mailing was received at this 38th Avenue address and signed for by "Naomi J. Strebel." *Id.* at 5. However, Ms. Strebel

is not identified on the Green Card as an agent of Mr. Strebel and nothing in the record indicates the relationship between Ms. Strebel and Respondent Strebel. *Id.*

As such, the record lacks sufficient evidence proving that the second address at which the Agency sent Mr. Strebel the NOVA was his “last known address,” as required by Rule 904.3(a). There is also no evidence in the record that establishes an agency or representative relationship between Naomi Strebel and Respondent Peter D. Strebel as required by Rule 904.3(c), for Naomi Strebel’s receipt of the NOVA to constitute service of process on Peter Strebel. AE 19 at 5. Therefore, there is insufficient evidence to establish that this Tribunal has jurisdiction over Mr. Strebel based upon service of process.²³

However, as indicated above, Ms. Bell conveyed Mr. Strebel’s purported consent to ADR, prior to the time this case was assigned to the undersigned for hearing. The question then becomes, did Mr. Strebel’s consent to participate in ADR constitute his appearance in this case.

The term “appearance” is generally used to signify the overt act by which a party submits himself to the court’s jurisdiction, and it has been said that a court will always look to matters of substance and a party’s conduct, as well as other circumstances, in determining whether he has actually appeared in an action. *See generally*, 73 A.L.R.3d 1250, citing *inter alia*, *Austin v. State*, 459 P.2d 753, 756 (Ariz. 1969) (letter noting receipt of court order and claiming inability to attend hearing held not to constitute an “appearance” given circumstances of the case); *Muniz v. Vidal*, 739 F.2d 699, 700 (1st Cir. 1984) (“Although appearance in an action typically involves some presentation or submission to the court -- a feature missing from this case -- there is strong authority requiring a court to ‘look beyond the presence or absence of such formal actions to examine other evidence of active representation.’”) (citing *Lutowski v. Panther Valley Coin Exchange*, 653 F.2d 270, 271 (6th Cir. 1981)).

In a few select cases, it has been held that a defendant’s participation at a prehearing conference constituted an entry of appearance. In *Collex, Inc. v. Walsh*, 74 F.R.D. 443 (E.D. Pa. 1977), it was held that the defendant’s attorney’s appearance at two conferences held in the judge’s chambers, together with its filing of a related state court action against the plaintiff,

²³ As was mentioned above, the Rules provide that: “A NOVA may assess a civil penalty against two or more respondents jointly and severally.” 15 C.F.R. § 904.107(a). If a NOVA does assert the respondents are liable under that theory, then, subsection (b) provides, “[a] hearing request by one joint and several respondent is considered a request by the other joint and several respondent(s).” *Id.* at (b). As has been noted, the NOVA in this case does not explicitly seek the imposition of joint and several liability against Respondents, and I cannot assume that that was in error. Therefore, 15 C.F.R. § 904.107(b) cannot be used as a vehicle with which to assert jurisdiction over Respondent Strebel or find that Karen Bell made an appearance on his behalf when she requested a hearing for the corporate Respondent. The separate issue of whether Respondent Lisa M. Belle, Inc., is liable for the violative actions of her agent, Mr. Strebel, under a theory of respondeat superior, however, will be discussed below as Mr. Strebel is not a necessary party to such action. 27 Am Jur 2d Employment Relationship § 378 (The proper defendant in an action based on a theory of respondeat superior is the employer, which is the direct or primary claim and distinct and separate from the claim against the employee; therefore, the employee is not a necessary party to an action against an employer.).

constituted an appearance by the defendant. In *New York Life Ins. Co. v. Brown*, 84 F.3d 137, (5th Cir. 1996), the court held that a defendant who personally participated in a telephone conference call among the parties and the magistrate had made an appearance in the case.

