UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:	**Docket Number:**
Mark Cordeiro and Willie Etheridge III,	**SE040289**
Respondents.	

DECISION AND ORDER FOLLOWING REMAND

Issued:

January 5, 2011

Issued By:

Hon. Parlen L. McKenna
Presiding

APPEARENCES:

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I. PRELIMINARY STATEMENT

On February 25, 2008, the Administrator for the United States Department of Commerce, National Oceanic and Atmospheric Administration (NOAA or Agency) issued an Order Granting Discretionary Review and Remanding Case for Further Proceedings (Remand Order). The Remand Order directed the undersigned to hold further proceedings to allow Respondents "to present evidence to rebut the presumption [that they] were shark finning on the 18 occasions charged in the NOVA, to allow the agency to present surrebuttal evidence, and for further consideration in light of additional evidence admitted into the record." Remand Order at 2. The Remand Order also specifically provided that on remand Respondents "may not present and the ALJ shall not consider or rule upon any facial challenge to the 5 percent rule approved in 50 C.F.R. § 635.30(c)." Id.

Following the hearing and submission of post-hearing briefs, the undersigned finds that Respondents have effectively rebutted the presumption that they were unlawfully shark finning on five (5) of the eighteen (18) charged occasions. Specifically, the undersigned finds that some of Respondents' fin-to-carcass ratios in excess of 5% are not only possible, but more likely than not, given the following factors: (1) the average fin-to-carcass ratio of the sandbar sharks targeted by Respondents exceed 5%; (2) Respondents generally took all eight fins instead of the four primary fins upon which the 5% fin-to-carcass ratio threshold was based; (3) Respondents left extra meat on the fins – thus increasing the fin-to-carcass ratio; (4) Respondents cut the shark carcasses "short" – i.e., cut more meat from the carcass when converting it to log form; and (5) Respondents soaked the fins and put them on ice, which marginally increased the fin weight.

As fully explained below, taking all of these factors into account results in the conclusion that the Agency cannot prove by a preponderance of substantial and reliable evidence that shark finning occurred based on the presumption for five (5) of the charges. However, for thirteen (13) of the charges, Respondents have not rebutted the Agency's prima facie case, even accounting for all the accepted factors presented by Respondents to explain the higher fin-to-carcass ratios that triggered the presumption.

Respondents were told by NOAA law enforcement that as long as all the fins corresponded with carcasses, no charges would be filed regardless of the amount by which the fin-to-carcass ratio exceeded 5%.[1] See Tr. at 18:1-13 (10/13/2009); see also Tr. at 45:13-47:3 (10/14/2009) (Mr. Hemilright's testimony regarding a meeting with Agency personnel indicating that the Agency was not prosecuting people with fin-to-carcass ratios under 7%).[2] Respondents argue that they relied on the government's assurance when they offloaded the fins and carcasses at the processors' dock, knowing that all the fins matched a corresponding carcass. Id. Given Respondents extensive discussions with Agency personnel both prior and subsequent to the charging date (e.g., discussions about the 5% rule and discussions about the earlier charges against Respondents that were subject to a Settlement Agreement), the undersigned finds it more likely than not that such discussions occurred both prior to and after the charged conduct

[1] While Agency witnesses denied ever telling Respondents that there would be no violation if the fins corresponded to the carcasses landed (see Tr. at 37:12-38:21; 64:23-65:17; 92:18-23 (11/13/2006)), Special Agent Barylsky admitted that it was something he "would say." See Tr. at 97:8-12 (11/13/2006). This is simply an uncontroversial statement of the law – as the Shark Finning Prohibition Act prohibited at the time landing shark fins without the corresponding carcasses – not the mere possession of an excessive weight of fins compared to carcasses. A presumption established on exceeding a fin-to-carcass threshold is quite different from the conduct actually being sanctioned (i.e., shark finning).

[2] Mr. Hemilright could not recall with precision the date of such meeting, nor the date of the claimed meeting with Special Agent Barylsky.

in this case. See Tr. at 69:5-70:13 (10/13/2009); see also Tr. at 41:21-43:16 (10/14/2009) (Respondents' witness Mr. Hemilright's participation in the in advisory council).

Indeed, one can question why Respondents would submit fish tickets that establish a prima facie violation but for the fact that they believed that their catch conformed to the law. Conversely, if Respondents were intentionally engaging in shark finning, they simply could have adjusted the number of fins/carcasses and weights to facially comport with the law. In this regard, Agency counsel asserted during the first hearing before the remand, that if Respondents were over the 5% fin-to-carcass ratio, the law permitted them to throw fins overboard to be in compliance. Tr. at 161-2 (11/13/2006).

Importantly, this being a paper case,[3] it is necessarily based upon a "legal fiction".[4] The fins and carcasses Respondents landed have been sold, processed, resold and shipped all over the world. Thus, because it is not possible to go back and match each fin to a carcass, it is impossible to determine whether Respondents actually engaged in shark finning. Under these circumstances, the fact-finder is left with weighing all the record evidence juxtaposed with the law to reach a decision by a preponderance of the evidence presented by counsel for both parties. The undersigned can only hope that the

[3] See, e.g., Tr. at 48:17-49:7 (11/13/2006) (Special Agent Raterman testifying that he never witnessed the actual product from the F/V BLUE FIN and that this was a pure paper case based on landing tickets and processing receipts).

[4] A "legal fiction" exists in this case by operation of law based upon a congressionally mandated statutory presumption. See 16 U.S.C. § 1857(1)(P). Once invoked, the presumption requires the trier of fact to assume the truth of something that may be false or that a state of facts exists, which might never have taken place. The difficult task therefore is to determine how far a presumption standing alone can take the Agency in proving its case. See East Sea Seafoods LLC v. United States, 703 F. Supp. 2d 1336, 1342-56 (CIT 2010) (finding that "Commerce's application of the presumption of state control, without considering abundant record evidence rebutting that very presumption, pushed legal fiction into the realm of legal fantasy").

facts and conclusions made in this Decision and Order correspond with the reality of what actually transpired.[5]

Moreover, as explained in Section IV.C.3, this was not an "all or nothing" case in which Respondents merely needed to submit general explanations to cast doubt upon the Agency's case. Conversely, just because Respondents are found by a preponderance of the evidence to have engaged in shark finning on some instances does not mean that it is reasonable to conclude that they engaged in shark finning on all charged instances.

II. PROCEDURAL BACKGROUND

On April 11, 2006, the Agency issued a Notice of Violation and Assessment of Administrative Penalty (NOVA) and a Notice of Permit Sanction (NOPS) to Respondents Mark Cordeiro and Willie Etheridge alleging eighteen (18) counts of shark finning. The Agency's regulations define shark finning as "taking a shark, removing a fin or fins (whether or not including the tail), and returning the remainder of the shark to the sea." 50 C.F.R. § 600.1021(a). The amended NOVA alleged that on eighteen (18) separate occasions Respondents landed shark fins that exceeded five percent (5%) of the dressed weight of the corresponding shark carcasses, in violation of the Magnuson Stevens Act, 16 U.S.C. § 1801 et seq. and its implementing regulations at 50 C.F.R §§ 635.71(a)(28) and 635.30(c)(1).

Respondents sought a hearing to contest the allegations in the NOVA. Unfortunately for Respondents (and despite a strong admonition from the undersigned), they both came to the hearing without legal representation. On October 24, 2007, the undersigned issued an Initial Decision and Order finding the allegations in the NOVA

[5] In effect, Respondents are arguing that it is patently unfair to the citizens of this country for the government to establish a system of laws and regulations in which such citizens are found liable because they cannot disprove a negative since the facts that would exonerate them are not available.

proven by a preponderance of the evidence and imposing the Agency's recommended penalties of $180,000 in fines and a 180 day permit suspension. See In re Mark Cordeiro and Willie Etheridge, III, 2007 WL 4112165 (N.O.A.A. October, 24, 2007).[6]

Respondents thereafter retained counsel and timely sought discretionary review of the Initial Decision and Order by the Agency's Administrator. On February 25, 2008, the Agency Administrator issued an Order Granting Discretionary Review and Remanding Case for Further Proceedings. See In re Mark Cordeiro and Willie Etheridge, 2008 WL 948340 (N.O.A.A. February 25, 2008).

The hearing following the Remand Order was held from October 13, 2009 through October 15, 2009 in Norfolk, Virginia. The delay in time between the remand and the rehearing was based upon the request of the parties. On December 9, 2009, the undersigned resumed the hearing via telephone conference call to conclude the examination of one of the Agency's witnesses (Mr. Sander). The parties' witnesses and exhibits entered into evidence are identified in **Attachment A**.

On June 23, 2010, the Agency published a revision to its procedural rules, which modified 15 C.F.R. § 904.204 to remove the presumption of reasonableness that previously attached to the Agency's proposed sanction. See 75 Fed. Reg. 35631 (June 23, 2010). This change made it clear that the judge in Agency proceedings was free to impose a sanction de novo by taking into account all the factors required by applicable law. Id. The Agency had proposed this change on March 18, 2010 and requested public comments (see 75 Fed. Reg. 13050). Given this announcement, the parties requested another stay of proceedings (which the undersigned granted) in light of this proposed

[6] Respondents did not raise the issue of inability to pay the sanction and so the issue is waived. See Tr. at 10:6-11:2 (11/13/2006); and Tr. at 12:6-9 (10/13/2009).

change in rules in order to give the parties time to review and evaluate its impact upon this case. See Post-Hearing Conference Report and Scheduling Order (June 30, 2010) (outlining previous stays in the case). The parties thereafter agreed that the new rule found at 15 C.F.R § 904.204(m) should apply to this case, and the undersigned so ordered. Id.

On July 16, 2010, Respondents filed their Post-Hearing Brief and Requests for Rulings of Law and Findings of Fact. On that same date, the Agency filed its Second Post-Hearing Brief, which included Proposed Findings of Fact and Conclusions of Law. Rulings on the parties' proposed findings of fact and conclusions of law are contained in **Attachment B**. On August 6, 2010, both parties filed their respective Reply Brief.

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

III. FINDINGS OF FACT[7]

1. At all relevant times mentioned herein, including all dates corresponding with the eighteen (18) counts included in the NOVA, Respondent Willie Etheridge, III was the owner of the F/V BLUE FIN, documentation number 59797. Agency Exhs. 1, 39; Tr. at 37 (11/13/2006).

[7] References to the hearing transcripts are designated as "Tr. at [page #:line #] (date of hearing)" and references to party exhibits are designated as "Agency Exh. [numeric]" and "Resp. Exh. [alaphabetic]".

2. At all relevant times mentioned herein, including all dates corresponding with the eighteen (18) counts included in the NOVA, Respondent Mark Cordeiro was the operator of the F/V BLUE FIN. Agency Exhs. 1, 39; Tr. at 24, 37 (11/13/2006).
3. At all relevant times mentioned herein, including all dates corresponding with the eighteen (18) counts included in the NOVA, Respondent Etheridge authorized Respondent Cordeiro to operate the F/V BLUE FIN to fish for shark species pursuant to the vessel's Federal Atlantic commercial shark limited access permit. Agency Exhs. 5-8, 38; Tr. at 24, 30 (11/13/2006).
4. On or about August 18, 2003, Respondents possessed a shark fin-to-carcass ratio of 7.48% from offloading 3,973 pounds of shark carcasses and 297 pounds of wet shark fins. Agency Exhs. 9, 10; Tr. at 68-70 (11/13/2006).
5. On or about January 4, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.81% from offloading 3,675 pounds of shark carcasses and 287 pounds of wet shark fins. Agency Exhs. 11, 12; Tr. at 71-3 (11/13/2006).
6. On or about January 8, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.29% from offloading 3,923 pounds of shark carcasses and 286 pounds of wet shark fins. Agency Exh. 13; Tr. at 73-4 (11/13/2006).
7. On or about January 9, 2004, Respondents possessed a shark fin-to-carcass ratio of 8.19% from offloading 3,942 pounds of shark carcasses and 323 pounds of wet shark fins. Agency Exh. 14; Tr. at 74 (11/13/2006).
8. On or about January 12, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.14% from offloading 3,751 pounds of shark carcasses and 268 pounds of wet shark fins. Agency Exhs. 15, 16; Tr. at 74 (11/13/2006).

9. On or about January 18, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.47% from offloading 3,239 pounds of shark carcasses and 242 pounds of wet shark fins. Agency Exh. 17; Tr. at 75 (11/13/2006).

10. On or about January 24, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.78% from offloading 4,140 pounds of shark carcasses and 322 pounds of wet shark fins. Agency Exh. 18; Tr. at 75 (11/13/2006).

11. On or about January 27, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.62% from offloading 3,633 pounds of shark carcasses and 277 pounds of wet shark fins. Agency Exh. 19, 20; Tr. at 75-6 (11/13/2006).

12. On or about July 2, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.37% from offloading 3,865 pounds of shark carcasses and 285 pounds of wet shark fins. Agency Exh. 21; Tr. at 76-7 (11/13/2006).

13. On or about July 4, 2004, Respondents possessed a shark fin-to-carcass ratio of 8.18% from offloading 4,022 pounds of shark carcasses and 329 pounds of wet shark fins. Agency Exh. 22; Tr. at 77 (11/13/2006).

14. On or about July 6, 2004, Respondents possessed a shark fin-to-carcass ratio of 8.07% from offloading 3,880 pounds of shark carcasses and 313 pounds of wet shark fins. Agency Exh. 23; Tr. at 77-8 (11/13/2006).

15. On or about July 8, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.79% from offloading 3,980 pounds of shark carcasses and 310 pounds of wet shark fins. Agency Exh. 24; Tr. at 79 (11/13/2006).

16. On or about July 11, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.94% from offloading 3,965 pounds of shark carcasses and 315 pounds of wet shark fins. Agency Exhs. 25, 26; Tr. at 80-1 (11/13/2006).

17. On or about July 13, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.77% from offloading 3,950 pounds of shark carcasses and 307 pounds of wet shark fins. Agency Exhs. 27, 28; Tr. at 81 (11/13/2006).

18. On or about July 16, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.29% from offloading 3,980 pounds of shark carcasses and 290 pounds of wet shark fins. Agency Exhs. 29, 30; Tr. at 82 (11/13/2006).

19. On or about July 19, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.44% from offloading 3,816 pounds of shark carcasses and 284 pounds of wet shark fins. Agency Exhs. 31, 32; Tr. at 82-3 (11/13/2006).

20. On or about July 25, 2004, Respondents possessed a shark fin-to-carcass ratio of 8.47% from offloading 3,980 pounds of shark carcasses and 337 pounds of wet shark fins. Agency Exhs. 33, 34; Tr. at 84 (11/13/2006).

21. On or about July 29, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.87% from offloading 3,800 pounds of shark carcasses and 299 pounds of wet shark fins. Agency Exhs. 35, 36; Tr. at 84 (11/13/2006).

22. All fishing resulting in the possession or offloading of shark carcasses and fins, as detailed in findings of facts four (4) through twenty one (21), occurred within the Exclusive Economic Zone of the United States. Agency Exh. 37; Tr. at 85 (11/13/2006).

23. Both Respondents admitted they possessed or offloaded wet shark fins in each of the eighteen (18) counts alleged in the NOVA and NOPS with a fin to corresponding carcass ratio in excess of five (5) percent. Tr. at 19, 31, 119, 232, 266 (11/13/2006).

24. A dressed, eviscerated shark carcass with the fins, tail and head removed is referred to in the shark fishing industry as a "log." Tr. at 105:14-16 (11/13/2006).

25. The manner of dressing the shark into log form can alter the fin-to-carcass ratio, for example, by where the neck is cut and how much meat is left on the fins. Tr. at 175:16-24, 20-21 (11/13/2006).

26. Shark carcasses can be cut in a variety of ways from what might be termed a "heavy" cut where less of the shark is cut away to arrive at log form to a "light" or "short" cut where more of the shark is cut away to arrive at log form. Tr. at 177:2-179:2 (11/13/2006).

27. The Agency's experts did not have any actual information about how Respondents cut the shark carcasses. Tr. at 177:2-179:2 (11/13/2006).

28. Agency expert Eric Sander acknowledged that the fin-to-carcass ratio could be affected by a variety of factors: including the method of cutting the carcass, leaving extra meat on the fins, icing/soaking the fins, and also by using sharks as bait. Tr. at 175:16-24, 20-21; 193:14-21; 196:22-24 (11/13/2006). This testimony is deemed credible.

29. Agency expert Eric Sander did not believe that even taking into account Respondents' method of cutting the carcass, leaving extra meat on the fins, and icing/soaking of fins could account for the overage in the fin-to-carcass ratios. Tr.

at 195:9-25 (11/13/2006). This testimony is only partially accepted as credible since it is clear that the fin-to-carcass ratios in some instances could account for the overages depending on the dressing procedures employed.

30. Neither the SFPA nor the Agency's regulations require that the 5% fin-to-carcass threshold applies only with respect to the four primary fins. The studies of sharks upon which the 5% fin-to-carcass threshold was established were based on the weight of the four primary fins, not including the secondary fins. Tr. at 4:6-17 (10/13/2009).

31. The Agency acknowledged that retention of the secondary fins, in addition to the primary fins of sharks, would raise the fin-to-carcass ratio as a "matter of logic." Tr. at 6:4-5 (10/13/2009).

32. Respondents were told by NOAA law enforcement that as long as all the fins corresponded with carcasses, no charges would be filed regardless of the amount by which the fin-to-carcass ratio exceeded 5%. See Tr. at 18:1-13; 69:5-70:13 (10/13/2009); see also Tr. at 45:13-47:3 (10/14/2009). Given Respondents' extensive discussions with Agency personnel prior and subsequent to the charges being brought (e.g., discussions about the 5% rule and discussions about the earlier charges against Respondents that were subject to a Settlement Agreement), the undersigned finds it more likely than not that such discussions occurred both prior to and after the charged conduct in this case.

33. Respondent Cordeiro denied engaging in shark finning with respect to the Agency's eighteen (18) charges. Tr. at 18:16-23; 57:22-58:3; 58:14-18; 211:16-19 (10/13/2009).

34. Respondent Cordeiro targeted larger sandbar sharks with larger fins. The larger fins are worth more on the market. Tr. at 20:19-21:9; 28:16-19; 35:17-24 (10/13/2009). This testimony is deemed credible.

35. Respondent Cordeiro's custom and practice was to cut the logs to remove the belly flap and short of the gills in response to market demands. Tr. at 24:1-11; 43:4-45:24 (10/13/2009); Resp. Exh. F.

36. The most valuable part of a shark by weight is its fins, not the meat from the log. Tr. at 50:1-15 (10/13/2009).

37. Respondent Cordeiro's custom and practice was to retain both the primary and secondary fins on the sharks he caught, except for very small sharks (e.g., would retain such fins if the sharks were "coming up slow" and crew was not busy). Tr. at 28:21-22; 35:7-13; 36:8-20 (10/13/2009). This testimony is deemed credible.

38. Respondent Cordeiro's custom and practice was to cut his shark fins heavy (i.e., leaving extra meat on the fins in order not to lose any cartilage, which is the most valuable part of the shark), and hope the fin buyer would not trim the excess meat off the fin and reduce the amount paid. Tr. at 21:20-22:3; 23:15-22; 66:13-15; 67:11-16 (10/13/2009). This testimony is deemed credible.

39. It was the custom and practice of the F/V BLUE FIN to immediately dress the sharks after they were caught. The next step in the process was to soak the fins in water, then pack both the fins and carcasses in ice. This process would maintain the fin weight as heavy as possible. Tr. at 22:8-10; 26:18-27 (10/13/2009).

40. The demonstrated amount of weight on the fins attributable to ice and water weight and/or loss of fluid from the fins during shipment of fins to Mr. Agger equated in one instance to 1.23%. Tr. at 226:23-229:12 (11/13/2006).

41. Upon arrival at the dock, the fins and carcasses were offloaded from the F/V BLUE FIN into fish containers. This transfer results in some of the ice melting and the resulting water dripping off which reduces the weight of the fins. Tr. 64:3-10 (10/13/2009). The fins were then shipped still frozen in a refrigerated truck to the wholesaler. See Tr. at 76:15-22 (10/13/2009).

42. Respondents shipped fins to Mr. Agger in aggregated shipments that combined various landings into a single pallet. Tr. at 74:19-25; 77:10-12; 84:8-20 (10/13/2009).

43. Respondent Cordeiro estimated that once the fin buyer trimmed off the extra meat from the fin, he would get paid for 93% of the shipped weight. This percentage takes into account that on some occasions the fin buyer would trim some of the extra meat from the fin. Tr. at 22:11-16 (10/13/2009).

44. Mr. Agger did not always trim the excess meat from Respondents' fins since he knew he could pass on some of the excess (ca. 5%-8%) to his buyers; and he wanted to retain Respondents' business because the quality of the fins were very good and he was willing to work on smaller margins. Tr. at 113:19-114:3; 127:12-16; 196:1-6; 197:11-19; 198:2-10; 200:1-201:13 (10/13/2009).

45. On some occasions, Mr. Agger directed Respondents to cut their fins with less meat. Tr. at 113:11-15 (10/13/2009).

46. Generally, Mr. Agger reduced Respondents' invoice between 6-10% to account for waste (i.e., excess meat left on the fins that he could not pass on to his customers) and the total average of waste was 12%. Tr. at 115:13-116:10; 197:22-25; 200:1-201:13 (10/13/2009). This testimony is found to be credible.

47. Messrs. Agger and Hemilright both testified that larger sharks have larger fins proportionally than smaller sharks. Tr. at 141:5-18 (10/13/2009); Tr. at 128:17-130:24. Mr. Cordeiro also maintained that large sandbar sharks have a larger fin-to-carcass ratio (e.g., "When we caught 4,000 pounds [of small sharks] we never got anywhere near 5 percent ever. And when we catch large sandbars, we're always over."). These assertions are rejected as having an insufficient factual basis in this record.[8]

48. The DELAWARE II study, which formed the basis for the initial determination that sandbar sharks have a fin-to-carcass ratio of approximately 5.1% was based upon taking the four primary fins of the sharks to determine average fin-to-carcass ratios, not the total of eight fins. Tr. at 160:19-161:4 (10/13/2009).

