and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c)(2). The nonmoving party must go beyond the pleadings and provide specific facts showing that there is a genuine issue for trial. *Id.* at 56(e)(2); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case. *Celotex*, 477 U.S. at 322–23.

The court should not, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts. *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)). The nonmoving party's burden "is not satisfied simply by creating some metaphysical doubt as to the material facts or by providing only conclusory allegations, unsubstantiated assertions or merely a scintilla of evidence." *Id.* (citations omitted). A court will resolve factual controversies in favor of the nonmoving party "only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Id.* Finally, cross-motions for summary judgment are each reviewed "independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." *Ford Motor Co. v. Texas Dep't of Transportation*, 264 F.3d 493, 498 (5th Cir. 2001).

VII. DISCUSSION

Although Plaintiffs have clothed their arguments in numerous claims, the essential issues

that they contest and the corresponding forms of relief they seek fall into four broad categories: (1) whether they were entitled to hearings on the NOPS/NIDPs and NOVAs 1412 and 30369; (2) whether the Agency could issue the NOPS/NIDPs against all of the corporate Plaintiffs without making factual findings that the corporate veil could be pierced; (3) whether their ability to pay should have been considered in the hearings on NOVAs 50027 and 43022, and the resultant civil penalties assessed based on those NOVAs; and (4) whether the Agency generally followed the proper procedures and complied with the Constitution.

A. Rights to Hearings and Judicial Review

1. Hearings on and Judicial Review of NOVAs 1412 and 30369

This Court previously dismissed all claims related to NOVAs 1412 and 30369. (Doc. No. 33 at 16–19.) It determined that Plaintiffs were properly served because "Mr. Garcia was an 'other representative' for the purposes of 15 C.F.R. § 904.3(a)." (*Id.* at 17, 19.) Plaintiffs were untimely in their requests for hearings and judicial review. (*Id.* at 18–19.) Finally, Plaintiffs' arguments regarding estoppel did not plead the elements of estoppel or develop any argument beyond the bare claim that the Agency had taken almost a year to process the Plaintiffs' June 29, 2005 request for hearings on all of the NOVAs. (*Id.*) The Court also reminded all parties in its September 29, 2009 Order that these claims had been dismissed. (Doc. No. 39 at 2.) Nothing in the Plaintiffs' motion for summary judgment or reply memorandum supports a contrary finding, and therefore all claims related to NOVAs 1412 and 30369 remain dismissed.

2. Hearings on and Judicial Review of the NOPS/NIDPs: Interpretation of the Magnuson-Stevens Act

The Plaintiffs were denied hearings on the NOPS/NIDPs based on the regulations

implementing the Magnuson-Stevens Act. *See* 43022 AR Vol. 1, Ex. 10 at 7–9 (Decision of Administrative Law Judge denying hearings); (Doc. No. 1, Exs. B and D (NOPS/NIDPs stating that the noticed parties would not have a right to a hearing to contest the sanction)(citing 15 C.F.R. § 904.304(b)).) These regulations provide that:

> There will be no opportunity for a hearing if, with respect to the violation that forms the basis for the NOPS or NIDP, the permit holder had a previous opportunity to participate as a party in an administrative or judicial proceeding, whether or not the permit holder did participate, and whether or not such a hearing was held. 15 C.F.R. § 904.304(b)

Under the Magnuson-Stevens Act, "[n]o sanctions shall be imposed . . . unless there has been a prior opportunity for a hearing on the facts underlying the violation for which the sanction is imposed, either in conjunction with a civil penalty proceeding under this section or otherwise." 16 U.S.C. § 1858(g)(5).

a. Agency's Arguments

In its Motion for Summary Judgment, the Agency makes several arguments in opposition to Plaintiffs' claims regarding the right to hearings in the NOPS/NIDPs. First, the Agency argues that the permits in question were never actually submitted, and therefore the claims regarding denial of the permits (presumably as a result of the NOPS/NIDPs) are not yet ripe because no final agency action has occurred. (Doc. No. 42 at 13–16.) Second, the Agency contends that even if any claim regarding the Agency's return of the incomplete permit applications (such as the argument that the applications were not properly processed) were ripe, the challenge would be time-barred. (*Id.* at 17–18 (citing 16 U.S.C. § 1855(f)(1)(B); 5 U.S.C. § 706(2)(A)–(D)).) Third, the Agency asserts that since the NOPS/NIDPs are "permit suspensions resulting from nonpayment of a penalty or fine," the Magnuson-Stevens Act bars their review in federal district

court. (*Id.* at 18–19 (citing 16 U.S.C. § 1858(b)).) Fourth, the Agency reasons that since the Plaintiff corporations against which the penalties were assessed in NOVAs 1412 (Rio Purifiacion, Inc.) and 30369 (Rio San Marcos, Inc.) had previous opportunities for hearings in those NOVAs, but did not make timely requests for hearings, the Plaintiffs are not entitled to hearings on the NOPS/NIDPs. 43022 AR Vol. 1, Ex. 10 at 9; (Doc. No. 42 at 19–22 (citing 15 C.F.R. § 904.304(b); 15 C.F.R. § 904.2).)

b. Plaintiffs' Arguments

Plaintiffs maintain that the Agency action was final based upon the decision of the Administrative Law Judge in NOVA 50027, which stated that the August 1, 2003 NOPS/NIDP "is considered a final administrative decision of the Agency." (Doc. No. 43 at ¶ 6.10 (citing 50027 AR Vol. 4, Ex. 38 at 18).) Plaintiffs further contend that the regulations cited by the Agency and the Administrative Law Judge who denied their motion for a hearing are in conflict with the Magnuson-Stevens Act itself, or else a violation of their constitutional due process rights. (Doc. Nos. 35 at 3–4; 43 at ¶¶3.2–3.5, 6.11, 6.13–6.14.) They also claim that the Agency's interpretation of the regulation—that is, the term "permit holder" as interpreted to include Jorge Gonzalez—is "misguided." (Doc. No. 43 at ¶ 6.12–6.13)

c. Finality

The Agency itself has written on the issue of finality—the Initial Decision of the Administrative Law Judge in NOVA 50027 states that "[t]he NOPS/NIDP was served on the Respondent [Gonzalez Fisheries, Inc.] and is considered a final administrative decision of the Agency." 50027 AR Vol. 4, Ex. 38 at 18. Notwithstanding the Agency's later assertion that the Administrative Law Judge's statement was mere dicta, (Doc. No. 44 at 9), the Court hereby

determines that the issuances of the NOPS/NIDPs did amount to final agency action. Under *Bennett v. Spear*, final agency action occurs where the action "marks the consummation of the agency's decisionmaking process–it must not be of a merely tentative or interlocutory nature" and where it is "one by which rights or obligations have been determined, or from which legal consequences will flow." 520 U.S. 154, 177–178 (1997).

The NOPS/NIDPs state that the recipients "do not have a right to a hearing to contest this permit sanction." Such a statement, with no other indication as to how a recipient might object to or appeal the permit sanction, indicates that the NOPS/NIDP is neither "tentative" nor of "interlocutory nature," satisfying the first requirement of *Bennett*. *Id.*, 520 U.S. at 178.

Moreover, even taking as true the Agency's assertion that the Plaintiffs have not applied for permits or even held a permit, the NOPS/NIDPs each explicitly state that after thirty days, the Agency "suspends all federal fisheries/dealer permits issued to and/*or applied for*" by the corporate Plaintiffs. (Doc. No. 1, Exs. B and D (emphasis added).) The message to the Plaintiffs which have not yet applied for mandatory permits is that there is no way they would ever get a permit until the civil penalty is paid. For this reason, the factual issue of whether the Plaintiffs actually applied for a permit is irrelevant to the NOPS/NIDPs hearing claims.

