

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:)	
)	
MICHAEL MOORE)	Docket No. SE0801831FM
LISA MOORE)	
DONNIE ANDERSON)	
F/V MISS HALEY II)	
)	
Respondents)	

INITIAL DECISION & ORDER

DATE ISSUED:

APRIL 15TH, 2011

ISSUED BY:

HON. BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE

APPEARANCES:

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
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FOR RESPONDENTS
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I. Preliminary Statement

On July 21, 2008, the United States Department of Commerce, National Oceanic and Atmospheric Administration (NOAA or Agency) issued a Notice of Violation and Assessment of Administrative Penalty (NOVA) to Respondents Michael Moore, Lisa Moore, Donnie Anderson and F/V MISS HALEY II (collectively, Respondents; individually, Respondents Moore and Respondent Anderson). The NOVA alleged that Respondents are jointly and severally liable for violating the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act or Act), as provided at 16 USC §1857(1)(A), and its implementing regulation as codified at 50 CFR §§622.7, 622.443.

Specifically, NOAA charged that on or about May 13, 2008, Respondents Moore and/or Respondent Anderson, jointly and severally, failed to comply with the restrictions that applied after the closure of a fishery, in violation of the Magnuson-Stevens Act, at 16 USC §1857(1)(A) and 50 CFR §§622.7, 622.443.

As a result, the Agency sought a civil penalty totaling \$12,000.00.

Also on July 21, 2008, the Agency issued a Notice of Permit Sanction (NOPS) to Respondents Moore suspending all federal fisheries permits issued to the F/V MISS HALEY II for a period totaling fifteen days.

On August 21, 2008, Respondents filed a request for an administrative hearing to contest the allegations contained within the NOVA. Pursuant to 15 CFR §904.107(b), “[a] hearing request by one joint and several respondent is considered a request by the other joint and several respondent(s).” Id.

On October 25, 2010, NOAA transmitted the request for hearing to the Administrative Law Judge (ALJ) Docketing Center. On October 26, 2010, Chief ALJ Joseph N. Ingolia issued a Notice of Transfer and Assignment of ALJ and Order Requesting Preliminary Positions on Issues and Procedures (PPIPs). NOAA and Respondents timely filed their respective PPIPs with the undersigned ALJ.¹

On December 15, 2010, the court held a telephonic pre-hearing conference with the parties. The court explained to Respondents the basic form and structure of a NOAA administrative case as it developed, as well as Respondents' various procedural rights in the present proceeding.

On January 7, March 10, and March 18 2011, the Agency filed Supplemental PPIPs in this matter.

On March 21, 2011, this matter came on for hearing at the Okaloosa County Courthouse Annex in Shalimar, Florida. Cynthia S. Fenyk, Esq. appeared on behalf of the Agency; Russell R. Stewart, Esq., appeared on behalf of all Respondents.

The court file reflects that on February 28, 2011, Respondents Moore requested the court issue a subpoena compelling the attendance of Respondent Anderson at the March 21, 2011, hearing. On March 3, 2011, the court issued the requested subpoena directing Respondent Anderson to appear at the hearing of this matter on March 21, 2011, at 10 a.m. (CDT), at the Okaloosa County Courthouse Annex, Courtroom G, 1250 North Eglin Parkway, Shalimar, Florida. The court directed Respondents Moore, or their duly authorized representative to serve the subpoena upon Respondent Anderson. According

¹ Pursuant to 15 U.S.C. §1541, United States Coast Guard Administrative Law Judges may perform all adjudicatory functions required by Chapter 5 of Title 5 of the United States Code to be performed by an Administrative Law Judge for any marine resource conservation law or regulation administered by the Secretary of Commerce acting through the National Oceanic and Atmospheric Administration.

to the return of service filed with the court, Respondent Anderson was personally served with the subpoena, and signed for it, on March 9, 2011. See 15 CFR §904.211(c).

On the day of the hearing, however, Respondent Anderson did not present himself at the hearing. (Tr. at 7). Moreover, counsel for Respondents represented to the court that Respondent Michael Moore had spoken with Respondent Anderson by telephone the evening before the hearing was to commence to ensure Respondent Anderson's presence at the hearing. Thereafter, no one heard from—or saw—Respondent Anderson and his whereabouts were unknown. (Tr. at 7-8). Despite this fact, counsel did not withdraw his representation of Respondent Anderson and proceeded to represent all three Respondents in the hearing. (Tr. at 8).

Respondent Anderson's absence is not an inconsequential matter. Under the provisions of 15 CFR §904.211(a)(2), a party who, after proper service of notice, fails to appear at a hearing, may find himself the recipient of a default judgment. Moreover, the presiding judge may find the facts alleged in the NOVA and NOPS as proved against that respondent. Id. Additionally, 15 CFR §904.212 provides that “whenever the record discloses the failure of any party to respond to orders or notices from the Judge, the Judge may issue . . . Any order, except dismissal, as is necessary for the just and expeditious resolution of the case.” Id. (emphasis added). The regulations provide other remedies for a party's failure to respond to a subpoena as well.²

² To the extent 15 CFR §904.241(f) is applicable in this case, the ALJ is also permitted to take a number of actions against a party who fails to respond to a subpoena. The judge may, in the interest of justice, (1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party; (2) Rule that the matter or matters covered by the order or subpoena are established adversely to the party; (3) Rule that the party may not introduce into evidence or otherwise rely upon, in support of any claim or defense, testimony by such party, officer, or agent, or the documents or other evidence; (4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown; or

Thus, the court may, and hereby does, enter a default judgment against Respondent Anderson and find as proved all of the allegations contained in the NOVA and NOPS. Such a finding also results in the automatic imposition of liability upon Respondents Moore under the doctrine of joint and several liability, discussed, infra. However, even without the imposition of a default judgment against Respondent Anderson, the evidence of Respondent Anderson's violations clearly obligate Respondents Moore by virtue of joint and several liability.

At the hearing, NOAA presented the testimony of three witnesses and offered twenty-three exhibits into evidence, all of which were admitted into evidence by stipulation with Respondents' counsel. (Tr. at 21). Respondents presented the testimony of two witnesses and offered no items of documentary exhibits into evidence.³ The hearing was concluded in one day.

The parties' respective witnesses, as well as exhibits entered into evidence, are identified in Attachment A.