49. Mr. Dewey Hemilright, a longtime commercial shark fisherman, conducted a study in cooperation with the North Carolina Department of Environment and Natural Resources, Division of Marine Fisheries of sandbar shark fin-to-carcass ratios. Mr. Hemilright found that sandbar sharks in that study had a fin-to-carcass ratio on average of 5.6% for the four primary fins and 6.5% for all eight fins (i.e.,

[8] The court left the record open for ten days following the 10/15/2009 hearing to provide the parties an opportunity to submit dispositive information on this subject. See Tr. at 131:8-19; 144:1-6 (10/15/2009). The undersigned requested additional material on this point, particularly, some data to establish or discredit Respondents' assertions, which were based on experience but for which Respondents had no hard data to establish the contention by a preponderance of the evidence. The parties did not supply any additional information on this subject.

the primary fins, plus the secondary fins). Tr. at 10:6-12:10 (10/14/2009); Resp. Exhs. Q, X.

50. In Mr. Hemilright's study, the fins were cut like a buyer would want them with very little, if any, extra meat attached. Tr. at 17:13-17 (10/14/2009).

51. The fins from Mr. Hemilright's study were sold and the fin buyer did not reduce the price based on any waste because of extra meat. Tr. 26:8-12; 26:22-25 (10/14/2009).

52. Neither of the Agency's experts, Dr. Carlson and Mr. Sander, took exception to Mr. Hemilright's study of sandbar fin-to-carcass ratios. Tr. at 45:12-21 (10/15/2009); Tr. at 9:5-17 (12/9/2009).

53. Mr. Hemilright also discovered an error in the DELAWARE II study calculations, which was corrected. As a result the DELAWARE II fin-to-carcass ratios for sandbar sharks should be raised to 5.34%. Tr. at 9:6-23 (10/14/2009); see also Tr. 14:6-12 (10/15/2009) (Agency expert, Dr. Carlson, acknowledging the error).

54. Agency counsel admitted that no Agency regulation dictated how shark fins were to be cut from shark carcasses or how to cut carcasses. Tr. at 34:10-20; 35:3-11; 103:17-20 (10/14/2009).

55. Both parties agreed/stipulated that the manner in which a fisherman dresses a shark carcass and cuts shark fins is driven by market conditions, i.e., what is acceptable to that fisherman's buyer. Tr. at 35:23-36:20 (10/14/2009).

56. Respondents' admitted that there is no direct evidence to indicate what amount of excess meat Mr. Cordeiro left on his fins but maintained that evidence from Mr.

Agger indicating that a back charge of 4.7% to 7.4% indicates what Mr. Agger felt he could pass on to the next buyer. Tr. at 38:19-40:11 (10/14/2009).

57. Mr. Rusty Hudson testified in this case for Respondents. He is a longtime fisherman/fish buyer who has worked for various shark fin buyers and as a fishing industry consultant, specializing in the shark fishery. Tr. at 54:5-57:1 (10/14/2009).

58. Mr. Hudson's experience indicates that cutting shark fins with a clean cut that had a little bit of meat left on fins which had not been soaked or iced would result in approximately 6% additional weight to the fins. Tr. at 79:1-22 (10/14/2009).

59. In contrast, Mr. Hudson's experience indicated that cutting shark fins with a heavier cut (flush with the carcass) by leaving half an inch of meat on the fin could result to approximately 7-9% additional weight to the fins. Tr. at 79:5-12; 109:22-110:11 (10/14/2009).

60. In the early 1990s, Mr. Cordeiro contacted Mr. Hudson, who was working for a fin buyer at the time, to ask whether Mr. Hudson would buy his fins if he left a half an inch of meat on the fins, but Mr. Hudson's employer was not interested in buying such fins even at a reduced price because the employer did not want to or could not trim the meat from the fins. Tr. at 93:14-24 (10/14/2009).

61. Mr. Hudson opined that combining the practice of leaving meat on the fin and cutting a shark carcass small could lead to a sandbar fin-to-carcass ratio as high as 10%. Tr. at 94:16-18 (10/14/2009).

62. Mr. Hudson examined the Agency's observer program data (data from those trips on the F/V BLUE FIN containing Agency observer logs, which could contain a

notation of shark finning occurring) to attempt to determine: (1) whether any of the charged trips had an observer onboard the F/V BLUE FIN and, if so (2) whether the observer reported whether shark finning had occurred. Tr. at 131:2-133:7 (10/14/2009).

63. Mr. Hudson was able to correlate only one charged occasion to the observer data from January 10-11, 2004 (indicating that no finning took place on that trip), which corresponded to Charge #5. See Tr. at 131:2-133:3; 186:11-187:24 (10/14/2009); see also Tr. at 133:4-19 (10/14/2009) (Court requesting that Mr. Hudson provide any additional information for other charges if able).

64. Mr. Hudson admitted that he had no specific information or knowledge regarding the fin-to-carcass ratios, the condition of the fins (e.g., how much meat, if any, was left on the fins) or how the carcasses were cut for any of the 18 charged occasions. Tr. 142:7-143:9 (10/14/2009).

65. Agency expert, Dr. John Carlson, has worked for the National Marine Fisheries Service since 1994 and specializes in shark issues for the Agency. Tr. at 4:5-5:6 (10/15/2009); Agency Exh. 48.

66. Dr. Carlson admitted that all the studies that support a fin-to-carcass ratio of slightly over 5% for sandbar sharks refer to a shark's four primary fins (i.e., the dorsal fin, the two pectoral fins, and the lower caudal fin) – and did not account for the secondary fins. Tr. at 7:3-22 (10/15/2009); see also Agency Exh. 49.

67. The Barrymore study (Resp. Exh. O) was acknowledged by Dr. Carlson as being a "good overview" of the current information the Agency has on sandbar shark fin-to-carcass ratios. Tr. 16:12-17 (10/15/2009).

68. The Barrymore study (Resp. Exh. O) represents data taken from the fishery as a whole, i.e., a mixed large coastal shark fishery and represents a "good overall average" of what the fin-to-carcass ratio would be for a mixed shark fishery. Tr. 27:18-25 (10/15/2009); see also Resp. Exh. W (Burgess study, containing data which was incorporated into the Barrymore study).

69. The finning practices between the United States and foreign fleets (e.g., Spanish long line fleet) have different finning procedures and practices (e.g., the Spanish fleet retains the entire tail of the shark and United States fishermen do not), which significantly effects the fin-to-carcass ratios, and data from the foreign fleets indicating fin-to-carcass ratios as high as 14% are thus not comparable to United States fishing practices. Tr. 17:12-25 (10/15/2009).

70. Additionally, foreign fleets target different species than the United States shark fishing fleet (and calculate fin-to-carcass ratios based on round weight rather than dressed weight), which further questions the utility of comparing foreign fleet fin-to-carcass ratios to those in the United States. Tr. 18:1-21; 20:7-13 (10/15/2009).

71. Mr. Agger speculated that seasonal variation and a shark's reproductive state (e.g., pregnant or "gravid") could have an effect on a given animals' fin-to-carcass ratio. Tr. at 128:17-134:8 (10/13/2009). This assertion is rejected. See testimony of Agency experts Dr. Carlson and Mr. Sander. Tr. at 23:6-25:3; 162:24-164:7 (10/15/2009).

72. The Burgess study (see Resp. Exh. W) found an average fin-to-carcass ratio of 4.90%. This percentage is based on data collected for the years 1994-1999 and

the year 2002 and represents a good average fin-to-carcass ratio for a mixed shark fishery. Tr. at 27:18-25 (10/15/2009).

73. Sandbar sharks accounted for approximately 50% of the sharks offloaded in the Burgess study (Resp. Exh. W). Tr. at 28:10-19 (10/15/2009).

74. Sharks generally have isometric growth patterns, and large sandbar sharks do not have correspondingly larger fin-to-carcass ratios than smaller sandbar sharks. Tr. at 31:6-32:7; 60:19-61:2; 95:10-17 (10/15/2009); Resp. Exh. O at p. 23.

75. A study on which Dr. Carlson was a co-author indicated that in the European shark fishery (particularly discussing the Spanish and Portuguese longline fleets' higher fin-to-carcass ratios) retention of extra meat on the fins and taking of the entire tail fin may make up to 1/3 of the reported "fin weight" and that market conditions drive such practices. Tr. at 68:5-25; 136:19-137:10; 141:4-142:18 (10/15/2009); Resp. Exh. R at vi.

76. Dr. Carlson admitted that it was "fully within the realm of possibility" that leaving extra meat on the shark fin could result in an additional 12% to the fin weight. Tr. at 69:1-3 (10/15/2009).

77. Dr. Carlson admitted that the "true average" fin-to-carcass ratio for sandbar sharks (just the four primary fins) was over 5.0% and demonstrated to be between 5.3%-5.6%. Tr. at 70:9:18 (10/15/2009).

78. Dr. Carlson admitted that the appropriateness of a 5% fin-to-carcass ratio for a mixed shark fishery depended upon the assumption that Mr. Cordeiro "fishes generally like the rest of the directed shark fleet which is a mixed shark fishery." Tr. at 112:8-18 (10/15/2009).

79. No studies show what effect, if any, soaking or icing shark fins would have upon the fin weight, but Dr. Carlson admitted that such practices would increase the weight of the fin by some unknown amount. Tr. at 121:3-121:23 (10/15/2009).

80. Agency expert Mr. Eric Sander, an experienced commercial shark fisherman and Agency contractor and instructor who has worked with the Agency's Office of Law Enforcement, has extensive experience in the Atlantic shark fishery. Agency Exh. 55.

81. In contrast to Mr. Cordeiro, Mr. Sander trimmed his shark fins with little, if any, excess meat on the fin. Tr. at 152:6-22 (10/15/2009); Tr. at 11:1-6 (12/09/2009).

82. Mr. Sander analyzed Mr. Cordeiro's landings for the general time period during which the Agency brought charges and came to the conclusion that in contrast to Mr. Cordeiro's testimony, the data indicated that sometimes he caught small sandbars. This analysis was not, however, tied specifically to the particular charges. Tr. at 166:15-173:6 (10/15/2009); Agency Exh. 58.

83. Mr. Sander generated a document from the exhibits that served the basis for the charges that detailed the percentage of sandbar sharks landed in each of the 18 charges. Tr. at 173:22-177:2 (10/15/2009); Agency Exh. 59.

84. Mr. Sander was able to correlate the observer data to four (4) of the charged counts, including, e.g., Count No. 5. Tr. at 183:3-186:2 (10/15/2009); Agency Exh. 60.

85. Mr. Sander's analysis demonstrates some discrepancies between what was listed as harvested/released sharks on Mr. Cordeiro's set logs and the observer data and

indicates that Mr. Cordeiro used some regulated shark species as bait. Tr. at 186:23-188:13 (10/15/2009).

86. Mr. Sander examined the amount of shark fins offloaded for Counts 9, 10, 13, 14 and 17 and correlated the "stock sheets" from Willie R. Etheridge Seafood Company associated with such counts to determine the amount that the F/V BLUE FIN was actually paid for those fins (based on the weight of the fins in pounds). Tr. at 212:3-217:3 (10/15/2009); Agency Exhs. 61-62.

87. Mr. Sander's analysis indicated that on these occasions the reduction between the amount of shark fins offloaded and the amount of shark fins paid to the F/V BLUE FIN equaled 1.1% for Count 9; 1.1% for Count 10; 3.1% for Counts 13/14 combined; and .78% for Count 17.[9] Id.

88. Mr. Sander admitted that the amount of extra meat, if any, a dealer would accept depended on the dealer and could vary from dealer to dealer and that Mr. Agger would be the "one to quantify how much meant was attached to the fins . . . ." Tr. at 268:7-15; 270:22-271:5 (12/09/2009).

89. The average value (per pound) of Respondents' shark fins for the charges are reflected on Agency Exhibit 43, and this value per pound will be accepted as a reasonable and credible estimate. See Agency Exh. 43; Tr. at 187:11-190:24 (11/13/2006).

[9] Importantly, the amount of "waste" attributed in this analysis for Counts 13 and 14 represents a combined amount and so it is impossible to attribute a specific amount with respect to either of these particular charges. As discussed in this Decision and Order, Charges 9, 10, 13, 14 and 17 are found proven. The undersigned accepted as a general matter that 12% was a reasonable percentage amount of excess meat left on Respondents' fins. Using a lower number for these particular charges (even assuming such numbers represented the total amount of "waste" for these counts, which the undersigned rejects) would not have affected the outcome on these charges.

IV. PRINCIPLES OF LAW

A. Agency's Burden of Proof

In order to prevail on the charges instituted against a respondent, the Agency must prove the violations alleged by a preponderance of the evidence. 5 U.S.C. § 556(d); In re Cuong Vo, 2001 WL 1085351 (N.O.A.A. 2001). Preponderance of the evidence means the Agency must show it is more likely than not a respondent committed the charged violation. Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983). The Agency may rely on either direct or circumstantial evidence to establish the violation and satisfy the burden of proof. See generally, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764-765 (1984). The burden of producing evidence to rebut or discredit the Agency's evidence will only shift to the Respondent after the Agency proves the allegations contained in the NOVA by a preponderance of reliable, probative, substantial, and credible evidence. Steadman v. S.E.C., 450 U.S. 91, 101 (1981).

This case involved the Agency's invocation of a statutory presumption that anyone who lands fins and sharks with a fin-to-carcass ratio in excess of 5% was engaged in shark finning. See 16 U.S.C. § 1857(1)(P). The effects of this presumption will be fully explored in Section IV.C.

B. The Agency's Anti-Sharking Finning Efforts and the SFPA

The Agency (through one of its components, the National Marine Fisheries Service (NMFS)) has managed the shark fishery in the Atlantic Ocean (including the Gulf of Mexico and the Caribbean) since 1993. See Appendix 1 (discussing the history of the Agency's anti-shark finning regulations).

In 2000, President Clinton signed the Shark Finning Prohibition Act (SFPA), P.L. 106-557. The stated purpose of this Act was "to eliminate shark-finning by addressing the problem comprehensively at both the national and international levels." SFPA, Sec. 2. The SFPA defined shark finning as "the taking of a shark, removing the fin or fins (whether or not including the tail) of a shark, and returning the remainder of the shark to the sea." SFPA, Sec. 9.

The SFPA amended the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1857(1)) (Magnuson-Stevens Act) by adding a new section P, which made it unlawful:

> (i) t o remove any fins of a shark (including the tail) and discard the carcass of the shark at sea;
> (ii) to have custody, control, or possession of any such fin aboard a fishing vessel without the corresponding carcass; or
> (iii) to land any such fin without the corresponding carcass.

Id.

The SFPA also provided that "[f]or purposes of subparagraph (P) there is a rebuttable presumption that any shark fins landed from a fishing vessel or found on board a fishing vessel were taken, held, or landed in violation of subparagraph (P) if the total weight of shark fins landed or found on board exceeds 5 percent of the total weight of shark carcasses landed or found on board." 16 U.S.C. § 1857(1)(P). The SFPA directed the Secretary of Commerce to promulgate regulations implementing the SFPA within 180 days after the act's enactment. SFPA, Sec. 4.

On June 28, 2001, the Agency announced proposed rules to implement the SFPA. See 66 Fed. Reg. 34401, 2001 WL 719959 (June 28, 2001). In these proposed rules, the Agency outlined the establishment of the 5% fin-to-carcass presumption. Id. at 34402. The Agency specifically stated that "[i]t would be the responsibility of the person

involved to rebut the presumption by providing evidence that there is a good reason for the weight of the fins to exceed the 5-percent threshold." Id. (emphasis added).

In its final rules, the Agency stated, "[i]t would be the responsibility of the person conducting the activity to rebut the presumption by providing evidence that the fins were not taken, held or landed in violation of these regulations." Id. at 67 Fed. Reg. 6194 at 6195 (February 11, 2002) (emphasis added). Indeed, in terms of enforcement practices, the Final Rule stated:

> NMFS notes that enforcement and prosecution of violations will not be contingent solely on the use of the rebuttable presumption. NOAA will consider all the evidence available in each instance, including the number and weight of shark carcasses, the condition of the carcasses (e.g., dressed or not dressed), and the amount or weight of other shark products when determining whether a violation likely occurred and whether to prosecute.

Id. at 6197 (emphasis added).[10]

These anti-finning regulations remainced in place until a fairly recent change that required all sharks to be landed with fins attached. See 73 Fed. Reg. 35778, 2008 WL 2490182 (June 24, 2008). This 2008 final rule requiring sharks to be landed with the fins attached specifically addressed comments made to the proposed rule about the 5% fin-to-carcass ratio as follows:

> NMFS first implemented the 5-percent fin-to-carcass ratio in the 1993 Shark FMP. This ratio was based on research that indicated that the average ratio of fin weight to dressed weight of the carcass was 3.6 percent, and the sandbar fin ratio was 5.1 percent. In December 2000, the SFPA was signed into law. The SFPA established a rebuttable presumption that any shark fins landed from a fishing vessel or found on board a fishing vessel were taken, held, or landed in violation of the shark finning ban if the total weight of shark fins landed or found on board exceeded 5-percent of the total weight of shark carcasses landed or found on board. This management measure was implemented by NMFS through

[10] Contrary to this explicit language in the Final Rule, the Agency's case against Respondents is entirely based on the reported fin-to-carcass ratios and invocation of the rebuttable presumption. See, e.g., Agency's Proposed Findings of Fact 4-21.

> a final rule released in February 2002. NMFS may conduct additional research on the fin-to-carcass ratio in the shark research fishery, though any changes to the 5-percent ratio will have to be modified by Congressional action.

Id. at 35789 (emphasis added).

C. The Charges Against Respondents.

The Agency's NOVA initially charged Respondents with 18 counts of shark finning, specifically, "possess[ing] shark fins without the corresponding carcasses while on board a U.S. fishing vessel" as required by 50 C.F.R. § 600.1203(a)(2). Approximately one month prior to the initial hearing, Agency counsel amended its Preliminary Position on Issues and Procedures and issued an amended NOVA and NOPS pursuant to 15 C.F.R. § 904.207(a) (regulation allowing the amendment of pleadings without prior approval of the judge as long as such amendment made at least 20 days prior to hearing).

The amended NOVA and NOPS replaced references to 50 C.F.R. § 600.1203(a)(2) with 50 C.F.R. §§ 635.71(a)(28) and 50 C.F.R. § 635.30(c)(1). The amendment also replaced the phrase "by possessing shark fins without their corresponding carcasses while on board a U.S. fishing vessel" with the phrase "by possessing or offloading wet shark fins in a quantity that exceeds 5 percent of the dressed weight of the shark carcasses." In each of the 18 counts, Agency counsel's approach toward the charges and Respondents' alleged violations during the initial hearing centered entirely on a strict liability violation of 50 C.F.R. § 635.30(c)(1). See, e.g., Agency's Post Hearing Brief at 6 (stating that to "prove its case, the Agency must . . . therefore prove that: 1) Respondents are 'persons' within the framework of the Magnuson-Stevens Act; 2) Respondents own or operate a vessel issued a Federal Atlantic

commercial shark limited access permit; and 3) Respondents possessed or offloaded wet shark fins in a quantity that exceeded 5% of the dressed weight of the shark carcasses.").[11]

Nowhere did the Agency seek to prove that Respondents were in fact shark finning or otherwise invoke the provisions of the SFPA. It was not until Agency counsel's Opposition to Respondents' Petition for Discretionary Review and Motion for Remand that the Agency asserted any necessary connection between 50 C.F.R. § 635.30(c)(1) and the provisions of the SFPA, particularly the 5% rebuttal presumption. In essence, the Agency had not charged Respondents with shark finning but rather a per se violation of the Agency's regulations under 50 C.F.R. § 635.30(c)(1). The Agency's approach to the charges thus framed the issues during the first proceedings and was considered to cabin the undersigned's authority to address Respondent's efforts to rebut such allegedly per se violations of the Magnuson-Stevens Act.

The Remand Order incorrectly characterized the undersigned's holding in the Initial Decision and Order as providing that Section 635.30(c)(1) carried with it an irrebuttable presumption that Respondents engaged in prohibited shark finning. This was not the holding of the Initial Decision and Order. As explained fully in that decision, the undersigned determined that the provisions of 50 C.F.R. § 635.30(c)(1) did not incorporate the provisions of the SFPA and thus, the issue of the rebuttable presumption did not arise based upon Agency counsel's choice of charging a per se violation of the Agency's regulations at 50 C.F.R. § 635.30(c)(1) and arguments made throughout the

[11] See also Tr. at 17:13-20; 19:2-6 (11/13/2006) (Agency counsel's presentation of the theory of the case, which centered on the fact that Respondents possessed and/or off-loaded shark fins in excess of the 5 percent fin-to-carcass weight ratio on 18 separate occasions and noting that "this is a math case" – not a case involving a burden to prove Respondents were shark finning).

initial proceedings.[12] Also see and compare In re Frontier Fishing Corp., 2007 WL 3054279 (N.O.A.A., Oct. 4, 2007) (Supplemental Decision and Order on Remand) and In re Frontier Fishing Corp., 2008 WL 948339 (N.O.A.A., Feb. 25, 2008) (Administrator's Order Granting Remand).

Nevertheless, the Administrator directed in the Remand Order that Respondents be given the opportunity to rebut the 5% presumption. To make absolutely certain no confusion remained as to the relationship between Section 635.30(c)(1) and the SFPA provisions, the undersigned held a telephonic conference with the parties following the Remand Order and clarified what law applied to this case.

As reflected in the Order Granting Agency Request to Amend Pleadings (Feb. 19, 2009), both parties agreed to amend the NOVA and the NOPS dated October 12, 2006 to allow Respondents to rebut the presumption that they were in fact shark finning. This amendment replaced the "Statute/Regulations Violated" in the NOVA and NOPS from 16 U.S.C. 1801 et seq. and 50 C.F.R. §§ 635.71(a)(28) and 635.30(c)(1) with references to 16 U.S.C. 1857(1)(P) and 50 C.F.R. §§ 600.1203(a)(2) and 600.1203(a)(3). Now, no question remains that the Agency has charged Respondents with shark finning under the

[12] Indeed, Respondents' counsel acknowledged that the undersigned gave Respondents every opportunity during the initial proceedings to rebut the charges that they exceeded the 5% fin-to-carcass ratio. See Transcript of Prehearing Conference at 293-294 (1/22/2009). Inexplicably, however, Agency counsel raised the issue of Respondents' inability to rebut the presumption in the Agency's brief opposing Respondents' appeal to the Agency Administrator and requesting that the case be remanded for further hearing (taking a position completely contrary to every statement and argument presented to the undersigned up to that date). See also Respondents' Post Hearing Brief at 2 ("The Agency opposed the Petition, but it sought to reverse this Court's position on the applicability of the Shark Finning Act and implementing regulations – a position the Court adopted at the Agency's insistence."). Agency counsel's position on Respondents' appeal was akin to complaining of an "error" that the Agency itself insisted upon when amending the charges from shark finning to exceeding the 5% threshold and through its briefing and arguments at the first hearing. See, e.g., United States v. Ross, 131 F.3d 970, 988 (11th Cir. 1997) ("It is a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party").

