UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:	**Docket Number:**
Martuna, S.A. de C.V. (F/V MARIA LUISA)	**SW0702881FM/V**
Respondent.	

INITIAL DECISION AND ORDER

Issued:

February 2, 2010

Issued By:

Hon. Parlen L. McKenna
Presiding

APPEARENCES:

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
Mr. Paul A. Ortiz, Esq.
National Oceanic and Atmospheric Administration
Office of General Counsel GCNW
501 W. Ocean Blvd., Rm. 4470
Long Beach, CA 90802

FOR THE RESPONDENT MARTUNA, S.A. de C.V.
Mr. Cris J. Wenthur, Esq.
Wenthur Law Group, LLP
4121 Napier Street
San Diego, CA 92110

TABLE OF CONTENTS

I. STATEMENT OF THE CASE

On May 14, 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 Respondent, Martuna, S.A. de C.V. (Martuna). The NOVA alleged a single count of violating the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act), as provided in 16 U.S.C. § 1858, and its implementing regulations codified at 15 C.F.R. Part 904. Specifically, Respondent is charged with ownership of a Mexican flagged purse seine vessel (the F/V MARIA LUISA) that conducted fishing operations without a permit within the EEZ of the United States at approximately 32°40.57N, 117°46.54W on July 29, 2007. The Agency alleged that the F/V MARIA LUISA's actions violated 16 U.S.C. § 1857(2)(B).

In the NOVA, the Agency seeks a $130,000.00 civil penalty against Martuna for this violation. Concurrently, NOAA also issued a Notice of Intent to Deny Permit (Permit Denial) under the authority of the Magnuson Act at 16 U.S.C. § 1858(g) and 15 C.F.R. § 904.303. The Permit Denial would make Martuna ineligible to hold (as either owner or lessee) any federal fishing permit or authorization to fish issued by the National Marine Fisheries Service (NMFS) for a period of five (5) years from its effective date.

On January 13, 2009, Martuna requested an administrative hearing to contest the NOVA. On June 18, 2009, a Notice of Transfer and Assignment of Administrative Law Judge and Order Requesting Preliminary Positions on Issues and Procedures (PIPP) was issued. On July 17, 2009, the Agency filed its PPIP and on July 20, 2009, Respondent filed its PIPP. On August 27, 2009, the undersigned issued an Order and Notice of Hearing, which set the matter for hearing in San Diego, California on October 22, 2009.

On October 1, 2009, the undersigned issued a Decision and Order, which addressed almost the same legal and factual issues presented in this matter. See In re Pesca Azteca, S.A. de C.V. (F/V AZTECA 1) (SW0702652).[1] Under that circumstance, both parties believed that another hearing was unnecessary. Thus, on October 15, 2009, the Agency submitted its Motion for Summary Decision Based on Stipulated Facts and Evidence. The Summary Decision Motion was supported by Respondent's counsel. On October 16, 2009, the undersigned issued an order granting the parties' request for a decision on the record without hearing.

On October 22, 2009, the parties filed a Joint Stipulation to Facts, Law and Admission of Evidence (Joint Stipulation).[2] The Joint Stipulation provided for the admission into evidence of both the Agency's and Martuna's exhibits. Attachment A.

---

[1] Mr. Wenthur, Respondent's attorney of record, represented the respondent in the Pesca Azteca case. See, generally, In re Pesca Azteca, S.A. de C.V (F/V AZTECA 1), 2009 WL 3721029 (October 1, 2009).

[2] Parties may not stipulate to the law. See Neuens v. City of Columbus, 303 F.3d 667, 670 (6th Cir. 2002) (parties may not stipulate to legal conclusions to be reached by the court). As such, the undersigned rejects the parties' stipulations to law contained in the Joint Stipulation.

On November 16, 2009, Respondent filed its Closing Brief and Proposed Findings of Fact (Resp. Closing Brief). On November 20, 2009, the Agency filed its Brief in Support of Summary Decision and Proposed Findings of Fact and Conclusions of Law (Agency Closing Brief). Rulings on the parties' Proposed Findings of Fact and Conclusions of Law are contained in Attachment B. On December 5, 2009, the Agency filed its Reply Brief in Support of Summary Decision (Agency Reply).

On December 28, 2009, the undersigned issued an Order Requiring Additional Information regarding an incident in the year 2000, which was raised by the parties in their respective briefs. On January 26, 2010, the Agency submitted materials in response to the Order Requiring Additional Information. On January 27, 2010, Respondent submitted materials in reply to the Agency's submission.

The record of this proceeding, including the evidence, pleadings and other submissions, has been reviewed by the undersigned. The findings of fact and conclusions of law that follow are prepared upon my analysis of the entire record, and applicable regulations, statutes, and case law. Each exhibit entered, although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration. This case is now ripe for decision.

II. FINDINGS OF FACT

1. On July 29, 2007, the F/V MARIA LUISA ("Vessel") was registered and flagged with the Government of Mexico, and is therefore not a vessel of the United States. Joint Stipulation ¶ 1.
2. The Vessel was authorized to fish for tuna species under the rules and regulations of the Government of Mexico. Joint Stipulation ¶ 2.
3. The owner of the Vessel is Martuna, S.A. de C.V., a Mexican corporation. Joint Stipulation ¶ 3.
4. Martuna, S.A. de C.V. was the registered owner of the Vessel during a fishing trip that included the dates of July 28th and July 29, 2007. Joint Stipulation ¶ 4.
5. On July 29, 2007, the Vessel was not authorized to fish in the exclusive economic zone (EEZ) of the United States. Joint Stipulation ¶ 5.
6. The Vessel is a large-scale tuna purse seine fishing vessel that is approximately 233 feet long, 1,174 gross tons, and has a carrying capacity of 1,089 tons of fish. Joint Stipulation ¶ 6.
7. Purse seine fishing vessels, in general, deploy a long fishing net that hangs vertically in the water by having a weighted edge along the bottom and floats along the top. Joint Stipulation ¶ 7.
8. Large scale purse seine vessels use skiffs to deploy the net around a school of fish and then hold the net in place while the net is "pursed" to prevent the fish from escaping. Joint Stipulation ¶ 7.A.

9. Normally, in a standard purse seine fishing operation, the net is then brought back on to the vessel while the fish are brailed out on to the deck and stored in holds on the vessel. Joint Stipulation ¶ 7.B.[3]
10. The Vessel was contracted to catch and transfer live fish which explains why the Vessel was holding the fish for transportation rather than brailing the fish onto the deck and stored in the holds of the Vessel. Id.
11. In a live fish operation, the seined tuna swims from the seine net into the fish pen after the transfer gate between the seine net and net pen are connected and then the net pen is towed to a Mexican fish farming operation ("Fish Farm"). Id.
12. The Fish Farming operation in question is conducted by an independent third party in the County of Mexico in two locations. One location is off the coast of Ensenada, Mexico and the other is off the coast of the Coronado Islands in Mexico. Joint Stipulation ¶ 8.
13. At the Fish Farm, owned and operated by an independent third party, the tuna are fed and grown and then harvested for human consumption. Joint Stipulation ¶ 8.A.
14. Because of the nature of the contract between the Vessel and the Fish Farm, the Vessel had to wait for a towboat with a net pen to arrive in order to transfer the live fish from the seine net to the net pen which would then be towed to the Fish Farm. Joint Stipulation ¶ 8.B.
15. On July 28, 2007, at approximately 5:25 p.m., the fishing captain of the Vessel initiated "Set 36". Resp. Exh. 1, 2, 3.
16. The purse seine net was pursed at approximately 7:25 p.m. Id.
17. Set 36 was begun in Mexican waters and the purse seine net was pursed while the Vessel was in Mexican waters. Id.
18. Normally, the net pen is on site with the seine net is pursed. Joint Stipulation ¶ 10.
19. On July 28, 2007, the net pen was late in arriving to engage in the transfer of the bluefin tuna from the Vessel's purse seine net to the net pen. Resp. Exh. 1, 2, 3.
20. The net pen was late in arriving to initiate the transfer of the live bluefin tuna. Id.
21. After the Vessel's purse seine net was pursed, the Vessel drifted north while waiting for the net pen to arrive to conduct the transfer of the live bluefin tuna. Id.
22. On July 28, 2007, the Vessel drifted north into the EEZ of the United States at approximately 10:30 p.m. Id.
23. On July 29, 2007 and the few days before, the ocean current in the area was running at approximately .5 knots and were running in a northerly direction. Id.
24. On July 29, 2007, at approximately 11:40 a.m., the captain of the Vessel decided to unpurse the seine net and let the bluefin tuna go and ordered that the purse seine net be opened. Id.
25. Mr. Benjamin Fuss, a representative from the Fish Farm, communicated with the captain of the Vessel and could not guarantee that there would be no legal

[3] "Brailing" is a process by which the fish are harvested from the purse seine net using a large scoopnet called the "brailer" by which several tons of fish can be taken on board each time and frozen in the hold. See http://www.fao.org/fishery/fishtech/40/en.

repercussions from United States authorities, which led to the Vessel's captain's decision to release the bluefin tuna from the purse seine net. Id.