However, in this case there is no evidence that Mr. Strebel ever personally appeared at a prehearing conference or made any effort to correspond with this Tribunal; instead, he merely allowed Ms. Bell to convey his agreement to the case entering this Tribunal's preliminary ADR process, a process initiated only upon the consent of all parties.²⁴ Further, while the record suggests that Mr. Strebel was actually aware of the proceeding and the date, time, and perhaps even importance of the hearing, such awareness alone, in my opinion, does not by itself constitute an appearance in the case, particularly where, as here, he has had no other contact with either this Tribunal or opposing counsel.²⁵

Thus, there is insufficient evidence in the record of either proper service of process of the NOVA on Respondent Strebel, or of his appearance, or of his waiver of either of those prerequisites that would subject him to the jurisdiction of this Tribunal. Therefore, all charges asserted in the NOVA against Peter D. Strebel are hereby **DISMISSED**.

VI. DISCUSSION OF LMB LIABILITY

A. Elements of Violation

To establish LMB's vicarious liability on the basis of *respondeat superior* for violating the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A), and 50 C.F.R. § 622.7(l), by failing to comply with 50 C.F.R. § 622.34(k)(3) as alleged in the NOVA, NOAA must prove that: Respondent LMB is a "person" under the Act, and the superior/joint venturer of another who, acting within the scope of his position, fished in an area during the time that area was closed to fishing by regulation. 16 U.S.C. § 1857(1)(A); 50 C.F.R. §§ 622.7(l), 622.34(k)(3).

B. Discussion and Conclusions

Respondent LMB has stipulated that it is a "person" within the meaning of the Act subject to the jurisdiction of the United States, as well as the owner of the fishing vessel Lisa M. Belle "[t]hroughout the fishing trip surrounding April 11, 2011." JE 1, Stips. 4-5; AE 11

²⁴ ADR proceedings are confidential and, as such, the record before the undersigned does not reflect the extent to which Mr. Strebel participated in the process or what was said in regard thereto.

²⁵ At the hearing, Ms. Bell advised the Tribunal that Mr. Strebel was "offshore fishing," but was aware of the hearing proceeding going on that day. Tr. 8. Prior to hearing, as a courtesy, the Tribunal's staff made an extended effort to reach out to Mr. Strebel and advise him of the upcoming hearing and provide him with copies of LMB's PPIP and all orders issued by the undersigned. See, EPA correspondence dated April 1, 2014, and April 30, 2014.

(showing LMB is a Florida for-profit corporation); 16 U.S.C. § 1802(36).²⁶ Further, LMB stipulated that throughout that fishing trip, which began on April 9, 2011, and ended on April 12, 2011, LMB authorized Peter D. Strebel to operate and fish aboard the Lisa M. Belle “pursuant to the privileges and responsibilities afforded by permit RR-405,” its federal fisheries commercial permit for the Gulf of Mexico Reef Fish Fishery, “with any proceeds or any losses resulting from such fishing to be shared between Respondents and crew.” JE 1, Stips. 5-7, 9. Using bottom longline gear, or hook and line gear, a total of 2,004 pounds of red grouper, porgy, kitty, scamp, and beeline snapper were harvested during that fishing trip. JE 1, Stips. 8-9.

The evidence well establishes Mr. Strebel’s violation by fishing in a closed area. “NOAA Vessel Monitoring System (VMS) staff observed position reports transmitted from the VMS unit aboard the F/V LISA M. BELLE that placed the vessel within the boundaries of both Steamboat Lumps and The Edges closed areas for approximately 37 hours from April 10, 2011 through April 11, 2011.” JE 1, Stip. 11; AE 3 at 2; *see* AE 16, AE 17, AE 18; Tr. 16.