SFPA by virtue of the rebuttable presumption contained in the statue and regulations. It is this charge that Respondents attempted to rebut upon remand.

The following three questions remain, however, in the face of this seemingly straightforward proposition: 1) what is Respondents' burden of production in the face of the presumption?; 2) did the burden of persuasion shift to Respondents as a result of the Agency's establishment of the presumption?; and 3) what effect does a persuasive rebuttal have upon the Agency's case?

1. Respondents' Burden Of Production To Rebut The Statutory Presumption.

The Agency clearly established a prima facie case to invoke the statutory presumption. Indeed, Respondents do not contest the fact that they landed fins in excess of 5% of the weight of carcasses they landed for each of the 18 charged violations. Respondents' Post Hearing Brief at 1; Tr. at 21:11-22:3 (11/13/2006) (Respondents stipulating to being over 5% on each occasion). As clarified in the prehearing conference call following the Remand Order, everyone understood that the Administrator remanded these proceedings to allow Respondents to rebut the presumption that they were unlawfully shark finning under the SFPA. The question centered on how Respondents could rebut the presumption.

While the undersigned may not entertain and rule upon direct challenges to the Agency's regulations (see 15 C.F.R. § 904.200(b)), the Administrator made it clear that on Remand, Respondents must be allowed to "to present evidence to rebut the presumption they were shark finning on the 18 occasions charged in the NOVA . . . ." Remand Order at 2. Respondents rebuttal efforts following Remand could be construed as a direct attack on the 5% presumption in the abstract, but the NPRM and the Final

Rule implementing the SFPA, make it clear that Respondents may rebut the presumption by providing evidence that they were not shark finning. In essence, Respondents were not tasked with rebutting the fact of having over a 5% fin-to-carcass ratio but rather with rebutting the presumed fact of shark finning based on the fact that their fin-to-carcass ratio exceeded the 5% threshold that triggers the presumption.

The only specific statement as to what kind of evidence may suffice to rebut the presumption is the NPRM's statement that an individual charged with shark finning may present evidence that there are good reasons why the fin-to-carcass ratio exceeded 5%. See 67 Fed. Reg. at 6195. Respondents attempted to do just that following remand by offering various reasons why the fin-to-carcass ratio exceeded 5% by offering forth various reasons for their excessive fin-to-carcass ratios.

Respondents could absolutely rebut the presumption by matching each fin to a landed carcass.[13] Obviously, this is not possible. To hold Respondents to this evidentiary threshold to rebut the government's presumption would be completely unfair.[14] Respondents' shark fins that are the subject of the 18 charges were processed and entered the stream of commerce; thus no "forensic" reconstruction is possible.

Indeed, one of the key purposes of the presumption is that the Agency could not have its agents on the docks for every landing to physically match fins to every carcass.

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[13] As clearly articulated by Special Agent Barylsky during the initial hearing, if he were at the dock or on the boat at landing and each fin could be matched to a landed carcass, there would be no violation even if the fin-to-carcass ratio was in excess of 5% as documented in the fish tickets and the processing receipts. Tr. at 113:16-20, 23-25; 114:3 (11/13/2006).

[14] See Tr. at 80:19-81:6 (10/13/2009) (Agency counsel suggested that if Respondents knew they were going to land in excess of 5% fin-to-carcasses, they could have proven that the logs corresponded to the fins by taking pictures). Nothing in the statute/regulations requires a fisherman to maintain evidence to disprove a charge of shark finning. Indeed, this suggestion is flatly rejected given the fact that the Agency specifically foreswore charging any respondent based strictly on the presumption alone. Interestingly, when faced with a question from the undersigned regarding the legality of throwing fins overboard to comply with the 5% rule, Agency counsel stated that such a practice would not be a violation of the law and that the Agency "expect[s] fisherman to comply with [the 5%] ratio". See Tr. at 162:8-25 (11/13/2006).

The presumption thus serves a legitimate enforcement purpose. Therefore, the undersigned determined that Respondents' burden was to explain why the fin-to-carcass ratios on each of the eighteen charges exceeded the congressionally mandated threshold. In order to do so, Respondents had to present what they typically would do with respect to cutting the shark fins (i.e., leaving extra meat so as not to miss any of the valuable fin), cutting the shark carcasses to minimize carcass weight, and icing and soaking the fins. Such efforts were reasonable ones as the ephemeral state of the evidence in this case does not allow either Respondents or the Agency to actually examine or reconstruct the fins/carcasses in question.

2. The Ultimate Burden Of Persuasion Remains On The Agency Regardless Of The Presumption.

The "burden of proof" clearly includes the "burden of going forward" with evidence to sustain one's position, and that burden rests initially with the Agency – as it is the entity that brought the charges against Respondents. See Ringsred v. Dole, 828 F.2d 1300, 1302 (8th Cir. 1987) (after the agency comes forward with a prima facie case, the "burden of production" shifts to the private party). Once the Agency came forward with sufficient evidence to invoke the 5% presumption (i.e., Respondent's landed fins and shark carcasses on each of the charged occasions with fin-to-carcass ratios exceeding 5%), the burden of coming forward with evidence to rebut the presumption (and thus the Agency's prima facie case) shifted to Respondents.

Whether the burden of persuasion shifted as well is a question needing further analysis. Agency counsel argued that Congress intended to shift both the burden of production, i.e., going forward with evidence to rebut the statutory presumption, and the burden of persuasion (also known as the ultimate burden of proof) on the ultimate issue.

See Agency Reply to Respondents' Post-Hearing Brief at 1-5. In Agency counsel's view, this shift is justified because Congress meant to create an affirmative defense through creation of the SFPA presumption. Id. at 2.

Unlike some other statutes that establish a statutory presumption (see, e.g., 15 U.S.C. § 1115(a)-(b)), the SFPA does not list explicit defenses or possible means to rebut the presumption of shark finning. Possible defenses might include the following: (1) the fish tickets were wrong – i.e., the carcasses vs. fins and resulting percentages were wrong (which is not at issue here as parties agreed that Respondents exceeded 5%); (2) each fin landed corresponded to a landed carcass – proof of which is not possible here; (3) evidence from an independent observer on boat for each charge who could reliably attest/verify no shark finning occurred. In this case, Mr. Cordeiro testified that no finning occurred; however, that assertion standing alone would not be enough to rebut the presumption. This conclusion is also true of the burden of going forward or of the ultimate burden of persuasion, depending on which legal construct was employed. A mere denial is simply not enough from an interested party. A fourth and only effective mechanism available to Respondents to rebut the presumption must be an explanation of why their fin-to-carcass numbers exceeded the 5% threshold.

To place the ultimate burden of persuasion – not just the burden of production with respect to rebuttal – places Respondents in the impossible position of proving the negative, i.e., they must prove, in the absence of any existing definitive evidence that they did not engage in the prohibited practice of shark finning. Such a requirement is so patently onerous that it would be like requiring the Agency to prove not only that Respondents violated the 5% rule but also affirmatively show that for each shark taken,

the fins did not correspond to a carcass. It would be unfair to require the Agency to meet such unreasonable burdens and it would be equally unfair to force Respondents to disprove the Agency's case as an affirmative defense.

Agency counsel acknowledged the lack of any direct expression of Congressional intent on this point but cited to: (1) an administrative law judge's holding in an Endangered Species Act case (U.S. Fish and Wildlife Service v. William J. Feldstein, 1 O.R.W. 325, 328) (quoting a Conference Report the judge found indicated that the law was revised "to create an affirmative defense" . . . "permitting a qualified person to plead in defense to a charge of violation of the Act that the goods or animals themselves were in their hands or under control on the effective date of the Act"); and (2) a Lanham Act case (Leelanau Wine Cellars, Ltd. v. Black & Red, Inc., 502 F.3d 504- 513-514) for the proposition that the presumption created an affirmative defense that shifts the burden of persuasion from the Agency to Respondents. Id. at n.1.

Respondents argued in contrast that the burden of persuasion never shifts from the Agency and that once they rebut the presumption, the presumption simply disappears from the case. Under Respondents' view, the Agency is left to its burden of persuasion absent the benefit of any facts presumed. Respondents' Post Hearing Brief at 3-4; Respondents' Post Hearing Reply Brief at 1.

Respondents cited Fed. R. Evid. Rule 301 for the proposition that the burden of going forward with evidence to rebut or meet the presumption does not shift the burden of proof "in the sense of the risk of nonpersuasion, which remains . . . upon the party on whom it was originally cast." Fed. R. Evid. Rule 301. Respondents argued that Rule 301's "bursting bubble" theory of presumptions apply to these proceedings. See, e.g.,

McCann v. Newman Irrevocable Trust, 458 F.3d 281, 287-288 (3d Cir. 2006) (describing the "bursting bubble" theory of presumptions contained in Rule 301 as requiring rebutting the presumption destroys that presumption and leaves only that evidence and its inferences to be judged against the competing evidence and its inferences to determine the ultimate question at issue). As the Federal Circuit summarized the shifts involved under Rule 301:

> The presumption affords a party, for whose benefit the presumption runs, the luxury of not having to produce specific evidence to establish the point at issue. When the predicate evidence is established that triggers the presumption, the further evidentiary gap is filled by the presumption . . . . However, when the opposing party puts in proof to the contrary of that provided by the presumption, and that proof meets the requisite level, the presumption disappears . . . . The party originally favored by the presumption is now put to his factually-supported proof. This is because the presumption does not shift the burden of persuasion, and the party on whom that burden falls must ultimately prove the point at issue by the requisite standard of proof . . . .

Routen v. West, 142 F.3d 1434, 1440 (Fed. Cir. 1998) (citations omitted). See also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) (holding that a Title VII plaintiff retains the burden of persuasion despite the presumption in plaintiff's favor created by a prima facie case and citing to Rule 301).

Agency counsel argued in response that by the Agency's own regulations the Federal Rules of Evidence do not apply (citing to 15 C.F.R. § 904.251(a)(2)). See Agency's Reply at 2. Furthermore, Agency counsel maintained that Rule 301 does not apply by its own terms because Congress "otherwise provided" for a shifting of burdens by creating the presumption. Id. (quoting Rule 301). But Agency counsel misinterprets the "otherwise provided" language in Rule 301 as that language simply means that Congress may explicitly provide some other effect of a presumption but otherwise it defaults to the effect provided for in Rule 301. See, e.g., Alabama By-Products Corp. v.

Killingsworth, 733 F.2d 1511, 1515 (11th Cir. 1984) (distinguishing between a regulation that explicitly required the party to "establish" the listed rebutting factor).

Even assuming Rule 301 did apply, Agency counsel asserted that the presumption simply cannot disappear from the case in the face of rebuttal evidence because the presumption is based upon a strong combination of science and policy. Id. at 3-5. Specifically, Agency counsel cited to case law for the proposition that when a presumption owes its origin to an important public policy, the burden of persuasion shifts as well – even under Rule 301. Id. at 4-5 & n.3 (citing Psaty v. U.S., 442 F.2d 1154 (3d Cir. 1971) and Kelly v. Armstrong, 141 F.3d 799, 802 (8th Cir. 1998)).[15]

The Congressional Record provides no discussion of the 5% presumption nor gives any clue as to Congress' intent with respect to shifting the burden of persuasion as well as the burden of production or to make a respondent's rebuttal an "affirmative defense." See 106th Congress, Congressional Record (October 30, 2000) H11571-11572 (House of Representatives remarks on the SFPA); (December 7, 2000) S11744-11745 (Senate remarks on same).

Whether Congress intended to make the rebuttal an affirmative defense is important as under general principles of the Administrative Procedure Act (APA) the ultimate burden of persuasion rests with the Agency – except – on the issue of an affirmative defense raised by a respondent. See 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); NLRB v.

[15] Importantly, Agency counsel's reliance on the two cited references appears misplaced. First, the Psaty decision predates the passage of the Federal Rules of Evidence and comments upon a draft version of Fed. R. Evid. 301 later revised (see notes to 1974 Enactment). Second, Kelly's application in this context is questionable as here Congress only recently enacted the presumption at issue and Kelly discusses more longstanding presumptions (i.e., those developed by the federal courts under admiralty law) that antedate the Federal Rules of Evidence.

Mastro Plastics Corp., 354 F.2d 170, 176 (2d Cir. 1965) (observing that it is well established that the burden of alleging and proving an affirmative defense to an action proposed by an administrative agency lies with the party raising the defense.).

Nevertheless, the requirement to rebut a presumption does not equate to the establishment of an affirmative defense. Respondents deny that they were shark finning – which is the necessary finding once the Agency establishes the presumption and Respondents fail to rebut. Respondents are not asserting a necessarily extrinsic matter as a defense to the charge but merely questioning the applicability of the presumption as it relates to their particular case and the numbers associated with their landings of fins/carcasses. As the Third Circuit phrased the issue:

> A denial, as opposed to an affirmative defense, will simply shift the burden of production to the defendant to present evidence that would tend to rebut the plaintiff's case, while the burden of persuasion remains with the plaintiff. If the defendant cannot meet its burden of going forward by presenting some evidence, the plaintiff has met its burden of persuasion. But if the defendant presents some evidence to support the denial, the fact-finder weighs the evidence, bearing in mind that the plaintiff retains the ultimate burden of persuasion.

Moore v. Kulicke & Soffa Industries, Inc., 318 F.3d 561, 566 (3d Cir. 2003) (discussing allocation of burdens of proof and persuasion under Pennsylvania trade secret law). The Third Circuit's language here seems appropriate to this case, as the statutory 5% presumption requires Respondents to "rebut" the presumed fact that they were shark finning not prove they did not engage in shark finning. In other words, Respondents needed to disrupt the underlying factual predicates that lead from the established fact of a 5% fin-to-carcass ratio for each of the 18 charges to the presumed fact of shark finning – not prove the negative.

As opposed to the Lanham Act case Agency counsel references, Congress did not here define specific "defenses" by statute – nor did it enact a particular provision making it clear that the ultimate burden of persuasion shifted to Respondents. See Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 57-58 (2005) (ordinary default rule provides that the burden of persuasion resides with the party seeking court action or relief "[a]bsent some reason to believe that Congress intended otherwise"). [16] Nor is Agency counsel's invocation of an opinion under the ESA persuasive where the Congressional record in that case explicitly indicated Congress' intent to create an affirmative defense.

Rather, a better view is that the presumption establishes a prima facie case and shifts the burden of going forward to rebut the Agency's showing by preponderant evidence that it is more likely than not that they did not engage in shark finning. Therefore, the undersigned will not shift the ultimate burden of proof in these proceedings without some explicit provision to the contrary in the statute or regulations. The statutory presumption, which Respondents sought to rebut, simply does not operate in the same manner of an affirmative defense.

3. Respondents' Rebuttal Of The Statutory Presumption Must Be Analyzed In Relation to Each Charge.

As discussed above, Respondents' burden was to rebut the presumption that they were engaged in shark finning based upon the Agency's establishment that their fin-to-carcass ratios exceeded the 5% threshold. Respondents may not rebut the presumption by showing that the 5% was unreasonable or unjustified in the abstract (which would be a prohibited attack upon the statute/regulations establishing the presumption); but rather, as the NPRM and Final Rule make clear, that their higher percentages are explainable.

[16] See, e.g., 29 U.S.C. § 1401(a)(3)(A),(B) (ERISA statute regarding arbitration that provides specific statutory guidance regarding the burden to be met to rebut the presumption).

Thus, for each charge, Respondent had to come forward with reliable, credible and probative evidence to establish reasons why the particular fin-to-carcass ratio in a given charge exceeded the statutory/regulatory threshold of 5%.[17] To the extent Respondent failed to explain the amount in excess of 5% (all of such excess – not just that there is a good reason for their ratio to exceed 5%), Respondents failed to rebut the presumption for that charge.[18]

In instances where Respondents have failed to rebut the presumption, the Agency has proven by a preponderance of the evidence that Respondents more likely than not engaged in shark finning for that charge based upon the presumption alone. This approach does not burden Respondents with having to prove that they did not engage in shark finning (for which the ultimate burden of proof always resides with the Agency) but rather appropriately shifts the burden of production to Respondent to rebut the 5% presumption on each of the charges with particular reference to the specific, reported (and accepted by both parties) fin-to-carcass ratios on each charge.

Alternatively, even if one accepted Respondents' contention that their rebuttal evidence serves to burst the 5% presumption bubble, one could view the Agency as

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[17] Respondents generally argued in their Post Hearing Brief in the aggregate (e.g., arguing in terms of the total percentage of sandbars for all 18 charges and making calculations on that basis). Had the undersigned analyzed the charges in the aggregate, Respondents would have failed to rebut any of the charges based on the accepted rebuttal evidence. See **Appendix 2** (listing analysis of each charge as well as presenting aggregate analysis).

[18] A hypothetical might clarify this point further. For example, if a respondent was charged with two instances of alleged shark finning based on fin-to-carcass ratios of 7.0% and 9.5% respectively. Assuming respondent could adequately explain only 2.75% of the ratio exceeding 5%, it would be reasonable to view respondent as having rebutted the presumption of shark finning with respect to the 7% but not the 9.5%. A respondent cannot simply provide evidence that a ratio greater than 5% is more likely than not, but rather that the particular ratio for a given charge exceeding 5% is a better explanation for the ratio than the presumption supplies (i.e., unlawful shark finning). Surely, at some point a fin-to-carcass ratio reaches proportions that are simply not explainable with reference to the rebuttal evidence proffered and the Agency is entitled to a finding of charge proved based on a preponderance of the evidence and the respondent's failure to adequately rebut the presumption triggered by exceeding the 5% fin-to-carcass ratio. The difficult determination involves where this point resides based on available record evidence.

having proved in specific charges that Respondents engaged in unlawful shark finning through an inference based on fin-to-carcass ratios for which the more reasonable explanation is that Respondents more likely than not did engage in shark finning.

The undersigned rejects this analytic rubric and will not rely upon it in this Decision and Order. While agencies may rely on circumstantial evidence and inferences to prove violations (see, e.g., Comm. of Mass. v. U.S., 856 F.2d 378 (1st Cir. 1988) (agencies are permitted to adopt and apply presumption of proven facts and inferred facts which are rationally correct)), there is simply not enough left of the Agency's case here to maintain a violation without the benefit of the presumption.[19] In this particular case, the Agency's case must rely entirely on the presumption and any inference left without the presumption that Respondents' engaged in shark finning simply does not rise to a level sufficient to meet the Agency's burden of proof.

V. ANALYSIS - RESPONDENTS' PROFFERED EXPLANATIONS FOR EXCESS FIN-TO-CARCASS RATIOS AND ANALYSIS OF THE CHARGES

A. Respondents' Explanations.

This case presents several key issues that the undersigned must resolve to fully evaluate Respondents' efforts to rebut the presumption. These issues include the determination of the following:

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[19] In Agency proceedings, violations can be established by inference. See, e.g., In re William H. Hulbig Endeavor Fishing Corp., 6 O.R.W. 759, 763 (N.O.A.A. 1992) (an inference that the fish onboard a vessel, observed to be unlawfully inside a closed area, were taken from that area, and damage to the resource may be presumed); see also In re Ted J. Pitre, 1996 NOAA LEXIS 29 (NOAA Aug. 29, 1996) (holding that discarding objects from a fishing vessel when law enforcement approaches creates an inference of misconduct); In re Tibor E. Kepecz, 6 O.R.W. 556 (NOAA 1991) (holding that discarding fish in contravention of an authorized law enforcement officer's order constitutes interference with a lawful investigation). But see In re Billy P. Archer, et al., 2010 WL 2395562 (April 22, 2010, NOAA) (contra, see Decision and Order where judge rejected inference in the absence of probative evidence that respondents possessed red snapper fish, illegally, in federal waters simply because the vessel spent most of the day navigating in federal waters). The inferences in these cases differ in quality and strength than an inference based merely on numeric fin-to-carcass ratios for which there may very well be a reasonable explanation apart from shark finning.

- What is the average fin-to- carcass ratio for Respondents' targeted shark species (sandbar sharks)?
- What is the average fin-to-carcass ratio for Respondents' targeted shark species if one takes into account all eight (8) fins, rather than just the four (4) primary fins?
- Assuming Respondents left extra meat on the fins, what effect does such practice have upon the reported fin-to-carcass ratios?
- Assuming Respondents put the fins on ice and soaked the fins, what effect does such practice likely have upon reported fin-to-carcass ratios?
- What effect does the percentage of non-sandbar sharks have upon the reported fin-to- carcass ratios?
- What effect does Respondents' practice of cutting the carcasses to remove extra meat have upon the reported fin-to-carcass ratios?

Each of these questions is analyzed in the sections below. As explained in the following analysis, Respondents were able with varying success to establish by a preponderance of reliable and credible evidence that their fishing practices reasonably lead to the conclusion that a fin-to-carcass ratio in excess of 5% does not necessarily indicate that they were shark finning. However, to the extent Respondents' fin-to-carcass ratio is not reasonably accounted for – even in light of all the Respondents' rebuttal evidence – those charges must be found proven.

Given the total absence of direct evidence of shark finning and the seriousness of the charges, the undersigned reviewed all the record evidence to give as much credence to Respondents' contentions as reasonable based on a preponderance of the evidence standard. Indeed, as discussed below in this Decision and Order, the undersigned

accepted virtually all Respondents' rebuttal evidence: (1) a 6.5% baseline fin-to-carcass ratio is appropriate for sandbar sharks; (2) Respondents targeted and caught a majority of sandbar sharks; (3) Respondents retained all 8 fins approximately 90% of the time; (4) 12% extra meat was left on Respondents' fins; (5) Respondents' fins were iced and soaked, which added approximately 1.25% to the fin weight; and (6) Respondents' carcasses were trimmed short by 5%.

