

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:

Adak Fisheries, LLC
Adak Fisheries Development, LLC
Icicle Seafoods, Inc.

Respondents.

Docket No. AK035039

Hon. Walter J. Brudzinski

**ORDER IN RESPONSE TO THE DEPUTY SECRETARY'S DETERMINATION
AND ORDER AFFIRMING IN PART AND REMANDING IN PART THE
INITIAL DECISION**

Issued: October 29, 2010

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BACKGROUND

The undersigned issued an Initial Decision on March 12, 2007 finding the 82 alleged violations proved and assessing a civil penalty totaling \$3,444,000 against Respondents jointly and severally. Icicle Seafoods, Inc. (Icicle) appealed. The Under Secretary of Commerce for Oceans and Atmosphere affirmed the Initial Decision in part and remanded it in part. After reconsidering the remanded issues, the undersigned finds the allegations addressed in the remand proved and the original civil penalties fair and appropriate under the circumstances.

This case concerns an interpretation of “control” as the term is used in section 211(c)(2)(A) of the American Fisheries Act (AFA or Act), Pub. L. 105-277, Div. C, Title II, § 211(c)(2)(A), 112 Stat. 2681 at 634 (1998) (codified at 16 U.S.C. A. § 1851 note) and 50 C.F.R. Part 679 as it applies to three (3) entities: Icicle, Adak Fisheries, LLC (Fisheries), and Adak Fisheries Development, LLC (AFDC). Section 211(c)(2)(A) of the AFA imposes a crab processing limit (cap) on entities that participate in the Bering Sea and Aleutian Island (BSAI) pollock fishery. Under the AFA, any entity in which ten percent (10%) or more of the interest is owned or “controlled” by another individual or entity is deemed to be the same entity and is therefore subject to the same crab cap. See AFA, Pub. L. 105-277, Div. C, Title II, § 211(c)(2)(A).

From February 2002 through February 2004, Icicle was subject to an annual crab processing cap of 221,901 pounds of western Aleutian brown king crab. Icicle owned fifty percent (50%) of Fisheries. Therefore, Fisheries was an affiliated entity and subject to Icicle’s crab processing cap.

AFDC custom processed western Aleutian brown king crab for Fisheries.

AFDC's sole owner and president, Mr. Kjetil Solberg, owned the other 50% interest in Fisheries with Icicle. Icicle also managed Fisheries. As such, it hired Mr. Solberg as Fisheries' Chief Executive Officer. The parties' business relationships were further detailed in an LLC Agreement, a Management Agreement, an Employment Agreement, a Sublease Agreement, and a Custom Processing Agreement.

While these arrangements enabled the parties to maximize crab processing opportunities, the basic organizational structure, contractual agreements, and interactions with one another exposed them to the prohibitions of section 211 (c)(2)(A) the AFA. Specifically, if Icicle, through Fisheries, controlled ten percent or more of AFDC then AFDC and Icicle would be considered affiliated entities, thereby subjecting AFDC to Icicle's annual crab cap. The amount of crab AFDC processed while its sole owner was CEO of Fisheries greatly exceeded Icicle's annual crab cap prompting the National Oceanic and Atmospheric Administration ("NOAA" or "Agency") to investigate for possible AFA violations.

On August 11, 2003, NOAA representatives met with Icicle's representatives, Mr. Solberg, and Mr. Solberg's attorney. At the conclusion of the meeting, the NOAA representatives identified some areas of concern with respect to the Adak structure and agreements. The NOAA representatives provided some suggestions that might reduce the amount of control Icicle exercised over AFDC through Fisheries. They also advised that the suggestions were neither exhaustive nor inclusive, and that implementing them would not remedy past violations. Respondents amended the LLC Agreement, the Employment Agreement, and the Custom Processing Agreement. However, the Respondents did not

submit the amended agreements to NOAA for review until December 2003 and NOAA did not complete its review until February 28, 2004.

Upon examination and review, the Agency determined that the amended agreements did not reduce the amount of control Icicle exercised over AFDC, through Fisheries, to less than ten percent (10%). Accordingly, it issued a Notice of Violation and Assessment (NOVA) against Respondents alleging eighty-two (82) separate violations of the AFA. Specifically, from February 2002 through February 2004, Icicle, Fisheries, and AFDC were “affiliated entities” that violated section 211(c)(2)(A) of the AFA. The entities processed 1,544,957 pounds of western Aleutian brown king crab in excess of Icicles’ 2002 crab cap of 221,901 pounds; 1,997,301 pounds of crab in excess of Icicles’ 2003 crab cap of 221,901 pounds; and 283,877 pounds of crab in excess of Icicles’ 2004 crab cap of 221,901 pounds. The total amount of excess crab processed by the entities from 2002-2004 was 3,826,135.

In the Initial Decision, the undersigned found that through the various agreements, amended agreements, and business practices, Icicle “controlled” AFDC through Fisheries to the extent of ten percent (10%) or more from February 2002 through February 2004. As such, AFDC became the same entity or an affiliated entity and was subject to Icicle’s crab processing cap established under section 211 (c)(2)(A) of the AFA. Due to the large volume of crab and the factors at 16 U.S.C. § 1858(a) and 15 C.F.R. § 904.108, the undersigned assessed a civil monetary penalty in the amount of \$3,440,000 against the Respondents jointly and severally.

SUMMARY OF ISSUES AFFIRMED AND REMANDED

The Under Secretary's Determination and Order considered six (6) issues on administrative appeal. Those issues and the Under Secretary's Determination and Order on each are summarized briefly as follows:

1. Whether the AFA grants NOAA authority to promulgate regulations establishing individual entity caps under § 211 (c)(2)(A) of the AFA.

The Under Secretary found that the Agency did not exceed its authority to promulgate regulations establishing individual entity caps.

2. Assuming NOAA had authority to promulgate regulations establishing individual entity caps under § 211(c)(2)(A) of the AFA, whether the Agency is required to prove the aggregate crab processing limit for all processors was exceeded in order to successfully prosecute a violation of the individual entity cap regulation.

The Under Secretary found that the ALJ was correct in concluding that the Agency was not required to prove that all processors together exceeded an aggregate cap in order to prosecute an individual processor for exceeding its individual cap.

3. Whether the ALJ applied the appropriate legal standard to determine whether AFDC was subject to Icicle's crab cap for the period February through December 2002, including whether Icicle had sufficient notice of the legal standard that NOAA would apply during that period in the absence of regulations? If the ALJ applied an incorrect legal standard, what was the correct legal standard?

The Under Secretary found that ALJ applied the appropriate legal standard: "Any entity in which 10 percent or more of the interest is owned or controlled by another individual or entity shall be considered to be the same entity for the purposes of this subparagraph." Pub. L. 105-277 § 211 (c)(2)(A).

4. Given the facts found by the ALJ, and based on the legal standard you believe should be applied for the period February through December 2002, was AFDC subject to Icicle's crab cap during the period February through December 2002?

The Under Secretary found that the record contains substantial evidence to support the ALJ's conclusion that Fisheries exercised power and influence over AFDC and ultimately controlled 10 percent or more of an interest in AFDC.

5. Given the facts found by the ALJ, and based on NOAA's regulations in effect during the period February 2003 through February 2004, was AFDC subject to Icicle's crab cap during that time period?

As discussed more fully below, the Under Secretary remanded on this issue to clarify findings and conclusions on violations of the 2003 AFA regulations between February 2003 and February 2004. The Under Secretary also suggested a more thorough analysis and discussion on whether the amendments to the various agreements reduced the amount of control that Fisheries had over AFDC.

6. Assuming the ALJ was correct in concluding AFDC was subject to Icicle's crab cap, did he err in establishing the appropriate penalty for the 82 violations charged? If so, identify the precise error(s) of law and/or fact.

As discussed more fully below, the Under Secretary remanded on this issue to reconsider the civil penalties as appropriate if there are any material changes to those findings and conclusions with respect to issue 5 and also to reconsider the entire penalty. Remand Order at 31.

A. Issue 5

Icicle claims it did not have either a direct or indirect interest in AFDC and therefore, did not have control of 10 percent or more of an interest in AFDC as that term was defined in the January 2003 regulations, particularly after the parties renegotiated their contracts to address issues raised by the Agency during its investigation.

The Agency's position is that the control Icicle asserted over AFDC in February 2004 is essentially the same as it was in February 2002. The Agency argues that the final regulations state control exists if one entity has the responsibility to procure insurance on the processor and that Icicle carried insurance on AFDC's crab line equipment and also carried worker's compensation insurance of AFDC's employees. *See* 67 Fed. Reg. 79692, 79722 (Dec. 31, 2002) (codified at 50 C.F.R. § 679.2(3)(vii)(2003-2007)) below.

The Under Secretary remanded on issue 5 to clarify findings of fact and conclusions of law with respect to the violations of the 2003 AFA regulations between

February 2003 and February 2004. Specifically, the Under Secretary stated the ALJ did not state which specific provision or provisions of the 2003 regulations he concluded were triggered by the business relationships among the Respondents and, further, the ALJ did not sufficiently explain whether the amendments the parties made to the agreements among them altered the legal analysis.

In addition to addressing the specific provision or provisions of the 2003 regulations triggered by the business relationships among the Respondents, the Under Secretary stated “[t]he ALJ should include in his decision after remand a more thorough analysis and discussion of, among other things, whether AFDC’s retention of its crab processing rights, the increase in the crab processing fees paid by Fisheries to AFDC, the elimination of administrative services provided by Fisheries to AFDC, and AFDC’s crab processing for itself and others sufficiently reduced the amount of control that Fisheries had over AFDC . . . between February 2003 and February 2004 to no longer trigger application of Icicle’s crab cap to AFDC’s crab processing operation.” Remand Order at 28.

B. Issue 6

Icicle claims the ALJ erred by failing to factor in the significant error made by NOAA counsel in estimating the profits made for the excess crab; misconstruing the legislative purpose; failing to find harm; and failing to take Icicle’s good faith into account when determining the sanction. The Agency’s position is that it is authorized to assess civil penalties up to \$120,000 per charge and that the ALJ’s imposed penalty for each of the 82 violations is \$42,000 per charge. The Agency further argues the penalty is

appropriate because Respondents made substantial profits and created substantial damages to competitors, the class intended to be protected by AFA § 211(c)(2)(A).

The Deputy Secretary found that the ALJ's decision to impose the penalty assessed was based in part on a conclusion that "Respondents engaged in an improper scheme to evade the law. The record does not support that conclusion. The record demonstrates that Respondents attempted to structure their business arrangement to meet the requirements of the law and cooperated fully with the Agency when it raised questions about that arrangement. The fact that they did not succeed in achieving compliance does not increase their culpability." Therefore, the Under Secretary instructed the ALJ to reconsider the penalties assessed with respect to all the charges proved. *Id.*

The Under Secretary also found that "[i]n light of the remand on Issue 5, the ALJ may reconsider the penalties imposed with respect to the charges alleged between February 2003 and February 2004 if necessary in the event that his decision with respect to the alleged violations covered by Issue 5, or any of them, changes in any respect material to the appropriate penalty assessment." *Id.* at 31.

Further, the Deputy Secretary found Icicle's following arguments to be without merit: 1) the ALJ failed to account for significant error made by NOAA counsel in estimating the excess crab processing profit; 2) the ALJ failed to find that ADA processor as a group ever processed an amount of crab in excess of the crab cap; 3) the ALJ erred in finding multiple violations for processing of crab in the same day; 4) the ALJ erred by taking into account seven violations that involved crab processed for Westward Seafoods; and, 5) the ALJ erred in determining that AFDC lacked the ability to pay the amount of the penalty. See Remand Order at 29-31.

ACTIVITY AFTER REMAND ORDER

Both parties submitted briefs containing additional arguments concerning the issues on remand. Icicle also submitted a Motion to Disqualify the Administrative Law Judge and a Motion to Supplement the Record on Remand by including the Department of Commerce Office of Inspector General's (OIG) "Review of NOAA Fisheries Enforcement Programs and Operations, Report No. OIG 19887 of January 2010." The undersigned denied Icicle's Motion to Disqualify in a separate Order dated August 4, 2009.