26. The bluefin tuna from Set 36 were released while the Vessel was in the EEZ of the United States. Id.
27. Thereafter the Vessel departed the EEZ of the United States and returned to Mexico. Joint Stipulation ¶ 20.
28. On July 29, 2007, the United States Coast Guard Helicopter 6025 (CGNR 6025) was tasked to launch in support of the USCG Cutter SEA OTTER, which was conducting a law enforcement boarding involving the incursion of a Mexican-flagged fishing vessel into the EEZ of the United States.[4] Joint Stipulation ¶ 22.
29. During this mission, SEA OTTER personnel further tasked CGNR 6025 to indentify other vessels in the area in addition to the one that was being boarded at the time by a boarding team from the SEA OTTER. Joint Stipulation ¶ 22.A.
30. At approximately 10:41 a.m., CGNR 6025 identified the F/V MARIA LUISA and documented the coordinates of that vessel at 32° 40' 57"N, 117°46' 54"W. These coordinates are approximately 3.6 nautical miles inside the EEZ of the United States. Joint Stipulation ¶ 22.B.
31. While at those approximate coordinates, personnel aboard CGNR 6025 identified a purse seine fishing net in the water next to the F/V MARIA LUISA, and saw two skiffs pulling on the corners of the purse seine net. Joint Stipulation ¶ 22.C.
32. While at those approximate coordinates, personnel aboard CGNR 6025 videotaped the activities of the F/V MARIA LUISA, as well as videotaping the coordinates of the helicopter from its Global Positioning System during passes in close proximity to the F/V MARIA LUISA. Joint Stipulation ¶ 22.D.
33. At approximately 11:00 a.m., CGNR 6025 disembarked the area. Joint Stipulation ¶ 22.E.
34. Thereafter an investigation was initiated by Special Agent Michelle Zetwo of the National Marine Fisheries Service based on the evidence provided by CGNR 6025. Joint Stipulation ¶ 23.
35. On July 29, 2007, the F/V MARIA LUISA had its pursed purse seine net in the water, and two skiffs from the vessel assisting with the net, within the EEZ of the United States. Joint Stipulation ¶ 24.
36. Martuna, S.A. de C.V. has no prior violations of the Magnuson Act within the past five years. Joint Stipulation ¶ 25.
37. In June 2000, a vessel under the control of Respondent recovered what it believed to be a live cruise missile, floating in international waters, which was property of the United States government. Resp. Exh. 4.
38. The crew on the vessel contacted the offices of Martuna S.A., de C.V., who in turn contacted the United States government. Joint Stipulation ¶ 27.A.
39. The missile, believed to be a live cruise missile, was picked up by the Vessel, at its perceived peril at the request of the United States government, and transported to the offices of Martuna S.A., de C.V., where the missile was then recovered by the United States government. Joint Stipulation ¶ 27.B.

---

[4] This other fishing vessel was the F/V AZTECA 1, the subject of the undersigned's decision in the case In re Pesca Azteca. See Agency Exh. 1.

40. The missile was not a cruise missile but rather a target drone. See Agency's Proffer of Additional Information on Respondent's Return of U.S. Government Property (January 26, 2010).
41. NOAA confirmed the occurrence of this event with the State Department of the United States. Joint Stipulation ¶ 27.E; Agency's Proffer of Additional Information on Respondent's Return of U.S. Government Property (January 26, 2010).
42. NOAA has been informed by the United States Department of Defense that it offers a reward of $500 for the return of target drones. See Agency's Proffer of Additional Information on Respondent's Return of U.S. Government Property (January 26, 2010).
43. There is insufficient evidence in the record to indicate whether or not Respondent requested or received compensation from the United States government for its return of the target drone.

III. PRINCIPLES OF LAW

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. See 5 U.S.C. § 556(d); 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, 764-765 (1984). The burden of producing evidence to rebut or discredit the Agency's evidence will only shift to the Respondent 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 Charge against Respondent

The Agency charged Respondent with a single violation of 16 U.S.C. § 1857(2)(B), which prohibits:[5]

> any vessel other than a vessel of the United States, and for the owner or operator of any vessel other than a vessel of the United States, to engage . . . in fishing, except for recreational fishing permitted under section 201(i), within the exclusive economic zone.

The Magnuson Act defines "fishing" as:

> (A) the catching, taking, or harvesting of fish;
> (B) the attempted catching, taking, or harvesting of fish;

[5] This charge also served as the basis for Agency's issuance of the Notice of Intent to Deny Permit.

(C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or
(D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C).

16 U.S.C. § 1802(15).

Like the Pesca Azteca case, the central legal issue in this case is what the definition of "fishing" encompasses, the undersigned must delve deeper into the constituent parts of the Magnuson Act's definition of "fishing." "Catching" is not defined in the statute, nor is "taking" or "harvesting." The undersigned must consider what these terms mean and in the absence of a statutory definition, the common meaning of such terms control. See BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91 (2006).

Dictionaries are a fundamental tool for ascertaining the plain meaning of terms used in statutes that are not otherwise defined in the statute itself. See Lachman v. United States, 387 F.3d 42, 51 (1st Cir. 2004) (citing Carey v. Saffold, 536 U.S. 214, 219-20 (2002)). The words of a statute must be read in their context taking into account the overall design objective and policy of the statute. See Gonzlon-Peretz v. United States, 498 U.S. 395, 407 (1991); Brower v. Evans, 257 F.3d 1058, 1065 (9th Cir. 2001); Tralfalgar Capital Assoc. v. Cuomo, 159 F.3d 21, 30 (1st Cir. 1998). Every clause and word of a statute should be given effect whenever possible. See United States v. Menasche, 348 U.S. 528-39 (1955).

The primary meaning of "to catch" is "to capture or seize esp. [especially] after pursuit." Webster's Ninth New Collegiate Dictionary (1987), 215. A secondary meaning is to "take hold of: SEIZE." Id. Meanings of "to take" include "to get into one's hands or into one's possession, power, or control" or "to get possession of (as fish or game) by killing or capturing." Id. at 1202. Finally, meanings of "to harvest" include "the act or process of gathering in a crop" or "to gather (a natural product) as if by harvesting." Id. at 555.

Taken together, these terms convey a broad conception of activities related to the overall fishing process, particularly in the context of a live fishing operation, like that at issue here. "Fishing" in this broad sense thus means the actual catching or seizure of the fish, the maintenance of possession and control over the fish, and the gathering and disposition of such caught fish. By the specific words chosen, Congress can be assumed to have meant the definition of "fishing" in Section 1802 (15) to encompass a wide array of activities – not simply the actual catching of fish on a hook or on a line or in a net.

Indeed, NOAA case law has consistently read the term "fishing" to include virtually any activity conducted by a vessel while its gear is in the water. See In re Savage, 3 O.R.W. 22 (NOAA 1983) ("The presence of fishing gear in the water while the vessel was under way...would be sufficient under the definition of fishing... to conclude that there had been a violation."); see also In re Murphy, 4 O.R.W. 794 (NOAA 1986) ("(f)or all intents and purposes, 'gear in the water' constitutes 'fishing.'); In re Pierce, 6 O.R.W. 527 (NOAA 1991) (the fact that the vessel had gear in the water and appeared to

be conducting fishing activity was sufficient evidence to be deemed "fishing" as defined under the Magnuson Act); In re Marques, 6 O.R.W. 1 (NOAA 1990) ("(t)he presence of such cables in the water such as the officers observed when they approached the vessel coupled with the behavior observed by radar are sufficient to establish that a violation has occurred"); In re Curcuru, 6 O.R.W. 132 (NOAA 1990) ("(m)any cases have held that the pattern of movement of the vessel, as evidenced here, and the observation of cables in the water establish that the vessel was engaged in fishing"); In re Cavanaugh, 3 O.R.W. 143, 149 (NOAA 1983) (the act of dragging a net with 200 or so pounds of shrimp constituted fishing).