After careful review of the entire record, the court finds that NOAA proved by a preponderance of reliable, probative, and credible evidence that Respondents did, jointly and severally, on or about May 13, 2008, within the exclusive economic zone (EEZ) of the United States, violate the Magnuson-Stevens Act by failing to comply with the restrictions that applied after the closure of a fishery as specified in 16 USC §1857(1)(A) and 50 CFR §§622.7(s), 43(a)(1)(2).

(5) Strike part or all of a pleading (except a request for hearing), a motion or other submission by the party, concerning the matter or matters covered by the order or subpoena.

³ Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at ___). Citations to Agency Exhibits are marked Agency Ex. 1, 2, 3, etc.; Respondent's Exhibits are marked Resp. Ex. A, B, C, etc.; ALJ Exhibits are marked ALJ Ex. I, II, III etc.

II. Findings of Fact

The following Findings of Fact are based on a thorough and careful analysis of the documentary evidence, the testimonies of witnesses, the exhibits entered into evidence and the entire record as a whole.

1. At all times relevant herein, the F/V MISS HALEY II was and is a registered and flagged vessel of the United States, documentation number 655108. (Agency Ex. 7).
2. At all times relevant herein, the F/V MISS HALEY II was and is owned by Respondent Michael G. Moore and Respondent Lisa M. Moore. (Tr. at 32, 109; Agency Ex. 7).
3. At all times relevant herein, and specifically on or about April 29 to May 13, 2008, Respondent Donnie Anderson operated the F/V MISS HALEY II. (Tr. at 109; Agency Ex. 9)
4. At all times relevant herein, the F/V MISS HALEY II held a “Gulf of Mexico Reef Fish Commercial” Federal Fisheries Permit issued by the National Marine Fisheries Service. (Tr. at 33; Agency Ex. 8).
5. At all times relevant herein, it was and is unlawful for any person to violate any provision of the Magnuson-Stevens Fishery Conservation and Management Act, or any regulation or permit issued pursuant to the Magnuson-Stevens Fishery Conservation and Management Act. 16 USC §1857(1)(A).
6. At all times relevant herein, the Magnuson-Stevens Fishery Conservation and Management Act defined a “person” as “any individual, . . . any corporation, partnership, association, or other entity. . .”. 16 USC §1802(36).
7. Respondent Michael G. Moore is a “person” as defined by 16 USC §1802(36).
8. Respondent Lisa M. Moore is a “person” as defined by 16 USC §1802(36).
9. Respondent Donnie Anderson is a “person” as defined by 16 USC §1802(36).

10. The owner/operator of a vessel may be held jointly and severally liable for the actions of a crewmember that violates the Magnuson-Stevens Act or its underlying regulations under the doctrine of respondeat superior. 15 CFR §904.107.
11. At all relevant times herein, Respondent Michael Moore and Respondent Lisa Moore authorized Respondent Donnie Anderson to operate the F/V MISS HALEY II and utilize the “Gulf of Mexico Reef Fish Commercial” Federal Fisheries Permit issued by the National Marine Fisheries to the F/V MISS HALEY II. (Tr. at 109).
12. Respondent Michael Moore and Respondent Lisa Moore are liable for the actions of Respondent Donnie Anderson under the doctrine of respondeat superior.
13. Grouper and tilefish are among the species included in Gulf of Mexico Reef Fish. 50 CFR §622.4
14. From approximately April 29 through May 13, 2008, the F/V MISS HALEY II was engaged in deepwater bottom longline grouper and tilefish fishing in the exclusive economic zone (EEZ) of the United States, particularly in the Gulf of Mexico off the coastlines of Florida, Alabama, Mississippi and Louisiana. (Tr. at 109; Agency Ex. 9).
15. On Tuesday, May 6, 2008, the National Marine Fisheries Service (NMFS), a division of NOAA, which is an agency within the Department of Commerce, published in the Federal Register notices of closure for deepwater grouper (misty grouper, snowy grouper, yellowedge grouper, warsaw grouper, and speckled hind) and tilefish fisheries in the exclusive economic zone of the Gulf of Mexico. The closure was effective at 12:01 a.m., local time, May 10, 2008 until 12:01 a.m., local time, January 1, 2009. (Agency Ex. 5). This notice comported with the provisions of 44 USC §1507.
16. The fishery closure notices for the Gulf of Mexico were published in the Federal Register only three days before the grouper and tilefish fisheries were to close. (Tr. at 122; Agency Ex. 5).
17. On May 5, 2008, NOAA published in the Southeast Fishery Bulletin a notice of fishery closure in the Gulf of Mexico for both tilefish and deep water grouper, effective 12:01 a.m., local time, May 10, 2008 through December 31, 2008. (Agency Ex. 6).
18. On May 1, 2008, NOAA personnel requested that the National Weather Service broadcast a notice of fishery closure over

National Weather Radio stations in the Gulf of Mexico from May 1 through May 6, 2008. The requested broadcast notice of fishery closure indicated that the fishery for deepwater grouper (including misty grouper, snowy grouper, yellowedge grouper, warsaw grouper and speckled hind) and tilefish would close at 12:01 a.m., local time, on May 10, 2008, and would remain closed until 12:01 a.m., local time, on January 1, 2009. (Tr. at 56-59; Agency Ex. 10).

19. There was no proof adduced at the hearing of this matter that the National Weather Service broadcasts were actually made as requested or that they were received by any member of the Gulf of Mexico fishing fleet. (Tr. at 71-72).
20. On Friday, May 9, 2008, Respondent Michael Moore, ashore in Panama City, Florida, learned of the impending fishery closures for grouper and tilefish. (Tr. at 110-11).
21. On Friday, May 9, 2008, Respondent Michael Moore recognized that his vessel, the F/V MISS HALEY II, was engaged in grouper and tilefish fishing and that the impending fishery closure applied to him and his vessel. (Tr. at 111).
22. On Friday, May 9, 2008, Respondent Michael Moore attempted to contact Respondent Donnie Anderson aboard the F/V MISS HALEY II to notify him of the impending closure using VHF radio, cell telephone, and the Vessel Monitoring System. (Tr. 111-14).
23. On May 12, 2008, at approximately 1630 hours, CDT, Coast Guard Boatswain's Mate Kevin Stryker boarded the F/V MISS HALEY II approximately 80 Nautical Miles Southeast of Pensacola Pass, Florida, Gulf of Mexico and within the EEZ. (Tr. at 75-76; Agency Ex. 21).
24. At the time Coast Guard Boatswain's Mate Stryker boarded the F/V MISS HALEY II, that vessel was engaged in longline fishing. (Tr. at 76). After Stryker boarded the F/V MISS HALEY II, he had a conversation with Respondent Donnie Anderson, the captain of the vessel. Stryker then asked Respondent Anderson what species of fish he had aboard the vessel; specifically asking Respondent Anderson if he had deepwater grouper on board. In response, Respondent Anderson lied and denied that he had any grouper aboard the F/V MISS HALEY II (Tr. at 76-77).
25. At the time of his initial conversation with Coast Guard Boatswain's Mate Stryker, Respondent Donnie Anderson also lied