A. Icicle's Motion to Supplement the Record on Remand

Icicle's requests that the U.S. Department of Commerce Office of Inspector General's (OIG) report entitled, "Review of NOAA Fisheries Enforcement Programs and Operations be included in the record. Icicle cites Finding 2, which states, in summary, that the Agency's Office of General Counsel for Enforcement and Litigation does not have an internal operations manual for assessing civil penalties; that Agency attorneys have broad discretion; and that the absence of formal procedures for sufficiently documenting its decisions regarding penalty assessments and settlement amounts, has resulted in a process that appears arbitrary.

Icicle claims that the problems outlined in Finding 2 manifest in this case because the Agency attorney has never provided an explanation of how he arrived at the proposed penalty and that he refused to answer on the grounds that such information was privileged and constituted work product. Therefore, the penalty assessment is arbitrary and not entitled to any credence or deference.

The Agency responded that the report does not address the particular facts and circumstances in this case or the impartiality of the undersigned Administrative Law Judge, only the general policies and procedures of NOAA's Office of Law Enforcement and Office of General Counsel for Enforcement and Litigation. For the OIG report to be relevant in this case, it would have to call into question the impartiality of the hearing process and/or the findings of the ALJ. Moreover, the Respondents received an extensive hearing in this case and the ALJ's considerations in assessing the penalty are clearly set out in the Initial Decision at pages 42 to 47. Therefore, the Agency concluded, the report is not relevant.

Icicle replied that the ALJ simply acceded to the Agency's original assessment. Icicle further claimed that the Agency's Notice of Proposed Rulemaking (NPRM) at 75 Fed. Reg. 13050-51 (Mar. 18, 2010) reinforces the relevance of the OIG report. The NPRM states the Agency will be required "to justify at a hearing . . . that its proposed penalty is appropriate, taking into account all the factors required by applicable law." Icicle concludes that the OIG Report is clearly relevant to the question of the arbitrary nature of the Agency's penalty assessment.

B. Decision on Icicle's Motion to Supplement the Record

The Agency's Final Rule at 75 Fed. Reg. 35,631 (June 23, 2010) (to be codified at 15 C.F.R. § 904.204(m)), responds to a comment on the NPRM that NOAA attorneys should be available to testify at hearings before an Administrative Law Judge as to the basis for penalty assessments in any particular case. The Agency disagreed and responded as follows:

NOAA is changing its regulations to remove the requirement at 15 C.F.R. § 904.204(m) that an Administrative Law Judge state good reason(s) for

departing from the civil penalty or permit sanction This revision eliminates any presumption in favor of the civil penalty or permit sanction assessed by NOAA in its charging document. (see In the matter of AGA Fishing Corp. 2001 WL 34683852 (NOAA Mar. 17, 2001)). It requires instead that NOAA justify at a hearing provided for under this Part that its proposed penalty or permit sanction is appropriate, taking into account all factors required by applicable law [16 U.S.C. § 1858(a)] It appears that the commenter is seeking to probe the NOAA attorney's thought process in deciding what facts and arguments to present. As the U.S. Supreme Court established in Hickman v. Taylor, 329 U.S. 495 (1947), such thought processes are protected from disclosure absent a compelling need which is not present here. See also Shelton v. American Motors, Corp., 805 F.2d. 1323 (8th Cir. 1986) (party seeking to depose opposing counsel in a pending case must show that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case); Nationwide Mutual Ins. Co. v. Home Ins. Co., 278 F.3d 621, 628 (6th Cir. 2002) (adopting the Eighth Circuit test in Shelton)."

75 Fed. Reg. 35,631, 35,632 (June 23, 2010) (to be codified at 15 C.F.R. § 904.204(m)).

Throughout these proceedings, the Agency has presented facts and figures in support of its proposed civil monetary penalty. Further, Respondents have presented facts and figures to the contrary. Moreover, the civil penalty analysis in the Initial Decision consists of six (6), single spaced pages. It applied all of the factors required by applicable law (16 U.S.C. § 1858(a) and 15 C.F.R. § 904.108(a)), plus extensive case law and legislative history.

The U.S. Department of Commerce Office of Inspector General subsequently issued its "Final Report" entitled "Review of NOAA Fisheries Enforcement Programs and Operations, Report No. OIG 19887-2 of September 2010." That report supplements the original report and contains the results of the OIG's examination of "27 Selected Fisheries Enforcement Complaints." As with the January 2010 report, the "Final Report" does not address the particular facts and circumstances in this well developed and fully

adjudicated case, nor does it address the impartiality of the undersigned Administrative Law Judge.

The law is clear. “Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.” 5 U.S.C. § 556(d). “All evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing.” 15 C.F.R. § 904.251(a)(2). In this case, the Under Secretary has prescribed the bases upon which the ALJ is to reconsider the civil penalties. The OIG reports do not constitute separate authority obligating the ALJ to expand on what the Under Secretary has prescribed.

In view of the foregoing, Icicle’s Motion to Supplement the Record on Remand with the OIG Report is DENIED. The undersigned will reconsider the civil penalties in accordance with the Determination and Order.

LAW

AFA Regulations February 2003 – February 2004

AFA regulations in effect from February 2003 through February 2004 are as follows.¹

50 CFR 679.2

§ 679.2 Definitions

* * *

Affiliation for the purpose of defining AFA entities means a relationship between two or more individuals, corporations, or other business concerns in which one concern directly or indirectly owns a 10 percent or greater interest in another, exerts control over another or has the power to exert control over another; or a third individual, corporation, or other business concern directly or indirectly owns

¹ 67 Fed. Reg. 79,692, 79722 (Dec. 30, 2002) as codified at 50 C.F.R. § 679.2 (2003). The pertinent regulations were effective January 29, 2003 through December 31, 2007.

² The following discussion is based on the Initial Decision’s Findings of Fact in their entirety. Those

a 10 percent or greater interest in both, exerts control over both, or has the power to exert control over both.

* * *

(3) *What is Control?* For the purposes of determining affiliation, control is deemed to exist if an individual, corporation, or other business concern has any of the following relationships or forms of control over another individual, corporation, or other business concern:

(i) Controls 10 percent or more of the voting stock of another corporation or business concern;

(ii) Has the authority to direct the business of the entity which owns the fishing vessel or processor. The authority to “direct the business of the entity” does not include the right to simply participate in the direction of the business activities of an entity which owns a fishing vessel or processor;

(iii) Has the authority in the ordinary course of business to limit the actions of or to replace the chief executive officer, a majority of the board of directors, any general partner or any person serving in a management capacity of an entity that holds 10 percent or greater interest in a fishing vessel or processor. Standard rights of minority shareholders to restrict the actions of the entity are not included in this definition of control provided they are unrelated to day-to-day business activities. These rights include provisions to require the consent of the minority shareholder to sell all or substantially all of the assets, to enter into a different business, to contract with the major investors or their affiliates or to guarantee the obligations of majority of investors or their affiliates;

(iv) Has the authority to direct the transfer, operation or manning of a fishing vessel or processor. The authority to “direct the transfer, operation or manning” of a vessel or processor does not include the right to simply participate in such activities;

(v) Has the authority to control the management of or to be a controlling factor in the entity that holds 10 percent or greater interest in a fishing vessel or processor;

(vi) Absorbs all the costs and normal business risks associated with ownership and operation of a fishing vessel or processor;

(vii) Has the responsibility to procure insurance on the fishing vessel or processor, or assumes any liability in excess of insurance coverage;

(viii) Has the authority to control a fishery cooperative through 10 percent or greater ownership or control over a majority of the vessels in the

cooperative, has the authority to appoint, remove, or limit the actions of or replace the chief executive officer of the cooperative, or has the authority to appoint, remove, or limit the actions of a majority of the board of directors of the cooperative. In such instance, all members of the cooperative are considered affiliates of the individual, corporation, or other business concern that exerts control over the cooperative; and

(ix) Has the ability through any other means whatsoever to control the entity that holds 10 percent or greater interest in a fishing vessel or processor.

DISCUSSION²

A. Original Agreement

The 2003 regulations define affiliation as “a relationship between two or more individuals, corporations, or other business concerns in which one concern directly or indirectly owns a 10 percent or greater interest in another, exerts control over another or has the power to exert control over another; or a third individual, corporation, or other business concern directly or indirectly owns a 10 percent or greater interest in both, exerts control over both, or has the power to exert control over both.” 67 Fed. Reg. 79,692, 79722 (Dec. 30, 2002). For the purposes of determining affiliation, control is deemed to exist if an individual, corporation, or other business concern has any [emphasis added] of the relationships or forms of control, listed as 3(i) through 3(ix) above, over another individual, corporation, or other business concern. The following enumerated examples show that control is “deemed” to exist among Respondents.

- i. 50 C.F.R. § 679.2(3)(vii). Has the responsibility to procure insurance on the fishing vessel or processor, or assumes any liability in excess of insurance coverage.**

Pursuant to the Crab Processing Agreement of December 4, 2001, “AF [Fisheries] shall maintain insurance policies on all of AFDC’s equipment and products.” ALJ Ex. 10

² The following discussion is based on the Initial Decision’s Findings of Fact in their entirety. Those Findings of Fact can also be found in this Decision at Attachment A.

at 2. Under the contemplated contractual changes expressed by AFDC's attorney and Icicle's General Counsel in their letter of September 16, 2003, Fisheries "will no longer insure AFDC's interest in the crab processing equipment." Icicle Ex. 20. However, Fisheries continued to maintain insurance on AFDC's crab processing equipment. Tr. Vol. VIII at 213-14. Under the regulations at 50 C.F.R. § 679.2(3)(vii), Icicle, in its capacity as 50% owner and manager of Fisheries, is deemed to have controlled AFDC to the extent of ten percent or more from February 2003 through February 2004, making AFDC an affiliated entity for the purposes of the AFA and subjecting it to Icicle's crab cap. Therefore, control is deemed to exist by way of 50 C.F.R. § 679.2(3)(vii), making AFDC an affiliated entity subject to Icicle's crab cap.

- ii. **50 C.F.R. § 679.2(3)(iv). Has the authority to direct the transfer, operation or manning of a fishing vessel or processor. The authority to "direct the transfer, operation or manning" of a vessel or processor does not include the right to simply participate in such activities.**

Mr. Solberg agreed to operate AFDC as a separate processing operation based on Fisheries' guarantee of support. Solberg Deposition Vol. II at 157-58. Approximately 12 employees are needed to operate the crab processing line. Solberg Deposition Vol. I at 20. AFDC had no full time employees. Agency Ex. 81 at 4 and 82 at 9. A Fisheries employee selected which of their employees would work on crab processing for AFDC. Agency Ex. 82 at 9. Without Fisheries, AFDC could not afford to hire its own employees. Hellerman Deposition at 10; Agency Ex. 82 at 12.

Under the Amended and Restated Processing Agreement, AFDC hired two employees (a foreman and a quality control person) to supervise the operation of the crab line. Finding of Fact 120; ALJ Ex. 14 at 2. The Supervisors were required under the terms of the agreement to be loaned to Fisheries when they were not engaged in

supervising crab processing as follows:

AF [Fisheries] shall loan AFDC employees as needed on an hourly basis to process crab (“Crab Processors”). AFDC shall maintain one fulltime employee at the plant in Adak (“AFDC Supervisor”) who shall be empowered to select and oversee the Crab Processors. The Crab Processors shall be available to AFDC as is reasonable; however, the parties recognize that if AF [Fisheries] is processing fish and cannot reasonably spare any employees, AF [Fisheries] shall be under no obligation to make any employees available. When not engaged in supervising crab processing, the AFDC Supervisor shall be loaned to AF [Fisheries].

ALJ Ex. 14 at 2.

Therefore, control is deemed to exist by way of 50 C.F.R. § 679.2(3)(iv), making AFDC an affiliated entity subject to Icicle’s crab cap.

iii. 50 C.F.R. § 679.2(v). Has the authority to control the management of or to be a controlling factor in the entity that holds 10 percent or greater interest in a fishing vessel or processor.