As stated in Murphy, "continuing difficulty was encountered trying to determine just when actual fishing underwater was occurring" (4 O.R.W. 798), and the equating of "gear in the water" to "fishing" solves that problem (id.). NOAA case law thus firmly establishes that when a vessel is found with its gear in the water, the vessel is actively fishing. This case law indicates the breadth of what constitutes "fishing" for Magnuson Act purposes.

Respondent need not have intended to violate the Magnuson Act, as violations of the Magnuson Act do not require such intent to find a violation because the statute has been held to impose strict liability. See Northern Wind, Inc. v. Daley, 200 F.3d 13, 19 (1st Cir. 1999) (holding that scienter is not an element under the Magnuson Act because conservation-related offenses under the statute are strict liability offenses). Whether Respondent meant to "fish" – as defined under the Magnuson Act – in United States waters is thus not an issue in terms of finding a violation.

To sustain its case, the Agency must therefore prove that Respondent fished (as the term is defined under Section 1802(15)) illegally, without a permit, in the EEZ of the United States, as an owner or operator, of the foreign flagged vessel F/V MARIA LUISA.

C. Agency Jurisdiction over Respondent

In its Closing Brief, Respondent raised a jurisdictional argument. See Closing Brief at 6-9. The jurisdictional issues arise in part because of the rather unique posture of this case where the government observed and documented what it determined to be unlawful fishing activity in the EEZ of the United States but did not make a seizure of the vessel, as it was empowered to do under 16 U.S.C. § 1860(a), or otherwise detain the vessel at the time of the asserted violation and confiscate its fish harvest.

1. Subject Matter Jurisdiction

The Magnuson Act grants the United States sovereign rights to exclusively manage the fisheries within the EEZ of the United States. See 16 U.S.C. 1811(a). Part of the Magnuson Act specifically addresses the jurisdiction over foreign vessels operating illegally in the EEZ of the United States. See 16 U.S.C. § 1857(2) ("It is unlawful for any vessel other than a vessel of the United States, and for the owner or operator of any vessel other than a vessel of the United States" to engage in the prohibited activities

provided). The Magnuson Act thus explicitly confers subject matter jurisdiction over a foreign vessel, like the F/V MARIA LUISA, and its owner/operator, like Respondent, for prohibited fishing actions taking place within the EEZ of the United States. See Marine Wonderland & Animal Park, Ltd. v. Kreps, 610 F.2d 947, 949 (D.C. Cir. 1979) (noting that whether NOAA had subject matter jurisdiction over the alleged violations hinged upon whether appellants' actions in that case constituted an "importation" under the statute in question).

2. Personal Jurisdiction over Respondent

Respondent argues that jurisdiction (both subject matter and personal) is at issue in this case. See Resp. Closing Brief at 6. However, Respondent failed to raise the issue of jurisdiction in its PPIP despite the clear and unequivocal request for the PPIPs to address any legal issues in dispute. See Notice of Transfer and Assignment of Administrative Law Judge and Order Requesting Preliminary Positions on Issues and Procedures (PPIP) dated June 18, 2009. Respondent replied to the question about any legal issues in dispute with the statement: "Yes there are legal issues in dispute. **The legal issue** in dispute is the definition of 'fishing.'" Resp. PPIP at 2 (emphasis added). The appropriate time for contesting personal jurisdiction would have been in response to the request for legal issues in the PPIPs or in earlier communications with the Agency.

For example, 15 C.F.R. § 904.102(a)(2) provides that a respondent upon receiving a NOVA from the Agency may respond by seeking "to have the NOVA amended, modified, or rescinded under paragraph (b) of this section . . . ." Under 15 C.F.R. § 904.102(b), Respondent could have sought an amendment or modification (or presumably rescission) of the NOVA "to conform to the facts or **the law** as that person sees them . . . ." (emphasis added). If Respondent believed jurisdiction was an issue, it should have raised that issue front and center with the Agency at its earliest opportunity.

Respondent engaged the adjudicative process in a substantive manner and addressed the merits of the Agency's claims without raising any jurisdictional issues until its Closing Brief.[6] Respondent's Closing Brief states that it "responded to provide evidence and facts that showed that neither the Agency nor this Administrative Court has subject matter or personal jurisdiction over the Respondent." Resp. Closing Brief at 4. But, again, it was not until this Closing Brief that Respondent mentioned a jurisdiction issue.

Respondent can be deemed to have consented to the Agency's jurisdiction and/or waived any argument about personal jurisdiction. From the beginning, Respondent contested the merits of the Agency's action without arguing about jurisdiction. For example, Respondent's letter requesting waiver of penalty dated June 11, 2008 states without reservation: Respondent "requests that in the event the NOVA and the NIDP are not cancelled by the Agency as a result of discussions concerning this matter that a

[6] One can presume that the jurisdiction issue in fact only arose because of the undersigned's inquiry into such matters sua sponte at the Pesca Azteca hearing, which predated Respondent's submission of its Closing Brief in this matter. See In re Pesca Azteca, S.A. de C.V (F/V AZTECA 1), 2009 WL 3721029 (October 1, 2009).

Hearing be held to resolve this matter." See Resp. Exh. 5. Nothing is mentioned about a lack of Agency jurisdiction, either subject matter or personal. Nor was anything mentioned about such jurisdictional issues in Respondent's initial request for hearing dated January 13, 2009.

Because the requirement of personal jurisdiction represents an individual right, a party may submit to the jurisdiction. See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982); see also In re Shawver, et al., 2 O.R.W. 301, 309-310 (NOAA 1980) (finding respondent consented to personal jurisdiction when neither respondent nor his counsel stated in the testimony or briefs that the appearance of respondent was a special appearance only to contest the jurisdiction issue and respondent's attorney directly examined respondent upon issues going to the merits of the case, not just the procedural issue of jurisdiction). Nowhere in its responses to the Agency or in its PPIP did Respondent highlight how the evidence and facts it asserted in such papers related to its jurisdiction arguments and issues. Respondent's ex post facto attempt to convert its substantive response to the Agency's charges and its PPIP into a preserved jurisdictional claim is unconvincing.

Under these circumstances, Respondent has waived personal jurisdiction in conducting these proceedings and/or has consented to the Agency's jurisdiction.

Second, assuming arguendo that personal jurisdiction is not a matter of Respondent's waiver or consent, exercising personal jurisdiction over Respondent is appropriate due to Respondent's activities within the EEZ of the United States. In order to be subject to a court's exercise of personal jurisdiction, a defendant must have "'fair warning that a particular activity may subject [him] to the jurisdiction of a foreign sovereign.'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (quoting Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment)). In making this analysis, one must ensure that "the defendant's actions [are] directed at the forum state in more than a random, fortuitous, or attenuated way." ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 625 (4th Cir. 1997).

Here, the degree of minimum contacts required to exercise jurisdiction over Respondent resides in the clear terms of Magnuson Act itself at 16 U.S.C. § 1857(2)(B). This Act provides that a foreign vessel and its owner/operator violate the Magnuson Act by fishing in the EEZ of the United States without appropriate authorization. Respondent's vessel, the F/V MARIA LUISA, did not drift into the EEZ of the United States by accident, but rather took affirmative steps to avail itself of the United States waters to conduct its business. The F/V MARIA LUISA purposefully drifted into the EEZ of the United States in an effort to transfer live bluefin tuna from its purse seine net to a net pen (which did not arrive) while within the EEZ of the United States. See Resp. Exh. 3.

Respondent was not "dead in the water" due to a mechanical malfunction that forced the F/V MARIA LUISA to passively drift into the EEZ of the United States. See Resp. Closing Brief at 6-9 (discussing the vessel's drift and arguing that it was not being "operated" at the time of its incursion and such drifting was an "isolated passive event").

Contrary to Respondent's assertions, there was nothing "passive" or "unintentional" about the F/V MARIA LUISA's entry into the EEZ of the United States, other than possibly the mechanism of such entry, i.e., the current. Respondent chose to drift into the EEZ of the United States in order to transfer the bluefin tuna to a net pen and complete its fishing set. By its own terms, the F/V MARIA LUISA was actively conducting "fishing operations" within the EEZ of the United States. See Resp. Exh. 1 (F/V MARIA LUISA's fishing log indicating that "fishing operations" began while the vessel was in Mexican waters but did not end until the vessel had been in the EEZ of the United States for several hours).