by saying he had only seven-thousand pounds of tilefish aboard the F/V MISS HALEY II, when, in fact, he had nearly 8,000 pounds of fish aboard. (Tr. at 77; Agency Ex. 1).

26. Immediately after his initial conversation with Respondent Donnie Anderson, Coast Guard Boatswain's Mate Stryker went below decks into the hold and initially found only tilefish. At that time, Stryker informed Respondent Anderson that the fishery had closed for tilefish as well as grouper. (Tr. at 77). It was then, and only then, that Respondent Anderson admitted that, in fact, he had grouper aboard his vessel. (Tr. at 77).
27. From May 10 through May 12, 2008, Respondent Donnie Anderson illegally fished for and possessed grouper and tilefish in the Gulf of Mexico within the EEZ of the United States, the area contemplated by the notice of fishery closure published in the Federal Register on May 6, 2008. (Tr. at 53).
28. On May 13, 2008, Coast Guard Boatswain's Mate Stryker, aboard the Coast Guard Cutter BONITO, escorted Respondent Donnie Anderson and the F/V MISS HALEY II to port in Panama City, Florida. There, also on May 13, 2008, Special Agent Elizabeth Slavin Nelson of the Department of Commerce/NOAA-Office of Law Enforcement, met and boarded the F/V MISS HALEY II and contacted Respondent Anderson. (Tr. 24-27; Agency Ex. 1).
29. On May 13, 2008, and during the course of her investigation, Special Agent Elizabeth Slavin Nelson obtained Respondent Donnie Anderson's fishing logbook which bore the dates he fished and the species and the number of fish caught on each given date. (Tr. at 27-28; Agency Ex. 1).
30. Respondent Donnie Anderson's log book indicated that on Saturday May 10, 2008, he caught 500 pounds of tilefish and on Sunday, May 11, 2008, he caught 700 pounds of tilefish. (Tr. at 28; Agency Ex. 2). Respondent Anderson also caught an additional approximate "100 pounds" of fish on May 12, 2008. (Agency Ex. 1).
31. Special Agent Elizabeth Slavin Nelson determined from the evidence available to her that Respondent Donnie Anderson had in his possession 1,300 pounds of fish taken after the closure of the fishery on May 12, 2008. Pursuant to agency practice, Special Agent Nelson then sold the 1,300 pounds of fish to Greg Abrams Seafood at the rate of \$2.00 per pound for a total of \$2,600.00 United States Dollars. She then sent the check, made payable to the

United States Department of Commerce, to be held until the instant matters were resolved. (Tr. at 30- 31, 50; Agency Ex. 5).

III. Summary of Decision

The evidence adduced at bar clearly establishes that Respondents were on notice that the Gulf of Mexico fishery for grouper and tilefish was closed after 12:01 a.m., local time, May 10, 2008. The evidence demonstrates that Respondent Anderson fished for, and caught, approximately 1,300 pounds of grouper and tilefish after the fishery closed. Those facts, coupled with the imposition of joint and several liability (plus the operation of 15 CFR §§904.212 and 211(a)(2), infra, dictating that a default judgment be entered against Respondent Anderson), result in a finding that that all three named Respondents are jointly and severally liable for the offense listed in the NOVA and NOPS.

IV. Discussion

A. Agency's Burden of Proof

In order to prevail on the charges instituted against a respondent, the Agency must prove the violations alleged by a preponderance of the evidence. 5 U.S.C. § 556(d); see In the Matter of Cunog Vo, 2001 WL 1085351 (NOAA 2001); see also Dept. of Labor v. Greenwich Collieries, 512 U.S. 267 (1994). Preponderance of the evidence means the Agency must show it is more likely than not a respondent committed the charged violation. See Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983). The Agency may rely on either direct or circumstantial evidence to establish the violation and satisfy the burden of proof. See generally, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764-65 (1984). The burden of producing evidence to rebut or discredit the Agency's evidence will only shift to Respondents after the Agency proves the allegations contained

in the NOVA by a preponderance of reliable, probative, substantial, and credible evidence. See Steadman v. S.E.C., 450 U.S. 91, 101 (1981).

B. The Magnuson-Stevens Act—in brief

1. Purpose, Persons & Proclamations

The Magnuson-Stevens Act was enacted to protect, conserve and manage the fishery resources of the United States and its adjacent waters. 16 USC §1801(b)(1)(A). In order to achieve this purpose, Congress empowered the Secretary of the Department of Commerce to assess civil penalties and/or impose permit sanctions against any person who violates the Magnuson-Stevens Act. See 16 USC §1858; see also In the Matter of Corsair Corporation, F/V CORSAIR, 1998 WL 1277924 (NOAA 1998).

The term “person” is broadly defined by the Act to include any individual, corporation, partnership, association or other entity. 16 USC §1802(36). Therefore, it is wholly possible that a business entity may be assessed a civil penalty as a person for any violation of the Magnuson-Stevens Act or any regulation adopted thereunder. See In the Matter of Northern Wind Seafood, Inc., 1998 WL 1277922 (NOAA 1998). The parties do not contest that Respondents herein are “persons” as that term is contemplated by 16 USC §1802(36).

The term “Exclusive Economic Zone” (EEZ) is the zone established by Presidential Proclamation 5030, 3 CFR Part 22, dated March 10, 1983, and is that area adjacent to the United States which, except where modified to accommodate international boundaries, encompasses all waters from the seaward boundary of each of the coastal states to a line on which each point is 200 nautical miles from the baseline from which the territorial sea of the United States is measured. 16 USC §1802(11); 50 CFR §600.10.