As CEO of Fisheries, Mr. Solberg was an at-will employee and could be terminated at any time, including without cause. The Employment Agreement required that he report to Fisheries’ Manager (Icicle). Further, the Employment Agreement required that he “devote all of his business time and attention to the business of the Company (Fisheries). . . and not render commercial or professional services of any nature to any person or organization, whether or not for compensation, without prior written consent of the Company’s Manager [Icicle], and will not directly or indirectly engage or participate in any business that is competitive in any manner with the business of the Company.” The Employment Agreement expressly allowed Mr. Solberg to conduct crab processing operations through AFDC and catch/process seafood using the F/V Western Queen or any other fishing vessel owned by Alaska Fisheries, LLC. “ALJ Ex. 8 at 2, 3. The Amended Employment Agreement did not change the relationship or Mr. Solberg’s

at-will status. ALJ Ex. 15. Therefore, control is deemed to exist by way of 50 C.F.R. § 679.2(3)(v) making AFDC an affiliated entity subject to Icicle's crab cap.

iv. 50 C.F.R. § 679.2(ix) Has the ability through any other means whatsoever to control the entity that holds 10 percent or greater interest in a fishing vessel or processor.

Respondents have run afoul of the AFA due in large part to their structural business contractual relationships. Icicle owned 50% of Fisheries. Mr. Solberg owned 100% of AFDC and the other 50% of Fisheries. As such, he was entitled to 50% of the profits. ALJ Ex. 6; Tr. Vol. VIII at 46. Fisheries was subject to Icicle's crab cap. Icicle was the manager of Fisheries. ALJ Ex. 7; Tr. Vol. II at 210. As manager, it hired Mr. Solberg as Fisheries' CEO and paid him a salary of \$300,000 per year, and required that he "devote all of his business time and attention to the business of the Company (Fisheries). . . ." ALJ Ex. 8 at 2, 3. As CEO of Fisheries, Mr. Solberg was an "at will" employee. ALJ Ex. 8. Icicle's Chief Financial Officer said, "[w]e want to invest in a company [Fisheries] that's going to have a CEO that's fully engaged, fully committed to our investment." Tr. VIII at 240.

Without Fisheries, AFDC would not be an economically viable entity and would not be able to hire its own employees. Hellerman Deposition at 105 based on his second report; Agency Ex. 82 at 12. Even after the Amended Agreements, without Fisheries' employees, Development could not have existed. Agency Ex. 82 at 12. Fisheries owned the totes, forklifts, and scaled used by AFDC in its crab processing operations. Tr. Vol. III at 539. AFDC had no line of credit and necessarily depended on Fisheries for support. Agency Ex. 48; Solberg Deposition Vol. II at 157-58. Fisheries paid all of AFDC's operating expenses, including utility, rent, supplies, shipping costs, insurance, and other

expenses. Fisheries then sought reimbursement at the end of the year. Tr. Vol. III at 541; Agency Ex. 36 and 68; Solberg Deposition Vol. I at 104, 109. Employees, fishermen, and companies that conducted business on Adak believed that Icicle and AFDC merged. Agency Ex. 12 at 25-28; Agency Ex. 32 at 39. Icicle was viewed as a partner in the crab processing operation. Id. Icicle personnel were responsible for marketing the crab that AFDC custom processed on behalf of Fisheries. Tr. Vol. III at 542.

Although AFDC maintained a bank account with First National Bank of Anchorage, Fisheries' manager (Icicle) established a separate bank account for AFDC at U.S. Bank in Seattle. Icicle Ex. 46; Agency Ex. 27; Tr. Vol. VIII at 92. The signatories on this account were Mr. Solberg and Icicle's CEO, CFO, and Controller. Agency Ex. 27; Tr. Vol. VII at 92. AFDC's separate account was not used. Agency Ex. 12 at 9, 12-15; Tr. Vol. III at 525. Mr. Solberg admitted that his focus was on building Fisheries because AFDC was expected to merge into Fisheries. Tr. Vol. III at 468 and 480. Therefore, he paid little attention to what Fisheries was charging AFDC. Tr. Vol. III 567. Fisheries represented nearly 85% of AFDC's business. Tr. Vol. III at 484-85; Agency Ex. 33a; Solberg Deposition Vol. II at 155.

Mr. Solberg served as the CEO of both Fisheries and AFDC and managed the daily operations of both companies. Mr. Solberg received an annual salary of \$300,000 as CEO of Fisheries and no salary as CEO of AFDC but as sole owner he was entitled to profits, if any were realized. ALJ Ex. 8 at 1-2; entire record. Mr. Solberg stated that the arrangement whereby AFC would process the crab on Adak Island was to be temporary in order to satisfy the requirement of the National Marines Fisheries Service (NMFS). It was also to be a "sleeper" until it could be rejoined with Fisheries. Tr. Vol. III at 456,

476; Agency Ex. 46. “Everything should ultimately be one company.” Tr. Vol. III at 468. Mr. Solberg also stated that his focus was to build Fisheries because it was the company that was going to be there for 30 years and AFDC was going to go away. Tr. Vol. III at 480.

Finally, as CEO of Fisheries, Mr. Solberg was obligated to report to the company’s manager. This placed him and the interests of AFDC in a subservient position to Icicle, the manager of Fisheries. When coupled with his own interest in building Fisheries, AFDC was susceptible to being controlled to the extent of ten percent or more. As 50% owner of Fisheries, and as its \$300,000 per year CEO, Mr. Solberg did not act in a manner that was contrary to the interests of Fisheries or its manager, Icicle. Under the original agreements and as revised, AFDC was a captive processor until Icicle sold its interest in Fisheries to Mr. Solberg for \$4.25 million on June 3, 2004. Agency Ex. 72; Tr. Vol. III at 559 and 564; Solberg Deposition Vol. I at 117; Agency Ex. 82 at 13.

Therefore, control is deemed to exist by way of 50 C.F.R. § 679.2(3)(ix), making AFDC an affiliated entity subject to Icicle’s crab cap.

B. Amended Agreements

In addition to addressing which specific provision or provisions of the 2003 regulations were triggered by the business relationships among the Respondents, the Under Secretary stated “[t]he ALJ should include in his decision after remand a more thorough analysis and discussion of, among other things, whether AFDC’s retention of its crab processing rights, the increase in the crab processing fees paid by Fisheries to AFDC, the elimination of administrative services provided by Fisheries to AFDC, and AFDC’s crab processing for itself and others sufficiently reduced the amount of control

that Fisheries had over AFDC . . . between February 2003 and February 2004 to no longer trigger application of Icicle's crab cap to AFDC's crab processing operation." Remand Order at 28.

In view of the foregoing discussion showing that several provisions of the 2003 regulations deemed control existed throughout the period February 2002 through February 2004, even after the amended agreements took effect, the amendments did not lessen Icicle's control over AFDC to the extent of less than ten percent. Agency Ex. 82 at 12. They lessened it only a minor extent. Hellerman Deposition at 143. Mr. Solberg could still be terminated as CEO of Fisheries and his sublease with Fisheries could also be terminated. Further, the changes to the agreements benefited Mr. Solberg somewhat financially but they did not lessen control. Mr. Solberg still remained a 50% partner with Icicle as CEO of Fisheries as well as the sole owner and CEO of AFDC. His salaried income continued to come from Icicle and Fisheries rather than from AFDC. His interest was in growing, nurturing, and doing whatever he could to make Fisheries a profitable operation. Tr. Vol. VI at 83, 84. AFDC continued to share the common use of a facility, employees, equipment, and utilities. The amended agreements were designed to make AFDC more profitable but they did not make it independent of Icicle's control through Fisheries to less than 10 percent.

AFDC retaining its crab processing rights reduced some control but Fisheries still had the authority to direct the operation or manning of the crab processing facility. Further, Mr. Solberg's interest was in growing, nurturing, and doing whatever he could to make Fisheries a profitable operation. Mr. Solberg believed AFDC was a "sleeper" and

that Fisheries and AFDC would eventually merge into one company. Moreover, control is already deemed to exist through 50 C.F.R. § 679.2(3)(iv)(v)(vii) and (ix).

Increasing the crab processing fees that Fisheries paid to AFDC may have helped AFDC become more profitable but it did nothing to reduce the control. Tr. Vol. IV at 802. The increased fees were \$.95 per pound for processing below 500,000 pounds, \$.90 for processing 500,000 +, and \$.85 for processing 1 million pounds or more. If Fisheries was expected to purchase 1 million pounds, a flat rate of \$.85 per pound was set. ALJ Ex. 14. As with AFDC retaining its crab processing rights, control existed through 50 C.F.R. § 679.2(3)(iv)(v)(vii) and (ix).

Eliminating administrative services to AFDC reduced some control Fisheries exercised over AFDC. Instead, AFDC was required to pay Fisheries an annual management fee to compensate Fisheries for services provided and incidental expenses including, but limited to telephone, computer support, use of Fisheries forklifts and other mobile equipment, office supplies, procurement of packaging, and other supplies, ALJ Ex. 14 at 4. The amount of management fee depended on the amount of crab AFDC processed during the calendar year with the top fee set at \$50,000 if AFDC processed 500,000 pounds or more to the bottom fee of \$10,000 if AFDC processed less than 200,000 pounds. *Id.* at 13. As with AFDC retaining its crab processing rights, control still existed through 50 C.F.R. § 679.2(3)(iv)(v)(vii) and (ix).

Finally, AFDC's processing crab for itself and others did not sufficiently reduce the amount of control that Fisheries had over AFDC because Fisheries still retained the right to direct the operation or manning of the crab processing facility. AFDC processing crab for itself and others does not sufficiently reduce the amount of control Fisheries had

over it because other operational relationships, contracts, and agreements were still enough to establish Fisheries' 10% or more control over AFDC. Tr. Vol. V at 36-37. As with AFDC retaining its crab processing rights, control still existed through 50 C.F.R. § 679.2(3)(iv)(v)(vii) and (ix).

SUPPLEMENTAL FINDINGS AND CONCLUSIONS

The Ultimate Findings of Fact and Conclusions of Law in the Initial Decision are supplemented as follows:

1. The amended agreements did not reduce control to below ten percent. Applying 50 C.F.R. § 679.2(3)(iv)(v)(vii) and (ix) to the facts and to the Agreements and Amended Agreements, Icicle exercised ten percent or more control over AFDC through Fisheries from February 2002 through February 2004, thereby making AFDC an affiliated entity under the AFA and subject to Icicle's crab cap.
2. NOAA has established by a preponderance of reliable and credible evidence that beginning February 2002 through February 2004, on 82 separate occasions, AFDC processed a total of 3,825,917 pounds of western Aleutian brown king crab in excess of Icicle's crab cap in violation of section 211(c)(2)(A) of the AFA and the Magnuson-Stevens Act (16 U.S.C. § 1857).

The remainder of the Ultimate Findings of Fact and Conclusions of Law are still in effect.

RECONSIDERED PENALTY ASSESSMENT UNDER ISSUE 6

The Deputy Secretary stated "[i]n light of the remand on Issue 5, the ALJ may reconsider the penalties imposed with respect to the charges alleged between February 2003 and February 2004 if necessary in the event that his decision with respect to the alleged violations covered by Issue 5, or any of them, changes in any respect material to

the appropriate penalty assessment.” Remand Order at 29. The decision with respect to the alleged violations covered by Issue 5, or any of them, does not change in any material way. Therefore, the undersigned finds no reason to change the civil penalties assessed in the Original Decision based on Issue 5. However, the Under Secretary also instructed the ALJ to reconsider the penalties assessed with respect to all the charges proved.

Section 210(g) of the AFA provides that a violation of section 211 constitutes a violation of section 307 of the Magnuson-Stevens Act (16 U.S.C. § 1857). See Pub. L. 105-277, Div. C, Title II, § 210(g), 112 Stat. 2681 at 631 (1998) (codified at 16 U.S.C. § 1851 note). A violation of section 211 is subject to civil penalties and permit sanction under section 308 of the Magnuson-Stevens Act, codified at 16 U.S.C. § 1858. Id. During the time period in question, each violation of the Magnuson-Stevens Act may incur a maximum civil penalty of \$120,000. See 16 U.S.C. § 1858(a); 15 C.F.R. 6.5(f)(15) (inflation adjustment of civil penalties) (2002 – 2003). Furthermore, each day of a continuing violation constitutes a separate offense. See 16 U.S.C. § 1858(a).

In assessing a civil penalty, several factors are considered, including the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require. 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(a). A civil penalty may be increased if a respondent’s ability to pay is such that a higher civil penalty is necessary to deter future violations, or for commercial violators, to make a civil penalty more than a cost of doing business. 15 C.F.R. § 108(b).

Since the findings are not materially changed, the 82 alleged violations remain proved. According to the law and regulations in effect at the time of the violations, a

total maximum civil penalty in the amount of \$9,840,000.00 may be assessed. The Agency still seeks a civil penalty totaling \$3,444,000.00.