However, it is simply not reasonable to accept, on the basis of the record evidence, some of Respondents' proffered explanations for their fin-to-carcass ratios: (1) the alleged but unproven effect of a gravid shark or seasonal variations; (2) the alleged but unproven proposition that larger sandbars have proportionally higher fin-to-carcass ratios; and (3) the alleged but unproven fact that Mr. Cordeiro was successful in landing those sandbar sharks which had on average fin-to-carcass ratios one standard deviation above the mean. Thus, even accepting most of Respondents' rebuttal evidence, the fin-to-carcasss ratios for thirteen of the charges are simply not explainable and so those charges are found proven as analyzed below.

1. Sandbar Sharks On Average Have A Fin-To-Carcass Ratio Exceeding 5%.

As discussed above, the presumption of unlawful shark finning occurs once the Agency establishes that Respondents landed shark carcasses and fins in excess of a 5% fin-to-carcass ratio. See 16 U.S.C. § 1857(1)(P). Respondents established at the hearing several factors in rebuttal that call into question the applicability of this ratio with respect to their fishing practices.[20]

[20] As explained in this Decision and Order, the undersigned determined that Respondents' rebuttal efforts must be viewed not as a general attack on the statute and the Agency's regulations, but rather explanations for why, in their particular case, the fin-to-carcass ratios for each charge are explainable.

Primary among these factors is that Mr. Cordeiro targeted a particular species – the sandbar shark. Tr. at 20:19-21:9; 28:16-19; 35:17-24 (10/13/2009). Indeed, for all the charges the Agency brought, the record evidence clearly established that the majority of sharks Respondents landed were sandbar sharks. See Respondents' Post Hearing Brief, Appendix A (demonstrating that in the aggregate, the percentage of sandbars by weight totaled approximately 84% for all eighteen charges).[21]

Furthermore, Respondents argued that Mr. Cordeiro not only targeted sandbar sharks but also targeted particularly large sandbar sharks, which Respondents claimed have a larger fin-to-carcass ratio than smaller sharks. The undersigned finds as credible and accepts the fact Mr. Cordeiro targeted larger sandbar sharks with larger fins that were worth more on the market. See Tr. at 20:19-21:9; 28:16-19; 35:17-24 (10/13/2009).

This established fact differs, however, from Respondents' asserted explanation for their high fin-to-carcass percentages. Respondents' witnesses Mr. Agger and Mr. Hemilright both testified that larger sharks have larger fins proportionally than smaller sharks. Tr. at 141:5-18 (10/13/2009); Tr. at 128:17-130:24. Mr. Cordeiro also maintained that large sandbar sharks have a larger fin-to-carcass ratio.[22] These assertions are rejected as having an insufficient factual basis in this record.

The undersigned determined that the record supports a finding that sharks have isometric growth patterns, and large sandbar sharks do not have correspondingly larger fin-to-carcass ratios than smaller sandbar sharks. Tr. at 31:6-32:7; 60:19-61:2; 95:10-17

[21] Each charge must be analyzed as a separate and distinct set of facts. For example, each charge must be viewed in light of the percentage of sandbar sharks for that particular charge – not the aggregate for all 18 charges – as the percentages vary from charge to charge (e.g., Charge No. 4 has 100% sandbar sharks landed; whereas Charge No. 9 has 59% sandbar sharks landed).

[22] See, e.g., Tr. at 134:15-17 (10/15/2009) ("When we caught 4,000 pounds [of small sharks] we never got anywhere near 5 percent ever. And when we catch large sandbars, we're always over.").

(10/15/2009); Resp. Exh. O at p. 23. Respondents were only able to provide anecdotal evidence in their failed attempt to counter the Agency's case.[23]

Respondents also asserted that specific individual sandbar sharks could be expected, purely on a statistical basis, to exceed the reported average fin-to-carcass ratio. See, e.g., Respondents' Post Hearing Brief at 5-6. In other words, Respondents asserted that Mr. Cordeiro not only caught larger sandbar sharks, but also targeted and caught those sharks having above-average fin-to-carcass ratios (i.e., those individual sharks that would be one standard deviation above the mean). While this assertion may be true, nothing in the record established this explanation and therefore it must be rejected. Indeed, given the number of sharks caught per charge, it is implausible that Mr. Cordeiro could catch only above-average sandbar sharks to skew the fin-to-carcass ratio for each charge to the upper third of the species. Making such an assumption is simply a bridge too far based on the record evidence presented.

The fact that Mr. Cordeiro targeted and successfully caught a majority of sandbar sharks is nevertheless significant because Respondents established through the Hemilright study that a reasonable average fin-to-carcass ratio for sandbar sharks (only counting the four primary fins) equals 5.6%. Tr. at 10:6-12:10 (10/14/2009); Resp. Exhs. Q, X. Neither of the Agency's experts took issue with the Hemilright study (see Tr. at 45:12-21 (10/15/2009); Tr. at 9:5-17 (12/9/2009)), and its results will be accepted.[24]

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[23] Respondents' witness Mr. Agger also tried to explain the fin-to-carcass ratios in the 18 charges by asserting that seasonal variation and a shark's reproductive state (e.g., pregnant or "gravid") could have an effect on a given animals' fin-to-carcass ratio. Tr. at 128:17-129:-21 (10/13/2009). But Mr. Agger failed to provide any specific information or data to support this contention. Further, Agency experts Dr. Carlson and Mr. Sander rejected Mr. Agger's claims – a rejection the undersigned finds more credible than Mr. Agger's claims. See Tr. at 23:6-25:3; 162:24-164:7 (10/15/2009). Therefore, this assertion is rejected.

[24] The Agency's own studies of the sandbar shark indicate that these sharks have on average a fin-to-carcass ratio of approximately 5.3%. See Tr. at 9:6-23 (10/14/2009) (Mr. Hemilright explaining an error

Indeed, Agency expert Dr. Carlson admitted that the appropriateness of a 5% fin-to-carcass ratio for a mixed shark fishery depended upon the assumption that Mr. Cordeiro "fishes generally like the rest of the directed shark fleet which is a mixed shark fishery." Tr. at 112:8-18 (10/15/2009). The fact that Mr. Cordeiro targeted and caught a majority of sandbar sharks impacts the force of the 5% presumption in this case.

The undersigned therefore accepts for the purposes of Respondents' rebuttal that the average fin-to-carcass ratio for sandbar sharks (only accounting for the four primary fins) equals 5.6%. The Agency's charges must therefore be analyzed to account for this average sandbar fin-to-carcass ratio based on the percentage of such sharks for each particular charge.

2. The 5% Presumption Was Based Upon Four Primary Fins And Did Not Include The Secondary Fins.

The record evidence demonstrates that the establishment of a 5% threshold fin-to-carcass ratio was based upon the average fin-to-carcass ratio for all sharks contained in the mixed Atlantic shark fishery. Tr. at 7:3-22 (10/15/2009); see also Agency Exh. 49. This number was arrived at based on an average fin-to-carcass ratio including only four primary fins of the sharks and not the additional secondary fins. Tr. at 4:6-17 (10/13/2009).

To the extent Respondents participated in the mixed shark fishery, one could reasonably expect their fin-to-carcass ratios to match this generic data. The primary study on the Atlantic mixed shark fishery found an average fin-to-carcass ratio of 4.90%, but sandbar sharks only represented approximately 50% of the sample taken. See Respondent's Exh. W (Burgess study); Tr. at 27:18-25; 28:10-19 (10/15/2009).

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from the DELAWARE II study of sandbar sharks); see also Tr. 14:6-12 (10/15/2009) (Agency expert, Dr. Carlson, acknowledging the error).

However, Mr. Cordeiro targeted a subset of sharks within the mixed shark fishery (i.e., sandbar sharks) and was successful in bringing in a majority of his catch in sandbar sharks for the charges.

As discussed above, Mr. Corderio's targeted species of shark has a fin-to-carcass ratio of 5.6% for the four primary fins. Tr. at 10:6-12:10 (10/14/2009); Resp. Exhs. Q, X. The only study available that included all eight fins for sandbar sharks determined that the average fin-to-carcass ratio equaled 6.5%. Id. This percentage will therefore be accepted as a baseline fin-to-carcass ratio for sandbar sharks where all eight fins were retained.

Taking into account Mr. Cordeiro's retention of all eight shark fins is entirely appropriate under the circumstances. The Agency acknowledged that retention of the secondary fins, in addition to the primary fins of sharks, would raise the fin-to-carcass ratio as a "matter of logic." Tr. at 6:4-5 (10/13/2009). Without absolute evidence on this point, the undersigned is left to make a judgment based on the record and determine how Mr. Cordeiro's general practices impact the analysis of each charge. For the reasons already discussed, it would be inappropriate and unfair to Respondents to demand that particular evidence be brought to bear on each of the 18 charges where the physical evidence is long gone. Rather, the rebuttal must be directed toward reasonable explanations (established by a preponderance of credible and reliable evidence) for the fin-to-carcass ratios.

In this vein, the undersigned finds it more likely than not that Mr. Cordeiro took all eight fins on the vast majority of occasions. Mr. Cordeiro's 90% retention rate for all eight fins will be accepted. See Tr. at 35:14-36:3 (10/12/2009). Given that Mr. Cordeiro

admitted that he did not always retain all eight fins, it would be inappropriate to use the full 6.5% fin-to-carcass ratio for sandbar sharks as the baseline for all the sandbar sharks he caught and landed.

That ratio must be reduced accordingly by calculating a baseline fin-to-carcass ratio for the sandbar sharks Mr. Cordeiro caught and landed. The expected aggregate fin-to-carcass ratio would equal 5.85% (i.e., 90% of 6.5%) + .56% (i.e., 10% of 5.6%) for an adjusted fin-to-carcass ratio of 6.41%. The 6.41% fin-to-carcass ratio therefore represents the baseline sandbar shark fin-to-carcass ratio the undersigned will use to evaluate the 18 charges. This expected fin-to-carcass ratio must be further adjusted based on the percentage of sandbar sharks landed in each particular charge. See, infra, Section E (full discussion of sandbar shark percentage adjustments).

3. Leaving Extra Meat On The Fins Would Alter The Fin-To-Carcass Ratio.

Each side acknowledged that leaving extra meat on the shark fins would necessarily impact the fin-to-carcass ratios. Credible evidence was offered that Mr. Cordeiro did in fact cut his fins heavy (i.e., leave extra meat on the fins) and hoped the fin buyer would not trim the excess meat off the fin and reduce the amount paid. Tr. at 21:20-22:3; 23:15-22; 66:13-15; 67:11-16 (10/13/2009). The record thus established that Mr. Cordeiro's practice was to leave extra meat on the fins and it is appropriate to factor such a practice into account for the 18 charges.[25]

The open question is how much, on average, one could expect the extra meat to affect the fin-to-carcass ratios. Respondents would have the court find that anywhere

[25] In addition to the testimony of Mr. Agger and Respondent Cordeiro about the practice of generally leaving extra meat on the fins, Mr. Hudson testified that in the early 1990s, Mr. Cordeiro contacted him to ask whether he would buy his fins if he left a half an inch of meat on the fins. Mr. Hudson's employer was not interested in buying such fins even at a reduced price because the employer did not want or could not trim the meat from the fins. Tr. at 93:14-24 (10/14/2009).

from 12% to 1/3 of the fin weight is attributable to such "waste" or extra meat left on the fin. Agency counsel would have the undersigned discount such proffer and/or at minimum severely reduce the amount of waste attributable to Mr. Cordeiro's fin cutting practices. Both sides presented various arguments and information on this subject.

As a fundamental point, both parties agreed that the way a fisherman dresses a shark carcass and cuts shark fins is driven by market conditions, i.e., what is acceptable to that fisherman's buyer. Tr. at 35:23-36:20 (10/14/2009); see also Tr. at 25:7-15; 27:22- (12/09/2009) (Mr. Sander admitting that the amount of extra meat, if any, a dealer would accept depended on the dealer and could vary from dealer to dealer and that Mr. Agger would be the "one to quantify how much meat was attached to the fins . . . ."). Mr. Cordeiro estimated that once the fin buyer trimmed off the extra meat from the fin, he would get paid for 93% of the shipped weight taking into account that sometimes the fin buyer would trim some of the extra meat from the fin. Tr. at 22:11-16 (10/13/2009). This estimate indicates a "waste" figure attributable to excess meat left on the fin of at least 7%.

But Respondents fin buyer, Mr. Agger, did not always trim all the meat from Respondents' fins since he knew he could pass on some of the excess (ca. 5%-8%) to his buyers. Tr. at 113:19-114:3; 127:12-16; 196:1-6; 197:11-19; 198:2-10; 200:1-201:13 (10/13/2009). Mr. Agger was willing to work on smaller margins given that he wanted to retain Respondents' business because the quality of the fins was very good. Id.

Nevertheless, on some occasions, Mr. Agger directed Respondents to cut their fins with less meat. Tr. at 113:11-15 (10/13/2009); Resp. Exh. G.[26]

Generally, Mr. Agger reduced Respondents' invoice between 6-10% to account for waste (i.e., excess meat left on the fins that he could not pass on to his customers) and the total average of waste was estimated to be 12% generally. Tr. at 115:13-116:10; 197:22-25; 200:1-201:13 (10/13/2009).[27] Respondents' admitted that no direct evidence exists to indicate what amount of excess meat Mr. Cordeiro left on his fins for the particular charges but maintained that evidence from Mr. Agger indicating that a back charge to Respondents of 4.7% to 7.4% demonstrates what Mr. Agger felt he could not pass on to the next buyer. Tr. at 38:19-40:11 (10/14/2009).

Agency counsel attempted to definitively attach a percentage of "waste" attributable to excess meat left on Respondents' fins, which he maintained was much lower than Respondents' proffered estimates. In support of this position, Mr. Sander examined the amount of shark fins offloaded for Counts 9 10, 13, 14 and 17. Mr. Sander then attempted to correlate the "stock sheets" from Willie R. Etheridge Seafood Company associated with such counts to determine the amount that the F/V BLUE FIN was actually paid for those fins (based on the weight of the fins in pounds). Tr. at 212:3-217:3 (10/15/2009); Agency Exhs. 61-62. Mr. Sander's analysis indicated that on these occasions the reduction between the amount of shark fins offloaded and the amount of shark fins paid to the F/V BLUE FIN equaled 1.1% for Count 9; 1.1% for Count 10;

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[26] While Resp. Exh. G is not directed to a particular shipment associated with any of the eighteen charges, Respondents offered it for the general proposition that Mr. Agger felt compelled to direct the F/V BLUE FIN to cut the shark fins with less meat attached to the fin.

[27] Notably, the Hemilright study, which found that sandbar sharks have, on average, a 5.6% fin-to-carcass ratio for the four primary fins and 6.5% when including the secondary fins, arrived at these results with minimal, if any, extra meat left on the fins. See Tr. at 17:13-17; 26:8-12; 26:22-25 (10/14/2009).

3.1% for Counts 13/14 combined; and .78% for Count 17. Id. Importantly, these numbers do not account for the amount of "waste" Mr. Agger might have passed on to his customers.[28]

In further support of their position, Respondents attempted to make much of a study co-authored by Dr. Carlson that indicated retention of extra meat on the fins and taking of the entire shark tail fin may make up to 1/3 of the reported "fin weight". Tr. at 68:5-25; 136:19-137:10; 141:4-142:18 (10/15/2009); Resp. Exh. R at vi. But this study was discussing the European shark fishery, particularly the Spanish and Portuguese longline fleets, which report higher fin-to-carcass ratios than those observed for the United States fleet. Id. These foreign fleets have different shark finning procedures and practices than those in the United States (e.g., different methods of trimming the carcasses and fins, retaining the whole tail fin, calculating fin-to-carcass ratios based on round weight rather than dressed weight, and fishing for different species of sharks). Tr. at 17:12-25; 18:1-21; 20:7-13 (10/15/2009). Such differences significantly affect the reported fin-to-carcass ratios (which are as high as 14%) from these foreign fleets. Id. The 1/3 number is thus not equivalent to Mr. Cordeiro's practice and represents a percentage much too high to be supported by a preponderance of the evidence for this case.

Taking all of this evidence into account, the undersigned finds that Respondents successfully established by a preponderance of the evidence: (1) that Mr. Cordeiro left extra meat on his fins and (2) that a reasonable percentage of the fin weight attributable to

[28] As such, these "waste" numbers should be increased, at minimum, by approximately 5% (on the low end) to 8% (on the high end) to account for the amount of "waste" Mr. Agger felt he could pass on to his customers.

such excess meat equaled approximately 12%. The Agency's charges will thus be analyzed taking these findings into account.[29]

4. Soaking Fins And Putting The Fins On Ice Prior To Landing Would Necessarily Alter The Fin-To-Carcass Ratio.

Mr. Cordeiro's practice was also to soak and ice the fins in order to maintain the fin weight as heavy as possible. Tr. at 22:8-10; 26:18-27:12 (10/13/2009). Agency Expert Eric Sander acknowledged that the fin-to-carcass ratio could be affected by a variety of factors, including icing/soaking the fins. Tr. at 175:16-24, 20-21; 193:14-21; 196:22-24 (11/13/2006).[30] Nevertheless, no studies show what effect soaking or icing shark fins would have upon the fin weight. However, Dr. Carlson admitted that such practices would increase the weight of the fin by some unknown amount. Tr. at 121:3-121:23 (10/15/2009).

The record evidence established only one instance where the effect of Mr. Cordeiro's practice of soaking/icing the fins was calculated. See Tr. at 226:23-229:12 (11/13/2006) (demonstrating the amount of weight on the fins attributable to ice and water weight equaled 1.23%). Accounting for the icing/soaking of the fins by reducing the fin weights in each of the charges by 1.25% is thus not unreasonable and is supported by evidence in the record. This adjustment accounts for what is an admitted effect such a practice necessarily would have upon the fin weights coming off the F/V BLUE FIN.

[29] The fin weights for each charge will thus be reduced by 12% and that amount of "meat" will be added back into the carcass weight as one must assume that this excess meat would have remained in the carcass had it not been cut off with the fins.

[30] Mr. Eric Sander also speculated that shark finning was also an explanation for the high fin-to-carcass ratios. Id.

5. Landings Containing Non-Sandbar Sharks Necessarily Alter The Expected Fin-To-Carcass Ratios.

As discussed above, Respondents did not land and process only sandbar sharks for the 18 charges. While some of the charges do include 100% sandbars, the rest of the charges have sandbar percentages ranging from a low of 59% to a high of 100%. Respondents cannot receive the full benefit of the demonstrated higher fin-to-carcass sandbar shark ratios for those charges where other types of sharks were included in the catch. Adjustments must therefore be made to the expected fin-to-carcass ratio based on the species of sharks actually caught in each count.

As the record does not contain sufficient data to specifically determine the fin-to-carcass ratios of each of the other sharks caught in each of the charges, the undersigned will use the figure of 5% as a reasonable fin-to-carcass ratio for non-sandbar sharks contained in each charge where the actual fin-to-carcass ratio is not available. While data is available for some of the other shark species in each of the 18 counts (see Resp. Exh. S), those numbers are presumably based on retention of only the four primary fins – not all eight of the fins.

The use of the 5% number for non-sandbar sharks arguably unduly advantages Respondents because the sandbar shark was the shark in the Atlantic shark fishery with the highest fin-to-carcass ratio and the other sharks Respondent landed had lower fin to carcass ratios. See Resp. Exh. S. But, those studies of the other sharks do not account for retention of all eight fins, which was Mr. Cordeiro's practice in the vast majority of instances.

6. Respondents' Practice Of Cutting The Carcasses Would Alter The Fin-To-Carcass Ratios.

The manner of dressing the shark into log form can significantly alter the fin-to-carcass ratio. For example, depending on where the neck is cut, how much meat is left on the fins, and how much of the tail is cut off will affect the weight of the log and thus the fin- to- carcass ratio. Tr. at 175:16-24, 20-21 (11/13/2006). Shark carcasses can be cut in a variety of ways from what might be termed a "heavy" cut where less of the shark is cut away to arrive at log form to a "light" or "short" cut where more of the shark is cut away to arrive at log form. Tr. at 177:2-179:2 (11/13/2006).

There are no statutory or Agency regulations that dictate how shark fins were to be cut from shark carcasses or how a fisherman was to cut carcasses. Tr. at 34:10-20; 35:3-11; 103:17-20 (10/14/2009). The Agency did not have any evidence about how Respondents cut the shark carcasses. Tr. at 177:2-179:2 (11/13/2006). Respondents, on the other hand, introduced record evidence in the form of uncontroverted testimony that it was Mr. Cordeiro's custom and practice to cut the logs to remove the belly flap and short of the gills in response to market demands. Tr. at 24:1-11; 43:4-45:24 (10/13/2009); Resp. Exh. F. This practice would result in less animal product on the log, which by force of logic must decrease the carcass weight and increase the resulting fin-to-carcass ratio.

The question to be resolved is whether any adjustment should be made to the expected fin-to-carcass ratio based on Mr. Cordeiro's carcass trimming practice. The rationale for making such an adjustment is that the sharks upon which the 5% fin-to-carcass threshold was based were cut differently (i.e., cut "heavier") than Mr. Cordeiro's. Given that the study supporting the 5% fin-to-carcass ratio threshold was a survey of the

shark fishery under commercial fishing conditions, there is not a lot of record evidence either to support or disprove such a premise. For example, Mr. Cordeiro testified that the way he cut his carcasses was "more acceptable to the market" and that "the market will not stand for purchasing belly flaps or any foul cuts with extra gills hanging on the carcass." Tr. at 24:1-11. However, the record lacks discussion on how Mr. Cordeiro's "market" for his carcasses was different from other commercial markets.[31]

The lack of definitive evidence concerning how Mr. Cordeiro carcass cutting practices might have differed from those of other market participants, however, is not fatal to this rebuttal effort. Respondents' burden was not to rebut the 5% fin-to-carcass ratio in the abstract (which the Agency based largely on observed commercial landings) but rather to rebut the presumption of shark finning arising from having fin-to-carcass ratios in excess of 5%. To reiterate, the violation was not landing an excessive fin-to-carcass ratio, but rather shark finning.