The nature and extent of a single act of illegal fishing can, under the terms of the Magnuson Act itself, subject a person to personal jurisdiction in the United States. One of Congress' primary concerns in enacting the Magnuson Act was to regulate such activities by foreign vessels. See PL 94-265 (HR 200) (April 13, 1976) (finding "[t]he activities of massive foreign fishing fleets in waters adjacent to [United States] coastal areas have contributed to [economic] damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen" . . . . and that "[i]nternational fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources."). Assuming the Agency establishes that such a violation did occur, exercise of personal jurisdiction over Respondent is not unreasonable. Finding otherwise would undermine the legitimate purposes of the Magnuson Act by denying the Agency the authority to exercise its mandate to protect the sovereign waters of the United States from illegal fishing by foreign flagged vessels.[7]

IV. ANALYSIS

Respondent's own documents confirm that the F/V MARIA LUISA was conducting fishing operations within the EEZ of the United States on July 29, 2007. The F/V MARIA LUISA's fishing log indicates the "Time Spent in Fishing Operations" with sub-columns indicated the "TIME STARTED" and "TIME ENDED". See Resp. Exh. 1. For the fishing set in question here, i.e., Set 36, the fishing log states that the set began on July 28, 2007 at 17:25 and ended at 11:40 on July 29, 2007. Id. Any argument that the F/V MARIA LUISA was not "fishing" is simply ludicrous. The fishing log by itself is an admission that the F/V MARIA LUISA was conducting "fishing operations" at a time while it was within the EEZ of the United States. Respondent's attempts to narrowly construe "fishing" for Magnuson Act purposes must be rejected not only by sheer logic but also by Respondent's own terms used to describe its activities.

Respondent had skiffs in the water actively maintaining the integrity of the purse seine net in addition to its having its gear in the water with live bluefin tuna in its purse seine net. See Joint Stipulation ¶¶ 22.C, 24; Agency Exh. 6. Despite Respondent's contention that the F/V MARIA LUISA passively drifted in the EEZ of the United States

[7] Finding the Agency has established personal jurisdiction in this case is especially appropriate given the deference to be afforded to the Agency's determination of its jurisdiction in the first instance. See Marine Wonderland & Animal Park, Ltd., 610 F.2d at 949 (noting "an agency should make the initial determination of its jurisdiction . . . . [and] [w]hile the (agency's) decision is not the last word, it must assuredly be the first") (internal citation and quotation marks omitted).

(see, e.g., Resp. Closing Brief at 20 (Respondent entered the EEZ of the United States "as a result of a[n] unintentional drift")), the F/V MARIA LUSIA's activities were geared toward keeping the bluefin tuna alive to conduct a transfer for its economic benefit, and this required that it enter the EEZ of the United States. See Resp. Closing Brief at 6-9; see also Resp. Exh. 3 (Statement of Messrs. Silva and Virissimo) (stating that one of the F/V MARIA LUISA's tender vessels could not be used to keep the F/V MARIA LUISA in Mexican waters because such use might cause harm to the bluefin tuna and this would diminish the sale price). Respondent made a decision to drift into the EEZ of the United States to complete its commercial fishing activity.

Respondent adopts a narrow definition of fishing to make this argument and relies on a plain meaning, dictionary definition of what it means to engage in "fishing" rather than the definition contained in the Magnuson Act. See Resp. Closing Brief at 12-14.

Respondent's plain meaning argument is faulty and must be rejected. The Magnuson Act itself contains the operative definition of "fishing" at 16 U.S.C. § 1802(15) and the undersigned must utilize that definition. Basic canons of statutory construction provide that "**[u]nless otherwise defined**, statutory terms are generally interpreted in accordance with their ordinary meaning." BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91 (2006) (emphasis added). When the statute in question provides a definition, such "[s]tatutory definitions control the meaning of statutory words." Burgess v. United States, 128 S.Ct. 1572, 1577 (2008) (internal citation and quotation marks omitted).

Congress is presumed to have meant what it said when it defined "fishing" for statutory purposes as provided in 16 U.S.C. § 1802(15). If Congress wanted the Agency and the courts to rely on a plain meaning of the term "fishing," it would not have specifically defined the term in the statute. Express definition of a statutory term thus cannot be countered by relying on a more general dictionary definition of that term. One can safely presume that "fishing" under the Magnuson Act is broadly defined because the purposes of the statute itself are wide-ranging. See Kramer v. Mosbacher, 878 F.2d 134, 135 (4th Cir. 1989) (the Magnuson Act gives the Secretary of Commerce "broad authority to manage and [to] conserve coastal fisheries" and develop the nation's maritime resources in a sustainable manner).

Respondent kept its gear in the water and had its skiffs maintaining the net due to the fact that this was a live fish operation, i.e., it was in its economic best interests to keep the fish alive for delivery to the Mexican fish farm rather than brailing the bluefin tuna onto the deck for cold storage in the hold. See Joint Stipulation ¶ 7.B. The economic relationship with the Mexican fish farm operation led Respondent to conduct its fishing operations within the EEZ of the United States in an attempt to transfer the live bluefin tuna to a net pen, which did not arrive. Id.; Joint Stipulation ¶ 8; Resp. Exh. 3.

The fact that Respondent failed in its attempts to actually transfer the live bluefin tuna to a net pen that did not arrive does not mean that Respondent was not "fishing" in the EEZ of the United States. Nor does the fact that Respondent engaged in a form of fishing that required it to maintain the caught fish in its purse seine net until a transfer of such

fish was complete mean that it was not "fishing" in violation of the law. Respondent's attempts to narrowly restrict the definition of "fishing" (see Resp. Closing Brief at 12-14) are legally deficient and must be rejected. The actions outlined above equaled the "catching, taking, or harvesting of fish" and/or an "activity that could be reasonably expected to result in the catching, taking, harvesting of fish" and/or an "operation at sea in support of any activity related to the catching, taking, or harvesting of fish." 16 U.S.C. § 1802(15). Respondent actions on July 29, 2007 thus constituted "fishing" for Magnuson Act purposes.

V. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is the owner of the F/V MARIA LUISA, which is vessel other than a vessel of the United States. Joint Stipulation ¶¶ 1, 3.
2. Respondent was not authorized to fish within the EEZ of the United States on July 29, 2007. Joint Stipulation ¶ 4.
3. It is unlawful under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act) for the owner of a vessel, other than a vessel of the United States, to engage in fishing within the exclusive economic zone of the United States unless such fishing is authorized by a valid permit issued under the Act. 16 U.S.C. § 1857(2)(B).
4. Respondent violated 16 U.S.C. § 1857(2)(B) on July 29, 2007 by illegally "fishing" within the Exclusive Economic Zone of the United States, when its vessel, the F/V MARIA LUISA, had its purse seine gear in the water and conducted activities in connection with the attempted transfer of live bluefin tuna from its purse seine net to a net pen which never arrived on scene.
5. The actions of the Respondent on July 29, 2007, within the Exclusive Economic Zone of the United States, constituted an activity which could have reasonably been expected to result in the catching, taking, or harvesting of fish under 16 U.S.C. § 1857(2)(B) and the applicable definition of "fishing" found at 16 U.S.C. § 1802(15).
6. The actions of the Respondent on July 29, 2007, within the Exclusive Economic Zone of the United States, constituted an operation at sea in support of, or in preparation for, the catching, taking or harvesting of fish, or an activity which could have reasonably been expected to result in the catching, taking, or harvesting of fish and the applicable definition of "fishing" found at 16 U.S.C. § 1802(15).
7. The actions of the Respondent on July 29, 2007, within the Exclusive Economic Zone of the United States, constituted the catching, taking or harvesting of fish under 16 U.S.C. § 1857(2)(B) and the applicable definition of "fishing" found at 16 U.S.C. § 1802(15).
8. Respondent unlawfully engaged in fishing within the Exclusive Economic Zone of the United States in violation of 16 U.S.C. § 1857(2)(B).
9. The Magnuson Act is a strict liability statute. See Northern Wind, Inc. v. Daley, 200 F.3d 13, 19 (1st Cir. 1999).
10. The Administrative Law Judge maintains appropriate subject matter jurisdiction to make an Initial Decision on this matter. See 16 U.S.C. § 1857(2) ("It is unlawful for any vessel other than a vessel of the United States, and for the owner

or operator of any vessel other than a vessel of the United States" to engage in the prohibited activities provided); discussion at Section C.1 above.

11. The Administrative Law Judge maintains appropriate personal jurisdiction to make an Initial Decision on this matter. See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 625 (4th Cir.1997); discussion at Section C.2 above.