Based on the plain text on the face of the NOPS/NIDPS, the Court finds that they constitute actual permit sanctions (in the case that the Plaintiffs possessed permits) or preemptive sanctions (in the case that the Plaintiffs are not yet in possession of permits); either way, the NOPS/NIDPs impair the Plaintiffs' ability to possess a legally valid permit. Therefore, the second requirement of *Bennett* is also satisfied, and the NOPS/NIDPs constitute final agency action subject to review by this Court. *See Bennett*, 520 U.S. at 178.

In addition, Plaintiffs Gonzalez Fisheries, Inc., Rio San Marcos, Inc., and Rio Purificacion, Inc. all filed a request for hearings on the NOPS/NIDPs, and this request was denied by an Administrative Law Judge on May 31, 2006. *See* 1412/30369 AR Ex. 7 (Request for Hearing); 1412/30369 AR Ex. 9 (Order Denying Request for Hearing). This decision also qualifies as a final agency determination as to the Plaintiffs' right to a hearing.

d. The federal regulations do not conflict with the Magnuson-Stevens Act.

The Plaintiffs have challenged the regulations that the Agency administers and its interpretation of those regulations as in conflict with the statute. The plain language of the statute unambiguously carves out an exception from the broad class of persons entitled to (a) judicial review of a civil penalty and (b) a hearing in cases where "there has been a prior opportunity for a hearing on the facts underlying the violation for which the sanction is imposed." *See* 16 U.S.C. §§ 1858(b), (g)(5). Congress's intent based on the plain language of the statute is to broadly provide for judicial review of and hearings concerning civil penalties, *except* in the instances where a party has already had an opportunity for hearings and judicial review. The Agency's regulations faithfully carry out this intent, broadly providing the opportunity for a hearing to any recipient of a NOPS or NIDP, *see* 15 C.F.R. § 904.304(a), but carving out an exception where "the permit holder had a previous opportunity to participate as a party in an administrative or judicial proceeding." 15 C.F.R. § 904.304(b). Therefore, the Court hereby finds that the federal regulations implementing the Magnuson-Stevens Act do not conflict with the Act itself.

e. The "violator" Plaintiffs were not entitled to a hearing on the NOPS/NIDPs and are not entitled to judicial review of the NOPS/NIDPs.

Plaintiff Rio Purificacion, Inc. was issued a NOVA on September 12, 2002, but did not seek a hearing on the NOVA until June 29, 2005. Although the Magnuson-Stevens Act would have provided it with a hearing had it timely requested one, no timely request was filed. *See* 16 U.S.C. § 1858(a); 15 C.F.R. §§ 904.102(a)(3); 904.201. Therefore, when Rio Purificacion received the August 1, 2003 NOPS/NIDP for failure to pay the civil penalty issued in NOVA 1412, it was not entitled to a hearing because it had a previous opportunity for a hearing on the underlying violation. 16 U.S.C. § 1858(g)(5); 15 C.F.R. § 904.304(b).

Plaintiff Rio San Marcos, Inc. was issued a NOVA on April 22, 2004, but also did not seek a hearing on the NOVA until June 29, 2005. It, too, had an opportunity for a hearing under the Magnuson-Stevens Act. *See* 16 U.S.C. § 1858(a); 15 C.F.R. §§ 904.102(a)(3); 904.201. Therefore, when Rio San Marcos received the October 25, 2005 NOPS/NIDP for failure to pay the civil penalty issued in NOVA 30369, it was not entitled to a hearing because it, too, had a previous opportunity for a hearing on the underlying violation. 16 U.S.C. § 1858(g)(5); 15 C.F.R. § 904.304(b).

The statute itself forecloses judicial review of "a permit suspension for nonpayment of a penalty or fine." 16 U.S.C. § 1858(b). Here, the August 1, 2003 NOPS/NIDP was issued because Plaintiff Rio Purificacion, Inc. failed to pay the civil penalty assessed in NOVA 1412, and the October 25, 2005 NOPS/NIDP was issued because Rio San Marcos, Inc. failed to pay the civil penalty assessed in NOVA 30369. (Doc. No. 1, Exs. B, D.) Therefore, this Court is also barred by statute from reviewing the issuance of the NOPS/NIDPs to the "violator" Plaintiffs Rio

San Marcos and Rio Purificacion. 16 U.S.C. § 1858(b).

f. The Agency's decision not to provide a hearing to the non-violating Plaintiffs was a misinterpretation of governing law.

As established above, for Plaintiff Rio Purificacion, Inc. in the August 1, 2003 NOPS/NIDP and Rio San Marcos, Inc. in the October 25, 2005 NOPS/NIDP, the Agency's denial of the hearings on the NOPS/NIDPs was consistent with the Magnuson-Stevens Act and federal regulations. For the remaining corporate Plaintiffs (the "non-violating" Plaintiffs)[6],

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[6] With respect to the NOPS/NIDP, the Court shall define the "violator" and "non-violating" Plaintiffs as follows:

> The "violator" Plaintiffs are defined as those Plaintiffs whose own conduct underlies the NOPS/NIDP issued. Therefore, for the August 1, 2003 NOPS/NIDP, Rio Purificacion, Inc. is the violator Plaintiff; and for the October 25, 2005 NOPS/NIDP, Rio San Marcos, Inc. is the violator Plaintiff.
>
> The "non-violating" Plaintiffs are defined as those Plaintiffs whose names were listed on the NOPS/NIDP as having their permits or applications suspended, but who did not commit the act(s) underlying the NOPS/NIDP. For the sake of clarity, the "non-violating" corporate Plaintiffs are: (a) for the August 1, 2003 NOPS/NIDP, Plaintiffs Leon Trawlers, Inc., Ojos Negros, Inc., El Grande Trawlers, Inc., El Colonel, Inc., Chubasco Inc., Ochos Hijos, Inc, Gonzalez Fisheries, Inc., and Rio San Marcos, Inc.; (b) for the October 25, 2005 NOPS/NIDP, Plaintiffs Leon Trawlers, Inc., Ojos Negros, Inc., El Grande Trawlers, Inc., El Colonel, Inc., Chubasco Inc., Ochos Hijos, Inc, Gonzalez Fisheries, Inc., and Rio Purificacion, Inc.

These definitions apply only for the discussion of the NOPS/NIDPs. Since the definition of a "violator" or "non-violating" Plaintiff turns on whether the Plaintiff's conduct underlies the NOPS/NIDP, it is possible that a Plaintiff may be a "violator" Plaintiff for one NOPS/NIDP, but a "non-violating" Plaintiff in a separate NOPS/NIDP. For example, Rio Purificacion is a violator Plaintiff for the August 1, 2003 NOPS/NIDP, but it is considered a non-violating Plaintiff for the October 25, 2005 NOPS/NIDP. The fact that it is considered a non-violating Plaintiff for the latter NOPS/NIDP does not have any bearing on the Agency's determinations that Rio Purificacion in fact violated the Magnuson-Stevens Act in NOVA 1412, such violation was a valid basis for the August 1, 2003 NOPS/NIDP, and Rio Purificacion was not entitled to a hearing on the August 1, 2003 NOPS/NIDP.