The parties do not dispute that the events giving rise to the instant matter occurred in the EEZ of the Gulf of Mexico.

2. Application of Strict & Vicarious Liability under the Magnuson-Stevens Act

The Magnuson-Stevens Act, and the regulations promulgated thereunder, do not set forth a scienter requirement. Northern Wind, Inc. v. Daley, 200 F.3d 13, 19 (1st Cir. 1999) (citing Tart v. Massachusetts, 949 F.2d 490, 502 (1st Cir.1991) for the proposition that “scienter is not required to impose civil penalties for regulatory violations when the regulation is silent as to state of mind”). Accordingly, any violations are strict liability offenses. Id. (internal citations omitted).

The law is well-settled that an employer may be vicariously liable for its employee’s acts committed in the scope of employment while furthering the employer’s business. In the Matter of: Robert R. Flores and Astara, 2009 WL 2053602 (NOAA 2009) (internal citations omitted). Therefore, “the owner of a vessel may be held liable for the actions of a crewmember that violates the Magnuson-Stevens Act or its underlying regulations.” Id. citing In the Matters of James Chan Song Kim, Askar Ehmes, Ulheelani Corp., 2003 WL 22000639 (NOAA 2003). Joint and several liability, as it applies in cases arising under the Act, is set forth at 15 CFR §904.107 and provides that:

(a) A NOVA may assess a civil penalty against two or more respondents jointly and severally. Each joint and several respondent is liable for the entire penalty but, in total, no more than the amount finally assessed may be collected from the respondents.

* * *

(c) A final administrative decision by the Judge or the Administrator after a hearing requested by one joint and several respondent is binding on all parties including all other joint and several respondent(s), whether or not

they entered an appearance unless they have otherwise resolved the matter through settlement with the Agency.

Id. (emphasis added).

“The idea behind respondeat superior is to subject an employer to liability for whatever is done by the employee by virtue of his employment and in furtherance of its ends.” In the Matters of James Chan Song Kim, Askar Ehmes, Ulheelani Corporation, 2003 WL 22000639 (NOAA 2003); see also Weinberg v. Johnson, 518 A.2d 985, 988 (D.C. 1986). Joint and several liability is imposed on the vessel’s owner if the violation occurs within the scope of the crewmembers duties. See In the Matter of Corsair Corporation, F/V CORSAIR, 1998 WL 1277924 (NOAA 1998); see also In the Matter of Blue Horizon, Inc., 6 O.R.W. 467 (NOAA 1991) (holding that owners of a fishing vessel are jointly and severally liable for the acts of an employee if the acts are directly related to duties that the employees have broad authority to perform).

The doctrine of respondeat superior is used to “prevent vessel owners and operators from reaping the benefits of illegal fishing activities while avoiding the responsibility that goes along with such tactics.” In the Matters of James Chan Song Kim, Askar Ehmes, Ulheelani Corporation, 2003 WL 22000639 (NOAA 2003); In the Matter of Atlantic Spray Corporation, 1996 WL 1352603 (NOAA 1996); In the Matter of Corsair Corporation, F/V CORSAIR, 1998 WL 1277924 (NOAA 1998); In the Matter of Atlantic Spray Corporation, 1997 WL 1402870 (NOAA 1997). It is not necessary that a vessel owner exercise detailed control over the operations of his vessel in order to be held liable for the illegal activities of its master and crew. It is sufficient that the owner of the vessel, and the major beneficiary of its operations, authorized the fishing expedition that was illegally conducted. Since it acquires a share of the vessel’s production, so must it

bear a major responsibility, along with the captain, for the latter's unlawful acts. To hold otherwise would be to allow vessel owners to escape responsibility for the transgressions of the captains that they hire, authorize to operate their boats, and have the authority to fire. Such a holding would substantially inhibit the effective enforcement of the Magnuson Act and the applicable regulations. In the Matters of James Chan Song Kim, Askar Ehmes, Ulheelani Corporation, 2003 WL 22000639 (NOAA 2003); In the Matter of Atlantic Spray Corporation, 1996 WL 1352603 (NOAA 1996); In the Matter of Corsair Corporation, F/V CORSAIR, 1998 WL 1277924 (NOAA 1998); In the Matter of Atlantic Spray Corporation, 1997 WL 1402870 (NOAA 1997).

There is no dispute herein that Respondent Anderson, as the operator of the F/V MISS HALEY II, was an employee of Respondents Moore at the time of the alleged violation.⁴ Consequently, Respondent Anderson's actions are imputed to his employer, Respondents Moore, under 15 CFR §904.107 and the doctrine of respondeat superior, as that doctrine is described in NOAA jurisprudence discussed supra. Therefore, Respondents Moore are jointly and severally liable for the actions of Respondent Anderson.

The facts of this case are straightforward and were generally uncontested by Respondents.

⁴ Although Respondents Moore did not attempt to argue Respondent Anderson was an independent contractor, the court notes that such an argument would nevertheless fail as the doctrine of respondeat superior also applies to individuals who claim to be independent contractors. In the Matter of Kenneth Shulterbrandt, William Lewis, 1993 WL 495728 (NOAA 1993); see also, In the Matter of Charles P. Peterson, James D. Weber, 1991 WL 288720 (NOAA 1991). The rationale behind applying the doctrine of respondeat superior to independent contractors is that the contract may be "characterized as 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, and inferred right of control and a right to participate in the profits." Id. "Generally, the test used to determine whether the doctrine applies is whether the vessel owner had, at the time of the violation, the right to control the actions of the wrongdoer." Id.

C. Analysis

The Agency has charged Respondents, jointly and severally, with one violation of 16 U.S.C. §1857 (1) (A), which is a general prohibition stating that “[i]t is unlawful for any person to violate any provision of this chapter or any regulation or permit issued pursuant to this chapter.” Id. Accordingly, NOAA further charged Respondents, jointly and severally, with having violated 50 C.F.R. §622.7(s) by “fail[ing] to comply with the restrictions that apply after closure of a fishery, as specified in §622.43(a)(1)(2) (closure of Gulf reef fish commercial quota).” (NOVA, July 21, 2008).

At all times relevant herein, Respondents Moore owned the F/V MISS HALEY II, a registered and flagged vessel of the United States and holder of a duly issued Federal Fisheries Permit for Gulf of Mexico Reef Fish Commercial. (Tr. at 109; Agency Ex. 1, 3, 7, 8, 9).