The factors to be considered in assessing the civil penalty are discussed fully in the Initial Decision. That discussion still applies except for the presumption in favor of the civil penalty assessed by NOAA which was changed by the Agency's Final Rule at 75 Fed. Reg. 35,631 (June 23, 2010) (to be codified at 15 C.F.R. § 904.204(m) and will not be repeated here except to emphasize a point.

A. The Nature of the Prohibited Acts Committed

The nature of the prohibited acts committed is an unlawful overage. The overage is unlawful because Respondents processed crab in excess of Icicle's crab cap. Processing excess crab violates the AFA's sideboard limitations. NOAA did not seize the unlawful overages so Respondents were able to receive income from the unlawful overage.

The purpose of the AFA sideboard limitations is to protect non-AFA entities against market encroachment resulting from the flexibility provided AFA-entities to exploit other fisheries. Tr. Vol. I at 94-96; Tr. Vol. IV at 618-621; Tr. Vol. X at 123; Agency Ex. 73. Senator Ted Stevens (sponsor of the legislation) stated:

[A] consensus had been achieved among Bering Sea fishing representatives on an agreement to reduce capacity in the Bering Sea pollock fishery. For the next three weeks, we drafted the legislation to give effect to the agreement, and spent considerable time with the fishing industry from other fisheries who were concerned about the possible impacts of the changes in the Bering Sea pollock fishery. The **legislation we are passing today includes many safeguards for other fisheries and the participants in those fisheries.**

144 Cong. Rec. S12741, S12777 (Oct. 21, 1998) (emphasis added); see also 144 Cong. Rec. S12969, S12698 (Oct. 20, 1998) (statement of Sen. Stevens).

Senator Patty Murray echoed similar sentiments stating:

[T]he bill attempts to ensure adequate protections for other fisheries in the North Pacific and Pacific from any potential adverse impacts resulting from the formation of fishery cooperatives in the pollock fishery. The formation of fishery cooperatives will undoubtedly free up harvesting and processing capacity that can be used in new or expanded ways in other fisheries. **Although many of these vessels and processors have legitimate, historic participation in these other fisheries, they should not be empowered by this legislation to gain a competitive advantage in these other fisheries to the detriment of participants who have not benefitted from the resolution of the pollock fishery problems.**

144 Cong. Rec. at S12708.

As shown in the discussion on Issue 5 above, Respondents' actions frustrated the very purpose of the AFA and undermined the direct efforts of Congress, NMFS, NOAA, the Council, and other Bering Sea fishing representatives who were instrumental in enacting the legislation.

B. The Circumstances of the Prohibited Acts Committed

The administrative record shows Respondents sought to maximize crab processing and avoid the crab processing sideboard limitations. Mr. Solberg explained that the crab processing arrangement was a temporary solution to satisfy NMFS requirements and that AFDC was to be a "sleeper" until the company could later be rejoined with Fisheries. Tr. Vol. III at 456, 468, and 476; Agency Ex. 46. "Everything should ultimately be one company. Tr. Vol. III at 468. "My focus was to build Fisheries. That was the company that was going to be there for 30 years. AFDC was going to go away" Tr. Vol. III at 480.

This may have made good business sense but the contractual arrangements among Respondents was the very conduct section 211 (c)(2)(A) proscribes. Respondents amended a few of their agreements but, as shown above, the amendments were only at the periphery of the contractual relationships and not at the core business operations where it caused them to run afoul of the AFA in the first place. See ALJ Ex. 13, 14, and 15.

C. The Extent and Gravity of the Prohibited Acts

From February 2002 through February 2004, Icicle was subject to an annual crab processing cap of 221,901 pounds of western Aleutian brown king crab. Icicle owned fifty percent (50%) of Adak Fisheries, LLC (Fisheries). Therefore, Fisheries was subject to Icicle's crab processing cap. During the same timeframe, Adak Fisheries Development, LLC (AFDC) custom processed western Aleutian brown king crab for Fisheries. AFDC's sole owner and president, Mr. Kjetil Solberg, also owned the other 50% of Fisheries. Icicle was Fisheries' manager. As manager, Icicle hired Mr. Solberg as Fisheries' Chief Executive Officer.

From February 2002 through February 2004, Icicle, Fisheries, and AFDC were "affiliated entities" that violated section 211(c)(2)(A) of the AFA by processing approximately 3,826,125 pounds of western Aleutian brown king crab in excess of Icicle's crab cap of 221,901 in each of the years 2002, 2003, and 2004. Consistent with its plan to purchase as much crab as possible on Adak, Fisheries represented nearly eighty-five percent (85%) of AFDC's business. Tr. Vol. at 484-85; Agency Ex. 33a; Solberg Deposition Vol. II at 155.

D. The Degree of Culpability

Icicle was fully aware that complete control or almost complete control was not required in order for AFDC to be subject to Icicle's crab cap. Icicle Ex. 26; Tr. Vol. VII at 75. In its own analysis dated November 15, 2001, Icicle recognized that joint ownership of Fisheries, the employment contract with Mr. Solberg, the subleases agreement between AFDC and Fisheries, the use of employees, the crab equipment, and the custom processing between AFDC and Fisheries were all possible mechanisms that might constitute control. Icicle Ex. 26. Yet, Icicle maintained that the crab processing cap limited the amount of brown king crab Fisheries could process but did not limit the amount of brown king crab that could be purchased from AFDC. Tr. Vol. X at 24; Icicle PFF 44).

On December 7, 2001, Mr. Terry Leitzell (General Counsel for Icicle) spoke to Mr. Kent Lind of NMFS for 5 to 10 minutes in a hotel hallway during a Council meeting. During the discussion, Mr. Leitzell showed Mr. Lind a diagram depicting ownership interest among several companies, illustrating that "affiliation does not flow upstream." Tr. Vol. VI at 212-21; Leitzell Deposition at 16 – 21; Icicle Ex. 30 and 31; Agency PFF 51A – 51I; Icicle PFF 51. Mr. Leitzell did not show Mr. Lind any contractual agreements between Fisheries and AFDC. Tr. Vol. VII at 88-90; Leitzell Deposition at 20; Agency PFF 51c-51e. Icicle states that Mr. Lind agreed that the structure depicted in the diagram was legitimate under the AFA and that there was no problem with Mr. Solberg serving as CEO of Fisheries and AFDC. Tr. Vol. VI at 219-20. Mr. Lind had no recollection of that discussion. Tr. Vol. I at 120; Agency PFF 51e. Mr. Leitzell was fully aware that Mr. Lind

was not in a position to provide a legally binding opinion concerning the Fisheries and AFDC structure. Tr. Vol. VI a 220-21; Leitzell Deposition at 59; Agency PFF 51g.

After learning that NOAA was conducting an investigation on possible violations of the AFA in this case, Respondents asked NOAA representatives for some suggestions to amend their agreements to help comply with the AFA. In August 2003, Mr. Gerald Hellerman provided some suggestions but advised that they were not exhaustive and that he not be held to them. Respondents amended the agreements but did not submit the amended agreements to NOAA for review until December 2003. Walker Deposition at 51. Mr. Garland Walker began to review the summary of the changes to the Fisheries-AFDC agreements upon receipt on December 30, 2003. He also sent a copy to Mr. Hellerman for review. *Id.* at 47. The Agency's review was not completed until February 28, 2004. *Id.* at 51. With the exception of the September 16, 2010 letter to Mr. Walker summarizing the amendments, Respondents never contacted NOAA regarding those changes. *Id.* at 105-107; Icicle Ex. 20. In the interim, Respondent's continued to process crab through AFDC. Agency Ex. 33 and 33a.

The amendments did not change Respondents' contractual relationships to the extent that Icicle, through Fisheries, controlled less than ten percent of AFDC. Mr. Hellerman testified in great detail that the suggestions he made were not exhaustive and that the amendments failed to keep Icicle, through Fisheries, from controlling AFDC to the extent of ten percent or more. See Hellerman Deposition; Tr. Vol. IV 792-812; Tr. Vol. V in its entirety; and, Tr. Vol. VI at 15-107.

E. Any History of Prior Offenses

The Respondent's do not have a history of prior offenses.

F. Other Matters as Justice May Require

The Initial Decision assessed civil penalties totaling \$3,440,000. The undersigned applied the appropriate considerations from 16 U.S.C. § 1858(a) and 15 C.F.R. § 904.108(a) and found the civil penalties to be appropriate and fair. The Initial Decision contains no findings in aggravation that warranted an upward departure from the Agency's recommendation nor does it contain findings in mitigation justifying a downward departure. After further analysis and reconsideration, the civil penalties are appropriate and fair.

The civil penalties are substantial because 3,826,135 pounds of unlawful crab overage is substantial. The time period during which these violations occurred was also substantial, over two years (2002 – 2004). Icicle purchased 3,735,015 pounds of crab for \$13,539,564 and sold it for \$17,627,008.³ Icicle Ex. 79. The difference between the sales value of the processed crab and the price Icicle paid for the crab is \$4,087,434. Icicle Ex. 79. After expenses, its revised net profit for crab in excess of the crab cap was \$1,134,487, half of which was credited to Icicle's capital account and the other half credited to Mr. Solberg's capital account. Icicle Ex. 80; Tr. Vol. VII at 168.

In addition to the above income, Icicle received \$150,000 in 2002 for administrative services and \$150,000 for Mr. Solberg's salary offset. In 2004 it received \$50,000 for its management fee. Agency Ex. 68, 70. Icicle also received \$4,250,000 in 2004 when Mr. Solberg purchased Icicle's interest in Fisheries. Agency Ex. 72; Tr. Vol. III at 559, 564. As Icicle's President told its Board, "we made money both years we

³ The 3,826,135 overage includes seven violations which involved crab that AFDC processed for Westward Seafoods, while subject to Icicle's crab cap. As the Deputy Secretary held in the Determination and Order at 30, "AFDC was subject to Icicle's crab cap and any crab processed by AFDC in excess of that cap, regardless for whom it was processed, constituted a violation of the AFA." Had Icicle purchased and sold the crab subject to the seven violations, the gross sales revenue would be greater than \$17,627,008.

operated . . . we made money by selling.” Agency Ex. 96. Therefore, the total revenue before expenses that Icicle received as the result of conducting operations as a 50% owner and manager of Fisheries, plus the sale of Fisheries was \$22,337,008.

It is inappropriate to fashion the civil penalty based only the \$1.1M net profit. In this case, net profits are credited to Icicle’s and Mr. Solberg’s capital accounts as Fisheries’ 50 percent owners, after Respondents have already received income from the unlawful overages. Since the civil penalty range coincides with the difference between the sales value and expenses, Respondents are, in a sense, receiving consideration for expenses incurred in the unlawful overage. To tie a civil penalty exclusively to net profit would result in a civil penalty amounting to no more than the cost of doing business, thereby thwarting the intent of the AFA to discourage such unlawful conduct.

The Initial Decision also states that the \$3.44M civil penalty amounts to \$.90 per pound of unlawful overage. Ninety cents per pound is also the median, agreed upon rate per pound for custom processing of the unlawful overages as reflected in the Amended Processing Agreement. ALJ Ex. 14 at 1. While it is not necessarily dispositive in determining the civil penalty, it does, however, reflect what the parties ultimately considered to be a median, fair price to process crab if they expected the purchases to be in the range of 500,000 to 999,999 pounds. Id.

The ten percent or more control in this case was pervasive and overt. Icicle was such an integral part of the business on Adak that employees, fishermen, and companies believed that Icicle was a partner in the crab processing. Agency Ex. 12 at 25-28; Agency Ex. 32 at 39. When asked about Icicle’s involvement on Adak during the period that

Icicle was a partner in Fisheries, Mr. Greg Baker, President of Westward Seafoods, said, “they were partners with Kjetil (Solberg) in his crab operation.” Id.

A civil penalty may be increased if a respondent’s ability to pay is such that a higher civil penalty is necessary to deter future violations, or for commercial violators, to make a civil penalty more than a cost of doing business. 15 C.F.R. § 904.108(b).