Further, on April 11, 2011, Florida Fish and Wildlife Commission Air Operations Coordinator, Captain Kevin Vislocky, “visually observed and photographed the F/V LISA M BELLE inside the boundaries of the Steamboat Lumps area with fishing gear trailing from the vessel into the water.” JE 1, Stip. 10; AE 1; AE 2; AE 3 at 2; Tr. 17-18. The operator of the vessel, Peter D. Strebel was notified on April 11, 2011 “of his closed area incursion and directed [] to return to port.” JE 1, Stips. 13-14; AE 3 at 3; AE 4 at 2; Tr. 17. Upon returning to port, Mr. Strebel confirmed to NOAA that the “VMS snapshot of the track line positions for the F/V LISA M BELLE within Steamboat Lumps and The Edges closed areas . . . accurately depicted the area where he fished.” JE 1, Stip. 15; Tr. 18; AE 3 at 3-4. In addition, Mr. Strebel’s log book identified the recorded coordinates of his fishing locations during the trip to be positions “within either the Steamboat Lumps or the Edges closed areas.” JE 1, Stip. 16-17; AE 3 at 5-6. As explanation for his conduct, Mr. Strebel explained that, while he was aware of the Steamboat Lumps area being closed at the time, he thought he was outside the area, and was unaware that the Edges area was closed at that time. Tr. 18; AE 3 at 1, 3. Further, he told Agent Casey that the incursion was unintentional and the result of obtaining either incorrect coordinates from a fellow fisherman, or he entered the coordinated incorrectly. Tr. 19; AE 4 at 2.

The regulations implementing the Act in effect in April 2011, as set forth above, provide that “all fishing is prohibited, and possession of any fish species is prohibited” in Steamboat Lumps and The Edges areas “through April” every year. 50 C.F.R. § 622.34(k)(3); 50 C.F.R. § 622.7(l).

At the hearing, Ms. Bell recalled that Mr. Strebel had also acknowledged to her that during that fishing trip “he was somewhere he wasn’t supposed to be.” Tr. 12; RX 1 at 1. As such, Ms. Bell conceded this point during her testimony. Tr. 27. However, she also alleged that Mr. Strebel told her that at the time of the fishing trip that he believed these closed areas “had opened on April 1st.” Tr. 20. Further, in LMB’s defense, she asserted that Mr. Strebel had repeatedly promised her he would attend the hearing and agreed that he was going to testify “that this was his own fault and he was going to take responsibility for it.” Tr. 29. However, she said, “last week he came up to the dock when I wasn’t there and told them he wasn’t coming.” *Id.*

²⁶ The Act defines “person” to include individuals and corporations. 16 U.S.C. § 1802(36).

Ms. Bell's testimony raises a number of potential defenses to LMB being held liable. The first issue is of lack of knowledge i.e., that Mr. Strebel was unaware of the law making the act illegal. As to being unaware of the law, it has been held that "[w]hen one engages in a highly regulated industry, that person bears the responsibility of knowing and interpreting the regulations governing that industry." *Peterson & Weber*, 6 O.R.W. 486, 1991 NOAA LEXIS 34, at *9 (NOAA 1991); *Vo & Vo*, 1998 NOAA LEXIS 8, at *10-11 (NOAA 1998) ("Whether or not Respondent [] knew the size limits applicable to swordfish, ignorance of the law and regulations governing his fishing activities is no excuse.") (citing *Welsh*, 6 O.R.W. 115 (NOAA 1990)); A's Brief at 11. As such, Mr. Strebel's lack of knowledge is not a defense to LMB's liability.

The second issue is lack of intent to commit the violation by Mr. Strebel and/or LMB. This too does not serve as a valid defense to liability, as the Act imposes strict liability for its 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). Moreover, as the claim against LMB is based upon vicarious liability, LMB's independent lack of intent to violate the law is not material to the issue of liability.