These definitions do not affect the NOVAs, which will be reviewed later in this opinion. Gonzalez Fisheries, Inc. in NOVA 50027 and Rio San Marcos, Inc. in NOVA 43022 were determined by the Agency to have violated the Magnuson-Stevens Act. That they are defined as "non-violating" Plaintiffs for the purposes of one or both NOPS/NIDPs has no bearing on this Court's review of the NOVAs, *infra*.

however, the Court finds that the Agency misinterpreted the statute and regulations by denying them the right to a hearing on the NOPS/NIDPs.

The Magnuson-Stevens Act provides that where "a vessel has been used in the commission of any act prohibited under section 1857 of this title, [or] . . . the owner or operator of a vessel or any other person who has been issued or has applied for a permit under this chapter has acted in violation of section 1857 of this title, . . . the Secretary may—(i) revoke any permit issued with respect to such vessel or person . . .; (iii) deny such permit; or (iv) impose additional conditions and restrictions on any permit issued to or applied for by such vessel or person under this chapter . . . ." 16 U.S.C. § 1858(g)(1).

A "permit holder" is defined by the federal regulations as "the holder of a permit or any agent or employee *of the holder*, and includes the owner and operator of a vessel for which the permit was issued." 15 C.F.R. § 904.2 (emphasis added). The Agency considered Jorge Gonzalez to be a "permit holder" because he was a director, shareholder, or officer in all of the Plaintiff corporations, which would have owned the vessels which required permits. *See* 1412/30369 AR, Ex. 9 at 6. According to the Administrative Law Judge, the NOPS/NIDPs "put all on notice that the civil penalties must be resolved prior to the Agency issuing federal fishery permits to any corporations in which Mr. Gonzalez was a director, shareholder, or officer." *Id.* The corporate Plaintiffs "were listed in the [NOPS/NIDPs] because all were potential permit holders." *Id.* Under the regulations, the failure of one permit holder to pay a penalty may result in the denial or sanctioning of that permit holder's other permits. 15 C.F.R. § 904.301.

The Agency and Administrative Law Judge's decision relies on the federal regulation to

find that the non-violating Respondents which requested a hearing were not entitled to one. *See* 1412/30369 AR Ex. 9 at 9 (citing 15 C.F.R. § 904.304(b)). Reasoning that the Respondents had the opportunity to challenge the underlying penalty in a hearing, the Agency contends that none of the Respondents would be permitted to challenge the permit sanction in a new hearing, even the ones that were not responsible for the underlying penalty. *See id.*; 15 C.F.R. § 904.304(b).

The crux of Plaintiffs' argument is that the Agency's actions are based on a definition of "permit holder" that is not the "plain meaning" of that term. (Doc. No. 43 at ¶¶ 6.12–6.13.) Nor is it the definition contained in the regulations. Essentially, the Agency's denial of a hearing to the non-violating corporations must be based on an interpretation that includes the non-violating corporations in the definition of "permit-holder," or else they should have been provided with the right to a hearing to contest the NOPS/NIDPs. (*Id.*;) *see also* 15 C.F.R. § 904.304(a) ("Except as provided in paragraph (b) of this section, the recipient of a NOPS or NIDP will be provided an opportunity for a hearing. . . .").

The interpretation of a statute that an Agency is charged with implementing, and actions taken pursuant to such interpretation, are generally entitled to "considerable weight." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1994). Here, the statute gives broad discretion to the Secretary in sanctioning a vessel, its owner or operator, or any other person who has violated the Act. *See* 16 U.S.C. § 1858(g)(1). The Agency's action here, however, relies on stretching the regulatory definition of "permit holder" beyond recognition to include a purported sister corporation, and therefore exceeds that breadth. This is because even if Mr. Gonzalez, and not the offending corporation, is considered the "permit holder" for each of the corporate Plaintiffs, it is not the case that each of the corporate Plaintiffs is also a "permit holder" of the other corporate

Plaintiffs. That is, Leon Trawlers, Inc. is not the permit holder of Rio San Marcos, Inc. even under the regulation's expansive definition of a permit holder. 15 C.F.R. § 904.2. It is not the owner, agent, or employee of the permit holder. Therefore, Leon Trawlers, Inc. would not have been served with the underlying NOVAs on which the violator Plaintiffs shirked their penalty fines. Leon Trawlers, Inc. would not have been able to contest the underlying NOVAs in a hearing. As such, Leon Trawlers, Inc. and the other non-violating Plaintiffs should not be denied the opportunity to contest the permit sanctions now being imposed on them by the Agency.

In addition, the argument that the statute bars judicial review of the NOPS/NIDPs because they are based on non-payment of a civil penalty, *see* 16 U.S.C. § 1858(b), is likewise meritless as to the non-violating Plaintiffs because they were not actually assessed the underlying civil penalties.

The Court therefore finds that the Agency's decision to deny the non-violating Plaintiffs a hearing to contest the NOPS/NIDPs was not in accordance with federal law, including its own regulations, and should be set aside, with the non-violating Plaintiffs' claims for hearings remanded to the Agency for further proceedings.[7] 16 U.S.C. § 1858(b); 5 U.S.C. § 706(2).

g. Due Process Was Not Denied to the Violator Plaintiffs.

Since the Court finds that the Agency misinterpreted the federal regulations by denying the non-violating Plaintiffs the right to a hearing, and remands these claims to the Agency, it

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[7] The Court takes no position on what the ultimate result of that hearing should be. It recognizes that it is possible that the same end result may occur, but an endpoint-only analysis has never been the hallmark of fairness or due process. Nor is the endpoint the hallmark of the existing regulations. Hearings were guaranteed to the non-violating Plaintiffs under the Magnuson-Stevens Act and its implementing regulations, and the Agency may not deny such hearings simply because it would be convenient or the outcome seems readily apparent without a hearing.

need not decide the question of whether the non-violating Plaintiffs were denied due process. For the violator Plaintiffs, however, it finds that they were not denied due process.

Plaintiffs also contend that the denial of a hearing on the NOPS/NIDPs must amount to a constitutional violation of due process, even if the statute is "allowed to be read to not grant hearing." (Doc. No. 43 at ¶ 6.11.) For the violator Plaintiffs, this contention is not supported by any analysis or application to the present facts except to state the rule that notice and a hearing are "prerequisites to due process in civil proceedings." (*Id.*) Here, the violator Plaintiffs were provided with notice and the opportunity for a hearing on NOVAs 1412 and 30369, the underlying civil penalties.

Under the *Mathews v. Eldridge* framework, "the necessary amount and kind of pre-deprivation process depends on an analysis of three factors: 'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'" *Caine v. Hardy*, 943 F.2d 1406, 1412 (5th Cir. 1991) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

The permit sanctioning procedures set forth by the Magnuson-Stevens Act are in accord with the *Mathews* framework because they only allow sanctions to be imposed after an opportunity for a hearing has been afforded. 16 U.S.C. § 1858(g)(5). Moreover, a balancing of the *Mathews* factors counsels strongly against requiring an additional hearing in instances where a party has already had an opportunity for a hearing. First, the private interest to be affected by

the official action is for a discretionary permit—one to which no person or corporation is entitled by law. Second, there is a low risk of erroneous deprivation because the sanctions that Plaintiffs challenge are imposed only against persons, corporations, or vessels which have already been determined to have violated federal laws. Moreover, there is no additional value to be had in relitigating such violations of the law at a later point in time. Requiring such relitigation would impose significant administrative costs, and could undercut the legitimacy of the initial set of proceedings. The procedures already afforded by the Magnuson-Stevens Act provide ample opportunity for a hearing on the facts that underlie a penalty assessment, and Plaintiffs in this case certainly had notice of their obligations under the law—they received copies of the NOVAs, which directed them to applicable law and explicitly informed them of their right to seek a hearing. That they did not avail themselves of that opportunity is not a sufficient basis to strike down the federal laws that impose consequences to Plaintiffs' delinquency in paying their civil penalties.