Reconsidering Respondents’ actions as detailed above and the additional \$4.25M Icicle received from the sale of its interest in Fisheries could justify a higher civil penalty to make it more than the cost of doing business. However, the existing civil penalty is fair and appropriate under the circumstances. It reflects the substantial amount of unlawful overages occurring for well over two years and all factors required by the applicable law. It is also more than the cost of doing business and should deter future violations.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that a civil penalty in the amount of **THREE MILLION FOUR HUNDRED AND FORTY-FOUR THOUSAND DOLLARS (\$3,444,000)** is assessed jointly and severally against Respondents Adak Fisheries, LLC, Adak Fisheries Development Company, LLC, and Icicle Seafoods, Inc.

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 decide to petition for administrative review. The petition for review must be filed with the Administrator of the National Oceanic and Atmospheric Administration (NOAA) within thirty (30) days of service of this Decision, as provided by 15 C.F.R. § 904.273. Copies of the petition for review, and all other documents and materials required in paragraph 15 C.F.R. § 904.273(d), must be served on all parties and the Assistant General Counsel for Enforcement and Litigation in accordance with 15 C.F.R. § 904.273(a). A copy of 15 C.F.R. § 904.273 is attached.

If neither party seeks administrative review within thirty (30) of service of this Decision, and the Administrator of NOAA does not elect to issue an order to review the initial decision without petition within sixty (60) of service, this Decision will become the final decision of the Agency.

Done and dated October 29, 2010
New York, New York



WALTER J. BRUDZINSKI
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD⁴

⁴ Pursuant to 15 U.S.C. § 1541, the United States Coast Guard 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.

ATTACHMENT A – FINDINGS OF FACT FROM INITIAL DECISION

The following findings of fact are taken from the initial decision and included in their entirety without modifications or additions.

I. The American Fisheries Act

A. Background

1. The BSAI pollock fishery is one of the largest fishery resources in the United States. (*Tr. Vol. I at 92*).
2. On October 21, 1998, the President signed the AFA into law. (Pub. L. 105-277, Div. C, Title II, 112 Stat. 2681 at 616-637 (1998); *Tr. Vol. I at 93, 98*).
3. The AFA, among other things, established a rationalization program for the BSAI pollock fishery that reduced the number of vessels participating in the fishery and established fishery cooperatives whereby the pollock quota was subdivided among various industry sectors (i.e., the factory trawler sector, the mothership sector, and the inshore sector). (*Tr. Vol. I at 90-96*).⁵
4. Rationalizing the pollock fishery provided AFA entities (i.e. companies that participate in the pollock fishery) flexibility to exploit other fisheries. (*Id. at 94-95*).
5. AFA sideboards were enacted to protect non-AFA entities (i.e., ground fish and shellfish companies) market share from such exploitation. (*Id. at 95-96; Tr. Vol. IV at 618-621; Tr. Vol. X at 123; Agency Ex. 73*).⁶
6. Among the specific “sideboard” provisions that Congress placed in the AFA was crab processing limits. Section 211(c)(2)(A) of the AFA prohibits an entity that participates in the BSAI pollock fishery from processing crab in excess of its aggregate crab processing cap. See AFA, Pub. L. 105-277, Div. C, Title II, § 211(c)(2)(A). Moreover, any entity in which ten percent (10%) or more of the interest is owned or “controlled” by another entity is deemed the same entity under the AFA. *Id.*

⁵ Under 50 C.F.R. § 679.2, “fishery cooperative” is defined as follows:

[A]ny entity cooperatively managing directed fishing for BS pollock and formed under section 1 of the Fisherman's Collective Marketing Act of 1934 (15 U.S.C. 521). In and of itself, a cooperative is not an AFA entity subject to excessive harvest share limitations, unless a single person, corporation or other business entity controls the cooperative and the cooperative has the power to control the fishing activity of its member vessels.

⁶ Sideboards are harvesting and processing limitations. (*Tr. Vol. IV at 618; Agency Ex. 3*).

7. Under section 210(g) of the AFA, a violation of section 211 constitutes a violation of section 307 of the Magnuson-Stevens Act. See AFA, Pub. L. 105-277, Div. C, Title II, § 210(g).
8. From late 1998 to 2000, the North Pacific Fishery Management Council (Council) debated implementation of the AFA sideboards. (*Tr. Vol. I at 100; Tr. Vol. IV at 621; see also Agency Proposed Findings of Fact (PFF) 1*).
9. On January 5, 2000, the National Marine Fisheries Service (NMFS), a sub-agency within NOAA, published an emergency interim rule that provided definitions of the terms “AFA crab facility”, “AFA inshore or mothership entity”, “Indirect ownership standard”, “10 percent control standard”, and “Control”. (*Icicle Ex. 1 and 2*). Those provisions expired on December 24, 2000. See 65 Fed. Reg. 380 (Jan. 5, 2000); 65 Fed. Reg. 39,107 (Jun. 23, 2000) (extending effective dates of emergency interim rules).
10. From December 24, 2000 through January 28, 2003, neither the AFA nor its implementing regulations provided a definition of “control”. See 65 Fed. Reg. 380; 65 Fed. Reg. 39,107; 67 Fed. Reg. 79,692 (December 30, 2002) (Final Rule implementing the AFA).
11. On December 30, 2002, the final rule implementing the AFA was published. The final rule contained working definitions of “affiliation for the purpose of defining AFA entities,” “10-percent or greater ownership”, “indirect interest”, and “control”. See 67 Fed. Reg. 79,692 (December 30, 2002).

B. The Brown King Crab Fishery

12. The Aleutian brown king crab fishery is divided into two districts: eastern and western. (*Tr. Vol. VIII at 64, and 176-77; see also Icicle Seafoods PFF 7*).⁷
13. The brown king crab fishery season annually begins in the eastern district on August 15 with deliveries made to processors in Dutch Harbor. (*Tr. Vol. IV at 689; Tr. Vol. VIII at 63-64, 177, and 180; see also Icicle Seafoods PFF 7*). Once the guideline harvest level (GHL) is reached, the fishery closes and fishing efforts move to the western district. (*Id.*).
14. The brown king crab fishery season typically begins in the western district around mid-September and lasts through early March or until the GHL is reached, whichever occurs first. (*Id.*).
15. In the mid-1990s, the State of Alaska and NMFS shifted the line between the eastern and western districts – moving the western district further west, closer to Adak, Alaska. (*Tr. Vol. VIII at 176-77; see also Icicle Seafoods PFF 8*).

⁷ Brown King Crab is also referred to as Golden King Crab throughout the administrative record. (*Tr. Vol. I at 117-18*).

16. The proximity of Adak to the western Aleutian brown king crab fishing grounds made it a prime location. (*Id.*; *Tr. Vol. IV* at 639; *Solberg Dep. Ex. 32* at 2; *Hansen Dep. at 15*; *Cosgrove Dep. at 22*; *Agency Ex. 32* at 26; see also *Icicle Seafoods PFF 8*, *Agency PFF 16*).

II. SEAFOOD PROCESSING ON ADAK:1998-December 2001

17. Mr. Kjetil Solberg is a Norwegian citizen who immigrated to Adak in 1998. (*Tr. Vol. III* at 404; *Agency PFF 12*).
18. From 1998 through December 2001, Mr. Solberg custom processed both fish and crab under the rubric of several seafood companies that he established on a former Naval Air Facility in Adak, Alaska. Those companies included: a) Adak Seafoods, LLC (Adak Seafoods); b) NorQuest-Adak, Inc. (NAI); and c) Adak Fisheries Development Company, LLC (AFDC). (*Tr. Vol. III* at 404-410, 416, 421; *Tr. Vol. VIII* at 175-78, 185; *Tr. Vol. IX* at 109-19; *Solberg Dep. at 10-13*; *Solberg Dep. Ex. 2, 30 and 31*; *Moller Dep. at 8, 11-12*; *Cosgrove Dep. at 10, 13, 16-17, 21*; *Hansen Dep. at 13-14*; *Loncon Dep. at 13*; *ALJ Ex. 2*; *Agency Ex. 1, 29, 30, 40, 42*; *Icicle Ex. 16* at 3; see also *Icicle Seafoods PFF 1, 3, 5, 6, 11-13, 18, 21-25*).
19. Custom processing is the processing of crab by a person/facility undertaken on behalf of another person/facility. (*Tr. Vol. VII* at 173; *Tr. Vol. IX* at 110-12; see also 50 C.F.R. § 680.2; *Icicle Seafoods PFF 9*).
20. In 1999, Mr. Solberg and Irgen Iversen jointly doing business as (d/b/a) Adak Seafoods custom processed western Aleutian brown king crab for Westward Seafoods, Inc. (Westward) pursuant to a written agreement. (*Tr. Vol. III* at 404-05; *Tr. Vol. VIII* at 175-76; *Agency Ex. 40*; *Icicle Ex. 16* at 3; see also *Icicle Seafoods PFF 1, 3, and 5*).
21. In 2000, Mr. Solberg and NorQuest Seafoods jointly (d/b/a NAI) custom processed western Aleutian brown king crab pursuant to agreements with two separate companies, Westward and Orca Bay. (*Tr. Vol. IX* at 116-17; *Agency Ex. 42*; *Cosgrove Dep. at 13, 16-17*; *Hansen Dep. at 13-14*; see also *Icicle Seafoods PFF 13*). The custom processing fee for brown king crab varied between \$.80 to .90 per pound depending on volume. (*Tr. Vol. III* at 415; *Tr. Vol. IX* at 113; *Agency Ex. 42*; see also *Icicle Seafoods PFF 13*).
22. In 2001, AFDC, solely owned and operated by Mr. Solberg, custom processed western Aleutian brown king crab for Royal Aleutian Seafoods, the F/V *Ocean Olympic*, and Westward. (*Tr. Vol. VIII* at 178, 185; *Agency Ex. 29, 30, 43 and 74*; *Cosgrove Dep. at 10 and 21*; *Loncon Dep. at 13*; *Solberg Dep. Ex. 30 and 31*; see also *Icicle Seafoods PFF 22-25*). The custom processing fee varied between \$.90 to .98, depending on volume. (*Tr. Vol. VIII* at 184-85; *Tr. Vol. III* at 433-35; *Agency Ex. 44*; *Agency Ex. 74*; *Solberg Dep. at 29 and 34*; see also *Icicle Seafoods PFF 23 and 25*).

23. Mr. Solberg recognized the market potential on Adak and desired to grow his business by seeking a partnership with an established seafood processor. (*Solberg Dep. at 11-12; see also Icicle Seafoods PFF 10*).
24. One company that Mr. Solberg sought a business relationship with was NorQuest Seafoods. (*Tr. Vol. III at 409; Tr. Vol. IX at 109-19, 114; Solberg Dep. at 10-13; Solberg Dep. Ex. 2; Moller Dep. at 11-12; ALJ Ex. 2; see also Icicle Seafoods PFF 11-12*). However, that joint venture proved unsuccessful. (*Tr. Vol. III at 418; Tr. Vol. IX at 116, 122, and 169-72; Solberg Dep. at 226-27; Icicle Ex. 83; see also Icicle Seafoods PFF 16, 17*).
25. The other company was Icicle Seafoods, Inc. (*Tr. Vol. III at 418; Tr. Vol. IX at 116, 122, and 169-74; Solberg Dep. at 226-27; Icicle Ex. 83; see also Icicle Seafoods PFF 16, 17*).
26. Icicle is a multi-million dollar seafood company headquartered in Seattle, Washington. (*Agency Ex. 97; Agency PFF 11*).
27. Mr. Solberg repeatedly advised Icicle representatives of the lucrative potential presented by the western Aleutian brown king crab market in Adak. (*Tr. Vol. III at 438; Tr. Vol. IX at 170; Giles Dep. Ex. 2-4, 6 and 7; Agency Ex. 23; see also Agency PFF 15*).

III. ADAK FISHERIES, LLC: December 2001-February 2004

28. On December 5, 2001, Mr. Solberg and Icicle jointly established Adak Fisheries, LLC. (*Tr. Vol. VII at 133-38 and 145-54; Tr. Vol. IX at 170 and 174-75; Giles Dep. at 16-17; ALJ Ex. 6; see also Agency PFF 9; Icicle Seafoods PFF 28 and 32-40*).