Third, Ms. Bell's testimony suggests that Mr. Strebel is solely responsible for the violation and that LMB should not be held vicariously liable for his violative acts. However, it is well-established that the owner of a vessel may be held vicariously liable for the actions of its captains under the theory of respondeat superior, where there is an employer-employee relationship or where there is evidence of a joint venture between the owner and operator. *Peterson & Weber*, 6 O.R.W. 486, 1991 NOAA LEXIS 34, at *10-13 (NOAA 1991) (vessel operator and owner both held liable for fishing violations under the Act where business relationship was characterized as "in the nature of a joint venture": "Owners of vessels who are the beneficiaries of its operation have consistently been held responsible for illegal activity."); *James Chan Song Kim, et al.*, 2003 NOAA LEXIS 4, at *28-29 (NOAA 2003) (joint and several liability may be imposed for violations of the Act to "prevent vessel owners and operators from reaping the benefits of illegal fishing activities while avoiding the responsibility that goes along with such tactics."); *Bluefin Fisheries, Inc.*, 2011 NOAA LEXIS 6, at *22-24 (NOAA 2011) ("When a corporation owns a vessel, it acquires a share of the vessel's proceeds from the fishing trip and thus, the corporation benefits financially from the illegal acts of the vessel's captain during the fishing trip. [] Therefore, the vessel owner should not be allowed to escape responsibility for the transgressions of the captain the vessel owner hires to operate its boat and has the authority to fire.") (citations omitted); *Shulterbrandt*, 7 O.R.W. 185, 1993 NOAA LEXIS 26, at *6-7 (NOAA 1993) (applying same to Endangered Species Act proceeding); A's Brief at 11-13.

Under NOAA case law, "[i]t is not necessary that the owner exercise detailed control over the operations of the vessel in order for it to be held liable for the illegal activities of its master and crew" for the owner to be held liable under a theory of respondeat superior; "[i]t is sufficient that Respondent as the owner of the vessel and the major beneficiary of its operations authorized

the expedition which was illegally conducted.” *Millis & Miss Charlotte, Inc.*, 4 O.R.W. 340, 1985 NOAA LEXIS 17, at *13 (NOAA 1985). The owner and operator of a vessel may be found to be engaged in a joint venture if there is the “intention of the parties to carry out a single business undertaking, a contribution by each of the parties to the venture, an inferred right of control, and a right to participate in the profits. [] Generally, the test used to determine whether the [respondeat superior] doctrine applies is whether the vessel owner had, at the time of the violation, the right to control the actions of the wrongdoer.” *Gonzalez Fisheries, Inc.*, 2006 NOAA LEXIS 36, at *18 (NOAA 2006) (quoting *Shulterbrandt*, 1993 NOAA LEXIS 26, at *6-7); *Peterson & Weber*, 1991 NOAA LEXIS 34, at *12 (“The fact that the owner was the permit holder also ties him to, and makes him responsible for, fishing activities conducted under the permit.”).

Here, the preponderance of the evidence establishes that in regard to the subject fishing trip, LMB and Mr. Strebel’s relationship was in the nature of a joint venture, because they worked cooperatively to commercially fish, and they intended to share in the profits or losses. JE 1, Stip. 7. Respondent Strebel individually contributed to the joint venture by operating the vessel and harvesting the fish. JE 1, Stips. 8-9. LMB individually contributed to the joint venture by hiring Mr. Strebel as a captain and offering him the use of its licensed commercial fishing vessel and federal fisheries permit. JE 1, Stip. 5-7. As such, LMB can be held liable for the illegal fishing activities engaged in by Respondent Strebel.

In addition to the foregoing arguments, Ms. Bell raised as a defense at hearing the issue of the Agency’s delay in prosecuting this matter, characterizing this as her “main point of contention” and a due process concern. Tr. 28; RX 5, 7. Specifically, she argued, “we’re supposed to be given [notice of a violation] within reasonable amount of time,” “we were not issued a notice of violation [in this case] for two years and seven months or 738 days” after the violation occurred, and “I don’t think two years and seven months is reasonable.” Tr. 28, 30. Ms. Bell claimed that NOAA routinely issues NOVAs for similar offenses within 30-90 days, which she characterized as “a much more manageable time,” noting that had the NOVA here been issued promptly “we may have dealt with Mr. Strebel differently,” suggesting “[m]aybe we would have removed him. Maybe we would have tried to keep him on as a crew member to be able to recoup some of the potential losses.” Tr. at 28, 31; RE 7-9. Further, she explained that:

... being a fleet operator, it’s difficult to find people to run boats that – you have to be very cautious because, again, you’re held accountable for their actions. But yet if they’re good, they eventually go get their own boats.