The Court therefore finds that the Agency is entitled to summary judgment on the question of whether the denial of a hearing on the NOPS/NIDPs to the violator Plaintiffs violates due process.

h. Equal Protection

In order to establish a claim for an equal protection violation, a plaintiff "must show that (1) he or she was treated differently from others similarly situated and (2) there was no rational basis for the disparate treatment." *Stotter v. University of Texas at San Antonio*, 508 F.3d 812, 824 (5th Cir. 2007) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). The Plaintiffs have not demonstrated that they were treated differently from any others similarly

situated—that is, they have brought forth no evidence of instances in which parties sought and were granted a hearing on an NOPS/NIDP based on a failure to pay a civil penalty. Therefore, the Court finds that the Agency is entitled to summary judgment on the issue of whether the denial of a hearing on the NOPS/NIDPs violates the Plaintiffs' equal protection rights.

Therefore, the Court determines that the Agency is entitled to summary judgment with respect to all claims regarding (a) the denial of hearings and review in NOVAs 1412 and 30369; (b) the rights of violator Plaintiffs Rio San Marcos, Inc. and Rio Purificacion, Inc. to a hearing on their respective NOPS/NIDPs; and (c) the due process and equal protection claims of the violator Plaintiffs with respect to the NOPS/NIDPs. The non-violating Plaintiffs are entitled to summary judgment with respect to their claims that the Agency should have provided them with the opportunity for a hearing on the NOPS/NIDPs.

B. The Agency Did Not Did Not Have to Pierce the Corporate Veil to Issue the NOPS/NIDPs, But It Did Have to Provide Notice and a Hearing to the Non-Violating Corporate Plaintiffs.

Next, Plaintiffs contest the Agency's decision to issue the NOPS/NIDPs for all of the corporate Plaintiffs, despite the fact that the underlying civil penalties were owed only by Plaintiff Rio Purificacion, Inc. for the August 1, 2003 NOPS/NIDP (Doc. No. 1, Ex. B), and Plaintiff Rio San Marcos, Inc. for the October 25, 2005 NOPS/NIDP (Doc. No. 1, Ex. D). They argue that the fact that all of their permits were sanctioned based upon the violations of other corporations that have Plaintiff Gonzalez as their director/officer/shareholder was arbitrary and capricious, as well as a violation of their due process and equal protection rights.

Whether or not the corporate veil must be pierced is an issue relevant to two of the Agency's decisions—first, its decision to issue the NOPS/NIDPs to all of the corporate Plaintiffs,

and second, its decisions with respect to the penalties assessed based on imputation of sister corporation violations. To the extent that the Plaintiffs contest the *issuance* of the NOPS/NIDPs based on the theory that each plaintiff is a separate, unrelated corporate entity, the Court withholds a finding. The Court notes that during the progress of this case, Plaintiffs admitted that Plaintiff Jorge Gonzalez is identified as the sole owner, director, and shareholder of each of the Plaintiff corporations. Nevertheless, there is no record that the Agency had these admissions at the time it issued the NOPS/NIDPs. Since the Agency should have held a hearing before issuing the NOPS/NIDPs to the non-violating Plaintiffs, the Court finds that the Agency's issuance of the NOPS/NIDPs to the non-violating Plaintiffs without such a hearing and supporting evidence was counter to federal law and should be set aside.

Plaintiffs contend Plaintiff Gonzalez should not count as a permit holder for the purposes of the Magnuson-Stevens Act or the federal regulations. (*See* Doc. No. 43 at ¶ 6.19.) As noted earlier, the Magnuson-Stevens Act authorizes the Agency to impose permit sanctions in situations where "any civil penalty . . . imposed on a vessel or owner or operator of a vessel or any other person who has been issued or has applied for a permit under any marine resource law enforced by the Secretary [of Commerce] has not been paid and is overdue." 16 U.S.C. § 1858(g)(1)(C). Federal regulations provide that the Agency "may take action . . . to sanction or deny a permit" for failure to pay a civil penalty assessed in accordance with the statute. 15 C.F.R. § 904.301(a). These regulations also provide that

> A permit sanction may be imposed, or a permit denied, under this subpart with respect to the particular permit pertaining to the violation or nonpayment, and may also be applied to any NOAA permit held or sought by the permit holder or successor in interest to the permit, including permits for other activities or for other vessels. 15 C.F.R. § 904.301(b).

As noted above, "permit holder" is defined as "the holder of a permit or any agent or employee of the holder . . . ." 15 C.F.R. § 904.2.

The Agency, interpreting Plaintiff Gonzalez as a permit holder, concluded that other companies for which he served as the sole director/officer/shareholder could have their permits denied or revoked under the federal regulations. This determination is not necessarily inconsistent with the regulation, which even provides as an example of its policy: "NOAA suspends Vessel A's fishing permit for nonpayment of a civil penalty pertaining to Vessel A. The owner of Vessel A buys Vessel B and applies for a permit for Vessel B to participate in the same or a different fishery. NOAA may withhold that permit until the sanction against Vessel A is lifted." 15 C.F.R. § 904.301(b)(1).

The Agency did not, however, inform the non-violating Plaintiff corporations that they were being sanctioned based on this policy, nor did it even address the NOPS/NIDPs to Plaintiff Gonzalez. (*See* Doc. No. 1, Exs. B, D.) Moreover, the corporate owners of the vessels identified in the NOPS/NIDPs, based upon the current administrative record, are separate corporations and so the application of the example cited above is tenuous at best without a hearing to determine whether the facts support application of the policy.

Plaintiffs suggest that the regulations conflict with the statute, or that the Agency's interpretation violates due process by punishing "independent" corporations. The statute, however, provides the Agency with broad discretion to impose permit sanctions and Plaintiffs have not demonstrated any statutory text or legislative history contrary to the federal regulations or the Agency's interpretation. It is designed to give the Agency latitude to prevent violators of

the Magnuson-Stevens Act (and related acts) from playing a corporate shell game. Moreover, as noted above, the statute and implementing regulations already impose procedural restrictions that should prevent the arbitrary sanctioning of unrelated vessels without proper notice and opportunity for a hearing. *See, e.g.*, 16 U.S.C. § 1858(g)(5); 15 C.F.R. §§ 904.304, 904.201.

Therefore, the Court concludes that the Agency's interpretation that it could ultimately sanction sister corporations based on their shared owner's failure to pay a civil penalty does not inherently conflict with the statute, federal regulations, or due process so long as the corporate/personal relationships and the sanctions are supported by the evidence adduced at a proper hearing. In this case, however, the Agency did not allow the non-violating sister corporations the opportunity for a hearing, it did not first inform the sister corporations that the basis for the sanction was their relationship to Plaintiff Gonzalez, and it did not allow them a chance to contest the allegations. The issuance of the NOPS/NIDPs to the non-violating Plaintiffs will therefore be set aside, and these matters are remanded to the Agency for further proceedings not inconsistent with this opinion.

C. The Administrative Law Judges Correctly Excluded Evidence Offered by Plaintiffs Concerning Ability to Pay and Correctly Concluded that Plaintiffs Have the Ability to Pay their Civil Penalties.