It is not disputed that at all times relevant herein, and specifically from on or about April 29 through May 13, 2008, Respondent Anderson, an employee of Respondents Moore, served as the captain and fishing master of the F/V MISS HALEY II and engaged in deepwater bottom longline grouper and tilefish fishing in the EEZ of the United States, particularly in the Gulf of Mexico off of the Florida, Alabama, Mississippi and Louisiana coast lines. (Tr. at 52-53, 109; Agency Ex. 9).

The evidence at trial revealed that on or about Tuesday, May 6, 2008, the National Marine Fisheries Service (NMFS)⁵ published two closure notices for commercial fisheries, to wit: closure of the deepwater grouper⁶ and tilefish fisheries effective 12:01 a.m., local time, May 10, 2008, and continuing until January 1, 2009.

⁵ The NMFS is a division of NOAA, which is an agency under the Department of Commerce.

⁶ According to the notice of closure, deepwater grouper included misty grouper, snowy grouper, yellowedge grouper, warsaw grouper and speckled hind.

(Agency Ex. 5). This publication constituted legal notice to Respondents per the dictates of 44 USC §1507. Respondents admit that appropriate notice was published in the Federal Register – albeit only three days before the fisheries were to close. (Tr. at 122).

Likewise, it is generally undisputed that on or about May 12, 2008, Respondent Anderson (and, thus, Respondents Moore, jointly and severally), fished after the closure of a season, in the Gulf of Mexico, within the boundaries of the EEZ of the United States, in violation of 16 USC §1857(1)(A), 50 CFR §§622.7(s) and 622.43(a)(1)(2).

In addition to publication in the Federal Register, on May 5, 2008, the NMFS, Southeast Regional Office, published two commercial fishery closure notices in its Southeast Fishery Bulletin. (Agency Ex. 6). FB08-28 and FB08-29 bulletins advised that the commercial fisheries for tilefish and deepwater grouper in the Gulf of would close, effective 12:01 am, local time, May 10, 2008 through December 31, 2008. (Id.).

According to the notices, “[t]he operator of a vessel with a valid reef fish permit having [tilefishes and/or deep water grouper] aboard must have landed and bartered, traded, or sold such [tilefish and/or deep water grouper] prior to 12:01 am, local time, May 10, 2008.” (Id.). According to the testimony of Anik Michelle Clemens, a technical writer in the Sustainable Fisheries Division of the NMFS, the Southeast Fishery Bulletins “are mailed to all permitted vessels and dealers . . . e-mailed to interested parties of whose e-mail we have.” (Tr. at 57).

Clemens further testified that NOAA’s NMFS Southeast Regional Office takes additional steps to notify the commercial fishermen and dealers of quota closures. (Tr. at 57-58). As described by Clemens, “[a]s an extra tool, the Southeast Regions uses other regions across the nation. The [NMFS] has a memorandum of agreement with the

National Weather Service to provide NOAA Radio Broadcast, time-sensitive or unanticipated fishery closures or trip limit reductions.” (Tr. at 58). On May 1, 2008, Clemens e-mailed a request to the National Weather Service that NOAA Weather Radio broadcast a notice of deepwater grouper and tilefish closures. (Agency Ex. 10). The broadcast was to be transmitted over “NWR stations from Key West, FL to Brownsville, TX. . . . commencing as soon as possible through noon on May 6, 2008 at approximately 30-minute intervals” (Id.). The requested broadcast notice of fishery closure indicated that the fishery for deepwater grouper (including misty grouper, snowy grouper, yellowedge grouper, warsaw grouper and speckled hind) and tilefish would close at 12:01 a.m., local time, on May 10, 2008 and would remain closed until 12:01 a.m., local time, on January 1, 2009. (Tr. at 56-59; Agency Ex. 10). However, there was no proof adduced that the broadcasts were actually made as requested or that they were received. (Tr. at 71-72).

Respondent Michael Moore testified that on Friday, May 9, 2008, only hours before the fishery was to close, he learned of the impending commercial fisheries closures for grouper and tilefish in the Gulf of Mexico. (Tr. at 110-11). Respondent Michael Moore further testified that he recognized that his vessel, the F/V MISS HALEY II, was engaged in grouper and tilefish fishing in the Gulf of Mexico and that the impending fishery closure applied to him and his vessel. (Tr. at 111).

According to Respondent Michael Moore, he “tried everything I knew to contact [Respondent Anderson].” (Tr. at 111). He attempted to raise Respondent Anderson via WLO, a marine operator which greater reach than regular VHS. Respondent Michael Moore contacted the Coast Guard, Respondent Anderson’s girlfriend contacted the Coast

Guard, and he apparently tried locate vessels that may be in Respondent Anderson's vicinity to notify him of the impending closure since the VMS kept track of the F/V MISS HALEY II's movements. (Tr. at 111-13).

On May 12, 2008, at approximately 1630 hours (CDT) United States Coast Guard Cutter (USCGC) BONITO located and boarded the F/V MISS HALEY II "approximately 80 nautical miles southeast of Pensacola Pass," Florida. (Tr. at 75-76, 84; Agency Ex. 21).⁷ Boatswain's Mate First Class (BM1) Kevin Stryker, Executive Officer of the BONITO, testified that at the time he boarded the F/V MISS HALEY II, that vessel was engaged in longline fishing. (Tr. at 76). BM1 Stryker further testified that upon boarding the F/V MISS HALEY II, he spoke with the captain of the vessel, Respondent Anderson and specifically "asked him if he had deepwater grouper on board, and everything he had on board, after we got through with the inspection and stuff." (Id.). In response, Respondent Anderson lied and denied that he had any grouper aboard the F/V MISS HALEY II. (Tr. at 77). Respondent Anderson further compounded the deceit by saying he had only 7,000 pounds of tilefish aboard the F/V MISS HALEY II. (Id.). However, subsequent investigation by members of the BONITO's boarding team revealed that the F/V MISS HALEY actually had nearly 8,000 pounds of fish aboard. (Agency Ex. 1)

Immediately after his initial conversation with Respondent Anderson, BM1 Stryker went below decks into the hold and initially found only tilefish. At that time, BM1 Stryker informed Respondent Anderson that the fishery had closed for tilefish as