So you’re always looking for potential, preferably young people, who like fishing. And so that’s what we felt, you know, Pete had the potential. But then he also ended up being too risky for us. So he’s no longer on the boat.

And at this point, two years and seven [months] later, he’s still in the Gulf. I don’t have any way to try to – I mean, I’ve spoken to him and he tells me over and over that he was going to be here and he was going to say that this was his own fault and he was going to take responsibility for it.

But then last week he came up to the dock when I wasn’t there and told them he wasn’t coming. So it’s just a difficult position to be in.

Tr. at 28-29.

While Ms. Bell's frustration with NOAA delay in instituting this action is understandable, as noted by the Agency at hearing, there is a five year statute of limitations for the institution of violations of the Act. Tr. 32; 28 U.S.C. § 2462 ("Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . ."). The violation alleged here occurred on or about April 10-11, 2011, and the NOVA was filed on April 8, 2013, which was days *less than* two years after the violation. As such, the case was brought well within the statute of limitations period set forth in 28 U.S.C. § 2462, and as such, the date the case was instituted does not provide a legal defense to liability.

Moreover, while in some types of legal cases the failure to diligently pursue an action can additionally and/or alternatively give rise to the equitable defense of "laches," that defense is not available in proceedings such as the instant one. *See, e.g., Amalfitano*, 2006 NOAA LEXIS 2, at *9 (NOAA 2006) ("Generally, 'the defense of laches is not available against the government, state or national, in a suit by it to enforce a public right or to protect a public interest.'") (quoting 30 C.J.S. Equity § 131 (1992)); *Ledet*, 7 O.R.W. 36, 42, 1993 NOAA LEXIS 7, *15 (NOAA App. 1993) ("[T]he doctrines of laches and staleness of claims do not apply to actions brought by the government to enforce its rights."); *Salvatore Patania, Boat Santa Rita, III, Inc.*, 3 O.R.W. 212, 215, 1983 NOAA LEXIS 36, at *8 (NOAA 1983) ("Laches does not usually run against the Government."). Moreover, even if laches was available, the defense is not established simply by the passage of time, but depends upon all of the circumstances of the case, and prejudice is a necessary element for the application of the doctrine of laches. *Asper v. U.S. Fish and Wildlife Service*, 4 O.R.W. 399, 1985 NOAA LEXIS 14, at *11 (1985), citing 2 Am. Jur. 2d Administrative Law § 321 (1963); *Schireson v. Shafer*, 47 A.2d 665 (Pa. 1946) (court rejected a claim that the licensing authority was precluded from revoking a medical license where the license had been issued many years before.). In this case, the only basis of prejudice suggested by Ms. Bell involves her decision to fire or retain Mr. Strebel as a captain on her vessels. However, LMB was aware of NOAA's opinion that a violation had been committed within a day of the violation, having been contacted by the Agency and told to direct the vessel return to port. AE 3 at 2. As such, at that point she could reasonably anticipate that a NOVA might issue and a penalty be imposed. Ms. Bell could have retained Mr. Strebel as a crew member after that point in an effort to potentially recoup any loss or penalty, but instead, the record indicates, chose not to employ him "much longer" in any capacity apparently after the instant violation occurred. Tr. 28. As justification for removing him, she stated that he "was removed from the boat because he was careless," and "too risky." Tr. 28-29. As such, LMB has not clearly proven that it incurred any actual prejudice as a result from NOAA's delay in instituting this action.

Therefore, it is hereby found that Respondent Lisa M. Belle, Inc., is vicariously liable for the violation of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A), and 50 C.F.R. § 622.7(l), by Mr. Strebel's fishing in April 2011 in a closed area as restricted by 50 C.F.R. § 622.34(k)(3).

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 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 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.²⁷

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

For the violation alleged therein, the Agency proposed in the NOVA a single penalty against the two individual respondents of \$13,500, although it did not allege “joint and several liability.” AE 19 at 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)).