When a person/entity has been found to violate the Magnuson-Stevens Act, his ability to pay the civil penalty is a factor that the Agency may consider when it determines the amount of the civil penalty, so long as the violator properly serves the information relating to his ability to pay thirty days before the administrative hearing. 16 U.S.C. § 1858(a). This statute, as the Administrative Law Judges noted in their Orders to Compel or Exclude, previously had stated that the Agency "shall take into account" the ability to pay factor, prompting a District Court to

remand for a new hearing and reassessment of a civil penalty because the administrative law judge had not considered the respondent's ability to pay. 50027 AR Vol. 1, Ex. 12 at 4 (citing *Diehl v. Franklin*, 826 F. Supp. 874 (D.N.J. 1993)); 43022 AR Vol. 1, Ex. 18 at 7 (also citing *Diehl*). After that decision, the statute was amended so that the Agency would no longer be required to consider the violator's ability to pay. 50027 AR Vol. 1, Ex. 12 at 4–5; 43022 AR Vol. 1, Ex. 18 at 7–8.

The federal regulations that implement the Magnuson-Stevens Act explain the procedures that a violator must follow if he wishes that the Agency consider his ability to pay. Specifically, such a respondent:

> has the burden of proving such inability [to pay the civil penalty] by providing verifiable, complete, and accurate financial information to NOAA. NOAA will not consider a respondent's inability to pay unless the respondent, upon request, submits such financial information as Agency counsel determines is adequate to evaluate the respondent's financial condition. Depending on the circumstances of the case, Agency counsel may require the respondent to complete a financial information request form, answer written interrogatories, or submit independent verification of his or her financial information. If the respondent does not submit the requested financial information, he or she will be presumed to have the ability to pay the civil penalty. 15 C.F.R. § 904.108(c).

In addition, relevant financial information is defined to include "the value of respondent's cash and liquid assets; ability to borrow; net worth; liabilities; income tax returns; past, present, and future income; prior and anticipated profits; expected cash flow; and the respondent's ability to pay in installments over time." 15 C.F.R. § 904.108(d). Based on the statutory history and the applicable federal regulations, the Administrative Law Judges concluded in their respective Orders to Compel or Exclude that the Plaintiffs would have to submit the information requested by Agency counsel within the statutory deadline, or else they would be presumed to have the

ability to pay. 50027 AR Vol. 1, Ex. 12; 43022 AR Vol. 1, Ex. 18.

Plaintiffs contend that the Administrative Law Judges in NOVAs 50027 and 43022 should have considered the tax returns submitted by the Plaintiffs in an effort to establish their inability to pay the proposed penalties. (*See, e.g.*, Doc. No. 35 at 4–6.) It is undisputed that the Agency's counsel received the Plaintiffs' submission of the tax returns. It is also undisputed that the Agency notified Plaintiff Rio San Marcos, Inc. and Plaintiff Gonzalez Fisheries, Inc., in each of their respective cases to inform them that the tax returns were not sufficient information and that they would need to submit additional financial information. Neither of the Plaintiffs submitted the additional information requested. Rather, Plaintiffs rest solely on the discretionary language of the statute that affords the Agency the ability, but not the obligation, to consider a violator's ability to pay and to consider "such other matters as justice may require." 16 U.S.C. §§ 1858(a), (g)(2)(B).

The record before the Court demonstrates that the two Respondent-Plaintiffs here had more than ample opportunity to comply with the requirements of federal law, the multiple requests by Agency counsel, and the admonishments of the Administrative Law Judges in their Orders to Compel or Exclude. It further demonstrates that the Plaintiffs' interpretation of the Magnuson-Stevens Act runs counter to clear congressional intent. Simply put, Plaintiffs were required by statute and federal regulation to provide more than a select number of tax returns if they wanted the Agency to consider their inability to pay the civil penalties charged. Plaintiffs did not provide the requested information. Therefore, the tax returns were properly excluded by the Administrative Law Judge because they were insufficient to satisfy Plaintiffs' burden of producing financial information that would allow the Agency "to properly evaluate a

respondent's financial condition." 43022 AR Vol. 2, Ex. 29 at 4; *see also* 50027 AR Vol. 4, Ex. 38 at 4–5.

Moreover, because Plaintiffs failed to follow the statutory and regulatory requirements for submitting financial information, the Agency did not err by concluding that the Plaintiffs have the ability to pay the penalties assessed. *See* 15 C.F.R. § 904.108(c) (" . . . If the respondent does not submit the requested financial information, he or she will be presumed to have the ability to pay the civil penalty.") The Court therefore finds that the Agency is entitled to summary judgment on all of Plaintiffs' claims that their ability to pay was not properly considered in the ultimate outcomes of NOVAs 50027 and 43022.

D. General and Constitutional Challenges to Agency Action

1. Objectivity and Conclusions in NOVAs 50027 and 43022

Plaintiffs generally contest the hearings held in NOVAs 50027 and 43022, alleging that the hearings were not objective and did not comply with the requirements of due process. (*See, e.g.*, Doc. No. 35 at 14–15.) The only evidence they offer is that the Agency excluded certain evidence regarding their ability to pay the civil penalties and an assertion that the Agency itself had issued a "be on the lookout" (or "BOLO") bulletin that was not properly docketed in the Agency record. (Doc. No. 43 at ¶¶ 2.1, 6.28.) They also contend that the agency's refusal to consider constitutionality challenges indicates the Agency was not objective. (Doc. No. 35 at 14.)

With respect to the first concern, the Court has already explained why the Administrative Law Judges properly excluded the Plaintiffs' selective offer of tax returns as irrelevant due to the Plaintiffs' own refusals to provide all of the appropriate financial information. With respect to

the second concern, the Court finds that even if it is true that there is a missing BOLO bulletin that was not filed, it is not enough to overcome the overwhelming facts demonstrating that the Agency's decisions are supported by substantial evidence. With respect to the third concern, the Agency was correct: it did not possess the authority to rule on constitutional challenges, and its refusal to consider those challenges was not out of a subjective disregard for Plaintiffs, but because it lacks the authority to do so. 15 C.F.R. § 904.200 ("The [Administrative Law] Judge has no authority to rule on constitutional issues or challenges to the validity of regulations promulgated by the Agency or statutes administered by NOAA.").

Plaintiffs do not dispute the record evidence showing that their vessels were found in violation of federal shrimping laws, nor did they offer sufficient evidence to demonstrate a financial inability to pay the civil penalties assessed. The Court therefore finds in favor of the Agency with respect to the general arbitrary and capricious, *cf.* 5 U.S.C. § 706(2)(A), challenges to the Agency's hearings and decisions with respect to NOVAs 50027 and 43022.