A. Fisheries Leases the Adak Facility

29. On or about December 28, 2001, Fisheries entered into a five (5) year lease agreement with the Aleut Enterprise Corporation (AEC) for real property, facilities, and certain equipment (including several vehicles and forklifts) on the former Naval Air Facility in Adak. (*ALJ Ex. 9; Moller Dep. at 17*).
30. The lease premises consisted of Bay # 1 and #2 of the Blue Shed (also known as the Adak plant), the Cold Storage building, the storage yard between Bay # 2 of the White Shed and Bay # 2 of the Red Shed (including access), the Sub Packing Building, Pier #5, 31 housing units, and an easement. (*ALJ Ex. 9, Ex. A at A-1*).
31. The base rent for the entire premises and equipment was \$ 9,000 per month until the 2004 Lease Term, at which time Fisheries was responsible to pay additional rent equaling the difference between 30% of its profits and the base rent. (*ALJ Ex. 9, Ex. D; Agency PFF 59*).

32. The lease contained an exclusive for pollock and cod, which prohibited AEC from leasing any premises on Adak to any other pollock or cod seafood processing company without Fisheries' consent. (*ALJ Ex. 9 at 3; Agency PFF 65 and 66*).
33. The lease also required Fisheries to operate the processing plant year-round during commercially reasonable times, and prohibited Fisheries from subletting the premises or portion thereof, without AEC's prior written approval. (*ALJ Ex. 9 at 4; Moller Dep. 34-35*).
34. Under section II(24)(c) of the lease agreement, Icicle was to indemnify and hold The Aleut Corporation (TAC) harmless from any and all responsibility, liability, costs, claims and damages of any kind asserted against TAC by any person or entity relating to or arising out of the presence of any hazardous substances on the Adak premises, or that has migrated from the premises caused by Fisheries actions or inactions. (*ALJ Ex. 9 at 9; Tr. Vol. II at 212*).
35. The lease agreement was signed by Mr. Don Giles (president of the Manager – Icicle), on behalf of Fisheries. (*ALJ Ex. 9 at 3*). As president of Icicle, Mr. Giles also assented to the provisions of section II(24)(c). (*ALJ Ex. 9 at 14*).

B. Fisheries Purchases NAI Assets

36. On or about December 28, 2001, Fisheries purchased NAI's assets for 1.7 million dollars. (*ALJ Ex. 12*).
37. The purchased assets included certain machinery, equipment, tools, furniture, furnishings, motor vehicles, consumables, and supplies located at the Adak facility. (*Id.*).
38. The purchased assets also included "any and all rights, privileges and processing histories of any nature, whether now existing or hereafter arising, related to the ownership, operations or use of the Adak Facility by Seller, or acquired by the Seller from its predecessor-in-interest, Adak Seafoods, LLC." (*Id. at 2*).
39. In this industry, history is a valued asset because it determines future entitlement to fishery resources based on one's historical level of participation in that particular fishery. (*Tr. Vol. I at 112*). For instance, the crab processing caps established by NMFS for each processor or vessel under the AFA was exclusively based on the entity's processing history between the years 1995 through 1998. (*Tr. Vol. I at 117-18; Agency Ex. 5*).

C. The Organizational Structure and Agreements

40. Five (5) agreements (collectively called "Adak Agreements") defined the companies' organizational structure: (1) the LLC Agreement (*ALJ Ex. 6*); (2) the Management Agreement between Icicle and Adak Fisheries (*ALJ Ex. 7*);

(3) the Employment Agreement between Mr. Solberg and Fisheries (*ALJ Ex. 8*); (4) the Sublease Agreement between Fisheries and AFDC; and the (5) Crab Processing Agreement.

41. Icicle and Mr. Solberg actively participated in negotiating the terms of the five documents that were all drafted by Icicle. (*Tr. Vol. I at 139-40; see also Agency PFF 25*).

1. **The LLC Agreement**

42. Under the LLC Agreement, Icicle and Mr. Solberg owned Adak Fisheries fifty-fifty (50-50). (*ALJ Ex. 6; see also Agency PFF 10*). As partners, the LLC Agreement contemplated that Icicle and Mr. Solberg would be entitled to an equal share of the profits. (*ALJ Ex. 6; Tr. Vol. VIII at 46; Icicle PFF 46*).
43. Under the LLC Agreement, major decisions required approval of a majority interest. (*ALJ Ex. 6 at 6*). Major decisions include: a) requiring additional Capital Contributions; b) admitting new Members; c) making distributions; d) entering into or amending a written agreement or contract; e) borrowing money; f) acquiring, selling, transferring, or leasing property valued in excess of \$10,000; and g) dissolving the company. (*Id.*).
44. The LLC Agreement also required Icicle and Mr. Solberg to each pay a capital contribution of \$200,000. (*ALJ Ex. 6; see Agency PFF 26*).
45. Icicle paid the \$200,000 capital contribution. (*Tr. Vol. VIII at 47-48, see also Agency PFF 27 and 28*).
46. Mr. Solberg paid \$200,000 but only \$75,000 was credited toward his capital contribution. (*Tr. Vol. VIII at 43-48, see also Agency PFF 27 and 28; Icicle PFF 63*). The remaining \$125,000 went toward the purchase of crab processing equipment in accordance with the crab processing agreement dated December 4, 2001, entered into between Fisheries and AFDC. (*Tr. Vol. VIII at 43-48, 53-58, ALJ Ex. 10; see also Agency PFF 27 and 28*).⁸
47. Mr. Solberg's residual capital contribution of \$125,000 remained outstanding and was not paid in accordance with the terms of the LLC Agreement. (*Tr. Vol. VIII at 47-50, and 229; see also Agency PFF 29*).

2. **The Management Agreement**

48. In late December 2001, a management agreement was executed whereby Icicle served as manager of Fisheries. (*ALJ Ex. 7; Tr. Vol. II at 210*).

⁸ The purchase of the crab processing equipment will be discussed in further detail in III(C)(5) of the findings of fact.

49. As the manager, Icicle was responsible for supervising, directing, and controlling the management and operation of Fisheries, including, but not limited to: a) maintaining the company's books and records (including the company's bank account); b) maintaining the member's capital accounts; c) preparing and distributing the company's financial statements; d) approving sales of the company's products; e) purchasing tangible personal property and consumables; and f) maintaining the company's insurance and required operational licenses. (*ALJ Ex. 7 at 1-2*).
50. As manager of Fisheries, Icicle received an annual salary of \$300,000, which could be increased based on approval by the company or the Chief Executive Officer (CEO). (*Id. at 2*).

3. **The Employment Agreement**

51. In December 2001, Fisheries and Mr. Solberg executed an employment agreement making Mr. Solberg Chief Executive Officer (CEO) of Fisheries. (*ALJ Ex. 8*).
52. Under the employment agreement, Mr. Solberg was an "at-will" employee of Fisheries who could be terminated at any time with 45 days notice by the managing partner of Fisheries, Icicle. (*ALJ Ex. 8 at 1, 2-3; Tr. Vol. II at 218-19; see also Agency PFF 21*).
53. Mr. Solberg served as the CEO of both Fisheries and AFDC and managed the daily operations of both companies. (*ALJ Ex. 8 at 1-2; Entire Transcript; Agency PFF 18*).
54. As CEO of Fisheries, Mr. Solberg received an annual salary of \$300,000, which under the original employment could be reduced by his net income from crab processing. (*ALJ Ex. 8 at 3; see Agency PFF 19 and 120*). Further, any annual salary increases were subject to the approval of the Fishery or its managing partner, Icicle. (*ALJ Ex. 8 at 3*).
55. Conversely, as CEO of AFDC, Mr. Solberg received no salary but as the sole owner he was entitled to profits, if any were realized. (*Agency PFF. 20*).

4. **The Sublease Agreement**

56. In late December 2001, Fisheries and AFDC entered into a two (2) year sublease agreement for Bay # 1 of the Blue Shed. No security deposit was required and the sublease agreement could be terminated at any time by either party upon thirty (30) days written notice. (*ALJ Ex. 11; Tr. Vol. II at 217-18; Tr. Vol. V at 9; Agency PFF 67, 70, and 75*).
57. Dennis Guhlke, Chief Financial Officer (CFO) of Icicle, set rent for Bay # 1 of the Blue Shed at \$ 5,000 per month. (*Tr. Vol. VIII at 230-32; ALJ Ex. 11 at 2; ALJ Ex. 10 at 2; Agency PFF 60 and 62*). This amounted to more than half

of the rent that Fisheries paid AEC for lease of the entire premises, including equipment. (*Compare ALJ Ex. 9 to ALJ Ex. 11*).

58. Fisheries did not obtain prior approval from AEC before entering into the sublease agreement with AFDC as required in section II(9) of the lease agreement between Fisheries and AEC. (*Tr. Vol. II at 216; Moller Dep. at 34-35; ALJ Ex. 9 at 4*).
59. Under the terms of the agreement, Blue Shed Bay # 1 was subleased to AFDC for crab processing only. This meant that AFDC could only operate approximately six to eight months during the year (i.e. during the western district's crab season). (*ALJ Ex. 11; Tr. Vol. VIII at 64, 177, 231; Tr. Vol. IX at 142-43; Agency PFF 61, 63, 64, and 75*).
60. This prohibition on AFDC processing anything other than crab prevented the company from becoming an economically viable enterprise. (*Solberg Dep. Vol. I at 88-89; Tr. Vol. IX at 142-43; Agency Ex. 32 at 52-53; Agency PFF 122-29, 132-34*).
61. Mr. Solberg only agreed to operate AFDC as a separate crab processing operation based on Fisheries' guarantee of support. (*Solberg Dep. Vol. II at 157-58; Agency PFF 124-29*).
62. The agreement allowed Fisheries to fulfill its obligations to AEC pursuant to the lease agreement that required the Adak facility to be operated year round during commercially reasonable times. (*ALJ Ex. 9; Agency PFF 142*).

5. **The Custom Processing Agreement**

63. During 2002 through 2004, Icicle was an AFA entity that had an annual crab cap of 221,901 pounds for western Aleutian brown king crab. (*Agency Ex. 5, 17, 18, and 84; see also Agency PFF 14; Icicle PFF 44; Agency Proposed Conclusion of Law ("PCL") 7*).
64. The 50% ownership by Icicle of Fisheries made that company an affiliated AFA entity subject to Icicle's crab cap. (*Leitzell Dep Ex. 1; see also Agency PFF 13*).
65. Icicle was aware that if Fisheries and AFDC were determined to be a single entity or if AFDC was determined to be controlled by Fisheries or Icicle, then AFDC would be subject to Icicle's crab processing cap as an affiliate. (*Tr. Vol. X at 20; Icicle Ex. 26; Agency PFF 7; Icicle PFF 44; Agency PCL 9*).
66. Icicle acknowledged that complete control was not required and the AFA would be triggered by exertion of a minimal amount of control (i.e., 10%). (*Icicle Ex. 26; Tr. Vol. VII at 75; Agency PFF 8*).

67. In an analysis dated November 15, 2001, Icicle identified the joint ownership of Adak Fisheries, the employment contract with Mr. Solberg, the sublease agreement between AFDC and Fisheries, the use of employees, the crab equipment, and the custom processing agreement between AFDC and Fisheries as potential sources of control. (*Icicle Ex. 26*). However, Icicle concluded that no control existed over AFDC. (*Id.*).
68. A plan was developed wherein AFDC processed western Aleutian brown king crab purchased by Fisheries. (*Tr. Vol. III at 568; Tr. Vol. VI at 187; Tr. Vol. X at 20; Agency PFF 17; Icicle PFF 45*).
69. Icicle believed that the crab processing cap limited the amount of brown king crab Fisheries could process but did not limit the amount of brown king crab that could be purchased from AFDC. (*Tr. Vol. X at 24; Icicle PFF 44*).
70. The crab processing arrangement was a temporary solution to satisfy NMFS requirements and AFDC was to be a “sleeper” until implementation of the “crab negotiation plan” when the company could later be rejoined with Fisheries. (*Tr. Vol. III at 455-56, 468, and 475-76; Agency Ex. 46; Agency PFF 22*).
71. On December 4, 2001, a crab processing agreement was executed between Fisheries and AFDC. (*ALJ Ex. 10*). The terms of the sublease agreement were incorporated into the crab processing agreement. (*ALJ Ex. 10 at 2*).
72. Under the terms of the crab processing agreement, Fisheries sold the crab processing equipment to AFDC for \$125,000 but retained the right to repurchase the crab processing equipment upon thirty (30) days written notice for the original sale price of \$125,000. The right to repurchase not only applied to the crab processing equipment, it also extended to any items that AFDC purchased or received from the sale, transfer, or exchange of the crab processing equipment. (*ALJ Ex. 10 at 1; Tr. Vol. III at 464-65; Tr. Vol. IV at 799-802; Agency PFF 91 and 92*).
73. Under the terms of the crab processing agreement, Fisheries also maintained the right of first refusal with respect to the crab processing equipment. (*ALJ Ex. 10 at 1; Tr. Vol. III at 464-65; Tr. Vol. IV at 799-800; Agency PFF 95*). AFDC was required to provide Fisheries with forty-five (45) days notice prior to any sale of said equipment. (*Id.*).
74. Further, under the terms of the crab processing agreement, AFDC and Mr. Solberg agreed to transfer all processing histories, other than those related to crab, to Fisheries. (*ALJ Ex. 10 at 2 and 3; Agency PFF 93*). This provision was expected to eventually include a transfer of AFDC’s crab processing history. (*Tr. Vol. III at 468*).
75. Moreover, under the terms of the crab processing agreement Fisheries provided administrative services to AFDC for crab processing operations

conducted under the sublease agreement. The administrative services included, without limitation, maintaining AFDC's books and records (including paying accounts payable and collecting accounts receivable), acquiring and maintaining necessary insurance, maintaining equipment, providing necessary utilities, and providing employees to process and handle crab. (*ALJ Ex. 10 at 2*; *see also Agency PFF 42*).