If one accepts the uncontroverted evidence that Mr. Cordeiro cut his logs "short" – i.e., cut extra meat from them – then one must accept the fact that his fin-to-carcass ratios would have increased. Respondents, as the proponent of this proposition, had the burden to produce preponderant evidence as to how he cut his logs. Having done so, this

[31] Mr. Agger testified about the market for carcasses/shark meat (see Tr. at 125:25-126:8) (10/13/2009)), but this testimony was in very general terms and did not attempt to distinguish Respondents' market from any other. Nor did Mr. Agger quantify what effect Mr. Cordeiro's carcass cutting practices would have on the fin-to-carcass ratio. See also Tr. at 15:15-24 (10/14/2009) (Mr. Hemilright's testimony regarding how he trimmed the carcasses of the sharks used in his study which arrived at a 6.5% fin-to-carcass ratio for sandbar sharks and indicating that the carcasses "may be a little more meat, little less meat it's you know, your normal fish house cleaning . . . ."). Mr. Hudson also testified concerning the market for shark meat and speculated that the DELAWARE II study on which Mr. Sander participated "did a maximum cut with regards to the carcass which included leaving what we call the nape, possibly a little extra belly flap, and in my experience of both having been in the shark carcass purchasing in the '80s to early '90s as well as being involved with the shark fin buying. We found that it varied from dock to dock, boat to boat, fish house to fish houses . . . .") Tr. at 65:13-22 (10/14/2009).

evidence shifted the burden of going forward to the Agency to rebut. The Agency failed to meet this burden.

The record does not reflect the particular weight of any specific shark in the charges. There are a number of reasons for the lack of specific weight information per shark carcass. First, Respondents offloaded the carcasses and weighed them in groups of 7-10 at a time. See Tr. at 80:7-10 (10/12/2009). Second, no regulatory or statutory obligation required that such a record be kept and the actual evidence (i.e., the fins and carcasses landed) related to this case is not available.

Nevertheless, based upon the record evidence that is extant, it is reasonable to find that (1) the average sandbar shark carcass weighed approximately 33.5 pounds (see, e.g., Agency Exh. 58) for those charges where such calculations are possible;[32] (2) Respondent Cordeiro cut the front of the shark to remove the belly flaps; (3) Respondent Cordeiro cut further down the body to eliminate foul cuts removing all of the gills; and (4) Respondent Cordeiro cut more meat off of the tail. These findings clearly warrant allowing at least 2 lbs. of extra meat from each of the sharks Mr. Cordeiro landed from an average of 97 sharks per trip (see Resp. Exh. K (articulating rationale for addition); Agency Exh. 58 (average number of sandbar sharks landed for those charges)). Such a finding leads one to conclude that 194 lbs. of additional carcass weight should be added to account for Mr. Cordeiro's carcass cutting practice. Such an adjustment is modest when one considers that the charges are for landings of sandbar shark carcasses weighing

[32] Agency Exh. 58 is Mr. Sander's analysis of the trip summaries and set logs from the F/V BLUE FIN during the period of the charges. Agency counsel acknowledged that this data was not able to be completely correlated charge-by-charge. See Tr. at 171:8-12 (10/15/2009). The average here represents only those trips able to be specifically correlated to the charges by a preponderance of the evidence (i.e., Charges 3, 5-17).

on average 3,245 lbs. (see Agency Exh. 58) (with an average of 3,862 total lbs. of carcasses per charge).[33]

A 194 lb. adjustment in the carcass weight thus represents on average a 5% increase in the carcass weight to account for Mr. Cordeiro's carcass cutting practice. This adjustment is at the low end of what Respondents' counsel asserted (5-10%) and is a reasonable number based on the simple fact that cutting more meat from a shark carcass will necessarily alter the fin-to-carcass ratio (a contention that was not rebutted).

Importantly, throughout Agency counsel's initial and reply briefs, the Agency objected to giving Respondents any credit for adjustments to the fin and carcass weights based on Mr. Cordeiro's alleged fishing and shark dressing practices. The Agency argued that any such adjustments are pure speculation and that such multiple assumptions are built one on top of the other like a house of cards. However, Agency counsel neglects to mention that their entire case is built without any record evidence whatsoever of shark finning, and instead relies entirely on a presumption of finning to support its case. Given this unavoidable situation, it would be patently unfair and contrary to the Administrator's Remand Order, not to make appropriate adjustments to the fin-to-carcass ratios based upon Mr. Cordeiro's fishing and dressing practices where the evidence warrants.

B. Analysis Of The 18 Charges.

As discussed above, the undersigned examined each of the 18 charges in light of Respondents' rebuttal evidence that was accepted. To summarize, the undersigned calculated an expected fin-to-carcass ratio based on record evidence to determine whether

[33] The 194 lbs. addition to the total carcass weight is a reasonable adjustment based on Mr. Cordeiro's carcass cutting practices and accounts not only for the way he cut the sandbar sharks, but all sharks landed in each charge.

Respondents have met their burden to rebut the Agency's charges by explaining the amount they exceeded the 5% fin-to-carcass ratio in each charge.

For those charges where Respondents were unable to adequately explain their overage, the presumption remains and such charges are found proven by a preponderance of the evidence. Conversely, for those charges where Respondents were adequately able to explain their overage, the presumption no longer exists as Respondents have rebutted the presumption for that particular charge. With no additional evidence (an inference of shark finning should not arise in light of this rebuttal evidence), these charges are found not proven.

The undersigned took the following factors into account when evaluating each of the 18 charges:

(1) Respondents far more often than not took all eight fins from the sharks they landed (90% of the time).

(2) Respondents landed a majority of sandbar sharks, which have a fin-to-carcass ratio of 5.6% for the four primary fins and 6.5% for all eight fins.

(3) The baseline expected fin-to-carcass ratio for sandbar sharks landed is thus 6.41%.

(4) The expected fin to carcass ratio for each charge must be adjusted by the percentage of non-sandbar sharks landed for that charge (using 5% as a baseline for non-sandbar sharks).

(5) Respondents cut the fins with extra meat attached, which added on average 12% additional weight to the fins landed. The fin weight in each charge must therefore be reduced by 12% with that amount added into the carcass weight.

(6) Respondents soaked and iced the fins which added an additional 1.25% to the adjusted fin weight. The fin weight in each charge must be reduced by 1.25%.

(7) Respondents cut the shark carcasses in a way that more likely than not eliminated on average 194 lbs. from the carcass weight for each charge. 194 lbs. will therefore be added to the carcass weight in each charge.

As presented in detail in **Appendix 1** to this Decision and Order, taking into account all of these factors results in the following fin-to-carcass ratios for each charge.

Charge 1: The fin weight equaled 297 lbs. The carcass weight equaled 3,973 lbs, which results in an initial fin-to-carcass ratio of 7.48%. Accounting for excess meat on the fin (i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 6.52%. Accounting for icing and soaking the fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 6.44%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass weight) leads to a fin-to-carcass ratio of 6.14%. Accounting for the fact that this charge contained 72% sandbar sharks reduces the expected fin-to-carcass ratio from 6.41% to 6.02%.

Since the threshold for a violation on this charge is 6.02% and Respondents' adjusted fin-to-carcass ratio is 6.14%, Respondents are .12% over the threshold amount and therefore a violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 1: Proven.

Charge 2: The fin weight equaled 287 lbs. The carcass weight equaled 3,675 lbs, which results in an initial fin-to-carcass ratio of 7.81%. Accounting for excess meat on the fin

(i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 6.81%. Accounting for icing and soaking the fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 6.72%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass weight) leads to a fin-to-carcass ratio of 6.39%. Accounting for the fact that this charge contained 79% sandbar sharks reduces the expected fin-to-carcass ratio from 6.41% to 6.11%.

Since the threshold for a violation on this charge is 6.11% and Respondents' adjusted fin-to-carcass ratio is 6.39%, Respondents are .28% over the threshold amount and therefore a violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 2: Proven.

Charge 3: The fin weight equaled 286 lbs. The carcass weight equaled 3,923 lbs, which results in an initial fin-to-carcass ratio of 7.29%. Accounting for excess meat on the fin (i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 6.36%. Accounting for icing and soaking the fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 6.28%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass weight) leads to a fin-to-carcass ratio of 5.99%. Accounting for the fact that this charge contained 96% sandbar sharks reduces the expected fin-to-carcass ratio from 6.41% to 6.35%.

Since the threshold for a violation on this charge is 6.35% and Respondents' adjusted fin-to-carcass ratio is 5.99%, Respondents are .36% under the threshold amount

and therefore no violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 3: Not Proven.

Charge 4: The fin weight equaled 323 lbs. The carcass weight equaled 3,942 lbs, which results in an initial fin-to-carcass ratio of 8.19%. Accounting for excess meat on the fin (i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 7.14%. Accounting for icing and soaking the fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 7.05%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass weight) leads to a fin-to-carcass ratio of 6.72%. Accounting for the fact that this charge contained 100% sandbar sharks keeps the expected fin-to-careass-at 6.41%.

Since the threshold for a violation on this charge is 6.41% and Respondents' adjusted fin-to-carcass ratio is 6.72%, Respondents are .31% over the threshold amount and therefore a violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 4: Proven.

Charge 5: The fin weight equaled 268 lbs. The carcass weight equaled 3,751 lbs, which results in an initial fin-to-carcass ratio of 7.14%. Accounting for excess meat on the fin (i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 6.23%. Accounting for icing and soaking the fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 6.16%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass

weight) leads to a fin-to-carcass ratio of 5.86%. Accounting for the fact that this charge contained 100% sandbar sharks keeps the expected fin-to-carcass at 6.41%.

Since the threshold for a violation on this charge is 6.41% and Respondents' adjusted fin-to-carcass ratio is 5.86%, Respondents are .55% under the threshold amount and therefore no violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 5: Not Proven.[34]

Charge 6: The fin weight equaled 242 lbs. The carcass weight equaled 3,239 lbs, which results in an initial fin-to-carcass ratio of 7.47%. Accounting for excess meat on the fin (i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 6.52%. Accounting for icing and soaking the fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 6.43%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass weight) leads to a fin-to-carcass ratio of 6.07%. Accounting for the fact that this charge contained 80% sandbar sharks reduces the expected fin-to-carcass ratio from 6.41% to 6.13%.

Since the threshold for a violation on this charge is 6.13% and Respondents' adjusted fin-to-carcass ratio is 6.07%, Respondents are .06% under the threshold amount and therefore no violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 6: Not Proven.

[34] This finding of Not Proven on Charge 5 is supported as well by the observer data indicating that the observer did not observe any finning during the time period associated with this charge.

Charge 7: The fin weight equaled 322 lbs. The carcass weight equaled 4,140 lbs, which results in an initial fin-to-carcass ratio of 7.78%. Accounting for excess meat on the fin (i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 6.78%. Accounting for icing and soaking the fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 6.70%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass weight) leads to a fin-to-carcass ratio of 6.40%. Accounting for the fact that this charge contained 96% sandbar sharks reduces the expected fin-to-carcass ratio from 6.41% to 6.35%.

Since the threshold for a violation on this charge is 6.35% and Respondents' adjusted fin-to-carcass ratio is 6.40%, Respondents are .05% over the threshold amount and therefore a violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 7: Proven.

Charge 8: The fin weight equaled 277 lbs. The carcass weight equaled 3,633 lbs, which results in an initial fin-to-carcass ratio of 7.62%. Accounting for excess meat on the fin (i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 6.65%. Accounting for icing and soaking the fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 6.57%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass weight) leads to a fin-to-carcass ratio of 6.24%. Accounting for the fact that this charge contained 100% sandbar sharks keeps the expected fin-to-carcass at 6.41%.

Since the threshold for a violation on this charge is 6.41% and Respondents' adjusted fin-to-carcass ratio is 6.24%, Respondents are .17% under the threshold amount and therefore no violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 8: Not Proven.

Charge 9: The fin weight equaled 285 lbs. The carcass weight equaled 3,865 lbs, which results in an initial fin-to-carcass ratio of 7.37%. Accounting for excess meat on the fin (i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 6.43%. Accounting for icing and soaking the fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 6.35%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass weight) leads to a fin-to-carcass ratio of 6.05%. Accounting for the fact that this charge contained 59% sandbar sharks reduces the expected fin-to-carcass ratio from 6.41% to 5.83%.

Since the threshold for a violation on this charge is 5.83% and Respondents' adjusted fin-to-carcass ratio is 6.05%, Respondents are .22% over the threshold amount and therefore a violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 9: Proven.

Charge 10: The fin weight equaled 329 lbs. The carcass weight equaled 4,022 lbs, which results in an initial fin-to-carcass ratio of 8.18%. Accounting for excess meat on the fin (i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 7.13%. Accounting for icing and soaking the

fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 7.04%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass weight) leads to a fin-to-carcass ratio of 6.72%. Accounting for the fact that this charge contained 80% sandbar sharks reduces the expected fin-to-carcass ratio from 6.41% to 6.13%.

Since the threshold for a violation on this charge is 6.13% and Respondents' adjusted fin-to-carcass ratio is 6.72%, Respondents are .59% over the threshold amount and therefore a violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 10: Proven.

Charge 11: The fin weight equaled 313 lbs. The carcass weight equaled 3,880 lbs, which results in an initial fin-to-carcass ratio of 8.07%. Accounting for excess meat on the fin (i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 7.03%. Accounting for icing and soaking the fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 6.94%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass weight) leads to a fin-to-carcass ratio of 6.62%. Accounting for the fact that this charge contained 93% sandbar sharks reduces the expected fin-to-carcass ratio from 6.41% to 6.31%.

Since the threshold for a violation on this charge is 6.31% and Respondents' adjusted fin-to-carcass ratio is 6.62%, Respondents are .31% over the threshold amount and therefore a violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 11: Proven.

Charge 12: The fin weight equaled 310 lbs. The carcass weight equaled 3,980 lbs, which results in an initial fin-to-carcass ratio of 7.79%. Accounting for excess meat on the fin (i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 6.79%. Accounting for icing and soaking the fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 6.71%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass weight) leads to a fin-to-carcass ratio of 6.40%. Accounting for the fact that this charge contained 77% sandbar sharks reduces the expected fin-to-carcass ratio from 6.41% to 6.09%.

Since the threshold for a violation on this charge is 6.09% and Respondents' adjusted fin-to-carcass ratio is 6.40%, Respondents are .31% over the threshold amount and therefore a violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 12: Proven.

Charge 13: The fin weight equaled 315 lbs. The carcass weight equaled 3,965 lbs, which results in an initial fin-to-carcass ratio of 7.94%. Accounting for excess meat on the fin (i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 6.93%. Accounting for icing and soaking the fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 6.84%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass weight) leads to a fin-to-carcass ratio of 6.52%. Accounting for the fact that this charge

contained 86% sandbar sharks reduces the expected fin-to-carcass ratio from 6.41% to 6.21%.

Since the threshold for a violation on this charge is 6.21% and Respondents' adjusted fin-to-carcass ratio is 6.52%, Respondents are .31% over the threshold amount and therefore a violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 13: Proven.

Charge 14: The fin weight equaled 307 lbs. The carcass weight equaled 3,950 lbs, which results in an initial fin-to-carcass ratio of 7.77%. Accounting for excess meat on the fin (i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 6.78%. Accounting for icing and soaking the fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 6.69%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass weight) leads to a fin-to-carcass ratio of 6.38%. Accounting for the fact that this charge contained 76% sandbar sharks reduces the expected fin-to-carcass ratio from 6.41% to 6.07%.

Since the threshold for a violation on this charge is 6.07% and Respondents' adjusted fin-to-carcass ratio is 6.38%, Respondents are .31% over the threshold amount and therefore a violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 14: Proven.

Charge 15: The fin weight equaled 290 lbs. The carcass weight equaled 3,980 lbs, which results in an initial fin-to-carcass ratio of 7.29%. Accounting for excess meat on

the fin (i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 6.36%. Accounting for icing and soaking the fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 6.28%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass weight) leads to a fin-to-carcass ratio of 5.99%. Accounting for the fact that this charge contained 72% sandbar sharks reduces the expected fin-to-carcass ratio from 6.41% to 6.02%.

Since the threshold for a violation on this charge is 6.02% and Respondents' adjusted fin-to-carcass ratio is 5.99%, Respondents are .03% under the threshold amount and therefore no violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 15: Not Proven.

Charge 16: The fin weight equaled 284 lbs. The carcass weight equaled 3,816 lbs, which results in an initial fin-to-carcass ratio of 7.44%. Accounting for excess meat on the fin (i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 6.49%. Accounting for icing and soaking the fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 6.41%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass weight) leads to a fin-to-carcass ratio of 6.10%. Accounting for the fact that this charge contained 63% sandbar sharks reduces the expected fin-to-carcass ratio from 6.41% to 5.89%.

Since the threshold for a violation on this charge is 5.89% and Respondents' adjusted fin-to-carcass ratio is 6.10%, Respondents are .21% over the threshold amount

and therefore a violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 16: Proven.

Charge 17: The fin weight equaled 337 lbs. The carcass weight equaled 3,980 lbs, which results in an initial fin-to-carcass ratio of 8.47%. Accounting for excess meat on the fin (i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 7.38%. Accounting for icing and soaking the fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 7.28%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass weight) leads to a fin-to-carcass ratio of 6.95%. Accounting for the fact that this charge contained 97% sandbar sharks reduces the expected fin-to-carcass ratio from 6.41% to 6.37%.

Since the threshold for a violation on this charge is 6.37% and Respondents' adjusted fin-to-carcass ratio is 6.95%, Respondents are .58% over the threshold amount and therefore a violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 17: Proven.

Charge 18: The fin weight equaled 299 lbs. The carcass weight equaled 3,800 lbs, which results in an initial fin-to-carcass ratio of 7.87%. Accounting for excess meat on the fin (i.e., reducing the fin weight by 12% and adding that amount back into the carcass weight) leads to a fin-to-carcass ratio of 6.86%. Accounting for icing and soaking the fins (i.e., reducing the fin weight by 1.25%) leads to a fin-to-carcass ratio of 6.77%. Accounting for cutting extra meat from the carcass (i.e., adding 194 lbs. to the carcass

weight) leads to a fin-to-carcass ratio of 6.45%. Accounting for the fact that this charge contained 100% sandbar sharks keeps the expected fin-to-carcass at 6.41%.

Since the threshold for a violation on this charge is 6.41% and Respondents' adjusted fin-to-carcass ratio is 6.45%, Respondents are .04% over the threshold amount and therefore a violation is found to have occurred by a preponderance of the record evidence.

Ruling on Charge 18: Proven.

VI. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondents are both persons within the meaning of the Manguson-Stevens Act. See 16 U.S.C. §1802(31).
2. Pursuant to 16 U.S.C. §1857(1)(P) and 50 C.F.R. §600.1203(a)(2) and 50 C.F.R. §600.1203(a)(3), it is unlawful for a person to possess shark fins without the corresponding carcasses while on board a U.S. fishing vessel, as provided in 50 C.F.R. § 600.1204(b) and (j) or to land shark fins without the corresponding carcasses, as provided in 50 C.F.R. § 600.1204(c) and (k).
3. Pursuant to 16 U.S.C. §1857(1)(P) and 50 C.F.R. § 600.1203 (b)(1) and (2), it is a rebuttable presumption that shark fins landed or possessed by a U.S. or foreign fishing vessel were taken, held, or landed in violation of this section if the total weight of the shark fins landed exceeds 5 percent of the total dressed weight of shark carcasses on board or landed from the fishing vessel.
4. Respondents violated 16 U.S.C. § 1857(1)(P) and 50 C.F.R. § 600.1203(a)(2) and (3), by unlawfully possessing while on board a U.S. fishing vessel or landing shark fins without the corresponding carcasses on thirteen (13) separate occasions based on Respondents' inability to rebut the presumption they were shark finning

arising from the fin-to-carcass ratios on the thirteen (13) occasions discussed herein.

VII. CONSIDERATION OF PENALTY ASSESSMENT

In assessing a penalty, the undersigned considered each of the factors required by law. "Factors to be taken into account in assessing a penalty . . . may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior violations . . . and such other matters as justice may require." 15 C.F.R. § 904.108(a).

The Agency recently modified 15 C.F.R. § 904.204(m) by removing any presumption in favor of the Agency's proposed sanction and providing that the undersigned may assess a civil penalty de novo, taking into account all the factors required by applicable law. See 75 Fed. Reg. 35631-32 (June 23, 2010).[35] The Agency designated this change as merely "procedural" and not substantive in nature, which means that it could be applied to pending cases. Pursuant to a stipulation by the parties, the new rule will be applied to this case.

The Agency proposed a civil sanction in the amount of $10,000 per violation or $180,000 total for the 18 charges.[36] Given the change to 15 C.F.R. § 904.204(m), this $10,000 per violation can no longer be presumed to be a reasonable starting point for assessment of the sanction amount and the penalty amount must be considered de novo by the undersigned, taking into account the required statutory factors.

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[35] The Agency also noted that the rule change requires that NOAA demonstrate that its proposed penalty or permit sanction is appropriate, taking into account all the factors required by applicable law." 75 Fed. Reg. 35631.

[36] The Agency's civil monetary penalties are subject to the Federal Civil Penalties Inflation Adjustment (FCPIA) Act of 1990. The Magnuson-Stevens Act authorizes the Secretary of Commerce to impose civil penalties of up to $100,000.00 for violations of that Act. At the time of Respondents' violations the established maximum under adjustments from the FCPIA was $120,000.00.

The Agency also proposed a permit sanction of 180 days against all Federal fisheries permits held by Respondents and the F/V BLUE FIN. The Agency based this assessment on Respondents' prior violations, and their alleged willful disregard for the law and regulations. The Agency did not alter the amount of the requested monetary or permit sanction following Remand and relied on its analysis of an appropriate penalty amount from the initial hearing. See Agency Exh. 43.

