

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

_____)	
IN THE MATTER OF:)	Docket Number:
)	
Craig Bolton,)	
Pacific Dawn, LLC and)	AK1200300
F/V Pacific Challenger)	
)	
Respondents.)	
_____)	

ORDER DENYING CROSS-PETITIONS FOR ADMINISTRATIVE REVIEW

This order addresses a fishery enforcement case brought by the National Oceanic and Atmospheric Administration (NOAA) against Pacific Dawn, LLC and Craig Bolton, respectively the owner and relief operator of a commercial fishing vessel (F/V) named the Pacific Challenger. On August 27, 2012, the Agency charged Respondents (jointly and severally) with three separate counts of fishing for Pacific Cod (a groundfish species) in the Western Gulf of Alaska (Western Gulf) without the required License Limitation Program in violation of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and related regulations codified at 50 C.F.R. Part 679. The Agency set the total penalties for the series of violations at \$325,441.76 (a \$12,500 base penalty plus an additional \$312,941.76 to recoup the gross value of the illegal catch).

Respondents denied the charges and requested a hearing before an Administrative Law Judge (ALJ). Following this hearing and the receipt of post-hearing briefs from both parties, the ALJ issued an Initial Decision on February 9, 2015. The ALJ found the violations proved but reduced the total penalties to \$223,905 (a \$45,000 base penalty plus an additional \$178,905 to recoup the net value of the illegal catch). The Agency sought reconsideration of the assessed penalty, arguing the methodology adopted by the ALJ in calculating the penalties was contrary to established NOAA precedent; however, on April 15, 2015, the ALJ denied the Agency's request.

Both parties have filed timely appeals with the NOAA Administrator seeking review of the ALJ's decision. Although the facts giving rise to the violations in this case are not disputed, Respondents argue that their conduct should be excused based on confusion over the status of their permits and alleged verbal authorization upon which they mistakenly relied. Respondents also allege the penalty was too high and should be reduced due to mitigating factors. The Agency has also filed a cross-appeal seeking an increase in the penalties. The Agency argues the ALJ erred by using the net value (instead of the typically used gross value) of the illegal catch to calculate the assessed penalties.

For the reasons stated below, both parties' petitions for review are **DENIED**.

DECISION ON DISCRETIONARY REVIEW

On appeal, the NOAA Administrator has broad discretion in deciding whether to grant or deny a petition for administrative review.¹ The criteria guiding the Administrator's decision are twofold: (1) whether the initial decision contains significant factual or legal errors that warrant further review by the Administrator; and (2) whether fairness or other policy considerations warrant further consideration by the Administrator.² Examples of cases in which a petition for review might be granted include, but are not limited to, those in which:

- The initial decision conflicts with decisions of one or more other NOAA administrative decisions or federal court decisions on an important issue of federal law;
- The ALJ decided an important federal question in a way that conflicts with prior rulings of the Administrator;
- The ALJ decided a question of federal law that is so important that the Administrator should pass judgment upon it even absent a conflict; or
- The ALJ so far departed from the accepted and usual course of administrative proceedings as to call for an exercise of the Administrator's supervisory power.³

Applying these criteria to the parties' respective petitions, I decline to accept review.

Both parties have challenged the ALJ's methodology for calculating penalties. The Agency argues the penalty should be increased because the ALJ erred by using net value of the illegal catch (instead of the typically used gross fair market value) to calculate the economic benefit component of the penalties. On the other hand, Respondents argue the penalty should be reduced, arguing the ALJ should have given more weight to mitigating factors.

Federal law provides the ALJ with broad authority to assess civil money penalties against any person found to have violated the Magnuson-Stevens Act. When calculating

¹ See 15 C.F.R. §§ 904.273(c) ("Review by the Administrator of an initial decision is discretionary and is not a matter of right."); 904.273(i) ("The Administrator need not give reasons for denying review.").