VI. CONSIDERATION OF PENALTY ASSESSMENT

The Agency Administrator has previously held that an assessed civil penalty based on the recommended penalty schedules is a reasonable starting point in determining the sanction. See In re AGA Fishing Corp., 2001 NOAA Lexis 1, at *6 (NOAA App. March 17, 2001); In re Jody Domingo and Elden Domingo, 2000 NOAA Lexis 1, at *9 (NOAA App. March 29, 2000). While a judge is not bound by the proposed penalty amount assessed in the NOVA, both the regulations and the applicable case law make clear that the judge may only depart upward or downward from the Agency's proposed assessment and impose a penalty de novo upon a showing of good cause. See 15 C.F.R. § 904.204(m); see also In re Town Dock Fish, Inc., 6 O.R.W. 580 (NOAA 1991); In re Jody Domingo, 2000 NOAA Lexis 1, at *8-9.

The Magnuson Act very clearly prohibits illegal commercial fishing activities, like those of the F/V MARIA LUISA, by foreign flagged vessels. The penalty in this case must be strong enough to alter the economic calculus that led Respondent to take its chances along the United States/Mexico border and risk having to conduct illegal fishing operations in United States waters to fulfill its contractual obligations. A stiff penalty is therefore warranted.

However, the Agency's proposed $130,000 penalty is unreasonably high and thus inappropriate. Therefore, for the reasons discussed below, good cause exists to deviate from the NOVA's assessed penalty. In so finding, the undersigned has fully considered the nature, circumstances, extent, and gravity of the violation, Respondent's prior history and degree of culpability, and other matters as justice requires. See 16 U.S.C. § 1858(a); 15 C.F.R. 904.108(a).

A. Aggravating Factors

There are significant aggravating circumstances involved in this case. First, and most important, is the fact that Respondent was aware of its exact location proximate to the EEZ of the United States at the time it began fishing on July 28, 2007. See Resp. Exh. 1 (F/V MARIA LUISA's log indicating exact location by GPS). Therefore, this was not a case of accident or mistake. Second, Respondent knew the direction and force of the current, and must have also known the wind direction and speed. Id. (showing current strength and direction); Resp. Exh. 3 (statement of Captain Perez indicating knowledge of drift). Such readily available data would have indicated to a prudent mariner that the Vessel should begin its fishing set farther away from the EEZ of the United States to avoid drifting into waters of the United States. Third, the F/V MARIA

LUISA's crew should have known the availability of the net pen and the time it would take it to arrive on site for the transfer of the bluefin tuna. See Resp. Exh. 3 (statement of Captain Perez indicating that he was informed by the Fish Farm's representative that the "tugboat was delayed and would not be with us to perform the fish transfer until next day[']s morning"). Any delay in the arrival of the net pen would necessitate that the F/V MARIA LUISA be kept even further from the EEZ of the United States and/or that action be taken (e.g., brailing the fish in the seine net) to avoid entry into the EEZ of the United States.

Finally, the F/V MARIA LUISA began its "set" at approximately 5:30 pm on July 28, 2007 while in Mexican waters. See Resp. Exh. 1, 2, 3. Approximately five (5) hours later, the F/V MARIA LUISA entered the EEZ of the United States. Id. Surely, Respondent could have taken another course of action to cease its fishing operations before crossing into the EEZ of the United States. Nothing except an economic arrangement with the Mexican fish farm "forced" Respondent to enter the EEZ of the United States. Respondent's actions were willful and directed toward completing its fishing operations in the EEZ of the United States for monetary gain.

B. Mitigating Factors

In terms of mitigation, this is the Respondent's first recorded violation of the Magnuson Act within the past five years. Joint Stipulation ¶ 13. Additionally, the F/V MARIA LUISA's Set 36 on July 28, 2007 was begun while the vessel was in Mexican waters and its purse seine net had been pursed while in Mexican waters. See Resp. Exh.1, 2, 3. Apparently, when Respondent became aware of the potential illegality of its actions in the United States EEZ, it took measures to cease such activity and return to Mexican waters. See Resp. Exh. 3. While one may legitimately question whether such action was motivated at least in part by the boarding of the F/V AZTECA 1 and/or the fly-over by the Coast Guard's helicopter, it is nevertheless clear that Respondent took affirmative steps to cease its fishing activities by releasing its catch of bluefin tuna and leaving the area. Id.[8]

Finally, given the fact that Respondent undoubtedly knew that the F/V AZTECA 1 was not arrested nor its catch of live/frozen tuna seized, it could have completed the transfer of live bluefin tuna to the net pen and proceeded back to Mexican waters.

C. Analysis

The Agency argues that even if Respondent released the fish, such a fact is of no mitigating value. See Agency Closing Brief at 23-24; Agency Reply at 12. There is some merit to the Agency's position. Respondent's communications with a representative of the Mexican fish farm operations indicate that it was only in response to such communications regarding the possible illegality of its operations that Respondent released the fish and proceeded back to Mexican waters. See Resp. Exh. 1, 2, 3. This was not an instance where Respondent made a mistake, drifted into the EEZ of the United

[8] The Agency failed to offer any evidence to rebut this proffer and the undersigned will accept as a fact that the F/V MARIA LUISA released the bluefin tuna it had captured in its purse seine net.

States by accident and then took corrective action. Indeed, Respondent had knowledge that the current was running in an unusual direction that could take a drifting vessel into the EEZ of the United States at the time it made the set in question near to the EEZ of the United States. Id.

It is more likely than not that Respondent learned of the boarding operations of another vessel (the F/V AZTECA 1) with which it was engaged in fishing activities for the same Mexican fish farm (see Resp. Exh. 5 at 3 (the "F/V Maria Luisa was fishing along with F/V Azteca 1")), observed the Coast Guard helicopter fly-over, and decided to cut its losses by releasing the bluefin tuna and beat a hasty retreat to Mexican waters to avoid possible legal entanglements. Indeed, had the F/V MARIA LUISA not released its catch before it returned to Mexican waters, the vessel could have rightfully been arrested and its catch subjected to forfeiture under 16 U.S.C. § 1860(a).[9]

Whatever the motivation for such behavior might have been, Respondent did in fact cease its fishing activities at some point while within the EEZ of the United States by releasing its catch and returning to Mexican waters. Such action serves in mitigation when compared to a continued blatant disregard for the law as in the Pesca Azteca case. Respondent's voluntary cessation of illegal conduct should therefore be considered a mitigating factor.

In this case, the Agency seeks the maximum civil penalty amount of $130,000. The value of the bluefin tuna Respondent released is undetermined, but its value was more likely than not approximately $3 per kilogram.[10] Indeed, one can estimate that based 1) on the size of the F/V AZTECA 1's catch in the same area on the same date (i.e., 10 metric tons) and 2) on the average size of the F/V MARIA LUISA's catches of bluefin tuna between May 16th and July 28th, the possible value of bluefin tuna released would have been approximately $35,000. See Resp. Exh. 1 (fishing log listing catch tonnage indicating an average of 11.64 tons of bluefin tuna per successful seining operation, excluding a large catch of 203 metric tons on July 31st).

Unlike the Pesca Azteca case, Respondent here was not the beneficiary of what amounts to a windfall by both fishing unlawfully in the EEZ of the United States and

---

[9] Due to an apparent error by the United States Coast Guard and NOAA law enforcement, the vessel in the Pesca Azteca case was allowed to proceed back to Mexican waters with its catch after being boarded. One can only assume that either a similar error was made in this case or that there simply were not enough surface assets to board the F/V MARIA LUISA. As both this decision and the decision in the Pesca Azteca case make clear, Mexican fishing vessels like Respondent's should not engage in unlawful fishing operations in the EEZ of the United States. The failure to seize such vessels and their catch is one that should not be repeated in the future. Such vessels should ensure that their operations do not carry them into the EEZ of the United States (e.g., by brailing any catch before entering). If such vessels do find themselves in the EEZ of the United States, they should be encouraged to cease their operations as quickly as possible and minimize such operations by releasing any live catch. To be clear, any such vessel is still subject to both the arrest and forfeiture provisions under 16 U.S.C. § 1860(a) and imposition of the maximum civil penalty allowed by law.