NOAA included with its NOVA (but did not include it with AE 19), a Penalty Worksheet, outlining the Agency’s penalty calculations for the alleged violation. NOVA at 7. The Worksheet and other documents submitted in this matter state that 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”).²⁸ A’s Brief at 14 (“NOAA’s Penalty Policy incorporates the relevant statutory provisions in

²⁷ 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 ever submitted by Respondents, and as the parties stipulated, Respondent LMB “did not submit all the financial information requested by the Agency.” JE 1, Stips. 21. Therefore, they are “presumed to have the ability to pay the civil penalty.” 15 C.F.R. § 904.108(c). LMB also asserted in its documents “financial hardship” based upon the fact that it has no way to “collect any monies from Mr. Strebel.” RX 1 at 2. As no judgment is being rendered against him here, this point is deemed moot.

²⁸ The Penalty Policy is available to the public at:
http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf.

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]ishing in a closed area or during a closed season” as a Level III in “offense level.” PP at 36. NOAA assigned the violation a Level III offense level, and characterized Respondents’ culpability as “negligent.” NOVA at 7. In its Brief, the Agency asserts that “the gravity of the offense of fishing [in the Lumps and Edges when closed] is significant because the areas were closed to (1) protect spawning aggregations of fish species in the area, (2) prevent overfishing, and (3) aid in evaluating the effectiveness of the marine reserves as a management tool.” A’s Brief at 10. Also, the extent of the violation, “harvesting ~2,000 lbs of reef fish from the protected closed area before Respondent Strebel’s fishing activity was interrupted,” is “similarly significant.” *Id.* In the Penalty Policy’s matrix for Magnuson-Stevens Act violations, the range of penalties suggested for Level III offenses when the respondent is “negligent” is \$10,000 – \$15,000. PP at 25.

After choosing a matrix base penalty within that range of \$12,500, the Agency made no adjustments based its consideration of the following factors: commercial/recreational fishing, or activity after violation/cooperation. However, based on one “prior violation,” presumably the one referred to in the parties’ Stipulations “committed by a different captain” on the same vessel in another matter “resolved by settlement” in 2008, a copy of which is included at AE 12, NOAA proposes a \$1,000 increase to the Base penalty, bringing it to \$13,500. JE 1, Stip. 22; NOVA at 7. As to proceeds of unlawful activity, the Agency notes that \$6,212.80 in profits from the fish caught were voluntarily abandoned to NOAA, so any economic benefit has already been “removed.” NOVA at 7.

Respondents explicitly address the Penalty Policy in RE 2, a letter to NOAA counsel dated November 10, 2013, stating that the offense level should be 1, and culpability should be the lowest, “unintentional.” RE 2 at 2. Under those circumstances, “a written warning or fine up to \$2000 would be suggested.” *Id.* Or, if “negligent,” “a fine of up to \$4000 would be the high.” *Id.* Even if “reckless,” LMB argues, “the high end of the scale is \$10,000.” *Id.*

At the hearing of the instant case, and in testimony incorporated therein, NOAA Special Agent Paige Casey testified credibly to the nature, circumstances, extent, and gravity of violations of measure intended to effectively manage grouper stocks in the Gulf of Mexico. Tr. 14-27.²⁹ The Agent has seven years of experience working with NOAA, with her current primary responsibilities being investigations of alleged violations of the Act and the federal fisheries regulations from Ft. Myers, Florida to Steinhatchee, Florida, including the area of Cortez, Florida and “the waters [] in the Gulf of Mexico EEZ [Exclusive Economic Zone].” Tr. 14-15; KJB Tr. 10-11.