Insofar as the Plaintiffs contest any of the factual findings by the Administrative Law Judges in NOVAs 50027 and 43022 regarding the actual violations, the Court hereby finds that the Agency is entitled to summary judgment because the Administrative Law Judges' findings are supported by substantial evidence, *cf.* 5 U.S.C. § 706(2)(E), and because Plaintiffs have not pointed to any record evidence to the contrary.[8]

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[8] The Court notes that the only underlying factual claim the Plaintiffs raise in their Reply Memorandum is the issue of whether or not the logbook containing F/V RIO SAN MARCOS's coordinates was a "hang-book logbook" or the actual logbook charting the vessel's fishing locations. (Doc. No. 43 at 15–16.) During the hearing, the Administrative Law Judge considered the first-hand testimony of the Game Wardens who boarded the F/V RIO SAN MARCOS and who questioned the captain on board, and in his initial decision, he determined that their testimony was more reliable than that of Plaintiff Gonzalez, who was neither on the

To the extent that Plaintiffs assert the penalties assessed in NOVAs 50027 and 43022 bear no rational relationship to the violations, (*see* Doc. No. 35 at 16), the Court disagrees.[9] The Agency has shown the penalties assessed to be within the guidelines for its Civil Penalty Schedule. *See* 43022 AR Vol. 3-36, Ex. 10 (Copy of Penalty Schedule). This Penalty Schedule exists to facilitate "assessment of individualized penalties to fit the specific facts of a case" and to establish "relative uniformity in penalties assessed for similar violations nationwide." *Id.*

Moreover, the Administrative Law Judges in both NOVAs 50027 and 43022 properly took into account the factors listed by federal regulation: "the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior offenses, and ability to pay; and such other matters as justice may require." 43022 AR Vol. 2, Ex. 29 at 13 (citing 15 C.F.R. § 904.108(a)); 50027 AR Vol. 4, Ex. 38 at 14–15. Given that the owner of Rio San Marcos, Inc. had a recent prior violation and an outstanding unpaid penalty for NOVA 1412, the Agency was not irrational in concluding that the respondent Plaintiff had a high degree of culpability and should have been assessed a penalty at the high end of the Penalty Schedule. *See* 43022 AR Vol. 2, Ex. 29 at 13–15. The Court is cognizant of the concern that Rio San Marcos has because the Administrative Law Judge considered the violation history of "all corporations owned and controlled by Jorge Gonzalez," including NOVA 1412 and the

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boat nor had any other corroboration for his claim that the logbooks were really "hang-books." 43022 AR Vol. 2, Ex. 29 at 8–10. Plaintiffs have not pointed to any evidence sufficient to contradict the Administrative Law Judge's determination and the Court therefore defers to and affirms the Administrative Law Judge's findings.

[9] Insofar as Plaintiffs' argument rests on their insistence that the selected tax returns they submitted should have been considered, the Court has already disposed of this claim *supra* and at this point in the opinion only considers the argument that the Agency assigned penalties that are not rationally related to the underlying acts for which they were assessed.

August 1, 2003 NOPS/NIDP (which was based on nonpayment of the fine assessed in NOVA 1412), both of which did not involve wrongdoing by Rio San Marcos, Inc. *See id.* at 13–14. These violations, however, do shed light on the culpability of Rio San Marcos's owner, Jorge Gonzalez, and would therefore be relevant factors for the Agency to consider. *See* 15 C.F.R. § 904.108(a); (*see also* July 2, 2004 Letter from NOAA Office of Assistant General Counsel for Enforcement & Litigation to Rep. Barney Frank, Doc. No. 42-5.) The Court therefore finds that the penalty decision of the Administrative Law Judge is supported by substantial evidence and should not be set aside.

In the case of Gonzalez Fisheries, Inc., the Administrative Law Judge recounted the long history of violations by the its sister corporations, and also pointed to a written warning that had been issued to the operator of its vessel (the F/V AZTECA). 50027 AR Vol. 4, Ex. 38 at 17–18. This Court has determined that the NOPS/NIDPs should not have been issued against Gonzalez Fisheries without a hearing, and it follows that the August 1, 2003 NOPS/NIDP should not contribute to increasing the amount of a penalty assessed against Gonzalez Fisheries. Nevertheless, the Court still concludes that the penalty assessment issued bore a rational relationship to the violation that was proved in NOVA 50027. That is, given the knowledge that Gonzalez Fisheries, Inc. should have possessed by virtue of the fact that its registered agent had a long history of violations and the fact that its vessel had an outstanding warning (which also put Gonzalez Fisheries on notice that the warning itself "may be used to justify a more severe penalty for future violations"), the Court concludes that the $30,000 civil penalty assessed against Gonzalez Fisheries for fishing without a valid permit did bear a rational relationship to its violation of the Magnuson-Stevens Act. *See id.* at 14–18. The Court therefore finds in favor of

the Defendant with respect to all challenges regarding the propriety of the hearings held in NOVAs 50027 and 43022, as well as the ultimate conclusions of the Administrative Law Judges in NOVAs 50027 and 43022, including the rational relationship between the monetary penalties assessed and their underlying violations.

2. Separation of Powers

Plaintiffs also argue that the Magnuson-Stevens Act violates principles of separation of powers. (Doc. No. 35 at 12–13.) Their argument claims that the Act violates the non-delegation doctrine by allowing the Agency, an executive branch of government, to perform judicial functions, allegedly without judicial review or due process. (*Id.*) They further assert that the Act amounts to the Agency's "delegation of the administrative process to itself," which "removes objectivity" and was a "substantial threat" to the Plaintiffs. (*Id.* (referring to *Grisham v. United States*, 103 F.3d 24, 27 (5th Cir. 1997)("[A] constitutional delegation of adjudicative functions to an administrative agency is not objectionable unless it creates a 'substantial threat to the separation of powers.'")).)

Plaintiffs' argument overlooks the explicit provisions in the Magnuson-Stevens Act that provide for judicial review of penalties and mandate the opportunity for a hearing before sanctions may be imposed. 16 U.S.C. §§ 1858(b),(g)(5). The Court therefore finds that the Plaintiffs are not entitled to summary judgement on this claim, and that the Agency is entitled to summary judgment.

3. Permit Handling

Throughout their Motion for Summary Judgment and Reply Memorandum, Plaintiffs contest the Agency's handling of its permit applications. Plaintiffs argue that they had submitted

permit applications and that the rejection of their permit applications was pretextual in nature based upon the violation history of sister corporations. The Agency has argued that Plaintiffs never submitted complete applications, and has challenged Plaintiffs' assertion that they did submit complete applications in the form of affidavits from a records manager at the Agency who performed searches for Plaintiffs' applications and turned up only five incomplete applications that were returned to the Plaintiffs and never re-submitted. 43022 AR Vol. 3-36 Exs. 8, 59 (Affidavits of Cheryl Franzen). Plaintiffs' only rebuttal evidence is the affidavit of Raul Garcia, who was previously employed by all of the corporate Plaintiffs, and who states that he "would have" signed and submitted the copies of nine applications attached to his affidavit. (Doc. No. 43, Ex. A at ¶ 3.) Mr. Garcia further states that he "do[es] not recall specifically receiving any notification of rejection" from the Agency "after submission of the permit applications." (Doc. No. 43, Ex. A at ¶ 6.)

The Court finds that the Plaintiffs have not met their burden of showing specific facts to demonstrate that there is any issue as to whether they in fact fully and completely applied for permits. As the Agency has argued, the Plaintiffs never submitted copies of completed applications, proof of payment, certified mail receipts, or any other evidence to prove that they ever possessed or properly applied for permits.

Moreover, the Agency has demonstrated that there is no record of the corporate Plaintiffs having submitted complete applications, and has further demonstrated that the copies of applications that the Plaintiffs have filed with this Court are lacking in critical information—signatures, corporate shareholder/officer/director information, and/or annual business reports. (*See* Doc. No. 42 at 13–16 (citing 50 C.F.R. § 622.4(e)(2))); *see also* 50 C.F.R.