76. The fee for administrative services was not set out in the agreement. (*ALJ Ex. 10*; *Tr. Vol. V at 31*; *Agency PFF 44*). Further, Fisheries was required to supply AFDC a written invoice on a monthly basis for administrative services which AFDC was required to pay within ten (10) days after receipt of the invoice. (*ALJ Ex. 10 at 2*; *see also Agency PFF 30*).
77. With respect to recruitment, hiring and paying employees, AFDC was required to pay Fisheries cost plus twenty percent (20%) for those services. (*ALJ Ex. 10 at 2*; *Tr. Vol. IV at 801*; *Agency PFF 106*). This fee was set by Mr. Guhlke of Icicle. (*Solberg Dep. Vol. I at 125*; *Agency PFF 105*).
78. The crab processing agreement also contained an indemnity clause whereby Fisheries was required to: 1) indemnify and hold AFDC harmless for any damages arising out of any injury to any employee provided to AFDC by Fisheries; 2) indemnify and hold AFDC harmless for any damages asserted against AFDC in connection with the crab processing, unless such damages result from AFDC's gross negligence or willful misconduct; and 3) maintain insurance policies on all of AFDC's equipment and products. (*ALJ Ex. 10 at 2*; *Tr. Vol. IV at 801-02*; *Agency PFF 71, 91 and 100*).
79. The crab processing agreement did not set forth the fee that Fisheries would pay for crab processed by AFDC. (*ALJ Ex. 10*; *Tr. Vol. III at 475-76, 564*; *Tr. Vol. IV at 802*; *Tr. Vol. V at 30*; *Agency PFF 36*).
80. In an arms length transaction, the processing fee would have been specified in the written agreement. (*Tr. Vol. IV at 802*; *Tr. Vol. V at 31*; *see e.g. Agency Ex. 63, 66, and 74*; *Agency PFF 37 and 38*).
81. Icicle determined that the Community Development Quota (CDQ) rate was the most appropriate fee for crabs processed by AFDC for Fisheries and Mr. Solberg verbally agreed to the terms. (*Tr. Vol. III at 564-65*; *Tr. Vol. IV at 599-601*; *Tr. Vol. VII at 112*; *Tr. Vol. VIII at 119-20*; *Tr. Vol. X at 38*; *Solberg Dep. Vol. I at 79-80*; *Icicle PFF 69*).
82. On December 7, 2001, Mr. Terry Leitzell (General Counsel for Icicle) allegedly spoke to Mr. Kent Lind, who was NMFS designated lead person on implementation of the AFA. Ostensibly, the discussion lasted for 5 to 10 minutes and occurred in a Hilton Hotel hallway by a piano where everyone congregates during Council meetings. During the purported discussion, Mr. Leitzell showed Mr. Lind a diagram depicting ownership interest among

several companies and illustrating that AFA affiliation does not flow upstream. (*Tr. Vol. VI at 212-21; Leitzel Dep. at 16-21; Icicle 30 and 31; Agency PFF 51a – 51i; Icicle PFF 51*). Mr. Lind was not shown any contractual agreements between Fisheries and AFDC. (*Tr. Vol. VII at 88-90; Leitzell Dep. at 20; Agency PFF 51c-51e*).

83. Icicle states that Mr. Lind agreed that the structure depicted in the diagram was legitimate under the AFA and that there was no problem with Mr. Solberg serving as CEO of Fisheries and AFDC. (*Tr. Vol. VI at 219-20*). Mr. Lind has no recollection of the discussion. (*Tr. Vol. I at 120; Agency PFF 51e*).
84. Mr. Leitzell was fully aware that Mr. Lind was not in a position to provide a legally binding opinion concerning the Adak structure. (*Tr. Vol. VI at 220-21; Leitzell Dep. at 59; Agency PFF 51g*).

D. Implementation of the Agreements

85. In January 2002, Fisheries and AFDC commenced operations under the Adak Agreements. (*Tr. Vol. III at 7; ALJ Ex. 6-11; Icicle PFF 56*).
86. Fisheries and AFDC was an integrated operation, and Icicle was an integral part of the seafood operations on Adak. (*Entire Administrative Record*).
87. As manager of Fisheries, Icicle established the payroll, purchasing, accounting, and computer systems, and performed all other administrative functions. (*Tr. Vol III at 483; Tr. Vol. VIII at 10; Guhlke Dep. at 28; Guhlke Dep. Ex. 8; see also Agency PFF 50*). Icicle timecards and time clock were used for payroll purposes. (*Tr. Vol. VIII at 11*). Icicle forms were also used for personnel matters. (*Tr. Vol VIII at 12; see e.g. Agency Ex. 16*).
88. As manager of Fisheries, Icicle assumed the responsibilities of providing administrative services to AFDC. This included, without limitation, the responsibility to perform accounting, payroll, collections, booking functions, and providing employees for AFDC's crab operations on behalf of Fisheries. (*Tr. Vol. III at 483, 519-21, 585; Tr. Vol. VIII at 74-75, 77, 80-81, and 85-91; Agency Ex. 16; Guhlke Dep. at 28; see also Agency PFF 50, 77 and 78; Icicle PFF 57*).
89. To perform administrative services for AFDC on behalf of Fisheries, Icicle replaced AFDC's computer and accounting systems with its own. (*Tr. Vol. I at 181; Tr. Vol. VIII at 7, 9-13, 29-31; Agency Ex. 12; Guhlke Dep. Ex. 8; see also Agency PFF 51; Icicle PFF 56*). Icicle's personnel action forms were also used for employee related matters. (*Agency Ex. 16*).
90. Approximately 12 employees are needed to operate the crab line. (*Solberg Dep. Vol. I at 20; Agency PFF 96a*).

91. Pursuant to the crab processing agreement, from January 2002 until September 2003, Fisheries hired the employees that performed services for both AFDC and Fisheries. Fisheries did not have to recruit employees; they were all former employees of Mr. Solberg. (*Tr. Vol. III at 519-21*). Fisheries also paid those employees wages and living expenses. AFDC had no employees of its own. (*Tr. Vol. I at 180-81; Agency Ex. 12; Agency PFF 76*).
92. Pursuant to the crab processing agreement, Fisheries paid AFDC's workmen compensation and general liability insurance, and also paid the insurance for the crab processing equipment. As manager of Fisheries, Icicle was responsible for writing the check from a Fisheries bank account. (*Agency Ex. 12 at 28*).
93. Fisheries owned the totes, forklifts, and scales used by AFDC in its crab processing operations. (*Tr. Vol. III at 539; Agency PFF 72*).
94. AFDC had no credit line and necessarily depended on Fisheries for support. (*Agency Ex. 48; Solberg Dep. Vol. II at 157-58; Agency PFF 68 and 124-29*).
95. Fisheries paid all AFDC's operating expenses, including utility, rent, supplies, shipping costs, insurance, and other expenses. Fisheries then sought reimbursement at the end of the year. (*Tr. Vol. III at 541; Agency Ex. 36 and 68; Solberg Dep. Vol. I at 104 and 109; Agency PFF 79, 110-12, and 114-16*).
96. Employees, fishermen, and companies that conducted business on Adak believed that Icicle and AFDC merged together. (*Agency Ex. 12 at 25-28; Agency Ex. 32 at 39; Agency PFF 130*). Icicle was viewed as a partner in the crab processing operation. (*Id.*).
97. Icicle was instrumental in assuring fishermen that they received prompt payment for crab deliveries made to Adak. (*Agency Ex. 29-31; Agency PFF 82 and 83*).
98. Purchase requisitions were sent to Icicle, who was responsible for paying the fishermen, including brown king crab fisherman. The payment was issued on a Fisheries bank account check. (*Agency Ex. 12 at 9-11*).
99. Icicle representatives also reviewed and made recommendations concerning draft custom processing contracts between AFDC and its customers. (*Agency Ex. 52-65; Agency PFF 84*).
100. Fisheries provided services that are indicative of crab processing operations. (*Agency Ex. 638*). Those services included selling crab bait and making cash advances to crab harvesters making deliveries to Adak. (*Tr. Vol. IV at 638; Tr. Vol. X at 149-50; Agency Ex. 89-92 and 109; Agency PFF 107-10*).

101. Icicle personnel were responsible for marketing the crab that was custom processed by AFDC on behalf of Fisheries. (*Tr. Vol. III at 542; Agency PFF 113*).
102. Although the crab processing agreement required monthly invoices to be submitted to AFDC for administrative services, monthly invoices were never provided, and Mr. Solberg never requested an itemized accounting. (*ALJ Ex. 10 at 2; Tr. Vol. VIII at 107-12, 216, and 220; see also Agency PFF 58*).
103. In December 2002, a single written invoice was provided to AFDC. (*Agency Ex. 68; Solberg Dep. Vol. II at 162; Agency PFF 31, 53*). The invoice shows that Mr. Solberg's compensation as CEO of Fisheries was reduced by \$150,000 and AFDC owed Fisheries a balance of \$14,106.27 for administrative services and expenses. (*Agency Ex. 68; Agency PFF 49*).
104. In that same invoice, AFDC was charged \$150,000 for administrative services performed by Icicle on behalf of Fisheries. (*Agency Ex. 68; Tr. Vol. VIII at 104; Guhlke Dep. at 28-28; see also Agency PFF 46 and 53*). This amounted to half of what Icicle charged Fisheries for similar administrative services. (*Compare ALJ Ex. 7 at 2 with Agency Ex. 68; Agency PFF 47*).
105. Mr. Guhlke set the fee for administrative services after services were rendered to AFDC for one year. (*Tr. Vol. VIII at 104; see also Agency PFF 45*).
106. While Icicle and Fisheries were not involved in preparing AFDC and Mr. Solberg's tax returns, Mr. Guhlke was responsible for: 1) introducing Mr. Solberg to the accountant who prepared the tax returns; and 2) provided accounting information concerning AFDC's crab operations to said accountant. (*Tr. Vol. VIII at 93-98; Tr. Vol. IX at 12-20; Icicle PFF 59*).
107. Although AFDC maintained a bank account with First National Bank of Anchorage, a separate bank account was established for AFDC at U.S. Bank in Seattle. (*Icicle Ex. 46; Agency Ex. 27; Tr. Vol. VIII at 92; Icicle PFF 60 and 61*). The signatories on this account were Mr. Solberg, Mr. Giles, Mr. Guhlke, and Ms. Debbie Larsen, Icicle's Controller. (*Agency Ex. 27; Tr. Vol. VIII at 92; Icicle PFF 61; Agency PFF 119*). AFDC's separate account was not used. (*Agency Ex. 12 at 9, 12-15; Tr. Vol. III at 525*).
108. Mr. Solberg admits that his focus was on building Fisheries because AFDC was expected to eventually merge into Fisheries. (*Tr. Vol. III at 468 and 480; Agency PFF 22*). Therefore, he paid little attention to what Fisheries was charging AFDC. (*Tr. Vol. III at 567; Agency PFF 55-56*). An example of his lack of attention to details is exemplified by the fact that for a short period in 2003, Mr. Solberg allowed AFDC to be involuntarily dissolved when he failed to file a bi-annual report with the State of Alaska. (*Agency Ex. 10; see also Agency PFF 34 and 35*).