[10] See In re Pesca Azteca, S.A. de C.V (F/V AZTECA 1), 2009 WL 3721029 (October 1, 2009) (Finding of Fact No. 58). The incorporation of this value is appropriate given the fact that the F/V MARIA LUISA was contracted with the same Fish Farm as the vessel in the Pesca Azteca case and the two vessels were fishing at the same time and in the same area.

keeping its catch. To be clear, the undersigned has not found that Respondent "suffered" any specific economic loss by releasing the bluefin tuna nor deducted such amount from the Agency's proposed civil penalty. Rather, the undersigned finds it appropriate to consider Respondent's decision to release the bluefin tuna to its economic detriment as a significant mitigating factor. Such a reduction is made in the interests of influencing future behavior and encouraging the immediate cessation of unlawful activity without profiting in any way from such activity. Thus, reducing the penalty in this case is appropriate in part to encourage any future violators to act in a similar manner.

Additionally, Respondent has demonstrated in the past a willingness to assist the United States government. In June 2000, Respondent came upon what it believed to be a live cruise missile adrift in the water, which was collected and eventually returned to the United States government. See Joint Stipulation ¶ 27.B; Agency's Proffer of Additional Information on Respondent's Return of U.S. Government Property (January 26, 2010); Respondent's Proffer of Additional Information on Respondent's Return of U.S. Government Equipment (January 27, 2010). There is insufficient information in the record to confirm whether or not Respondent received any monetary reward for recovery of the target drone. Although such actions took place approximately seven (7) years prior to the violation at issue here and is a completely separate incident with the United States government, Respondent's assistance to the United States should not be completely disregarded. Such actions evidence, at least minimally, Respondent's inclination to comport itself in a way helpful to the United States and demonstrates good character.

Ultimately, the penalty must be harsh enough to prevent any Mexican fishing vessel from unlawfully fishing in the EEZ of the United States or fish near the EEZ of the United States if such action will lead them to enter the EEZ of the United States to complete their fishing operations. The penalty should also distinguish this case from that of the Pesca Azteca case, in which the respondent did not cease its activities nor release its catch. A civil penalty in the amount of $85,000 adequately serves these purposes and should help deter other foreign entities from unlawfully fishing in the EEZ of the United States.

The imposition of a permit denial under 16 U.S.C. § 1858(g) and 15 C.F.R. § 904.303 is also reasonable under the circumstances. Respondent's fishing activities in the EEZ of the United States demonstrated a willingness to disregard the sovereignty of the United States. Respondent should not be allowed to legally make use of United States waters to conduct any fishing operations and the denial of a permit for a period of five years will help ensure that Respondent is prohibited from doing so.

VII. ORDER

WHEREFORE,

IT IS HEREBY ORDERED that a civil penalty in the amount of **EIGHTY FIVE THOUSAND DOLLARS** ($85,000.00) is assessed against Martuna, S.A. de C.V.

IT IS HEREBY FURTHER ORDERED that Martuna, S.A. de C.V. is barred from holding (either as owner or lessee) any United States of America federal fishing permit or authorization to fish issued by the National Marine Fisheries Service for a period of five (5) years from the effective date of this **ORDER** pursuant to 16 U.S.C. § 1858(g) and 15 C.F.R. § 904.303.

IT IS HEREBY FURTHER OREDERED that given the full litigation of issues in both this case and the Pesca Azteca matter, no Petitions for Reconsideration pursuant to 15 C.F.R. § 904.272 will be entertained by the undersigned in this matter.

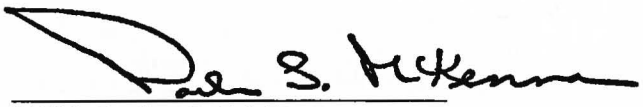
PLEASE BE ADVISED that a failure to pay the penalty within thirty (30) days from the date on which this decision becomes final Agency action will result in interest being charged at the rate specified by the United States Treasury regulations and an assessment of charges to cover the cost of processing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

PLEASE BE FURTHER ADVISED that any party may petition for administrative review of this decision. The petition for review must be filed with the Administrator of the National Oceanic and Atmospheric Administration within thirty (30) days from the day of this initial decision and order as provided in 15 C.F.R. § 904.273. Copies of the petition should also be sent to the ALJ Docketing Center, NOAA counsel, and the presiding judge. A copy of 15 C.F.R. § 904.273 is attached as Attachment C to this order.

If neither party seeks administrative review within thirty (30) days after issuance of this order, this initial decision will become the final decision of the agency.

IT IS SO ORDERED.

Done and dated this 2nd day of February, 2010
at Alameda, CA.



HON. Parlen L. McKenna
Administrative Law Judge
United States Coast Guard

ATTACHMENT A
LIST OF EXHIBITS

AGENCY EXHIBITS

1. NOAA Offense Investigation Report (Narrative Section)
2. Chartlet of location of F/V MARIA LUISA at time of observation
3. Statement of LT. Joshua Nelson
4. Statement of Lt. William Seward
5. CD-ROM, USCG Helicopter CG 6025 Video for 29 July 2007 (Un-edited version, relevant portion at: 11:00 to 17:34)
6. CD-ROM, USCG Helicopter CG 6025 Video for 29 July 2007 (Edited Version)
7. Screen shot of MARIA LUISA from USCG Helicopter CG 6025 Video for 29 July 2007
8. USCG Search and Rescue Optimal Planning System Chart of F/V MARIA LUISA coordinates relative to U.S. Exclusive Economic Zone at time of observation
9. Inter-American Tropical Tuna Commission, Vessel Registry information for the MARIA LUISA
10. Declaration of Suzanne Kohin
11. Notice of Violation and Assessment (SW0702881)
12. Notice of Intent to Deny Permit (SW0702881)
13. Federal Express Delivery Confirmation
14. Civil Administrative Penalty Schedule for the Western Pacific Pelagic Fishery (relevant portion)

RESPONDENT EXHIBITS

1. MARIA LUISA Vessel Log, 07/28/07 to 07/29/07, and Fishing Log, 05/16/07 to 07/31/07
2. Diagram of MARIA LUISA Fish Catch Location, Drift Pattern of MARIA LUISA, and Fish Release Location
3. Statements of Captain Perez, and Fishing Technicians Silva and Verissimo
4. Request for Waiver of the Civil Penalty for Martuna, S.A. de C.V. and "Maria Luisa" Assessed Under NOAA Case No. SW07002881
5. Letter of Protest and Request for Hearing

ATTACHMENT B
RULINGS ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Agency's Proposed Findings of Fact[11]

1. On July 29, 2007, the F/V MARIA LUISA was registered and flagged with the Government of Mexico, and is therefore not a vessel of the United States. Stipulation, ¶ 1.

   ACCEPTED AND INCORPORATED.

2. The F/V MARIA LUISA was authorized to fish for tuna species under the rules and regulations of the Government of Mexico. Stipulation, ¶ 2.

   ACCEPTED AND INCORPORATED.

3. The owner of the F/V MARIA LUISA is Martuna, S.A. de C.V., a Mexican corporation. Stipulation, ¶ 3.

   ACCEPTED AND INCORPORATED.

4. Martuna, S.A. de C.V. was the registered owner of the F/V MARIA LUISA during a fishing trip that included the dates of July 28 and July 29, 2007. Stipulation, ¶4.

   ACCEPTED AND INCORPORATED.

5. On July 29, 2007, the F/V MARIA LUISA was not authorized to fish in the exclusive economic zone (EEZ) of the United States. Stipulation, ¶ 5.

   ACCEPTED AND INCORPORATED.

6. The F/V MARIEA LUISA is a large-scale tuna purse seine fishing vessel that is approximately 233 feet long, 1,174 gross tons, and has a carrying capacity of 1,089 tons of fish. Stipulation, ¶ 6.

   ACCEPTED AND INCORPORATED.

7. Purse seine fishing vessels, in general, deploy a long fishing net that hangs vertically in the water by having a weighted edge along the bottom and floats along the top. Stipulation, ¶ 7.

   ACCEPTED AND INCOPORATED.

[11] The Agency designated the Joint Stipulation as "Stipulation", its Exhibits as "Government's Exh. _", and Respondent's Exhibits as "Respondent's Exh. _".

8. Large scale purse seine vessels use skiffs to deploy the net around a school of fish and then hold the net in place while the net is "pursed" to prevent the fish from escaping. Stipulation ¶ 7.A.

ACCEPTED AND INCORPORATED.

9. In a standard purse seine fishing operation, the net is then brought back on to the vessel while the fish are brailed out on to the deck and stored in holds on the vessel. However, the F/V MARIA LUISA was contracted to catch and transfer live fish which explains why the vessel was holding the fish for transportation rather than brailing the fish onto the deck and stored in the holds of the vessel. The seined tuna swims from the seine net into the fish pen after the transfer gate between the seine net and net pen are connected and then the net pen is towed to a Mexican fish farming operation ("Fish Farm"). Stipulation, ¶ 7(B).