§ 622.4 (b)(3)(ii) (detailing application requirements); 43022 AR Vo. 3-36, Ex. 8 (Franzen Affidavit and copy of permit application and instructions). Therefore, the Court finds, with the exceptions noted above, that the Agency is entitled to summary judgment with respect to all of Plaintiffs' claims that its permit applications were mishandled or improperly rejected.[10]

4. Eighth Amendment Claims

The Agency is also entitled to summary judgment on all of the Plaintiffs' Eighth Amendment Claims that Agency imposed excessive fines or violated the double jeopardy clause of the Eighth Amendment. First, both of the fines assessed in NOVAs 50027 and 43022 are within the limits authorized by Congress in the Magnuson-Stevens Act, and are therefore not "excessive." *See* 16 U.S.C. § 1858(a); *Newell Recycling Co. v. E.P.A.*, 231 F.3d 204, 210 (5th Cir. 2000). Additionally, even though the fines are at the high end of the Agency's penalty schedule, they still fall within the limits of a first-time violation. *See* 50027 AR Vol. 5-44, Ex. 49 (Magnuson-Stevens Act Penalty Schedule); 43022 AR Vol. 3-36, Ex. 10 (same document). For this reason, the Court need not consider whether or not the Agency could have imputed the violations of sister corporations as the individual violator's "prior history of violations." The

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[10] The Court notes that this finding pertains only to all claims regarding handling of the permits to the extent that such claims are independent from the claims relating to the issuance of the NOPS/NIDPs discussed above. Thus, although the Court grants summary judgment to the Agency on the issue of permit handling or rejection on grounds *other* than the NOPS/NIDPs, its findings above would still impact permit handling related to the NOPS/NIDPs. *See* §§ VII.A.2.(c), (f)–(g), *supra*.

The ultimate effect of this Court's opinion is a remand for further proceedings on the NOPS/NIDPs, which could affect applications that have not been completely filed. While at first blush this may seem unusual, the result is necessitated by the nature of the NOPS/NIDPs which apply to not only permits in existence, but also to any applications in process (as is claimed by Plaintiffs) or future application that the Plaintiffs may eventually file. This is true regardless of the validity of the Agency's position that at least five of the applications had been abandoned, because the Agency could still apply the existing NOPS/NIDPs to any future permit application.

Double Jeopardy clause is not implicated by the civil penalties, permit sanctions, or shrimp seizures because none of the actions constitute "punishment" within the meaning of the double jeopardy clause. *See United States v. Halper*, 490 U.S. 435, 447 (1989).

Therefore, the Court finds that the Agency is entitled to summary judgment, and that it has not violated either the excessive fine or the Double Jeopardy clauses of the Constitution.

5. Fifth Amendment Takings

With respect to Plaintiffs' claims that they were entitled to possess the federal shrimping permits and therefore suffered takings due to the Agency's actions, the Court finds that they are not entitled to summary judgment, and the Agency is entitled to summary judgment. For the reasons discussed above—that Plaintiffs have not demonstrated they actually possessed federal shrimping permits or submitted complete applications for such permits—Plaintiffs have not demonstrated that they held a property interest subject to a taking under the Fifth Amendment. Moreover, even if Plaintiffs did hold permits, the permits would not have the "crucial indicia of a property right" necessary to invoke the takings doctrine. *See Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (finding that as a threshold matter, a takings claimant must demonstrate the existence of a legally cognizable property interest). That is, Plaintiffs have not cited to any authority or offered any evidence that they would have been able to assign, sell, or transfer their permits, or that their permit would have conferred exclusive fishing privileges. *Cf. American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1374 (Fed. Cir. 2004). Therefore, the Court finds that the Agency is entitled to summary judgment because Plaintiffs have failed to demonstrate a property interest with respect to the federal shrimping permits.

With respect to Plaintiffs' claims that the shrimp seizures, the civil penalties assessed in

NOVAs 50027 and 43022, and the NOPS/NIDPs constituted takings, the Court agrees with the Agency that it lacks subject matter jurisdiction on these claims because the United States Court of Federal Claims has exclusive jurisdiction over these matters. (*See* Doc. No. 42 at 40 (citing 28 U.S.C. § 1491(a); *Wilkerson v. United States*, 67 F.3d 112 (5th Cir. 1995)). Therefore, it finds that the Agency is entitled to summary judgment on all of the takings claims.

To the extent that Plaintiffs seek relief for the shrimp seizure on the ground that the seizure represents a forfeiture, the Court finds that the Agency has sufficiently demonstrated such claim to be unripe because the judicial proceedings in Case No. 50027 are not yet final. (*See* Doc. No. 42 at 38–39 (citing 18 U.S.C. § 983(a)(2)(B)).) The Court also finds that the Administrative Law Judge in NOVA 50027 properly excluded any forfeiture claims from the administrative hearing because such claims must be brought in federal district court. (*Id.* at 39 (citing 16 U.S.C. § 1860(b)).)

6. Right to a Jury Trial

Plaintiffs have also asserted that they were deprived of their constitutional right to a jury trial on the assessed violations and permit sanctions. (Doc. No. 34-2 at ¶ 13.0.) This claim lacks merit. Through the Magnuson-Stevens Act, Congress provided that administrative proceedings would be available for parties charged with violations and/or permit sanctions. *See* 16 U.S.C. § 1858. The Supreme Court has held that in statutory schemes specifying administrative proceedings as the mechanism for litigating public rights , the Seventh Amendment does not guarantee a right to a jury trial. *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Com'n*, 430 U.S. 442 (1977). As in the Occupational Safety and Health Act, where the government could seek civil penalties from employers violating the law by maintaining unsafe

working conditions, Congress created through the Magnuson-Stevens Act a mechanism by which the government could seek civil penalties from fishers violating the law by using unsafe fishing methods or fishing without valid permits. The Magnuson-Stevens Act does not provide for jury trials to litigate public rights, and the Seventh Amendment does not guarantee them to Plaintiffs. Therefore, the Court finds that the Plaintiffs' constitutional claims to a jury trial are without merit and should be dismissed.

7. Remaining Asserted Claims

The Court hereby finds that with respect to any of the remaining asserted claims not specifically addressed above—*e.g.*, general due process, equal protection, and civil rights claims—that the Plaintiffs have failed state a claim upon which relief can be granted because the Plaintiffs have not pleaded specific facts or law that would demonstrate they are entitled to relief. Despite being afforded the opportunity to fully develop their claims in summary judgment motions, the Plaintiffs have not done so, and such claims are therefore dismissed with prejudice.

VIII. CONCLUSION

For the foregoing reasons, it is hereby ordered:

(1) Plaintiffs' Motion for Summary Judgment (Doc. No. 35) is GRANTED IN PART and DENIED IN PART as follows:

(a) All Agency decisions denying the right to a hearing on NOPS/NIDPs issued to the non-violating corporate Plaintiffs, including but not limited to the Agency's May 31, 2006 Order, are REVERSED only with respect to the denial of the right to a hearing on the NOPS/NIDPs and this action is REMANDED to the Agency to

provide the non-violating Plaintiffs with the opportunity for a hearing on the NOPS/NIDPs such that:

(i) Plaintiffs Leon Trawlers, Inc., Ojos Negros, Inc., El Grande Trawlers, Inc., El Colonel, Inc., Chubasco Inc., Ochos Hijos, Inc, Gonzalez Fisheries, Inc., and Rio San Marcos, Inc. are entitled to a hearing on the August 1, 2003 NOPS/NIDP; and

(ii) Plaintiffs Leon Trawlers, Inc., Ojos Negros, Inc., El Grande Trawlers, Inc., El Colonel, Inc., Chubasco Inc., Ochos Hijos, Inc, Gonzalez Fisheries, Inc., and Rio Purificacion, Inc. are entitled to a hearing on the October 25, 2005 NOPS/NIDP;