⁷ Agency Exhibit 21 is a written statement provided by BM1 Stryker. In his written account of his boarding of the F/V MISS HALEY II, BM1 Stryker indicated that at the time he boarded the Respondent's vessel, that craft lay "approximately 80 Nautical Miles" southeast of Pensacola Pass, Florida. By contrast, in the transcription of his testimony, BM1 Stryker's estimation was that the Respondent's vessel was "8.8 nautical miles" southeast of Pensacola Pass. Read in conjunction with Respondent Michael Moore's testimony (Tr. at 112), it appears that the transcript is in error – and that the distance was more likely 80 nautical miles, rather than the transcribed 8.8 nautical miles. The undersigned regards the discrepancy as a scrivener's error by the court reporter.

well as grouper. (Tr. at 77). It was then, and only then, that Respondent Anderson admitted that, in fact, he had approximately 800 pounds of grouper aboard his vessel, which was hidden “under the tilefish.” (Tr. at 77, 79). BM1 Stryker was thereupon directed by his command to seize the catch and escort the F/V MISS HALEY II to Panama City. (Tr. at 78). Upon arriving in port at a Panama City dock on May 13, 2008, the F/V MISS HALEY II was met and boarded by Special Agent Elizabeth Slavin Nelson with NOAA/NMFS Office of Law Enforcement. (Tr. 24-27; Agency Ex. 1).

On May 13, 2008, and during the course of her investigation, Special Agent Nelson obtained Respondent Anderson’s fishing logbook which bore the dates he fished and the species and the number of fish caught on each given date. (Tr. at 27-28; Agency Ex. 1). Respondent Anderson’s log book indicated that on Saturday, May 10, 2008, he caught 500 pounds of tilefish and on Sunday, May 11, 2008, he caught 700 pounds of tilefish. (Tr. at 28; Agency Ex. 2). Respondent Anderson told Special Agent Nelson that he had also caught “approximately 100 pounds” of fish on May 12, 2008. (Agency Ex. 1).

Special Agent Nelson testified that, based upon the evidence available to her, that Respondent Anderson had in his possession 1,300 pounds of fish taken after the closure of the fishery on May 12, 2008. Pursuant to agency practice, Special Agent Nelson then sold the 1,300 pounds of fish to Greg Abrams Seafood at the rate of \$2.00 per pound for a total of \$2,600.00 United States Dollars. (Tr. at 51). She then sent the check, made payable to the United States Department of Commerce, she received for the fish to “NOAA fines and Penalties lockbox” to be held until the instant matters were resolved. (Tr. at 30-31, 50; Agency Ex. 5).

D. Imposition of Joint & Several Liability herein

Clearly, in the instant case, it was within Respondent Anderson's duties to conduct fishing operations aboard the F/V MISS HALEY II in the Gulf of Mexico in the EEZ of the United States on the dates alleged. Equally clear is the fact that Respondents Moore had, at the time of the violation, anticipated reaping the economic benefits of Respondent Anderson's labor and also enjoyed the right to control Respondent Anderson's actions – as evidenced by Respondent Moore's efforts to contact Respondent Anderson and order him to cease fishing operations after May 9, 2008. (Tr. at 99 – 106). Hence, it is appropriate to impose joint and several liability upon Respondents Moore in this case if the facts support a finding of a violation by Respondent Anderson.

V. Ultimate Findings of Fact

1. Respondent Donnie Anderson was served with a subpoena on March 9, 2011. The subpoena reflects that Respondent Anderson was directed to appear at the hearing of this matter on March 21, 2011 at the Okaloosa County (Florida) Courthouse Annex, Courtroom G, 1250 North Eglin Parkway, Shalimar, Florida. The court file reflects that Respondent Donnie Anderson received personal service of the subpoena and that he signed for same on March 9, 2011. 15 CFR §904.211(c).
2. On the day of the hearing, however, Respondent Donnie Anderson did not present himself at the hearing. Moreover, Respondent's counsel, Mr. Stewart, represented to the court that Respondent Michael Moore had spoken with Respondent Anderson by telephone the evening before the hearing was to commence to ensure Respondent Anderson's presence at the hearing. Thereafter, no one heard from—or saw—Respondent Anderson and his whereabouts were unknown. (Tr. at 7-8).
3. Respondent Donnie Anderson is a party who, after proper service of notice, failed to appear at the hearing. Therefore, the undersigned ALJ may, and does, hereby find the facts alleged in the NOVA and NOPS as proved against Respondent Anderson. 15 CFR §904.211(a)(2).
4. The record reveals that Respondent Anderson failed to respond to the subpoena, which is an order from the ALJ. Hence, the ALJ may, and

hereby does, issue an order, as necessary, for the just and expeditious resolution of the case. 15 CFR §904.212.

5. The undersigned ALJ hereby enters a default judgment against Respondent Anderson and finds as proved against him, all of the allegations contained in the NOVA and NOPS. Such a finding results in the automatic imposition of liability upon Respondents Lisa Moore and Michael Moore under the doctrine of joint and several liability. 15 CFR §904.107.
6. On October 1, 2007, Respondents Lisa Moore and Michael Moore, as owners of the F/V MISS HALEY II, were granted a Federal Fisheries Permit for Gulf of Mexico Reef Fish – Commercial. (Agency Ex. 1, 8). Grouper and tilefish are among the species included in Gulf of Mexico Reef Fish. 50 CFR §622.4.
7. On or about May 13, 2008, and at all relevant times herein, Respondents Michael Moore and Lisa Moore were the owners of the F/V MISS HALEY II and Respondent Donnie Anderson served as Captain and fishing master of that vessel. (Tr. at 109).
8. From approximately April 29 through May 13, 2008, the F/V MISS HALEY II was engaged in deepwater bottom longline grouper and tilefish fishing in the EEZ of the United States, particularly in the Gulf of Mexico off of the Florida, Alabama, Mississippi and Louisiana coast lines. (Tr. at 109)(Agency Ex. 9).
9. On Tuesday, May 6, 2008, the Department of Commerce/NOAA-National Marine Fisheries Service published a notice of closure of the commercial fishery for deepwater grouper (including misty grouper, snowy grouper, yellowedge grouper, warsaw grouper and speckled hind) and tilefish in the Federal Register. The closure was effective at 12:01 am, local time, May 10, 2008 until 12:01 am, local time, January 1, 2009. (Agency Ex. 5). This notice comported with the provisions of 44 USC §1507.
10. On Friday, May 9, 2008, Respondent Michael Moore attempted to contact Respondent Anderson aboard the F/V MISS HALEY II to notify him of the impending closure via VHF radio, cell telephone, and via the Vessel Monitoring System. (Tr. 111-14).
11. On May 12, 2008, at approximately 1630 hours, CDT, Coast Guard Boatswain's Mate Kevin Stryker boarded the F/V MISS HALEY II in the vicinity of Desoto Canyon approximately 80 Nautical Miles Southeast of Pensacola Pass, Florida; an area within the Gulf of Mexico and within the Exclusive Economic Zone of the United States. (Tr. at 75-76; Agency Ex. 21).