The Agency's analysis as to the penalty amount rests upon two basic assumptions: (1) all fin weight in excess of the 5% fin-to-carcass ratio called for by the statutory presumption represents fins landed without corresponding carcasses and (2) the estimated value of such fin overage at the time of the violations. Testimony at the initial hearing established the value of Grade A fins at the time of the violations as being $25-$27 per lb. and $19-$20 per pound for Grade B fins, $9 per pound for Grade C fins, $4 per pound for Grade D fins, and the secondary "chips" at $3 per pound. See Tr. at 185:18-186:7 (11/13/2006). Agency Exh. 43 contains estimates (which the undersigned accepts) concerning the value per pound of Respondents' shark fins for 16 of the 18 counts. As reflected in Agency Exh. 43, the range of estimated fin value for all amounts in excess of 5% fin-to-carcass ratio ranged from a low of $1,555.20 for Count 6 (found not proven in this Decision and Order) to a high of $3,139.50 for Count 17 (found proven in this Decision and Order). Agency Exh. 43. The Agency estimated the total value of Respondents' shark fin overages at $37,834.63 for 16 of the 18 counts. Id.[37]

The first assumption in the Agency's calculation is no longer valid as: (1) Respondents have established by a preponderance of evidence for all the charges that a

[37] Agency counsel also attempted to estimate the amount of shark carcasses (in pounds) not landed by Respondents' based on the amount their fin-to-carcass ratios exceeded 5%. See Agency Exh. 43. These calculations are not accepted as credible given Respondents' accepted rebuttal evidence.

fin-to-carcass ratio in excess of 5% does not necessarily equate with having finned sharks; and (2) Respondents also accounted for some amount of the overage for the charges found proven. Thus, a significant reduction in the amount of the Agency's proposed penalty is therefore warranted.

A. The Nature, Circumstances, Extent and Gravity of the Violations.

Respondents offered various explanations (the majority of which were accepted as having been established by a preponderance of the evidence) to rebut the presumption that they engaged in unlawful shark finning. Taking into account the accepted rebuttal explanations leads to some very close calls with respect to several of the charges found proven. See, e.g., Analyses of Charges 1, 7 & 18.[38]

Finding a charge proven by a mere .04% overage in a recalculated fin-to-carcass ratio (see Analysis of Charge 18) from what one could reasonably expect based on Respondents' accepted rebuttal evidence is discomforting to say the least under these circumstances. It is almost as likely as not that Respondents could have been found not to have engaged in shark finning on such a charge. Several of the charges could have gone either way depending on what was accepted and to what degree. The statutory and regulatory scheme at issue, however, mandated that Respondents come forward with sufficient evidence to rebut each of the charges. Respondents' failure to do so results in the finding of charges proven on 13 of the Agency's charges for all the reasons discussed above.

To reiterate, however, the findings of Respondents' unlawful shark finning was not supported by overwhelming evidence. Indeed, without the benefit of the statutory

[38] Of course, this also works in the converse. See, e.g., Analysis of Charges 6 & 15 (charge not proven based on .06% and .03% fin-to-carcass ratio under what would reasonably be expected based on accepted rebuttal evidence).

presumption, the Agency's case would not stand. The shark finning proven was not so egregious (based on the record evidence) to indicate that Respondents were blatantly disregarding the law as first might have appeared based on the unadjusted fin-to-carcass ratios. Unfortunately for Respondents, if they actually did not engage in any shark finning, they are unable to rebut the presumption because: (1) the exculpatory evidence no longer exists; and (2) they relied on the Agency's written and oral pronouncements that if the fins match the carcasses, no charges would be filed for exceeding the 5% ratio. The undersigned struggled with this conundrum and, but for the presumption would have ruled in favor of Respondents.

Nevertheless, accounting for the accepted rebuttal explanations, Respondents should be afforded the benefit of these explanations in determining an appropriate sanction for the remaining 13 charges proved. The extent of the violations found proven is thus impacted significantly by the fact that Respondents' accepted rebuttal evidence alters the amount of unexplained overage. Unadjusted fin-to-carcass ratio overages ranged from a low of 2.14% over the 5% presumption level (Charge 5) to a high of 3.47% over the 5% presumption level (Charge 17). Taking into account Respondents' accepted rebuttal evidence reduces such overages from an expected fin-to-carcass ratio to levels not indicating a violation (five of the charges) or to overages ranging from a low of .04% to a high .59% (Charges 18 and 10 respectively).

Taking the Agency's proffered average value of the shark fins per pound and computing the amount of overage from the adjusted violation threshold level leads to a total estimated value of the overage (in light of Respondents' accepted rebuttal evidence) of $3,448.61. See Appendix 2. This amount is significantly lower than the estimate

contained in Agency Exh. 43 (i.e., $37,834.63) upon which the Agency's suggested penalty amount was partly based.

A single act of finning a single shark is, however, a violation subject to the maximum penalty available under the statute. The SFPA was implemented to put a complete stop to this practice and that purpose must be considered in determining an appropriate penalty.

B. Respondents' Degree of Culpability.

Respondents were aware of the law prohibiting shark finning and nevertheless are found to have engaged in unlawful finning on 13 separate occasions. See Tr. at 71:4-9 (10/13/2009) (Mr. Cordeiro's acknowledgement of the restrictions); Tr. at 159:2-11 (10/14/2009) (Mr. Etheridge's acknowledgment of the restrictions). Respondents argued that they were told by Agency personnel that there would be no problems if they landed shark fins and the corresponding carcasses no matter the actual fin-to-carcass ratio.

This argument does not absolve Respondents from complying with the law (which is aimed at eliminating the practice of shark finning). The Agency's communications can be considered a mitigating factor as such communications could have led Respondents to believe that had they landed fins and corresponding carcasses, no violation would be found no matter what the ratios. Respondents therefore would not need to maintain exhaustive or definitive records to disprove allegations of shark finning.[39]

[39] The force of this mitigating factor is blunted somewhat by the fact that Respondents could not establish when such statements occurred.

Nevertheless, Respondents could not meet their statutory burden to rebut the Agency's case. Based on the record evidence, it is more likely than not that on 13 occasions, Respondents engaged in unlawful behavior.

C. Respondents' Prior Offenses.

Respondents have one prior offense within the prior five years of the conduct at issue in the NOVA. See Agency Exh. 41. No hearing was ever held concerning these charges since Respondents entered into a Settlement Agreement with the Agency. That case involved various shark related violations, including exceeding the shark retention limits and retaining, possessing, selling or purchasing a prohibited shark. Id. Two of the allegations dealt with shark finning, but were dropped as part of the Settlement Agreement with the Agency. Id. This prior history with the Agency serves as an aggravating factor in this case despite Respondents' contentions concerning the lack of substantive basis for at least some of these other charges.[40]

D. Other Matters As Justice Requires.

As thoroughly discussed in this Decision and Order, the evidence supporting the government's charges is solely based on the fish tickets, tallies, invoices, and trip tickets, which led to a presumption of shark finning. Thus, this is purely a paper case. No evidence exists apart from Respondents' fin-to-carcass ratios that they engaged in shark finning. The Agency is authorized under the statute to obtain the benefit of the presumption of shark finning simply on the basis of these fin-to-carcass ratios.

Nevertheless, the Agency's Final Rule implementing the SFPA explicitly stated that prosecution of shark finning violations were not going to be based on the

[40] Respondents agreed as part of the Settlement Agreement that the violations charged in the NOVA and NOPS "will be considered a prior offense in the event of future violations." Agency Exh. 41.

presumption alone. Thus, it is not unreasonable to think that a fisherman would rely on this statement. Put another way, the citizens of this country should be able to rely on the explicit parameters set by its government to operate in a regulated industry. However, this case was based solely on the presumption alone. Therefore, had Respondents landed fins that matched each carcass, they should have been able to rely on the Agency's assurance that they would not face prosecution on that basis alone – even though they exceeded the 5% fin-to-carcass ratio. The question with which the undersigned has struggled is how to account for Respondents' rebuttal evidence in light of the statutory presumption through which Respondents are found to engaged in shark finning on thirteen occasions.

The Agency has also recently changed the shark fishing rules so that sharks must be landed with fins attached to the carcasses. Respondents argued that this regulatory change eliminates, or at the very least, diminishes the deterrent component of the sanction. While specific deterrence might not be as much of an issue given this change, general deterrence is still a legitimate goal for imposition of a significant sanction. Agency counsel argued that the change in law calls for a substantial penalty, not a reduced one, as the Agency was compelled to change the law to put a stop to continuing shark finning.

Given the factual basis for this case (i.e., violations established on the basis of a presumption) and the problems associated with enforcement actions based on such a presumption, the change in law clearly provides greater certainty with respect to establishing violations. A monetary and limited permit sanction will accomplish the

goals of both deterrence and recoupment of possible unlawful gains from Respondents' conduct.

The primary purpose of the permit sanction and penalty assessment is remedial and to deter future violations – not simply to effect punishment on violators. See, e.g., In re Alfred D. Greene, 7 O.R.W. 172, 1993 NOAA Lexis 24, at 6-7 (N.O.A.A. 1993). In a case such as this, where the government is bringing charges against Respondents based only on a presumption and there is no direct evidence to support the violations, a significant reduction in the amount of penalty sought is appropriate given the extent of Respondents' accepted rebuttal evidence.

E. Monetary Sanction Amount and Permit Sanction Imposed

Given that (1) Respondents were able to rebut 5 of the 18 charges; (2) Respondents were nevertheless able to explain considerable amounts of the excessive fin-to-carcass ratios reported even for those charges found proven; (3) the resulting adjusted overages are thus significantly less than the Agency estimates for the 13 charges proved; (4) the Agency indicated that it would not base prosecutions merely on the presumption alone; and (5) Respondents have a prior violation on shark-related charges, the undersigned is assessing a monetary sanction of $1,500.00 per charge found proven for a total of $19,500.00 for the thirteen proven violations.

A permit sanction is an appropriate element of the sanction, but it should be directed only to Respondents shark permits so that the specific practice (i.e., shark finning) that is the subject of these violations will be foreclosed for a period of time. Therefore the undersigned is assessing a permit sanction for the length of sixty (60) days against Respondents Mark Cordeiro and Willie Etheridge, III (and the F/V BLUE FIN),

which will be solely limited to any federal shark permits held. The fact that Respondents do not currently fish for sharks is not relevant to this consideration. Respondents currently hold such a permit and are free to resume shark fishing activity at anytime.

VIII. ORDER

WHEREFORE:

IT IS HEREBY ORDERED that a civil penalty in the total amount of **NINETEEN THOUSAND FIVE HUNDRED DOLLARS** ($19,500.00) is assessed against Respondents Mark Cordeiro and Willie Etheridge, III, jointly and severally, for the 13 violations found proven.

IT IS HEREBY FURTHER ORDERED that a permit sanction for the length of sixty (60) days is imposed against Respondents Mark Cordeiro and Willie Etheridge, III (and the F/V BLUE FIN), solely limited to any Federal shark permits held.

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

PLEASE BE FURTHER ADVISED that any party may petition for administrative review of this decision. The petition for review must be filed with the Administrator of the National Oceanic and Atmospheric Administration within thirty (30) days from the day of this initial decision and order as provided in 15 C.F.R. § 904.273. Copies of the

petition should also be sent to the ALJ Docketing Center, NOAA counsel, and the presiding judge. A copy of 15 C.F.R. § 904.273 is attached as **Attachment C** to this order.

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

IT IS SO ORDERED.

Done and dated this 5th day of January, 2011
at Alameda, CA.

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

Appendix 1: History of Agency Anti-Shark Finning Efforts

The Agency (through one of its components, the National Marine Fisheries Service (NMFS)) has managed the shark fishery in the Atlantic Ocean (including the Gulf of Mexico and the Caribbean) since 1993. See 58 Fed. Reg. 21931, 1993 WL 128383 (April 26, 1993). A significant part of the Atlantic Ocean shark management plan from the beginning included measures to prevent shark finning. See 54 Fed. Reg. 46283, 1989 WL 287239 (November 2, 1989) (announcing Agency plans to implement a Fishery Management Plan (FMP) for the Atlantic shark fishery and calling for public comments).

The Agency's 1989 announcement of a planned Atlantic shark FMP included various proposed management measures, one of which was a prohibition on finning. This anti-finning prohibition would allow fins to be landed, but "only in proportion to carcasses, (i.e., no more than four fins per carcass)[.]" Id. This initial announcement thus focused not on any prohibited fin-to-carcass ratio, but rather, provided a suggested limitation on the sheer number of fins (i.e., four) for every carcass landed.

Prior to the implementation of its management regulatory structure, NMFS published a notice that it had prepared a revised draft of the FMP for the Atlantic Ocean shark fishery in 1991. See 56 Fed. Reg. 2410, 1991 WL 304992 (May 3, 1991). This notice indicated that pursuant to amendments to the Magnuson-Stevens Act, the Agency was given specific regulatory authority to manage highly migratory species, including oceanic sharks. Id. The notice also contained a shift in management strategy with respect to anti-finning. Instead of proposing that the number of fins relative to the number of carcasses be limited, this notice suggested that finning would be prohibited

"by requiring that fins be landed attached to carcasses, except for caudal fin, which may be severed[.]" Id.

Following several public hearings, NMFS revised the FMP again and requested additional comments, noting that one intended management measure was a finning prohibition, with "finning" defined as "the practice of harvesting sharks for fins alone and discarding the carcass at sea". See 57 Fed. Reg. 1250, 1992 WL 2073 (January 13, 1992).

On June 8, 1992, NMFS published its Proposed Rule for the FMP. See 57 Fed. Reg. 24222, 1992 WL 121936 (June 8, 1992). This Proposed Rule contained specific prohibitions on shark finning, which the Proposed Rule observed had "emerged in recent years in response to the rising price of shark fins." Id. at 24223. The Proposed Rule sought to address the problem by requiring fins to be landed in proportion to the carcasses landed. NMFS observed that the then-current practice frequently involved landing only the fins from pelagic sharks and that a requirement of landing fins along with carcasses "may result in the release of both live and dead sharks currently taken for fins alone [because] some fishermen may elect to save their freezer space for more valuable carcasses such as tuna or swordfish." Id. at 24226.

The Proposed Rule contained several measures to eliminate the practice generally by not allowing finning for permitted vessels and requiring that any fins landed must be in proportion to the number of carcasses landed, i.e., "the number of fins may not exceed five per carcass." Id. at 24232 (proposed 50 C.F.R. § 678.21(a)(2)). In the Proposed Rule, NMFS thus returned to the initial suggestion of limiting only the number of fins landed per carcass.

On April 26, 1993, NMFS published a combined Final Rule and Interim Rule with a request for comments for the Atlantic shark fishery. See 58 Fed. Reg. 21931, 1993 WL 128383 (April 26, 1993). Importantly, the Final Rule established for the first time a limit on the ratio of the weights of wet fins to carcasses (dressed weight) to five percent (5%) or less. Id. at 21933-34. NMFS stated that this change from the Proposed Rule limiting the number of fins landed per carcass was based "on industry requests for a weight ratio as a more flexible" enforcement approach. Id. In addition, the 5% rule "would prevent mixing large fins from big sharks with small shark carcasses (a potential loophole that could allow finning)." Id. NMFS based the 5% fin-to-carcass ratio upon "weights of fins and carcasses under commercial fishery conditions" with the information obtained through experimental fishing activities. Id. at 21934.

NMFS considered several other ratios (6%-10%) used by Virginia and North Carolina that were suggested by dealers, but rejected these higher percentages. Id. at 21938. NMFS determined that the 5% ratio was appropriate based on "samples of sharks dressed at sea under commercial fishing conditions" and believed that the fin-to-carcass weight ratio would be easier to enforce and would better prevent finning than a simple numeric limitation on the number of fins landed per carcass. Id. at 21939.

The Final Rule provided the following changes to the Code of Federal Regulations with respect to shark finning and the implementation of the 5% ratio:

> 50 C.F.R. § 678.7 – [I]t is unlawful for any person to do any of the following:
> . . . .
> (k) Remove the fins from a shark and discard the remainder, as specified in § 678.21(a)(1).
> (l) Possess shark fins aboard or off-load shark fins from a fishing vessel, except as specified in § 678.21(a)(2) and (3).

> 50 C.F.R. § 678.21(a)(1) – The practice of "finning," that is, removing only the fins and returning the remainder of the shark to the sea, is prohibited in the EEZ or aboard a vessel that has been issued a permit pursuant to § 678.4.
>
> 50 C.F.R. § 678.21(a)(2) – Shark fins that are possessed aboard or off-loaded from a fishing vessel must be in proper proportion to the weight of carcasses. That is, the weight of fins may not exceed five percent of the weight of the carcasses. All fins must be weighed in conjunction with the weighing of the carcasses at the vessel's first point of landing and such weights of the fins landed must be recorded on the weighout slips submitted by the vessel owner or operator under § 678.5(a).

Id. at 21947.

In 1996, NMFS announced an effort to consolidate its rules for Atlantic tuna, billfishes, and sharks into its existing rules for Atlantic swordfish at 50 C.F.R. Part 630. See 61 Fed. Reg. 57361, 1996 WL 636916 (November 6, 1996). Eventually, Part 678 was removed effective July 1, 1999 and its provisions were placed into 50 C.F.R. Part 630. See 64 Fed. Reg. 29090, 1999 WL 334355 (May 28, 1999). This consolidation led to the 5% threshold being contained at 50 C.F.R. § 635.30(c), which altered the language surrounding the 5% restrictions as follows:

> 50 C.F.R. § 635.30(c)(1) – No person shall fin any shark, i.e., remove only the fins and return the remainder of the shark to the sea, shoreward of the outer boundary of the EEZ and on board a vessel for which a commercial vessel permit for shark has been issued. No person shall possess a shark fin on board a fishing vessel after the vessel's first point of landing. No person shall possess or offload wet shark fins in a quantity that exceeds 5 percent of the weight of the shark carcasses. The prohibition on finning applies to all species of sharks in the management unit . . . .

Id. at 29152.

In 2000, President Clinton signed the Shark Finning Prohibition Act (SFPA), P.L. 106-557. The stated purpose of this Act was "to eliminate shark-finning by addressing the problem comprehensively at both the national and international levels." SFPA, Sec.

2. The SFPA defined shark finning as "the taking of a shark, removing the fin or fins (whether or not including the tail) of a shark, and returning the remainder of the shark to the sea." SFPA, Sec. 9.

The SFPA amended the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1857(1)) (Magnuson-Stevens Act) by adding a new section P, which made it unlawful:

> (iv)to remove any fins of a shark (including the tail) and discard the carcass of the shark at sea;
> (v) to have custody, control, or possession of any such fin aboard a fishing vessel without the corresponding carcass; or
> (vi) to land any such fin without the corresponding carcass.

Id.

The SFPA also provided that "[f]or purposes of subparagraph (P) there is a rebuttable presumption that any shark fins landed from a fishing vessel or found on board a fishing vessel were taken, held, or landed in violation of subparagraph (P) if the total weight of shark fins landed or found on board exceeds 5 percent of the total weight of shark carcasses landed or found on board." 16 U.S.C. § 1857(1)(P). The SFPA directed the Secretary of Commerce to promulgate regulations implementing the SFPA within 180 days after the act's enactment. SFPA, Sec. 4.

On June 28, 2001, the Agency announced proposed rules to implement the SFPA. See 66 Fed. Reg. 34401, 2001 WL 719959 (June 28, 2001). In these proposed rules, the Agency outlined the establishment of the 5% fin-to-carcass presumption. Id. at 34402. The Agency specifically stated that "[i]t would be the responsibility of the person involved to rebut the presumption by providing evidence that there is a good reason for the weight of the fins to exceed the 5-percent threshold." Id. (emphasis added).

In announcing the Final Rule, the Agency again discussed the 5% presumption and made it clear that "[t]his final rule does not alter or modify shark finning regulations already in place in the Atlantic for Federal permit holders." 67 Fed. Reg. 6194 (February 11, 2002). The Final Rule also stated, "[i]t would be the responsibility of the person conducting the activity to rebut the presumption by providing evidence that the fins were not taken, held or landed in violation of these regulations." Id. at 6195 (emphasis added). Indeed, in terms of enforcement practices, the Final Rule stated:

> NMFS notes that enforcement and prosecution of violations will not be contingent solely on the use of the rebuttable presumption. NOAA will consider all the evidence available in each instance, including the number and weight of shark carcasses, the condition of the carcasses (e.g., dressed or not dressed), and the amount or weight of other shark products when determining whether a violation likely occurred and whether to prosecute.

Id. at 6197 (emphasis added).

The Final Rule provided the following key provisions concerning sharking finning at 50 C.F.R. Part 600, Subpart M:

> 50 C.F.R. § 600.1021(a) – Shark finning means taking a shark, removing a fin or fins (whether or not including the tail), and returning the remainder of the shark to the sea.
>
> 50 C.F.R. § 600.1022(a) – In addition to the prohibitions in §§ 600.505 and 600.725, it is unlawful for any person to do, or attempt to do, any of the following:
>
> (1) Engage in shark finning, as provided in § 600.1023(a) and (i).
>
> (2) Possess shark fins without the corresponding carcasses while on board a U.S. fishing vessel, as provided in § 600.1023(b) and (j).
>
> (3) Land shark fins without the corresponding carcasses, as provided in § 600.1023(c) and (k).
>
> (4) Fail to have all shark fins and carcasses from a U.S. or foreign fishing vessel landed at one time and weighed at the time of the landing, as provided in § 600.1023(d).

. . . .

(8) Fail to have all shark carcasses and fins landed and weighed at the same time if landed in an Atlantic coastal port, and to have all weights recorded on the weighout slips specified in § 635.5(a)(2) of this chapter.

(9) Fail to maintain a shark intact through landing as specified in §§ 600.1023(h) and 635.30(c)(4) of this chapter.

50 C.F.R. § 600.1022(b) – (1) For purposes of this section, it is a rebuttable presumption that shark fins landed by a U.S. or foreign fishing vessel were taken, held, or landed in violation of this section if the total weight of the shark fins landed exceeds 5 percent of the total dressed weight of shark carcasses on board or landed from the fishing vessel.

(2) For purposes of this section, it is a rebuttable presumption that shark fins possessed by a U.S. fishing vessel were taken and held in violation of this section if the total weight of the shark fins on board, or landed, exceeds 5 percent of the total dressed weight of shark carcasses on board or landed from the fishing vessel.

50 C.F.R. § 600.1023 – (a)(1) No person aboard a U.S. fishing vessel shall engage in shark finning in waters seaward of the inner boundary of the U.S. EEZ.

. . . .

(b) No person aboard a U.S. fishing vessel shall possess on board shark fins harvested seaward of the inner boundary of the U.S. EEZ without the corresponding carcass(es), as may be determined by the weight of the shark fins in accordance with § 600.1022(b)(2), except that sharks may be dressed at sea.

(c) No person aboard a U.S. or foreign fishing vessel (including any cargo vessel that received shark fins from a fishing vessel at sea) shall land shark fins harvested in waters seaward of the inner boundary of the U.S. EEZ without corresponding shark carcasses, as may be determined by the weight of the shark fins in accordance with § 600.1022(b)(1).