² E.g. *Stephen C. Daniels*, 2015 NOAA Lexis 7 (NOAA App. Mar. 18, 2015); *Anthony Black*, 2014 NOAA Lexis 11 (NOAA App. Apr. 14, 2014), *aff'd sub. nom. Black v. Pritzker*, Civil Action No. 14-782 (D.D.C. Aug. 10, 2015).

³ *Stephen C. Daniels*, 2015 NOAA Lexis 7; *Anthony Black*, 2014 NOAA Lexis 11.

a penalty, the ALJ must consider certain statutorily-mandated penalty factors, including “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 . . . [and] any information provided by the violator relating to the ability . . . to pay.”⁴ An ALJ’s penalty assessment will be upheld on appeal if the initial decision “clearly explains [the] relationship between the nature of the offense — informed by consideration of these factors — and the sanction imposed.”⁵

In the current case, the ALJ identified the appropriate legal standard for developing the penalties, weighed the evidence against each penalty factor, and considered both aggravating and mitigating circumstances. After doing so, the ALJ found the Agency’s proposed penalties were too high with respect to economic benefit, but too low with respect to a base penalty. The ALJ equated the economic benefit to the “net profit” Respondents received from the illegal fishing trips,⁶ and carefully calculated the net profit by offsetting only those ordinary and necessary expenses incurred in generating the income, but excluding the cost of post-trip capital improvements and deductions for “wear and tear.”

Economic benefit derived from a respondent’s illegal conduct is not among the statutorily-mandated penalty factors the judge is required to consider under the Magnuson-Stevens Act;⁷ but it is a discretionary factor that the regulations provide the ALJ may take into account when developing penalties.⁸ While the use of the net value of the illegal catch (instead gross fair market value) in calculating economic benefit will not be appropriate in every case⁹ – or even typical cases – I do not find that the ALJ has so substantially departed from NOAA precedent or the usual course of administrative proceedings to constitute an abuse of discretion or warrant further review.

In sum, in the current case, the ALJ clearly explained the nature of the offense and the rationale for the sanction imposed applying the appropriate penalty factors.

⁴ 16 U.S.C. § 1857(1)(A) (2014); 15 C.F.R. § 904.204; Department Organizational Order 10-15, § 5 (Dec. 12, 2011). See also, 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(a). Respondents do not challenge the penalty based upon financial inability to pay.

⁵ *Lars Axelsson*, 2012 NOAA Lexis 6, at *8 (NOAA App. Dec. 10, 2012); see also *Duckworth v. United States*, 2006 U.S. Dist. LEXIS 13859, at *14-18 (D. R.I. Mar. 22, 2006); *The Fishing Company of Alaska v. United States*, 195 F. Supp. 2d 1239, 1254 (D. Wash 2002); *Jody Domingo*, 2000 NOAA Lexis 1, *8-9 (NOAA App. Mar. 29, 2000) (holding that the justification for adjusting penalty must be clearly stated); *Rio Fishing Corp.*, 1996 NOAA Lexis 27 (NOAA App. Sept. 4, 1996) (dismissing permit sanctions on appeal where the ALJ provided no reason for imposition of permit sanctions).

⁶ ALJ Decision, at 48.

⁷ 16 U.S.C. § 1858(a).

⁸ 15 C.F.R. § 904.108(b) (emphasis added).

⁹ See *Jupiter, Inc.*, 1985 NOAA Lexis 11, at 14-15 (NOAA ALJ Nov. 20, 1985) (rejecting the use of net value of the illegal catch where the vessel expenses so far exceeded the value of the illegal catch that it would have resulted in no penalties being assessment respondents).

Accordingly, based on the individual facts and circumstances of this particular case, both parties' cross-petitions to review the ALJ's assessment of penalties are **DENIED**.


Respondents also have challenged the ALJ's liability findings, but have not identified any significant factual or legal errors in the ALJ's liability findings, and no fairness or policy considerations warrant further consideration of the ALJ's findings of liability in this case. Therefore, Respondents' petition for review on these issues is **DENIED**.

CONCLUSION

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

9-8-15

Dated



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