12. At the time Coast Guard Boatswain's Mate Stryker boarded the F/V MISS HALEY II, that vessel was engaged in longline fishing. (Tr. at 76). After Stryker boarded the F/V MISS HALEY II, he had a conversation with Respondent Anderson, the captain of the vessel. Stryker then asked Respondent Anderson what species of fish he had aboard the vessel; specifically asking Respondent Anderson if he had deepwater grouper on board. In response, Respondent Anderson lied; denying that he had any grouper aboard the F/V MISS HALEY II (Tr. at 76-77).
13. Immediately after his initial conversation with Respondent Anderson , Coast Guard Boatswain's Mate Stryker went below decks into the hold and initially found only tilefish. At that time, Stryker informed Respondent Anderson that the fishery had closed for tilefish as well as grouper. (Tr. at 77). It was then, and only then, that Respondent Anderson admitted that, in fact, he had grouper aboard his vessel. (Tr. at 77).
14. From May 10 through May 12, 2008, Respondent Anderson illegally fished for and possessed grouper and tilefish in the Gulf of Mexico within the EEZ of the United States, the area contemplated by the notice of fishery closure published in the Federal Register on May 6, 2008. (Tr. at 53).
15. On May 13, 2008, and during the course of an official investigation, Special Agent Nelson obtained Respondent Anderson's fishing logbook which bore the dates he fished and the species and the number of fish caught on each given date. Respondent Anderson's log book indicated that on Saturday May 10, 2008, he caught 500 pounds of tilefish and on Sunday, May 11, 2008, he caught 700 pounds of tilefish. Respondent Anderson also caught an additional approximate "100 pounds" of fish on May 12, 2008. (Tr. at 27-28; Agency Ex. 1, 2).
16. Respondent Anderson had in his possession 1,300 pounds of fish illegally taken after the closure of the fishery on May 12, 2008. Pursuant to agency practice, NOAA then sold the 1,300 pounds of fish to a commercial vendor at the rate of \$2.00 per pound for a total of \$2,600.00 United States Dollars, via check, made payable to the United States Department of Commerce. (Tr. at 30-31, 50; Agency Ex. 5).

VI. Penalty Assessment & Ability to Pay

The Magnuson-Stevens Act authorizes the imposition of a civil penalty of up to \$100,000 and permit sanctions commensurate to the violations involved. 16 USC §1858(a), (g). In assessing penalties and or permit sanctions, the court may consider a

number of factors including the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior violations, and ability to pay. Id. at (a), (g)(2); 15 CFR §904.108(a). Furthermore, a respondent "has the burden of proving such inability to pay by providing verifiable, complete, and accurate financial information to NOAA." 15 CFR §904.108(c). "Agency counsel may require the respondent to complete a financial information request form . . . if the respondent does not submit the requested financial information, he or she will be presumed to have the ability to pay." Id. Respondents did not comply with NOAA's request for financial information nor did Respondents offer any financial information relative to their ability to pay at the hearing. Thus, Respondents are, jointly and severally, presumed to have the ability to pay any civil penalty imposed hereby.

Considering the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, no probative evidence of any history of prior offenses by any of the Respondents (Tr. at 52), and ability to pay; the following penalties are appropriate:

A civil penalty, in the amount of \$7,600.00, is jointly and severally imposed on all Respondents. This figure is the sum of the market value of the Grouper landed aboard the F/V MISS HALEY II, i.e., \$2,600.00 plus \$5,000.00 because Respondent Anderson knowingly fished beyond the closure of the season, see supra.

In this particular case, it appears that although the "letter" of the regulation was violated by Respondents Michael and Lisa Moore, it does not appear that they offended the "spirit" of the law. It appears that Respondent Michael Moore attempted to take reasonable steps to notify Respondent Anderson of the fisheries closure.

By contrast, the evidence, and all reasonable inferences taken therefrom, leads to a different conclusion relative to Respondent Anderson. The court takes particular note of the testimony of Coast Guard BM1 Stryker, who clearly described Respondent's deceit when he was asked if he had any grouper aboard the F/V MISS HALEY II. The facts revealed that after boarding the vessel, Stryker asked Respondent Anderson what species of fish he had aboard the vessel: "I asked him if he had deepwater grouper on board, and everything he had on board, after we got through with the inspection and stuff." In response, Respondent Anderson denied that he had any grouper aboard the F/V MISS HALEY II (Tr. at 76-77). The evidence also suggests Respondent Anderson attempted to conceal the grouper.

The court infers from his deceit that Respondent Anderson knew of the fishery closure before on or about May 10, 2008, despite his subsequent protestation of ignorance of that fact. (Agency Ex. 1, 15). This is a reasonable inference because, apart from his knowledge of the fishery closure, Respondent would have had no other reason to tell Stryker he had no grouper aboard.

The court also takes note of the testimony given by Respondent Michael Moore concerning Respondent Anderson's propensity for deceit:

Q. Do you believe he [Respondent Anderson] was being truthful with you?

A. It's hard to say about him. You're not going to hold him liable for nothing, so he doesn't care really about me, you, him, or anybody, so he left it on my shoulders. I wish he would have been here [in court]. He could have helped me, but that's irregardless. He doesn't care about that. So, we thought with a subpoena, he would come and testify, you know. That's just the type of person he is. (sic)

(Tr. at 116)

The court is satisfied that Respondent Anderson knowingly attempted to deceive BM1 Stryker. This is evidence he knew that he was fishing for grouper and tilefish illegally.