E. Crab Processing by AFDC in 2002

109. From February 4 through December 18, 2002, on forty-one (41) separate occasions, AFDC processed and/or custom processed a total of 1,544,957 pounds of Western Aleutian Island brown king crab in excess of Icicle's cap of 221,901 pounds (Tickets #: C01001877-C01001905, C01001918-C01001925, C99012193-C99012196). (*ALJ Ex. 10; Agency Ex. 33a at 4-18*).
110. Consistent with its plan to purchase as much crab as possible on Adak, Fisheries represented nearly eight-five percent (85%) of AFDC's business. (*Tr. Vol. III at 484-85; Agency Ex. 33a; Solberg Dep. Vol. II at 155; Agency PFF 68a; 69, 137 and 138*).
111. The custom processing fee for 2002 was a flat rate of seventy-nine (79) cents per pound. (*Icicle Ex. 79, App. A; but see Solberg Dep. Vol. I at 79-80; Tr. Vol. III at 476; Tr. Vol. IX at 46-47*). This was less than what AFDC charged in the past under custom processing agreements with other companies. (*Agency Ex. 25, 26, and 89-95; Agency PFF 41*).

F. Remedial Measures

112. In March 2003, Icicle learned that an investigation was being conducted on possible violations of the AFA. Icicle was very cooperative. (*Tr. Vol I at 164; Tr. Vol. II at 302 and 357-58; Agency Ex. 5 at 6; Icicle PFF 70*).
113. On August 11, 2003, Mr. Garland Walker of NOAA General Counsel's Office, Mr. Gerald Hellerman, and Agent Ernie Soper met with Icicle's representatives, Mr. Solberg, and Mr. Chris Kim (attorney for Mr. Solberg). At the conclusion of the meeting, Mr. Hellerman identified some areas of concern with respect to the Adak structure and agreements. Respondents were advised that the list of suggestions was neither exhaustive nor inclusive, and implementation of the suggestions would not remedy past violations. (*Tr. Vol. VI at 8, 13-17, 20; Tr. Vol. VII at 51-58; Walker Dep. at 27-40; Hellerman Dep. 128-36; Icicle Ex. 21; Hellerman Dep. Ex. 4; Icicle PFF 80*).
114. In an effort to achieve compliance, Fisheries, AFDC, and Mr. Solberg amended the following agreements: 1) the Custom Processing Agreement; 2) the LLC Agreement; and 3) the Employment Agreement. (*ALJ Ex. 13-15*). The parties planned to submit the amended agreements to NOAA General Counsel for review. (*Icicle Ex. 44 and 45; Walker Dep. at 44*).
115. The agreements were not submitted to NOAA for review until December 2003. (*Walker Dep. at 45-47; Walker Dep. Ex. 9; Icicle PFF 90; Agency PFF 90a-90e; but see Icicle 20*). The Agency did not complete its review until February 28, 2004. (*Walker Dep. at 51; Agency PFF 90b*).
116. In the interim, Respondents continued to process crab through AFDC. (*Agency Ex. 33 and 33a*).

1. *The Amended and Restated Processing Agreement*

117. Effective as of August 15, 2003, an Amended and Restated Processing Agreement between Fisheries and AFDC (Amended Processing Agreement) was executed. (*ALJ Ex. 14*).
118. The Amended Processing Agreement established the following rates for crabs custom processed by Fisheries during the 2003-2004 seasons:
- | | |
|--------------------------------|-----------|
| Below 500.00 lbs of round crab | .95\$/Lbs |
| 500.00+ | .90\$/Lbs |
| 1 mil lbs + | .85\$/Lbs |
- (*ALJ Ex. 14 at 1*). The rate was to be invoiced at expected numbers. (*Id. at 2*). If Fisheries was expected to buy 1 mil+ Lbs, a flat rate of .85 cents would apply and Fisheries was to provide its own fiber/packaging. (*Id.*).
119. The Amended Processing Agreement required costs to be calculated on a monthly basis and invoiced quarterly. (*Id.*). These costs included utility for operation of the crab broiler, packaging supplies for crab not processed for Fisheries, and maintenance of the crab processing equipment. (*Id.*).
120. Pursuant to the Amended Processing Agreement, AFDC hired two employees (a foreman and a quality control person) to supervise the operation of the crab line. (*Tr. Vol. III at 527-29 and 537; ALJ Ex. 14 at 2; Agency Ex. 15 and 67; Agency PFF 102*). The supervisors were required under the terms of the agreement to be loaned to Fisheries when they were not engaged in supervising crab processing. (*ALJ Ex. 14 at 2*).
121. Also, under the Amended Processing Agreement, Fisheries continued to loan employees to AFDC as needed for crab processing. (*Agency Ex. 14 at 2*). But if fish was being processed and employees could not be reasonably spared, Fisheries could withhold employees from AFDC. (*Id.*). The rate for the employees loaned to AFDC was prorated dependent on the actual hours spent on crab processing. (*Id.*).
122. With respect to the crab processing history, AFDC retained the rights to such history. (*Id at 2-4*).
123. Conversely, with respect to the crab processing equipment, Fisheries maintained the right of refusal on the sale, transfer, or exchange of the equipment. (*Id at 4*). Furthermore, the right to require Fisheries to repurchase the crab processing equipment for the original sale price of \$125,000 was directly linked to Mr. Solberg's continued tenure at Fisheries. (*Id at 4*). Fisheries also continued to maintain insurance on the crab processing equipment. (*Tr. Vol. VIII at 213-14*).

124. The Amended Processing Agreement eliminated the administrative services provision contained in the original Crab Processing Agreement. (*Compare ALJ Ex. 10 at 2 with ALJ Ex. 14*). The administrative fee that Fisheries billed AFDC for the first seven months of 2003 (January through July) was “reversed”. (*Icicle Ex. 78; Tr. Vol. VIII at 149-52; Icicle PFF 91*).
125. Instead, the Amended Processing Agreement required AFDC to pay Fisheries an annual management fee to compensate Fisheries for services provided and incidental expenses including, but not limited to, telephone, computer support, use of Fisheries forklifts and other mobile equipment, office supplies, procurement of packaging, and other supplies. (*ALJ Ex. 14 a 4*).
126. The amount of the management fee depended on the amount of crab processed by AFDC during the calendar year and was set forth as follows:

Greater or equal to 500,000 lbs	\$ 50,000
Greater or equal to 400,000 lbs But less than 500,000 lbs	\$ 40,000
Greater or equal to 300,000 lbs But less than 400,000 lbs	\$ 30,000
Greater or equal to 200,000 lbs But less than 300,000 lbs	\$ 20,000
Less than \$ 200,000 lbs But greater than 0 lbs	\$ 10,000
0 lbs	\$ 0

(*ALJ Ex. 14 at 4*). Management functions continued to be performed by Icicle personnel on behalf of Fisheries. (*ALJ Ex. 13*).

2. The Amended and Restated LLC Agreement

127. The Amended and Restated LLC Agreement (Amended LLC Agreement) was nearly identical to the original LLC Agreement dated December 5, 2001. (*Compare ALJ Ex. 6 and 13*). One notable change in the Amended LLC Agreement was the definition of “Initial Members”. (*Id.*). The definition of “Initial Members” was expanded to include “Single Purpose Entities” as defined in Section 11.5.1. (*ALJ Ex. 13 at 4*). Section 11.5.1 governs “Permitted Transfers” and provides:

An Initial Member may transfer all of his, her or its Units to any corporation, limited liability company, or other entity that: (i) is wholly-owned by the Initial Member, (ii) owns, or will own, no assets other than the Units, and (iii) engages, or will engage in no business other than owning the Units (a “Single Purpose Entity”). Any such transfer must be completed no later than the date that is two (2) years from the date of the Original LLC Agreement. Any such transfer is subject to the requirements of Section 11.1, except the requirement of 11.1.2.⁹

3. The Amended Employment Agreement

128. The Amended Employment Agreement eliminated the salary offset contained in the original agreement between Fisheries and Mr. Solberg. (*ALJ Ex. 14; Tr. Vol. VII at 69; Icicle PFF 91*). This revision was effective retroactive to January 1, 2003. (*Icicle Ex. 78; Tr. Vol. VIII at 149-52; Icicle PFF 91*).

G. Crab Processing by AFDC in 2003 and 2004

129. From February 5 through December 19, 2003, on thirty-five (35) separate occasions, AFDC processed and/or custom processed 1,997,301 pounds of western Aleutian Island brown king crab in excess of Icicle’s crab cap established under section 211(c)(2)(A) of the AFA (Tickets #: C99012202-C99012209., C99012211-C99012217, C99012219, C00010974-C00010979, C01006206- C01006215). (*Agency Ex. 33a at 1-3, 20-31*).
130. The custom processing fee for the first six months of 2003 (January through June 30) was eighty (80) cents per pound. (*Icicle Ex. 79, App. A; Icicle PFF 69*). This was similar to what NAI charged in 2000. (*Tr. Vol. III at 415; Tr. Vol. IX at 113; Agency Ex. 42; see also Icicle Seafoods PFF 13*).
131. The custom processing fee for July 1, 2003 through December 31, 2003 was eighty-five (85) cents. (*Icicle Ex. 79, App. A*).

⁹ Section 11.1 governs prohibited transfers and 11.2.1 establishes the notice requirements concerning rights of first refusal. (*ALJ Ex. 13 at 22-23*). Sections 11.1, 11.2.1, and 11.5.1 were also contained in the original LLC Agreement. (*ALJ Ex. 6 at 20 and 23*).

132. From January 23 through February 8, 2004, on six (6) separate occasions, AFDC processed and/or custom processed 283,877 pounds of western Aleutian Island brown king crab in excess of Icicle's crab cap established under section 211(c)(2)(A) of the AFA (Tickets #: C01006219- C01006222, C01006224, C03000605). (*Agency Ex. 33a at 31-35*).
133. The custom processing fee for January 1 through June 3, 2004 was eighty-seven (87) cents. (*Icicle Ex. 79, App. A*).
134. In accordance with their customary practice, Icicle and AFDC did not settle their accounts until the end of the year even though monthly invoices were required pursuant to the Amended Processing Agreement. (*Agency Ex. 70*).

H. Mr. Solberg buys Icicle's Interests in Fisheries

135. In late March or early April 2004, Icicle offered to buy Mr. Solberg's interest in Fishers for \$5 million. (*Tr. Vol. X at 43-46; Giles Dep. at 122; Icicle PFF 97*). Mr. Solberg rejected Icicle's offer. Instead, Mr. Solberg triggered the shotgun provision of the LLC Agreement which allowed him to sell his interest in Fisheries or buy Icicle's interest in the company. (*Tr. Vol. III at 558; Tr. Vol. VII at 217-19; Tr. Vol. X at 45-46; Icicle PFF 97*).
136. Mr. Solberg elected to buy Icicle's interest in Fisheries for \$ 4.25 million. (*Agency Ex. 72; Tr. Vol. III at 559 and 564; Agency PCL 16; Icicle PFF 97 and 143*). The buyout closed on June 3, 2004, and Icicle ceased to be a member of Fisheries. (*Id.; Solberg Dep. Vol. I at 117*).
137. Throughout their business relationship, no cash directly passed between AFDC and Fisheries until the wire transfer on April 21, 2004. (*Solberg Dep. Vol I at 107; Agency Ex. 71; Agency PFF 118*).
138. From 2002 through 2004, Fisheries earned approximately \$1,407,399 million in net profit solely from the crab processed on Adak. (*Icicle Ex. 79, App. A; Agency PFF 139; Agency PCL 11*).

ATTACHMENT B – ADMINISTRATIVE REVIEW RIGHTS

15 CFR 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 the foregoing ORDER IN RESPONSE TO THE DEPUTY SECRETARY'S DETERMINATION AND ORDER has been served upon the following parties and entities (or their designated representatives) to this proceeding by third party commercial carrier in accordance with 15 C.F.R. 904.271(c):

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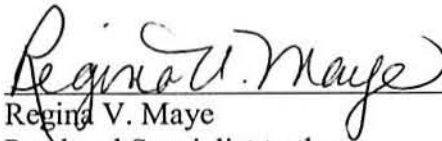
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Done and dated October 29, 2010
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