(d) Except as provided in paragraphs (g) and (h) of this section, a person who operates a U.S. or foreign fishing vessel and who lands shark fins harvested in waters seaward of the inner boundary of the U.S. EEZ shall land all fins and corresponding carcasses from the vessel at the same point of landing and shall have all fins and carcasses weighed at that time.

. . . .

> (g) A person who owns or operates a vessel that has been issued a Federal Atlantic commercial shark limited access permit and who lands shark in an Atlantic coastal port must have all fins weighed in conjunction with the weighing of the carcasses at the vessel's first point of landing. Such weights must be recorded on the "weighout slips" specified in § 635.5(a)(2) of this chapter.
>
> . . . .
>
> (i) No person aboard a vessel that has been issued a Federal Atlantic commercial shark limited access permit shall engage in shark finning.
>
> (j) No person aboard a vessel that has been issued a Federal Atlantic commercial shark limited access permit shall possess on board shark fins without the corresponding carcass(es), as may be determined by the weight of the shark fins in accordance with § 600.1022(b)(2), except that sharks may be dressed at sea.
>
> (k) No person aboard a vessel that has been issued a Federal Atlantic commercial shark limited access permit shall land shark fins without the corresponding carcass(es) . . . .

Id. at 6200-6201. In 2004, these shark finning regulations were reorganized, renumbered and placed into 50 C.F.R. Part 600, Subpart N. See 69 Fed. Reg. 53359, 2004 WL 1929352 (September 1, 2004). As a result 50 C.F.R. §§ 1021-1022 became 50 C.F.R. §§ 1202-1203. Id.

These anti-finning regulations remained in place until a fairly recent change that required all sharks to be landed with fins attached. See 73 Fed. Reg. 35778, 2008 WL 2490182 (June 24, 2008). This 2008 final rule requiring sharks to be landed with the fins attached specifically addressed comments made to the proposed rule about the 5% fin-to-carcass ratio as follows:

> NMFS first implemented the 5-percent fin-to-carcass ratio in the 1993 Shark FMP. This ratio was based on research that indicated that the average ratio of fin weight to dressed weight of the carcass was 3.6 percent, and the sandbar fin ratio was 5.1 percent. In December 2000, the

> SFPA was signed into law. The SFPA established a rebuttable presumption that any shark fins landed from a fishing vessel or found on board a fishing vessel were taken, held, or landed in violation of the shark finning ban if the total weight of shark fins landed or found on board exceeded 5-percent of the total weight of shark carcasses landed or found on board. This management measure was implemented by NMFS through a final rule released in February 2002. NMFS may conduct additional research on the fin-to-carcass ratio in the shark research fishery, though any changes to the 5-percent ratio will have to be modified by Congressional action.

Id. at 35789 (emphasis added)

Appendix 2 – Revised Fin-to-Carcass Weight Calculations

Charge	Reported Fin Weight	Reported Carcass Weight	Reported Fin to Carcass Ratio[A]	% of Sandbars for Each Count	Adjusted Fin Weight (Excess Meat on Fins)[B]	Adjusted Carcass Weight (Excess Meat on Fins)[C]	Adjusted Fin to Carcass Ratio (Excess Meat on Fins)[D]	Adjusted Fin Weight (Ice/Soak Factor)[E]	Adjusted Fin to Carcass Ratio (Ice/Soak Factor)[F]	Adjusted Carcass Weight (Cut Logs Short)[G]	Adjusted Fin to Carcass Ratio (Cut Logs Short)[H]	Adjusted Violation Threshold[I]	% Exceeding Violation Threshold[J]	Estimated Value of Fins Exceeding Adjusted Violation Threshold[K]
1	297	3973	7.48%	72.00%	261.36	4008.64	6.52%	258.09	6.44%	4202.64	6.14%	6.02%	0.12%	$112.13
2	287	3675	7.81%	79.00%	252.56	3709.44	6.81%	249.40	6.72%	3903.44	6.39%	6.11%	0.28%	$243.07
3	286	3923	7.29%	96.00%	251.68	3957.32	6.36%	248.53	6.28%	4151.32	5.99%	6.35%	-0.36%	Not Proven
4	323	3942	8.19%	100.00%	284.24	3980.76	7.14%	280.69	7.05%	4174.76	6.72%	6.41%	0.31%	$315.82
5	268	3751	7.14%	100.00%	235.84	3783.16	6.23%	232.89	6.16%	3977.16	5.86%	6.41%	-0.55%	Not Proven
6	242	3239	7.47%	80.00%	212.96	3268.04	6.52%	210.30	6.43%	3462.04	6.07%	6.13%	-0.06%	Not Proven
7	322	4140	7.78%	96.00%	283.36	4178.64	6.78%	279.82	6.70%	4372.64	6.40%	6.35%	0.05%	$41.69
8	277	3633	7.62%	100.00%	243.76	3666.24	6.65%	240.71	6.57%	3860.24	6.24%	6.41%	-0.17%	Not Proven
9	285	3865	7.37%	59.00%	250.8	3899.2	6.43%	247.67	6.35%	4093.20	6.05%	5.83%	0.22%	$193.47
10	329	4022	8.18%	80.00%	289.52	4061.48	7.13%	285.90	7.04%	4255.48	6.72%	6.13%	0.59%	$583.43
11	313	3880	8.07%	93.00%	275.44	3917.56	7.03%	272.00	6.94%	4111.56	6.62%	6.31%	0.31%	$285.74
12	310	3980	7.79%	77.00%	272.8	4017.2	6.79%	269.39	6.71%	4211.20	6.40%	6.09%	0.31%	$294.16
13	315	3965	7.94%	86.00%	277.2	4002.8	6.93%	273.74	6.84%	4196.80	6.52%	6.21%	0.31%	$298.48
14	307	3950	7.77%	76.00%	270.16	3986.84	6.78%	266.78	6.69%	4180.84	6.38%	6.07%	0.31%	$295.75
15	290	3980	7.29%	72.00%	255.2	4014.8	6.36%	252.01	6.28%	4208.80	5.99%	6.02%	-0.03%	Not Proven
16	284	3816	7.44%	63.00%	249.92	3850.08	6.49%	246.80	6.41%	4044.08	6.10%	5.89%	0.21%	$195.65
17	337	3980	8.47%	97.00%	296.56	4020.44	7.38%	292.85	7.28%	4214.44	6.95%	6.37%	0.58%	$554.87
18	299	3800	7.87%	100.00%	263.12	3835.88	6.86%	259.83	6.77%	4029.88	6.45%	6.41%	0.04%	$34.35
Total	5371	69514	7.73%	84.80%	4726.48	70158.52	6.74%	4667.40	6.65%	73650.52	6.34%	6.20%	0.14%	$3448.61

Explanatory Notes:

A. The Reported Fin-to-Carcass Ratios were calculated by taking the Reported Fin Weight and dividing that number by the Reported Carcass Weight.

B. The Adjusted Fin Weights (Excess Meat on Fins) were calculated by taking the Reported Fin Weights and multiplying that number by .88 to represent an average of 12% extra meat on the fins.

C. The Adjusted Carcass Weights (Excess Meat on Fins) were calculated by taking the Reported Carcass Weights and adding to that number the amount of fin weight removed to account for the excess meat on the fins.

D. The Adjusted Fin-to-Carcass Ratios (Excess Meat on Fins) were calculated by taking the Adjusted Fin Weights (Excess Meat on Fins) and dividing that number by the Adjusted Carcass Weights (Excess Meat on Fins).

E. The Adjusted Fin Weights (Ice/Soak Factor) were calculated by taking the Adjusted Fin Weights (Excess Meat on Fins) and multiplying that number by .9875 to account for the 1.25% reduction adjustment due to the loss of water from melting ice and runoff.

F. The Adjusted Fin-to-Carcass Ratios (Ice/Soak Factor) were calculated by taking the Adjusted Fin Weights (Ice/Soak Factor) and dividing that number by the Adjusted Carcass Weights (Excess Meat on Fins).

G. The Adjusted Carcass Weights (Cut Logs Short) were calculated by taking the Adjusted Carcass Weights (Excess Meat on Fins) and adding 194 lbs. to that number to account for an average of 194 lbs. of excess carcass meat cut from the logs per charge.

H. The Adjusted Fin-to-Carcass Ratios (Cut Logs Short) were calculated by taking the Adjusted Fin Weights (Ice/Soak Factor) and dividing that number by the Adjusted Carcass Weights (Cut Logs Short).

I. The Adjusted Violation Thresholds were calculated by taking the baseline 6.5% fin-to-carcass ratio for retention of all eight fins of a sandbar shark and multiplying that number by .9 – and adding the resulting number to the accepted fin-to-carcass ration for sandbar sharks when retaining the four primary fins (5.6%) multiplied by .1 (i.e., 5.85% (90% of 6.5%) + .56% (10% of 5.6%) for an adjusted fin-to-carcass ratio of 6.41%. This number (6.41%) was then multiplied by the % of sandbars for each charge. For those counts having a mixture of sandbar and non-sandbar sharks, the Adjusted Violation Thresholds were arrived at by apportioning the 6.41% and 5.0% baselines.

J. The % Exceeding Violation Threshold numbers were calculated by taking the Adjusted Fin-to-Carcass Ratios (Cut Logs Short) and subtracting the Adjusted Violation Threshold. A positive number indicates a charge found **PROVEN**.

K. The estimated Value of Fins Exceeding the Adjusted Threshold Level was calculated by using the estimated average values of fins on date of landing (where available) from Agency Exh. 43 and using the average of the estimated value of fins for those counts where data was indicated as insufficient or unavailable (i.e., $22.30) and multiplying that number by the amount of pounds of Adjusted Fin Weight (Ice/Soak Factor) – exceeding the Adjusted Threshold Level (in terms of pounds of fins).

Example of Calculation:

Count 1: 297 divided by 3,973 = 7.48% (Reported Fin-to-Carcass Ratio);
297 multiplied by .88=261.36 (Adjusted Fin Weight (Excess Meat on Fins));
3,973 + (297-261.36)=4,008.64 (Adjusted Carcass Weight (Excess Meat on Fins));
261.36 divided by 4,008.64=6.52% (Adjusted Fin-to-Carcass Ratio) (Excess Meat on Fins));
261.36 multiplied by .9875=258.09 (Adjusted Fin Weight (Ice/Soak Factor));
258.09 divided by 4,008.64=6.44% (Adjusted Fin-to-Carcass Ratio (Ice/Soak Factor));
4,008.64+194=4202.64 (Adjusted Carcass Weight (Cut Logs Short));
258.09 divided by 4,202.64=**6.14%** (Adjusted Fin-to-Carcass Ratio) (Cut Logs Short));
(6.41%*.72) + (5.0%*.28)= **6.02%** (Adjusted Violation Threshold); and
.12% overage
PROVEN
6.02% multiplied by 4,202.64 (Adjusted Carcass Weight (Cut Logs Short)) = 253 lbs. (maximum fin weight for no violation). 258.09 (Adjusted Fin Weight (Ice/Soak Factor) – 253 = 5.09 lbs. estimated overage in fin weight. 5.09 multiplied by $22.03 = $112.13 (Estimated Value of Fins Exceeding Adjusted Violation Threshold).

ATTACHMENT A: LIST OF WITNESSES AND EXHIBITS
AGENCY WITNESSES[41]

1. Dr. John Carlson (National Marine Fisheries Service)
2. Theodor Eric Sander

RESPONDENTS' WITNESSES

1. Mark Cordeiro
2. Mark Agger (fish dealer)
3. Francis "Dewey" Hemilright (commercial fisherman)
4. Russell "Rusty" Hudson (fishing industry consultant)
5. Willie Roswell Etheridge, III

AGENCY'S EXHIBITS (Agency Exh. 44 through Agency Exh. 62)[42]

44. Agency Request to Amend Pleadings
45. Statement of Brad F. Reynolds (4/10/03)
46. NOAA Supplemental Offense Investigation Report (5/1/03)
47. Forensic DNA Identification of Shark Fins and Body Parts for Law Enforcement, plus cover letter (4/25/03)
48. John K. Carlson Curriculum Vitae
49. Expected Testimony of John Carlson, Ph.D.
50. JPG image of tiger shark
51. Email string dated 10/14/09 including emails between R. Hudson and Dr. Cortes and Lori Hale
52. Differences in the Ratios of Fin to Carcass Weight among Fourteen Species of Shark by I. Barremore, et al.
53. Guide for Complying with the Regulations for Atlantic Tunas, Swordfish, Sharks and Billfish, NOAA Fisheries, National Marine Fisheries Service (September 2003)
54. United States of America v. Harrison International, LLC – Judgment in a Criminal Case, United States District Court – Northern District of Georgia, Atlanta Division (September 1, 2009)
55. Eric Sander Curriculum Vitae
56. Settlement Agreement between Agger Fish Corp. and NOAA (6/23/06)
57. Testimony of Marc Agger (6/8/09)
58. January 2004 Average Carcass Size From Trip Summaries and Set Logs[43]
59. Species Composition of Landings Associated with Charges
60. Set Log and Observer data[44]

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[41] For both parties, only those witnesses who testified at the hearing following the Remand Order are identified. The prior testimony of witnesses during the initial proceedings remains part of the record.

[42] Agency Exh. 1-43 were admitted into evidence in connection with the initial proceedings and will not be listed here. The exhibits listed are only those admitted in connection with the hearing following the Remand Order.

[43] The Agency submitted a corrected version of Exhibit 58, which it designated as Exh. 58A. The corrected exhibit was reviewed for the purposes of this Decision and Order and is included in the record.

61. Percentage of Fin Waste Calculations
62. Stock Sheets from Willie R. Etheridge Seafood Company

RESPONDENTS' EXHIBITS (Resp. Exh. A through Resp. Exh. II)

A. Picture of shark fins and log
B. Preliminary Reassessment of the Validity of the 5% Fin To Carcass Weight Ratio for Sharks, Enric Cortes and Julie A. Neer, (SCRS/2005/086)
C. Agger documents (01/14/2004)
D. Agger documents (02/02/2004)
E. Agger documents (01/19/2004)
F. Diagram of shark with Mr. Cordeiro's cuts indicated
G. Agger documents (copies of Resp. Exhs. C-E)
H. Rusty Hudson resume
I. Etheridge handwritten resume
J. Email from Dewey Hemilright to fishlaw@aol.com dated 11/22/2008 re dewey's bio!!
K. Summary of talking points for Rusty's Testimony (12/22/2008)
L. Pictures of shark fins
M. Small Entity Compliance Guide – Regulations to Implement the Shark Finning Prohibition Act (2/11/2002)
N. Preliminary Reassessment of the Validity of the 5% Fin To Carcass Weight Ratio for Sharks, Enric Cortes and Julie A. Neer, (SCRS/2005/086); Col. Vol. Sci. Pap. ICCAT, 59(3): 1025-1036 (2006)
O. Differences in the ratios of fin to carcass weight among fourteen species of shark by I. Barremore, et al.
P. NOAA Civil Administrative Penalty Schedule (Preface) (revised 8/02)
Q. CD-Rom containing photographs from Hemilright study
R. Hareide, N.R., et al., European Shark Fisheries: A Preliminary Investigation into Fisheries, Conversion Factors, Trade Products, Markets and Management Measures. European Elasmobranch Association (2007)
S. Hindmarsh, S., A Review of Fin-weight Ratios for Sharks, IOTC-2007-WPEB-I4 (2007)
T. Standard Deviation, Wikipedia entry (10/12/2009)
U. Mejuto, et al., Ratios between the Wet Fin Weight and Body Weights of Blue Shark (*Prionace Glauca*) in the Spanish Surface Longline Fleet during the Period 1993-2006 and their Impact on the Ratio of Shark Species Combined, Collect. Vol. Sci. Pap. ICCAT, 64(5): 1492-1508 (2008)
V. Ariz, J., et al., Body-weight (dressed weight) and fin-weight ratios of several species of shark caught by Spanish longliners in the Indian Ocean, Document SAR-7-09, IATTC, Working Group to Review Stock Assessments, 7th Meeting, La Jolla, CA, May 15-19, 2006

[44] The Agency submitted a corrected version of Exhibit 60, which it designated as Exh. 60A. The corrected exhibit was reviewed for the purposes of this Decision and Order and is included in the record.

W. Fin Weight in Relation to Body Weight of Sharks, The IUCN/SSC Shark Specialist Group, Ichthyology at the Florida Museum of Natural History. www.flmnh.ufl.edu/fish/organizations/ssg/finweights.html (10/12/2009)

X. North Carolina Department of Natural Resources, Division of Marine Fisheries, Memorandum re Shark Fin Ratio Study (11/9/2006) from Whitney Grogan, Marine Fisheries Biologist to Dewey Hemilright

Y. Florida Sea Grant College Publication, Manual on Shark Fishing (1985)

Z. Observer Data Disk

AA. Email from Directed Shark to Fishlaw, cc'd to DSF2009, directedshark@gmail.com, dated 6/3/2009 re Ivy Baremore mistake at top and at bottom the correction due to Rusty 12-21/2008; email from mastigophora@yahoo.com to RHudson106@aol.com, dated 8/4/2005 re Methods

BB. 10 page facsimile from Mark Harrison to Directed Shark, attention Rusty Hudson, dated 9/01/2005

CC. Table – "Original 12 Sandbar Sharks in February 25, 1993 Fishery Management Plan for Sharks of the Atlantic Ocean

DD. Documents prepared by Rusty Hudson and Dewey Hemilright

EE. Federal Register, June 24, 2008, Vol. 73, No. 122, 35778-35779.

FF. Cruise Results – NOAA Ship DELAWARE II, Cruise DE II 91-06 (I-III) – Survey of Apex Predators – Sharks

GG. Affidavit of Mark Cordeiro dated 12/11/2009

HH. Affidavit of Dewey Hemilright dated 12/10/2009

II. Cortes, E., Stock Assessment of Small Coastal Sharks in the U.S. Atlantic and Gulf of Mexico (March, 2002)

JUDGE'S EXHIBT

1. Order Denying Motion To Disqualify The Administrative Law Judge issued by Judge Walter J. Brudzinski (August 4, 2009) In re Adak Fisheries, LLC, et al. (AK035039)

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

Agency's Proposed Findings of Fact

1. At all relevant times mentioned herein, including all dates corresponding with the eighteen (18) counts included in the NOVA, Respondent Willie Etheridge, III was the owner of the F/V BLUE FIN, documentation number 59797. (Agency Ex. 1, 39; November 13, 2006 Tr. at 37).

Ruling: Accepted and Incorporated

2. At all relevant times mentioned herein, including all dates corresponding with the eighteen (18) counts included in the NOVA, Respondent Mark Cordeiro was the operator of the F/V BLUE FIN. (Agency Ex. 1, 39; November 13, 2006 Tr. at 24, 37).

Ruling: Accepted and Incorporated

3. At all relevant times mentioned herein, including all dates corresponding with the eighteen (18) counts included in the NOVA, Respondent Etheridge authorized Respondent Cordeiro to operate the F/V BLUE FIN to fish for shark species pursuant to the vessel's Federal Atlantic commercial shark limited access permit. (Agency Ex. 5-8, 38; November 13, 2006 Tr. at 24, 30).

Ruling: Accepted and Incorporated

4. On or about August 18, 2003, Respondents possessed a shark fin-to-carcass ratio of 7.48% from offloading 3,973 pounds of shark carcasses and 297 pounds of wet shark fins. (Agency Ex. 9, 10; November 13, 2006 Tr. at 68-70).

Ruling: Accepted and Incorporated

5. On or about January 4, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.81% from offloading 3,675 pounds of shark carcasses and 287 pounds of wet shark fins. (Agency Ex. 11, 12; November 13, 2006 Tr. at 71-3).

Ruling: Accepted and Incorporated

6. On or about January 8, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.29% from offloading 3,923 pounds of shark carcasses and 286 pounds of wet shark fins. (Agency Ex. 13; November 13, 2006 Tr. at 73-4).

Ruling: Accepted and Incorporated

7. On or about January 9, 2004, Respondents possessed a shark fin-to-carcass ratio of 8.19% from offloading 3,942 pounds of shark carcasses and 323 pounds of wet shark fins. (Agency Ex. 14; November 13, 2006 Tr. at 74).

Ruling: Accepted and Incorporated

8. On or about January 12, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.14% from offloading 3,751 pounds of shark carcasses and 268 pounds of wet shark fins. (Agency Ex. 15, 16; November 13, 2006 Tr. at 74).

Ruling: Accepted and Incorporated

9. On or about January 18, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.47% from offloading 3,239 pounds of shark carcasses and 242 pounds of wet shark fins. (Agency Ex. 17; November 13, 2006 Tr. at 75).

Ruling: Accepted and Incorporated

10. On or about January 24, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.78% from offloading 4,140 pounds of shark carcasses and 322 pounds of wet shark fins. (Agency Ex. 18; November 13, 2006 Tr. 75).

Ruling: Accepted and Incorporated

11. On or about January 27, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.62% from offloading 3,633 pounds of shark carcasses and 277 pounds of wet shark fins. (Agency Ex. 19,20; November 13, 2006 Tr. 75-6).

Ruling: Accepted and Incorporated

12. On or about July 2, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.37% from offloading 3,865 pounds of shark carcasses and 285 pounds of wet shark fins. (Agency Ex. 21; November 13, 2006 Tr. at 76-7).

Ruling: Accepted and Incorporated

13. On or about July 4, 2004, Respondents possessed a shark fin-to-carcass ratio of 8.18% from offloading 4,022 pounds of shark carcasses and 329 pounds of wet shark fins. (Agency Ex. 22; November 13, 2006 Tr. at 77).

Ruling: Accepted and Incorporated

14. On or about July 6, 2004, Respondents possessed a shark fin-to-carcass ratio of 8.07% from offloading 3,880 pounds of shark carcasses and 313 pounds of wet shark fins. (Agency Ex. 23; November 13, 2006 Tr. at 77-8).

Ruling: Accepted and Incorporated

15. On or about July 8, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.79% from offloading 3,980 pounds of shark carcasses and 310 pounds of wet shark fins. (Agency Ex. 24; November 13, 2006 Tr. at 79).

Ruling: Accepted and Incorporated

16. On or about July 11, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.94% from offloading 3,965 pounds of shark carcasses and 315 pounds of wet shark fins. (Agency Ex. 25, 26; November 13, 2006 Tr. at 80-1).