The court is also satisfied that while the Respondents Moore were put on “legal notice” of the fishery closure (and, thus, obliged to adhere to its dictates), the timing of the notice, vis-a-vis the closure date, gave Respondents but three days to take appropriate action. The evidence reveals that Respondents Moore undertook reasonable efforts to notify Respondent Anderson to ensure that he comply with the closure order. The imposition of joint and several liability can sometimes result in an seemingly inequitable imposition of a penalty; although public policy considerations certainly suggest that a vessel’s owner is the party most able to ensure a captain’s compliance with the law. If the Administrator was predisposed to grant some equitable relief to Respondents Michael Moore and Lisa Moore under the provisions of 15 CFR §904.273, the facts of this case would support such an action.

A permit sanction of fifteen days shall also be imposed the F/V MISS HALEY II.

WHEREFORE,

V. Order

IT IS HEREBY ORDERED, that the following penalties are appropriate and imposed:

A civil penalty, in the total amount of \$7,600.00, is jointly and severally is imposed on Respondents Michael Moore, Lisa Moore and Donnie Anderson.⁸

⁸ This amount may be offset against the \$2,600.00 currently held in escrow by NOAA subject to policies and practices with regard to such funds.

IT IS FURTHER ORDERED that a permit sanction of **FIFTEEN DAYS** be imposed against the F/V MISS HALEY II.

PLEASE TAKE NOTICE, that a failure to pay the civil penalty to the Department of Commerce/NOAA within thirty (30) days from the date on which this decision becomes final Agency action will result in the total penalty becoming due and payable, and interest being charged at the rate specified by the United States Treasury regulations and an assessment of charges to cover the cost of processing and handling of the delinquent penalty. Further, in the event the penalty, or any portion thereof, becomes more than 90 days past due, Respondents may also be assessed an additional penalty charge not to exceed 6 percent per annum.

PLEASE TAKE FURTHER NOTICE, that any petition for review of this decision must be filed within 30 days of this date with the Administrator of the National Oceanic and Atmospheric Administration as subject to the requirements of 15 CFR §904.273. If neither party seeks administrative review within 30 days after issuance of this order, this initial decision shall become the final decision of the Agency. A copy of 15 CFR §904.273 is attached hereto as Attachment B.

IT IS SO ORDERED.

Done and dated this the 15th day of April, 2011,
at New Orleans, Louisiana.



HONORABLE BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE

ATTACHMENT A – EXHIBIT & WITNESS LIST

NOAA EXHIBITS – AS OFFERED/ADMITTED CHRONOLOGICALLY

1. Investigative Report of Special Agent Nelson (6 pages)
2. Respondent Donnie Anderson's logbook (2 pages)
3. Photo log by Special Agent Nelson (3 pages)
4. Greg Abrams Seafood, Inc. HACCP Unloading Sheet (1 page)
5. Federal Register, Vol. 73, No. 88, Tuesday, May 6, 2008, 24883-24885 (3 pages)
6. Southeast Fishery Bulletin, May 5, 2008, FB08-028 and FB08-29 (2 pages)
7. F/V MISS HALEY II Certificate of Documentation and General Index or Abstract of Title (7 pages)
8. Federal Fisheries Permit Gulf of Mexico Reef Fish Commercial issued to the F/V MISS HALEY II (4 pages)
9. VMS coordinates and chart plots of the F/V MISS HALEY II from April 29, 2008 to May 13, 2008 (9 pages)
10. National Marine Fisheries Service request for broadcast on NWR (8 pages)
11. National Climatic Data Center records (3 pages)
12. Fisheries Violation Case Package Memorandum prepared by the United States Coast Guard (1 page)
13. USCGC BONITO GPS Verification Form (1 page)
14. USCGC BONOITO RADAR Verification Form (1 page)
15. Fisheries Violation Report prepared by USCG BONITO (5 pages)
16. USCGC BONITO Log-Remarks Sheet dated May 12, 2008 (2 pages)
17. USCGC BONITO Log-Weather Observation and Operational Summary Sheet dated May 12, 2008 (1 page)
18. USCGC BONITO Log-Navigation Data Sheet dated May 12, 2008 (2 pages)
19. USCGC BONITO Activity Summary Report dated May 12, 2008 (6 pages)
20. USCGC BONITO Situation Report (2 pages)
21. Statement of BM1 Kevin Stryker, USCG concerning the F/V MISS HALEY II boarding (2 pages)
22. Photo log by USCGC BONITO boarding team (3 pages)
23. NOAA Chart 411

NOAA WITNESSES

1. Special Agency Elizabeth Slavin Nelson
2. Anik Michelle Clemens
3. BM1 Kevin Stryker, USCG

RESPONDENT WITNESSES

1. Terrance Gregory Abrams
2. Michael G. Moore

ATTACHMENT B: PROCEDURES GOVERNING ADMINISTRATIVE REVIEW
15 CFR §904.273

§ 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party may petition for review of an initial decision of the Judge within 30 days after the date the decision is served. The petition shall be addressed to the Administrator and filed at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue NW, Washington, DC 20230.

(b) Review by the Administrator of an initial decision is discretionary and is not a matter of right. A petition for review must be served upon all parties. If a party files a timely petition for discretionary review, or action to review is taken by the Administrator upon his or her own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator.

(c) Petitions for discretionary review may be filed only upon one or more of the following grounds:

(1) A finding of a material fact is clearly erroneous based upon the evidence in the record;

(2) A necessary legal conclusion is contrary to law or precedent:

(3) A substantial and important question of law, policy, or discretion is involved (including the amount of the civil penalty); or

(4) A prejudicial procedural error has occurred.

(d) Each issue must be separately numbered, concisely stated, and supported by detailed citations to the record, statutes, regulations, and principal authorities. Issues of fact or law not argued before the Judge may not be raised on review unless they were raised for the first time in the 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) No oral argument on petitions for discretionary review will be allowed.

(f) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. No further replies are allowed.

(g) If the Administrator declines to exercise discretionary review, such 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 decision of NOAA. The Administrator need not give reasons for declining review.

(h) If the Administrator grants a petition for discretionary review, he or she will issue an order specifying issues to be briefed and a briefing schedule. Such issues may constitute one or more of the issues raised in the petition for discretionary review and/or matters the Administrator wishes to review on his or her own initiative. Only those issues specified in the order may be argued in the briefs and considered by the Administrator. No oral argument will be permitted.

(i) After expiration of the period for filing briefs under paragraph (h) 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.