ACCEPTED AND INCORPORATED.

10. The Fish Farming operation in question is conducted by an independent third party in the County of Mexico in two locations. One location is off the coast of Ensenada, Mexico and the other is off the coast of the Coronado Islands in Mexico. Stipulation ¶ 8.

ACCEPTED AND INCORPORATED.

11. The Fish Farm owner has been identified as Aquafarms, S.A. de C.V. Respondent's Exh. 3.

ACCEPTED AND INCORPORATED.

12. Benjamin Fuss was an employee of Aquafarms, S.A. de C.V. on July 29, 2007.

ACCEPTED AND INCORPORATED.

13. At the Fish Farm, the tuna are fed and grown and then harvested for human consumption. Stipulation, ¶ 8(A).

ACCEPTED AND INCORPORATED.

14. Because of the nature of the contract between the F/V MARIA LUISA and the Fish Farm, the F/V MARIA LUISA had to wait for a towboat with a net pen to arrive in order to transfer the live fish from the seine net to the net pen which would then be towed to the Fish Farm. Stipulation ¶ 8(B).

ACCEPTED AND INCORPORATED.

15. Normally the net pen is on site when the seine is pursed, but on July 28, 2007 the seine net was pursed in Mexico with no net pen in the vicinity. Stipulation, ¶ 10 and ¶ 11.

ACCEPTED AND INCORPORATED.

16. The fishing set on July 28, 2007, was made approximately 1.5 nautical miles from the EEZ of the United States. Judicial Notice.

ACCEPTED AND INCORPORATED.

17. The F/V MARIA LUISA drifted to the north with its purse seine net in the water while waiting for the net pen to arrive. Stipulation, ¶ 13.

ACCEPTED AND INCORPORATED.

18. The F/V MARIA LUISA entered the EEZ of the United States at approximately 10:30 p.m. on July 28, 2007. Stipulation, ¶ 14.

ACCEPTED AND INCORPORATED.

19. On July 29, 2007, and the few days before, the ocean current in the area was running at approximately .5 knots, and rather than running north to south was actually running in a northerly direction. Stipulation, ¶ 15.

ACCEPTED AND INCORPORATED.

20. On July 29, 2007, the USCG Helicopter 6025 (CGNR 6025) was tasked to launch in support of the USCG Cutter SEA OTTER which was conducting a law enforcement boarding involving the incursion of a Mexican-flagged fishing vessel into the EEZ of the United States. Stipulation, ¶ 22.

ACCEPTED AND INCORPORATED.

21. During this mission, SEA OTTER personnel further tasked CGNR 6025 to identify other fishing vessels in the area in addition to the one that was being boarded at the time by a boarding team from the SEA OTER. Stipulation, ¶22(A).

ACCEPTED AND INCORPORATED.

22. At approximately 10:41 a.m., CGNR 6025 identified the F/V MARIA LUISA and documented the coordinates of that vessel at 32° 40' 57"N, 117° 46' 54"W. These coordinates are approximately 3.6 nautical miles inside the U.S. EEZ. Stipulation, ¶ 22(B).

ACCEPTED AND INCORPORATED.

23. While at those approximate coordinates, personnel aboard CGNR 6025 identified a purse seine fishing net in the water next to the F/V MARIA LUISA, and saw two skiffs pulling on the corners of the purse seine net. Stipulation, ¶ 22(C).

ACCEPTED AND INCORPORATED.

24. While at those approximate coordinates, personnel aboard CGNR 6025 videotaped the activities of the F/V MARIA LUISA, as well as videotaping the coordinates of the helicopter from its Global Positioning System during passes in close proximity to the F/V MARIA LUISA. Stipulation, ¶ 22(D).

ACCEPTED AND INCORPORATED.

25. At approximately 1:00 a.m., CGNR 6025 disembarked the area. Stipulation, ¶ 22(E).

ACCEPTED AND INCORPORATED.

26. Following the overflight by USCG Helicopter 6025, the F/V MARIA LUISA eventually departed the U.S. EEZ and returned to Mexico. Stipulation, ¶ 20.

ACCEPTED AND INCORPORATED.

27. An investigation of the incident was initiated by Special Agent Michelle Zetwo of the National Marine Fisheries Service based on the evidence provided by CGNR 6025. Stipulation, ¶ 23.

ACCEPTED AND INCORPORATED.

28. On July 29, 2007, the F/V MARIA LUISA had its pursed purse seine net in the water, and two skiffs from the vessel assisting with the net, within the U.S. EEZ. Stipulation, ¶ 24.

ACCEPTED AND INCORPORATED.

29. Martuna, S.A. de C.V. has no prior violations of the Magnuson Act within the past five years. Stipulation, ¶ 25.

ACCEPTED AND INCORPORATED.

30. The approximate value of any bluefin tuna caught by the F/V MARIA LUISA on July 29, 2007, would have been $3 per kilogram if transferred live. Judicial Notice.

ACCEPTED AND CONSIDERED IN RENDERING THE DECISION ABOVE.

31. Respondent was charged for violating the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801. A Notice of Violation and Assessment and Notice of Intent to Deny Permit were issued to Respondent on May 14, 2008, citing a violation of 16 U.S.C. 1857(2)(B). Government's Exh. 11 and Exh. 12.

ACCEPTED AND INCORPORATED.

32. Respondent filed a Letter of Protest with NOAA on June 11, 2008. Respondent's Exh. 5.

ACCEPTED AND INCORPORATED.

33. Respondent has no prior violations of the Magnuson Act within the past five years. Stipulation, ¶ 25.

ACCEPTED AND INCORPORATED.

Agency's Proposed Conclusions of Law

1. Respondent is the owner of the F/V MARIA LUSIA, which is a vessel other than the vessel of the United States.

ACCEPTED AND INCORPORATED.

2. The Administrative Law Judge maintains appropriate subject matter jurisdiction to make an Initial Decision on this matter.

ACCEPTED AND INCORPORATED.

3. The Administrative Law Judge maintains appropriate personal jurisdiction to make an Initial Decision on this matter.

ACCEPTED AND INCORPORATED.

4. The actions of the Respondent on July 29, 2007, within the Exclusive Economic Zone of the United States, constituted the catching, taking or harvesting of fish.

ACCEPTED AND INCORPORATED.

5. The actions of the Respondent on July 29, 2007, within the Exclusive Economic Zone of the United States, constituted an activity which could have reasonably be[en] expected to result in the catching, taking or harvesting of fish.

ACCEPTED AND INCORPORATED.

6. The actions of Respondent on July 29, 2007, within the Exclusive Economic Zone of the United States, constituted an operation at sea in support of, or in preparation for, the catching, taking or harvesting of fish, or an activity which could have reasonably been expected to result in the catching, taking, or harvesting of fish.

ACCEPTED AND INCORPORATED.

7. It is unlawful under the Magnuson-Stevens Fishery Conservation and Management Act for the owner of a vessel, other than a vessel of the United States, to engage in fishing within the exclusive economic zone of the United States unless such fishing is authorized by a valid permit issued under the Act. 16 U.S.C. 1857(2)(B).

ACCEPTED AND INCORPORATED.

8. Respondent did unlawfully engage in fishing within the Exclusive Economic Zone of the United States in violation of 16 U.S.C. 1857(2)(B).

ACCEPTED AND INCORPORATED.

9. The Magnuson Act is a strict liability statute.

ACCEPTED AND INCORPORATED.

Respondent's Proposed Findings of Fact[12]

1. On July 29, 2007, the F/V MARIA LUISA ("Vessel") was registered and flagged with the Government of Mexico, and is therefore not a vessel of the United States.

ACCEPTED AND INCORPORATED.

2. The Vessel was authorized to fish for tuna species under the rules and regulations of the Government of Mexico.

ACCEPTED AND INCORPORATED.

3. The owner of the vessel is Martuna, S.A. de C.V., a Mexican corporation.

ACCEPTED AND INCORPORATED.

[12] Respondent did not submit separate Conclusions of Law in its post-hearing brief, but some of its proposed findings of fact read as such and will be so treated.

4. Martuna, S.A. de C.V. was the registered owner of the Vessel during a fishing trip that included the dates of July 28 and July 29, 2009.

ACCEPTED AND INCORPORATED.

5. On July 29, 2007, the Vessel was not authorized to fish in the exclusive economic zone (EEZ) of the United States.

ACCEPTED AND INCORPORATED.