²⁹ Area closures, at least of the Edges, as amended in 2009 at 74 Fed. Reg. 30,001 (AE 9), are designed “provide additional protection for spawning aggregations of various grouper species some of which are experiencing overfishing, benefit other reef fish undergoing overfishing, and facilitate more effective enforcement.” 74 Fed. Reg. at 30,002 (June 24, 2009). A closed area “creates a larger contiguous area within which fishing activity and fishing mortality will be reduced.” *Id.*

Agent Casey recalled that her involvement in the investigation concerning the fishing vessel Lisa M. Belle on April 11, 2011 was prompted by NOAA Vessel Monitoring System staff notifying her that the satellite surveillance had located the vessel in a closed area. Tr. 16. In response, she contacted Walter Bell, LMB's President, and then at his referral contacted his associate Glen Brooks, and advised them to notify the vessel that it was in a closed area and instruct it to return to port. Tr. 16-17; RX 1 at 1. LMB and the vessel abided by the Agent's instructions, and Agent Casey interviewed the vessel's captain, Peter Strebel, about the trip upon his return to port. Tr. 17. During the interview, Mr. Strebel advised the Agent that he had seen the Florida Fish and Wildlife plane overfly his vessel within the Steamboat Lumps area. Tr. 18. Further, he acknowledged fishing in the Lumps and the Edges closed areas, but stated he had not realized he was in the areas at the time, explaining that he had relied on certain coordinates for the closed areas he had obtained from a fellow fisherman, producing a paper memorializing the coordinates for the Agent. Tr. 18-19. The Agent stated that upon review she determined that the coordinates were for not for the closed areas, but for the longline buoy gear restricted area. Tr. 18-19, 21-22. Mr. Strebel also denied knowledge of the fishery bulletins posted on NOAA's website and sent to vessel owners and dealers, just months before the violation, advising of the closed areas.³⁰ Tr. 19; AE 7. Nevertheless, Mr. Strebel affirmatively asserted to the Agent that he would not have fished in the areas had he known they were closed, a claim the Agent found credible. Tr. 23. Further, she characterized Mr. Strebel overall as "cooperative." *Id.*

Significantly, Agent Casey testified at hearing that she had had a similar interaction with Mr. Strebel a few months prior to the instant violation, when he was found to be fishing on the Lisa M. Belle in Pully Ridge, another closed area in the south part of the Gulf of Mexico. Tr. 23-24, 26. At that time, Mr. Strebel again asserted the violation was unintentional, claiming he plotted his position incorrectly and believed he was just outside the closed area when he was actually just inside it. Tr. 24. The Agent also found Mr. Strebel's claim of confusion at that time credible, however she still referred the violation to NOAA enforcement. Tr. 24. It was Agent Casey's recollection at hearing that as a result of the violation the fish on the boat was seized or abandoned and a fine imposed, however on cross-examination Ms. Bell credibly denied that was the case, asserting that she had been notified that that case was dismissed at the same time she received the NOVA in the instant case. Tr. 24, 26-27.

The record also contains a copy of the 2008 settlement agreement between NOAA, LMB and an individual, after they were charged with two counts of violating regulatory provisions implemented under the Act not at issue here; they settled the matter for a penalty of \$22,500, and agreed to a 30-day permit sanction on the F/V Lisa M. Belle. AE 13; JE 1, Stip. 22.

As indicated above, during her testimony at hearing, Ms. Bell acknowledged that in regard to the violation, Mr. Strebel had conceded to her that "he was somewhere he wasn't supposed to be," but also asserted that Mr. Strebel had told her that at the time of the violation he

³⁰ In its Post-Hearing Brief, the Agency advises that the Steamboat Lumps closed area was first established in 2000, reauthorized in 2004, and indefinitely extended in 2008. A's Brief at 8. Further, that regulations of the closure were properly filed and published in the Federal Register and notice thereof is further posted on its website and continually disseminated to the public through the issuance of Bulletins. *Id.* at 8-9.

was under the erroneous impression that the closed areas had opened on April 1st. Tr. 12, 20, 27. Through her exhibits she also noted the violation only occurred 19 days before the closed areas reopened to fishing. RX 1 at 1. Further, Ms. Bell asserted that there is no evidence that Mr. Strebel attempted to hide his illegal fishing activities by disengaging the VMS; rather this case represented an instance where the VMS system and the law enforcement monitoring it “actually did work well,” in that NOAA timely observed the violation, promptly notified the company by telephone, the vessel was called and came into port, and the proceeds of the catch, \$6,212, was seized. Tr. 28; AE 19 at 1. In addition, Mr. Strebel was honest, cooperative, has no prior history of adjudicated violations, and is no longer “working on any vessels out of Cortez,” she proffered. RX 1 at 1-2.