(b) The NOPS/NIDP issued on August 1, 2003 is VACATED as to all Plaintiffs except Rio Purificacion, Inc., and the matter is REMANDED to the Agency for further proceedings not inconsistent with this opinion;

(c) The NOPS/NIDP issued on October 25, 2005 is VACATED as to all Plaintiffs except Rio San Marcos, Inc., and the matter is REMANDED to the Agency for further proceedings not inconsistent with this opinion; and

(d) All of Plaintiffs' remaining claims for summary judgment are DENIED.[11]

(2) With the exception of the relief granted above in ¶ 1, Defendant's Motion for Summary Judgment (Doc. No. 42) is GRANTED IN PART and DENIED IN PART. It is granted as

[11] The relief granted to Plaintiffs by the Court does not cure any existing defects in some or all of the permit applications by the Plaintiffs, nor does such relief cure any actual failure by one or all of the Plaintiffs to submit a complete permit application. Stated another way, by ordering a hearing on the NOPS/NIDPs for the non-violating Plaintiffs, this Court's action should not be interpreted as taking any position on any yet-to-be filed application.

to all claims except for those of the non-violating Plaintiffs with respect to the NOPS/NIDPs, and it is denied as to those claims.

SIGNED this 15th day of March, 2010.

Andrew S. Hanen
United States District Judge

APPENDIX:
Timeline of Key Events[12]

Nov. 10, 2000	Plaintiff Rio Purificacion, Inc.'s vessel (F/V RIO CONCHOS) found fishing without a turtle excluder device and without a bycatch reduction device. (NOVA 1412)
Sept. 12, 2002	NOVA 1412 Issued against Rio Purificacion, Inc.
Dec. 5, 2002	Federal Law requires Gulf shrimping boats to have on board a valid federal commercial vessel permit
Dec. 15, 2002	Date on which the following Plaintiffs claim to have applied for fishing permits: El Colonel, Inc. — F/V EL MISTER El Grande Trawlers, Inc. — F/V EL GRANDE Leon Trawlers, Inc. — F/V LEON Ojos Negros, Inc. — F/V MARIA BONITA Rio San Marcos, Inc. — F/V RIO SAN MARCOS Gonzalez Fisheries, Inc. — F/V AZTECA Ocho Hijos, Inc. — F/V CONQUISTADOR
Feb. 11–12, 2003	NOVA 1412 Served on Raul Garcia
Mar. 31, 2003	Agency receives applications for the following Plaintiffs and vessels: El Colonel, Inc. — F/V EL MISTER El Grande Trawlers, Inc. — F/V EL GRANDE Leon Trawlers, Inc. — F/V LEON Ojos Negros, Inc. — F/V MARIA BONITA Rio San Marcos, Inc. — F/V RIO SAN MARCOS
Apr. 11, 2003	Agency returns all applications for owner date of birth and annual business report
Jun. 4, 2003	Date on which the following Plaintiffs claim to have applied for fishing permits: Chubasco, Inc. — F/V CHUBASCO Rio Conchos, Inc. — F/V RIO CONCHOS

[12] The descriptions contained in this timeline should not be considered findings of fact or conclusions of law, but are merely added to help the reader of the main opinion follow the sequence of events.

Aug. 1, 2003	NOPS/NIDP Issued against all Corporate Plaintiffs for Rio Purificacion, Inc.'s failure to pay civil penalty in NOVA 1412
Oct. 17, 2003	Plaintiff Rio San Marcos, Inc.'s vessel (F/V RIO SAN MARCOS) found fishing without a permit. (NOVA 30369)
Mar. 20, 2004	Plaintiff Rio San Marcos, Inc.'s vessel (F/V RIO SAN MARCOS) found fishing without a permit. (NOVA 43022)
Apr. 22, 2004	NOVA 30369 Issued Against Rio San Marcos, Inc.
Sept. 15, 2004	NOVA 30369 Served on Raul Garcia
Feb. 3, 2005	Plaintiff Gonzalez Fisheries, Inc.'s vessel (F/V AZTECA) found fishing without a permit (NOVA 50027)
Mar. 22, 2005	NOVA 50027 Issued Against Gonzalez Fisheries, Inc.
Apr. 1, 2005	NOVA 50027 Received by Raul Garcia
May 2, 2005	Plaintiff Gonzalez Fisheries, Inc. files request for hearing on NOVA 50027.
Jun. 24, 2005	NOVA 43022 Issued Against Rio San Marcos, Inc.
Jun. 29, 2005	NOVA 43022 Received by Raul Garcia
Jun. 29, 2005	Plaintiffs Gonzalez Fisheries, Inc.; Rio San Marcos, Inc.; and Rio Purificacion, Inc. file request for hearings on NOVAs 1412, 30369, 50027, 43022
Oct. 25, 2005	NOPS/NIDP Issued against all Corporate Plaintiffs for Rio San Marcos, Inc.'s failure to pay civil penalty in NOVA 30369
Mar. 21, 2006	Hearing on NOVA 50027 held
Apr. 18, 2006	ALJ grants Agency's Motion Opposing Hearing Requests on NOVAs 1412 and 30369 as time-barred
May 10, 2006	Plaintiffs Gonzalez Fisheries, Inc.; Rio San Marcos, Inc.; and Rio Purificacion, Inc. file Request for Reconsideration on the denial of hearings on NOVA 1412 and 30369. Plaintiffs Gonzalez Fisheries, Rio SM, and Rio Purificacion also file Request for Hearing on the

	"Permit Sanctions" (NOPS/NIDP)
May 31, 2006	ALJ denies Plaintiffs Gonzalez Fisheries, Inc.; Rio San Marcos, Inc.; and Rio Purificacion, Inc.'s request for reconsideration, and for hearing on the NOPS/NIDP. ALJ determines that issuing the NOPS/NIDPs as part of civil penalty collection process is appropriate under 15 C.F.R. § 904.301(a)(2) and that the Respondents do not have a right to a hearing on the NOPS/NIDPs because they had a previous opportunity to participate as a party in a hearing on the underlying NOVAs.
Aug. 15, 2006	Cheryl Franzen performs record search, showing that no permits were ever issued to: El Colonel, Inc. — F/V EL MISTER El Grande Trawlers, Inc. — F/V EL MISTER Leon Trawlers, Inc. — F/V LEON Ojos Negros, Inc. — F/V MARIA BONITA Rio San Marcos, Inc. — F/V RIO SAN MARCOS Search also shows that the following vessels never applied for a permit: Gonzalez Fisheries, Inc. — F/V AZTECA Ocho Hijos, Inc. — F/V CONQUISTADOR Chubasco, Inc. — F/V CHUBASCO Rio Conchos, Inc. — F/V RIO CONCHOS
Aug. 22, 2006	Hearing on NOVA 43022 held
Dec. 5, 2006	ALJ issues Initial Decision finding Plaintiff Gonzalez Fisheries, Inc. liable for violating the Magnuson-Stevens Act and that NOVA 50027 was proved by the Agency, and assesses $30,000 penalty.
May 1, 2007	Secretary of NOAA denies request for discretionary review on NOVA 50027
Feb. 12, 2008	ALJ issues Initial Decision finding Plaintiff Rio San Marcos, Inc. liable for violating the Magnuson-Stevens Act and that NOVA 43022 was proved by the Agency, and assesses $30,000 penalty
July 10, 2008	Secretary of NOAA denies request for discretionary review on NOVA 43022