6. The Vessel is a large-scale tuna purse seine fishing vessel that is approximately 233 feet long, 1,174 gross tons, and has a carrying capacity of 1,089 tons of fish.

ACCEPTED AND INCORPORATED.

7. Martuna, S.A. de C.V. has no prior violations of the Magnuson Act within the past five years.

ACCEPTED AND INCORPORATED.

8. On July 29, 2007, the vessel MARIA LUISA was never boarded or contacted by the USCG or NOAA regarding its presence in the US EEZ.

REJECTED AS IRRELEVANT AND HAVING INSUFFICIENT FACTUAL SUPPORT IN THE RECORD.

9. Respondent['s] ship log, fish log and statement of the Vessel's Captain Gildardo Garcia Perez, the Vessel's fishing technician Yolando Ramos Silva and the Vessel's fishing technician Jose Conceicao Virissimo, all exhibits and statements admitted into evidence, state that on July 28, 2007 at approximately 5:25 P.M. the fishing captain of the Vessel initiated Set 36 and the net was pursed (closed) shortly thereafter (approximately 5:25 p.m. and 7:25 p.m.) completing the capture of the Mexican fish in Mexican Waters. As a result of the net being pursed it was impossible to catch additional fish in the US EEZ without the net being unpursed and the seine net re-set around another school of fish inside the US EEZ.

ACCEPTED IN PART AND INCOPORATED. REJECTED IN PART TO THE EXTENT THAT THIS PROPOSED FINDING STATES OR IMPLIES THAT THE "CAPTURE" OF THE FISH FOR MAGNUSON ACT PURPOSES WAS COMPLETE ONCE THE PURSE SEINE NET WAS PURSED. FISHING UNDER THE MAGNUSON ACT IS BROADLY CONSTRUED TO ENCOMPASS A RANGE OF FISHING OPERATIONS, INCLUDING THOSE OF RESPONDENT, AS DISCUSSED ABOVE.

10. On July 28th and 29th, 2007, the ocean current, in the area where the fish were caught in the seine net in Mexico, w[as] running in a south to north direction rather than the normal north to south direction.

ACCEPTED AND INCORPORATED.

11. Per the Vessel Log, and Respondent's Vessel Drift Pattern Exhibit, all the exhibits admitted into evidence, because the boat was adrift, the ocean current carried the Vessel and its pursed seine net, with fish inside of it caught in Mexico, north, from Mexico and into the US EEZ at approximately 10:30 p.m. on July 28, 2007.

ACCEPTED IN PART AND INCORPORATED. REJECTED TO THE EXTENT THIS PROPOSED FINDING STATES OR IMPLIES THAT THE F/V MARIA LUISA HAD NO OTHER CHOICE OF ACTION THAN TO DRIFT INTO THE US EEZ.

12. Per the Vessel Log and statement of the Vessel's Captain Gildardo Garcia Perez, the Vessel's fishing technician Yolando Ramos Silva and the Vessel's fishing technician Jose Conceicao Virissimo, all exhibits and statements admitted into evidence, because the net pen did not arrive as of 11:40 a.m. on July 29th while the Vessel was inside the US EEZ the captain of the Vessel made a decision to unpurse the seine net and let the fish go.

ACCEPTED IN PART AND INCORPORTED. REJECTED TO THE EXTENT THIS PROPOSED FINDING STATES OR IMPLIES THAT THE VESSEL'S ACTIONS WERE MOTIVATED SOLEY OR EVEN PRIMIARILLY BY THE FAILURE OF THE NET PEN TO ARRIVE. THE CREW'S STATEMENTS DEMONSTRATE IN CONTRAST THAT THE VESSEL RELEASED THE FISH BECAUSE OF THE VESSEL'S COMMUNICATIONS WITH MR. BENJAMIN FUSS AND THE LACK OF ASSURANCE THAT THE VESSEL WOULD NOT FACE LEGAL REPURCUSSIONS FOR ITS FISHING ACTIVITIES.

13. Per the Vessel Log and statement of the Vessel's Captain Gildardo Garcia Perez, the Vessel's fishing technician Yolando Ramos Silva and the Vessel's fishing technician Jose Conceicao Virissimo, exhibits and statements admitted into evidence, Respondent contends that no fish was kept. NOAA does not stipulate to Respondent's contention.

ACCEPTED AND INCORPORATED.

14. Thereafter the Vessel departed the US EEZ and returned to Mexico.

ACCEPTED AND INCORPORATED.

15. After the Vessel's seine net was set and pursed in Mexico on July 28, 2007 at 1725 and after the Mexican fish had been caught from the Mexican Fishery, and until the Vessel released all fish in the seine net, the Vessel made no further attempt to catch, capture, harvest or "fish" fish [sic] inside the US EEZ because it would have been impossible to do so since the seine net was already pursed.

REJECTED AS A FINDING OF FACT AND/OR CONCLUSION OF LAW. RESPONDENT'S ACTIVITIES WHILE WITHIN THE EEZ OF THE UNITED STATES CONSTITUTED "FISHING" FOR MAGNUSON ACT PURPOSES AS DISCUSSED ABOVE.

16. As set forth in Respondent's Exhibit R-4, an exhibit admitted into evidence, in June of 2000 a Vessel under the control of Martuna S.A. de C.V. recovered what it believe to be a live cruise missile, floating in international waters which was the property of the United States Government.

    (1) The crew on the vessel contacted the offices of Martuna S.A. de C.V. who in turn contacted the United States government.
    (2) The missile, believed to be a live cruise missile, was picked up by the Vessel, at its perceived peril at the request of the US Government, and transported to the office of Martuna S.A. de C.V. where the missile was then recovered by the United States Government.
    (3) NOAA contends the missile was not a cruise missile but rather a target drone. Respondent does not stipulate to NOAA's contention.
    (4) Despite the fact that the cost of a drone/missile is at minimum, hundreds of thousands of dollars, Respondent received no reward or compensation for this act. Respondent asks this court to consider such important Respondent cooperation, the value of which far exceeds the amount of the proposed civil penalty in considering the imposition of any civil penalty concerning this matter. NOAA does not stipulate to Respondent's contention[.]
    (5) NOAA has confirmed the occurrence of this event with the U.S. Department of State.

ACCEPTED IN PART AND REJECTED IN PART. THE FACT THAT RESPONDENT RECOVERED AND RETURNED UNITED STATES GOVERNMENT PROPERTY IS ACCEPTED. THE FACT THAT RESPONDENT BELIEVED AT THE TIME THAT THE PROPERTY WAS A CRUISE MISSILE IS ACCEPTED. THE RECORD IS INSUFFICIENT TO DETERMINE WHETHER OR NOT RESPONDENT REQUESTED OR RECEIVED THE TYPICAL $500.00 REWARD FOR THE RETURN OF THE TARGET DRONE. THE UNDERSIGNED WILL NOT MAKE A SPECIFIC FINDING REGARDING THE VALUE OF SUCH COOPERATION BUT DID CONSIDER SUCH COOPERATION AND RETURN OF UNITED STATES GOVERNMENT PROPERTY IN RENDERING THIS DECISION.

ATTACHMENT C: PROCEDURES GOVERNING ADMINISTRATIVE REVIEW

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.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the Initial Decision and Order (**SW0702881FM/V**) on the following parties and limited participants (or designated representatives) in this proceeding at their listed facsimile numbers and address by Certified U.S. Mail – (postage pre-paid-return receipt requested) as follows:

Mr. Cris John Wenthur, Esq.
Wenthur Law Group, LLP
4121 Napier Street
San Diego, CA 92110
Comm (619) 398-9050
Fax: (619) 398-9051

Mr. Paul A. Ortiz, Senior Enforcement Attorney
National Oceanic and Atmospheric Administration
Southwest Regional Office (GCSW)
501 W. Ocean Blvd, Room 4470
Long Beach, CA 90802
Comm: (562) 980-4069
Fax No. (562) 980-4084

(Certified Mail – Return Receipt Requested)
National Oceanic and Atmospheric Administration
Department of Commerce, Rm. 5128
14th Street and Constitution Avenues, N.W.
Washington, DC 20230

ALJ Docketing Center
NOAA Docket Clerk
40 South Gay Street, Room 412
Baltimore, MD 21202-4022
Comm: (410) 962-7434
Fax: (410) 962-1746

Done and Dated on this 2nd day of February, 2010
at Alameda, California.

Cindy J. Melendres

Cindy J. Melendres
Paralegal Specialist to the
Hon. Parlen L. McKenna