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

First, it seems clear from the record that Mr. Strebel was a “careless,” and “risky” captain, as LMB concluded on its own when it decided to terminate him. Tr. 28-29. Within a matter of a few months, he repeatedly engaged in fishing activities on the Lisa M. Belle in closed areas in violation of the law. Fishing in a closed area is a significant violation in that the areas are closed in an effort to “protect gag and other groupers during their respective spawning seasons.” JE 1, Stip. 18. Without adequate spawning, fish populations are reduced, and without sufficient fish stocks, the commercial fishing industry suffers. AE 9 at 2; KJB 15-16; A’s Brief at 8, 10-11 (purpose of such restrictions is “to protect the nation’s food supply and the on-going viability of the fishing industry”; “were it not detected, they would have gained a benefit over competing vessels and law-abiding fishermen, who cautiously avoid fishing in the closed area”; such fishing “undermined the goals of the Magnuson-Stevens Act”). Further, due to his prior violation occurring just months before the instant case, LMB should have been on notice of Mr. Strebel’s nature and taken measures to assure he was fully aware of the closed areas in effect in his intended fishing spots before he began his fishing trip. There is no testimony in the record to suggest that that occurred, and in fact, the record suggests it did not since Mr. Strebel told Agent Casey that he obtained information allegedly on the closed area from another fisherman, not from bulletins or his supervisors, etc. As such, LMB was careless and risky as well. In addition, LMB has a history of an unrelated prior violation, and has not alleged an inability to pay.

On the other hand, as Ms. Bell noted, Mr. Strebel frankly acknowledged his violation each time he was caught and cooperated with NOAA. AE 1 at 1. LMB also cooperated with the Agent when she instructed the company to have the vessel come in and turned over records. *Id.* Further, to LMB’s credit, it terminated its involvement with Mr. Strebel not long after this second incident, despite its need for boat captains. In addition, it surrendered the proceeds of the catch, \$6,212, to NOAA. RX 1 at 1.

In light of the foregoing, imposition upon LMB of a civil penalty in the amount of \$10,000 for the violation is deemed appropriate. This sum, approximately one and a half times the value of the catch taken from the closed area (the proceeds from which have already been seized), takes into account all of the statutory factors, including the nature, circumstances,

gravity, and extent of the violation, the prior offense history, and LMB's culpability and cooperation.³¹

³¹ LMB offered as exhibits various decisions in prior enforcement cases suggesting that they should influence the outcome of the instant case. RX 6, 9. However, the facts of individual cases vary and thus do not control the determination made in other cases.

ORDER

Wherefore, having been found liable for the violation set forth in the NOVA, a penalty in the amount of **\$10,000**, is hereby assessed and imposed Respondent Lisa M. Belle, Inc.

All allegations asserted in the NOVA against Peter D. Strebel are hereby dismissed.

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.

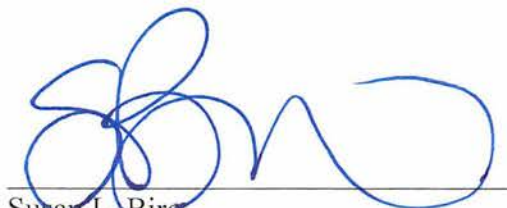
PLEASE TAKE NOTICE, that any petition for reconsideration of this Initial Decision must be filed with the undersigned within **20 days** after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and 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.

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 Agency³²

Dated: March 23, 2015
Washington, DC

³² 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.

(l) 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.