Ruling: Accepted and Incorporated

17. On or about July 13, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.77% from offloading 3,950 pounds of shark carcasses and 307 pounds of wet shark fins. (Agency Ex. 27, 28; November 13, 2006 Tr. at 81).

Ruling: Accepted and Incorporated

18. On or about July 16, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.29% from offloading 3,980 pounds of shark carcasses and 290 pounds of wet shark fins. (Agency Ex. 29, 30; November 13, 2006 Tr. at 82).

Ruling: Accepted and Incorporated

19. On or about July 19, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.44% from offloading 3,816 pounds of shark carcasses and 284 pounds of wet shark fins. (Agency Ex. 31, 32; November 13, 2006 Tr. at 82-3).

Ruling: Accepted and Incorporated

20. On or about July 25, 2004, Respondents possessed a shark fin-to-carcass ratio of 8.47% from offloading 3,980 pounds of shark carcasses and 337 pounds of wet shark fins. (Agency Ex. 33, 34; November 13, 2006 Tr. at 84).

Ruling: Accepted and Incorporated

21. On or about July 29, 2004, Respondents possessed a shark fin-to-carcass ratio of 7.87% from offloading 3,800 pounds of shark carcasses and 299 pounds of wet shark fins. (Agency Ex. 35, 36; November 13, 2006 Tr. at 84).

Ruling: Accepted and Incorporated

22. All fishing resulting in the possession or offloading of shark carcasses and fins, as detailed in findings of facts four (4) through twenty two (21), occurred within the

Exclusive Economic Zone of the United States. (Agency Ex. 37; November 13, 2006 Tr. at 85).

Ruling: Accepted and Incorporated

23. Both Respondents admitted they possessed or offloaded wet shark fins in each of the eighteen (18) counts alleged in the NOVA and NOPS with a fin to corresponding carcass ratio in excess of five (5) percent. (November 13, 2006 Tr. at 19, 31, 119, 232, 266).

Ruling: Accepted and Incorporated

Agency's Proposed Conclusions of Law

1. Respondents are both persons within the meaning of the Manguson-Stevens Act. (See 16 U.S.C. §1802(31)).

Ruling: Accepted and Incorporated

2. Pursuant to 16 U.S.C. §1857(1)(P) and 50 C.F.R. §600.1203(a)(2) and 50 C.F.R. §600.1203(a)(3), it is unlawful for a person to possess shark fins without the corresponding carcasses while on board a U.S. fishing vessel, as provided in 50 C.F.R. 50 C.F.R. §600.1204(b) and (j) or to land shark fins without the corresponding carcasses, as provided in 50 C.F.R. §600.1204(c) and (k)..

Ruling: Accepted and Incorporated

3. Pursuant to 16 U.S.C. §1857(1)(P) and 50 C.F.R. §600.1203 (b)(1) and (2), it is a rebuttable presumption that shark fins landed or possessed by a U.S. or foreign fishing vessel were taken, held, or landed in violation of this section if the total weight of the shark fins landed exceeds 5 percent of the total dressed weight of shark carcasses on board or landed from the fishing vessel.

Ruling: Accepted and Incorporated

4. Respondents violated 16 U.S.C. §1857(1)(P) and 50 C.F.R. §600.1203(a)(2) and (3), by unlawfully possessing while on board a U.S. fishing vessel or landing shark fins without the corresponding carcasses on eighteen (18) separate occasions by possessing or offloading shark fins in excess of the congressionally mandated five (5) percent fin-to-carcass ratio allotted; specifically on each count Respondents' fin-to-carcass ratio exceeded seven (7) percent.

Ruling: Accepted in Part and Incorporated, Rejected in Part. The undersigned accepts the conclusion that on 13 occasions, the Agency has proven by a preponderance of the evidence that Respondents were shark finning in violation of the statute and regulations. The mere fact that Respondents possessed or offloaded shark fins in excess of the 5% fin-to-carcass ratio leading to the presumption of shark finning does not

establish a violation on each of the eighteen charged occasions. Rather, Respondents effectively rebutted this presumption for 5 charges as fully discussed in this Decision and Order.

Respondents' Proposed Findings of Fact

1. Respondent Mark Cordeiro was at all times material to this case, the captain of F/V BLUEFIN. *See* Agency Exhibit 1; Transcript, November 13, 2006 at 37.

Ruling: Accepted and Incorporated.

2. Respondent Willie Etheridge, III was at all times material to this case, the owner of F/V BLUEFIN. *See* Agency Exhibit 1. Transcript, November 13, 2006 at 37.

Ruling: Accepted and Incorporated.

3. On April 11, 2006, the Agency issued Respondents a Notice of Violation and Assessment of Administrative Penalty (hereinafter "NOVA") and a Notice of Permit Sanction (hereinafter "NOPS"). *NOVA and NOPS*, Case No.: SE040289 (April 11, 2006).

Ruling: Accepted and Incorporated.

4. The NOVA alleged 18 separate violations wherein Respondents, while owning/operating F/V BLUEFIN, violated the Magnuson-Stevens Fishery Conservation and Management Act "by possessing shark fins without their corresponding carcasses while on board a U.S. fishing vessel," in contravention of both the Magnuson-Stevens Act and of 50 C.F.R. § 600.1203. *NOVA*.

Ruling: Accepted and Incorporated.

5. The Agency's allegations that Respondents possessed "shark fins without their corresponding carcasses while on board a U.S. fishing vessel," (hereinafter referred to as "shark finning") on 18 separate occasions were based on the Agency's findings that Respondents possessed a weight of shark fins in excess of five percent (5%) of the weight of possessed carcasses on those 18 separate occasions. *NOVA*.

Ruling: Accepted and Incorporated.

6. The Agency's charges that Respondents possessed a fin-carcass weight ratio in excess of 5% on all 18 occurrences are based upon the recorded weights of fins and sharks as referenced in the fish tickets, tallies, invoices, and trip tickets within Agency Exhibits 9-36. Transcript, November 13, 2006 at 67-85; Agency Exhibits 9-36.

Ruling: Accepted and Incorporated.

7. In fact, none of the Agency's witnesses or agents ever saw the actual fins and carcasses referenced in Agency Exhibits 9-36, giving rise to Respondents' charges. *See* Transcript, November 13, 2006 at Pages 48-50, 113-114.

Ruling: Accepted and Incorporated.

8. The only direct evidence of the allegation that Respondents' possessed shark fins without their corresponding carcasses are the recorded amounts of fins and carcasses within Agency Exhibits 9-36. Transcript, November 13, 2006 at 67-85, 113-114; Agency Exhibits 9-36.

Ruling: Accepted and Incorporated.

9. Possession of a weight ratio of fins to carcasses in excess of 5% creates a rebuttable presumption that Respondents had fins without their corresponding carcasses in violation of 50 C.F.R. § 600.1203. 50 C.F.R. § 600.1203.

Ruling: Accepted and Incorporated.

10. After being initially charged with the NOVA/NOPS, Respondents prepared their case to rebut the presumption that Respondents were shark finning pursuant to 50 C.F.R. § 600.1203. Transcript, November 13, 2006 at 252; *see also Respondent's PPIP* ("I'm trying to find out a clear and precise explanation of the rebuttal [sic.] presumption and feel very strongly that this could be my legal way of proving my argument . . . .").

Ruling: Accepted and Incorporated.

11. On October 12, 2006, however, the Agency amended its NOVA/NOPS alleging that Respondents violated the Magnuson-Stevens Fishery Conservation and Management Act on 18 occasions not "by possessing shark fins without their corresponding carcasses while on board a U.S. fishing vessel," in contravention of 50 C.F.R. § 600.1203, but by "possessing or offloading wet shark fins in a quantity that exceeds 5 percent of the dressed weight of the shark carcasses," in contravention of 50 C.F.R. §§ 635.71(a)(28) and 635.30(c)(1). *Amended NOVA* (October 12, 2006).

Ruling: Accepted and Incorporated.

12. The Amended NOVA charged Respondents not with actually finning sharks, but with merely possessing a quantity of shark fins whose weight exceeds 5% of the corresponding carcasses. *See* Transcript, November 13, 2006 at 31, 232.

Ruling: Accepted and Incorporated.

13. The Agency, however, does not prosecute fishermen for violating 50 C.F.R. §§ 635.71(a)(28) and 635.30(c)(1), who have a quantity of fins weighing in excess of 5% of

the corresponding carcasses, if all their fins can be matched to their carcasses. Transcript, November 13, 2006 at 96-97, 113-114, 130-131.

Ruling: Accepted and Incorporated in Part, Rejected in Part. The record evidence indicates that NOAA personnel would not prosecute fishermen for violations if they could observe that the fins landed actually matched the carcasses no matter what the fin-to-carcass ratios. Actual charging is a matter left to Agency discretion and is not part of this Decision and Order.

14. If the Agency finds a fisherman with a fin-carcass ratio in excess of 5%, then the Agency will normally count the fins and carcasses to see if the fins match to the carcasses, and only if any carcasses are missing will a violation be issued. *See* Transcript, November 13, 2006, at 115-116.

Ruling: Rejected – this Proposed Finding of Fact mischaracterizes the testimony. The Special Agent's testimony addressed issues of procedures he might use if he were at the offloading site – not a general enforcement practice.

15. The Agency never counted any of Respondents' fins and carcasses in this case to see if they matched, but relied solely on the recorded weights of fins and carcasses to allege a violation of 50 C.F.R. §§ 635.71(a)(28) and 635.30(c)(1). Transcript, November 13, 2006 at 113-114. NOAA agents could have tracked the BLUEFIN using its NOAA required VMS tracking system; they chose not to do so, Agency Exhibit 37-VMS records.

Ruling: Accepted and Incorporated in Part and Rejected in Part. This proposed finding of fact is rejected to the extent it postulates that NOAA could have tracked the F/V BLUEFIN but "chose not to do so." The Agency's operational and enforcement decisions are not at issue in this case.

16. The Agency instructs shark fishermen that possessing a quantity of fins weighing in excess of 5% of the possessed carcass weight does not create a violation of the Magnuson-Stevens Act and NOAA's regulations in and of itself, but that it only creates a rebuttable presumption of a violation. *See* Small Entity Compliance Guide (Feb. 11 2002) Respondents' Exhibit M.

Ruling: Rejected. This proposed finding of fact mischaracterizes the document. The Small Entity Compliance Guide states with respect to dressing sharks under the regulations that "NMFS and NOAA will presume that the fins were taken in violation of the regulations if the weight of the fins is greater than 5 percent of the weight of the carcasses landed."

17. Respondents relied on the Agency's past enforcement practices and instructions on the 18 occurrences underlying their charges. *See, e.g.,* Transcript, November 13, 2006 at 114, 123.

Ruling: Rejected. Respondents were unable to definitively establish the timing of the instructions and Agency representations made to them regarding the regulations.

18. Respondents never possessed shark fins without their corresponding carcasses. *See* Transcript, November 13, 2006 at 19, 31, 232, 266.

Ruling: Rejected. Respondents have been found to have violated the SFPA on 13 occasions as discussed in this Decision and Order.

19. Respondents do not dispute that they possessed a quantity of fins weighing in excess of 5% of their corresponding carcasses, but assert that they were not finning sharks and are thus not in violation of 50 C.F.R. §§ 635.71(a)(28) and 635.30(c)(1), pursuant to the Agency's prior interpretation and instruction. *See* Transcript, November 13, 2006 at 19, 31, 119, 232, 266.

Ruling: Accepted in Part and Incorporated and Rejected in Part. The fact of Respondents' denial of shark finning is accepted but this Proposed Finding of Fact is rejected to the extent it is asserting that Respondents did not fin sharks on the 13 occasions where a violation was found proven by a preponderance of the evidence.

20. According to the Agency's own witnesses, the appropriate fin to carcass ratio for the majority of fins landed involved in this case, (sandbar) is 5.3%.

Ruling: Accepted and Incorporated.

21. Dewy Hemilright conducted a scientific study, under the auspices of the North Carolina Department of Marine Resources. He documented and photographed each fish, cutting them in a uniform manner, and determined scientifically that using a uniform method of cutting all excess meat from fins and a uniform carcass, he achieved an average fin to carcass ratio of 5.6%, with a standard deviation of .5%

Ruling: Accepted and Incorporated.

22. Neither of the Agency's experts challenged Mr. Hemilright's methodology, and Agency expert Carlson noted that the difference between the Hemilright study and the Agency figure was statistically insignificant.

Ruling: Accepted and Incorporated.

23. Mr. Hemilright's study is the only study referred to at the hearing that examines the effect the four additional fins has on the fin to carcass ratio. Mr. Hemilright determined that the four additional fins added .9% to the fin to carcass ratio for sandbar sharks.

Ruling: Accepted and Incorporated.

24. Neither of the Agency experts offered testimony to rebut Mr. Hemilright's calculations of the effect of the four additional fins on the fin to carcass ratio.

Ruling: Accepted and Incorporated.

25. Respondents retained four fins from all of their sharks.

Ruling: Accepted and Incorporated.

26. Sandbar sharks constituted 86% of their landings on the 18 trips in question.

Ruling: Accepted and Incorporated in Part. The undersigned determined that the appropriate percentage of sandbar sharks Respondents landed equaled approximately 85% - not 86%. See Appendix 2.

27. On the 18 trips in question, the BLUEFIN landed 5371 pound of fins and 69514 pounds of shark carcasses, Appendix A, Agency Exhibit 11-36.

Ruling: Accepted and Incorporated.

28. NOAA agents charged Respondents for 18 violations, despite hundreds of trips made in the same time period, indicating that these 18 trips had the highest fin to carcass ratios.

Ruling: Rejected. There is no support in the record for this Proposed Finding of Fact.

29. Capt. Cordeiro Respondents [sic] generally shipped their fins to Agger Fish Corp. with 12% excess meat weight.

Ruling: Accepted and Incorporated as modified – i.e., Respondents generally shipped the fins in question to Agger Fish Corp.

30. At times, Agger would either request the BLUEFIN to cut their fins more cleanly, or would adjust the price somewhat, but generally would accept BLUEFIN's fins, as Mr. Agger wanted to continue to buy the BLUEFIN's fins.

Ruling: Accepted and Incorporated.

31. If the 12% excess fin weight is reduced from the BLUEFIN's fins landed on the 18 trips in question, the resulting fin weight is 4726.48 (5371*.88) and results in an overall fin to carcass ratio of 6.8% (4726.48/69,514), within one standard deviation of Mr. Hemilright's average.

Ruling: Rejected. Each charge must be analyzed independently and not in the aggregate. Furthermore, the undersigned rejected Respondents' arguments

concerning the proposed fact that Mr. Cordeiro landed sharks having particularly high fin-to-carcass ratios (i.e., on the upper third of the distribution).

32. The difference between Mr. Hemilright's average and average is most likely due to the any of the following factors raised by Respondents: a. Respondents trimmed their carcasses to remove as much unusable meat as possible. b. Respondents left excess meat attached to their fins c. Respondents targeted and landed larger sandbar sharks d. Respondents soaked and froze their fins to maximize fin weight.

Ruling: Accepted in Part and Incorporated and Rejected in part. The undersigned accepted several of Respondents' proffered explanations in rebuttal but not all (e.g., the targeting of larger sandbar sharks which were asserted to have greater fin-to-carcass ratios) as outlined in this Decision and Order.

33. The Agency concedes that the only ratio it purports to have established is based on the four primary sandbar fins - which Respondents' expert, Hemilright testified would increase fin to carcass yield by .9%.

Ruling: Accepted and Incorporated in Part and Rejected in Part. The fact that the 5% threshold was established based upon taking four fins is accepted, but the remainder of this Proposed Finding of Fact is unclear and confusing.

34. The Agency's studies show ranges of as high as 9.9% for individual animals.

Ruling: Accepted and Incorporated.

35. The Agency experts concede that the method of cutting fins and the carcass can create wide variations in fin to carcass ratios, of up to 9.9% in its studies, and Agency expert Carlson conceded that animal selection, excess trimming, excess meat on fins, water and ice could all affect fin to carcass ratios and that fishermen would likely maximize value of sharks by leaving meat on fins and trimming carcasses, as well as adding water weight. There is no standardized method of or regulation governing trimming of carcasses or fins, and as such, it remains a subjective measure.

Ruling: Accepted and Incorporated. It must be noted that the Agency's expert also stated that shark finning would also account for Respondents' fin-to-carcass ratios exceeding the 5% threshold. As discussed in this Decision and Order, even accounting for all of Respondents' accepted rebuttal evidence, the charges are found proven by a preponderance of the evidence on 13 occasions.

36. Agency Exhibits 11-36 establish that over 86% of the sharks landed were sandbar sharks.

Ruling: Accepted and Incorporated in Part. The undersigned determined that the appropriate percentage of sandbar sharks Respondents landed equaled approximately 85% - not 86%. <u>See Appendix 2</u>.

37. Agency Expert Sander had no knowledge as to how the crew of the BLUEFIN dressed their carcasses or fins. Transcript, December 9, 2009, Page 258-259.

Ruling: Accepted and Incorporated.

38. Agency Expert Sanders indicated that a crew of a vessel would most likely cut fish in a consistent fashion over time, in accordance with their chosen methodology, similar fashion over time, Transcript, December 9, 2009, Page 258-259.

Ruling: Accepted and Incorporated.

39. Mr. Agger is really the only one who can testify as to the quantity of meat left on the fins by the BLUEFIN he accepted, Sander's Testimony, and Transcript December 9, 2009, at Page 271-272.

Ruling: Accepted and Incorporated in Part and Rejected in Part. Agency witnesses admitted that Mr. Agger would be in the best position to testify as to the amount of meat left on Respondents' fins, but the Agency also attempted to quantify how much "waste" was actually charged back to the F/V BLUE FIN, which was considered in this Decision and Order.

40. Agency Expert Sanders [sic] does not know how the crew of the BLUEFIN trimmed their fish, Sander's Testimony, Transcript December 9, 2009, at Page 271-272.

Ruling: Accepted and Incorporated.

41. Respondents have repeatedly affirmed that the [sic] they did not engage in finning and landed fins and the corresponding carcasses, Statement of Capt. Cordeiro, Agency Exhibit 2, Cordeiro testimony, October 14, 2009, Page 17, Line 21 through Page 18, Line 23.

Ruling: Accepted and Incorporated. The fact of Respondents' denial of shark finning is accepted but this denial, even when combined with all of the accepted rebuttal evidence does not completely exonerate Respondents as discussed in this Decision and Order.

42. Respondents landed primarily sandbar shark-86% of all carcasses by weight referenced in the records associated with the charges were sandbar, Agency Exhibits 11-36 and 43, compiled in Appendix A.

Ruling: Accepted and Incorporated in Part. The undersigned determined that the appropriate percentage of sandbar sharks Respondents landed equaled approximately 85% - not 86%. See Appendix 2. For the reasons discussed in this Decision and Order, each charge must be analyzed as a discrete event and aggregate numbers are not an appropriate measure to analyze each charge.

43. The Agency, Transcript at Page 4, Lines 12-17 and the Agency's own witnesses conceded that the scientific literature, including Agency referenced studies supports a fin to carcass ratio of 5.3% for sandbar sharks based on 4 fins, Carlson testimony, Transcript October 15, 2009, Page 7, Line 3 through Line 22, and Carlson testimony generally. These studies performed by different entities, had a standard deviation of 1.3%. Carlson testimony, Transcript October 15, 2009, Page 7, Line 3. This was also the testimony of Respondents' expert, Marc Agger, Transcript, October 13, 2009, Page 135, Line 13 though Page 136, Line 2.

Ruling: The fact that the Agency's corrected studies demonstrated an average fin-to-carcass ratio of sandbar sharks based on the four primary fins is Accepted and Incorporated.

44. Respondent's expert, Dewey Hemilright conducted a study in conjunction with the North Carolina Department of Environment and Natural Resources, Division of Marine Fisheries, in which he cut 34 sandbar sharks, documenting each with measurements and photographs, and established a fin to carcass ratio of 5.6%, Respondents' Exhibit X and Hemilright testimony, Transcript, October 14, 2009, Pages 9 though 19, with a standard deviation of .5% for the four primary fins, Carlson, Transcript October 14, 2009, Page 45, Line 15. He also determined that cutting all eight fins increased the fin to carcass ratio by .9% to 6.5%, as reflected in the North Carolina Study by Hemilright, Respondents' Exhibit X. Agency Expert Carlson agreed that the Hemilright average "...seems appropriate, given the data," Carlson testimony, Transcript October 15, 2009, Page 44, Line 23.

Ruling: Accepted and Incorporated.

45. Respondents have consistently asserted that they landed eight fins from their sharks, Etheridge statement, Transcript November 13, 2006, Page 134, Lines 7-10.

Ruling: Accepted and Incorporated.

46. Respondents have consistently asserted that they left excess meat on the fins, not trimming them closely as done in scientific studies, Cordeiro Testimony, Transcript, October 13, 2009, Page 21, Line 17, Page 25, Line 25, and Page 43 to 44, but did trim excess meat from the carcass, Cordeiro, Transcript October 13, 2009, Page 38, Line 25 through Page 42.

Ruling: Accepted and Incorporated.

47. The dealer who purchased, Marc Agger, the fins testified that the Respondents generally left 12% excess meat on the fins, Agger Testimony, Transcript October 13, 2009, Page 115, Line 13 to Page 116, Line 10. He passed some of the excess on to his customers and didn't always back charge his seller, Transcript, October 13, 2005, Page 113, Line 16 to Page 114, Line 3, see also Respondents' Exhibit C. Mr. Agger tolerated

the excess meat on fins because Capt. Cordeiro was a high liner and produced a significant quantity of large fins.

Ruling: Accepted and Incorporated.

48. The Agency's studies show ranges of as high as 9.9% for individual animals and Agency expert Sander testified that a vessel or crew could maintain a specific style of cutting over its entire catch.

Ruling: Accepted and Incorporated.

49. The Agency experts concede that the method of cutting fins and the carcass can create wide variations in fin to carcass ratios, of up to 9.9% in its studies, and Agency expert Carlson conceded that animal selection, excess trimming, excess meat on fins and water and ice could all affect fin to carcass ratios. There is no standardized method of or regulation governing trimming of carcasses or fins, and as such, it remains a subjective measure.

Ruling: Accepted and Incorporated. It must be noted that the Agency's expert also stated that shark finning would also account for Respondents' fin-to-carcass ratios exceeding the 5% threshold. As discussed in this Decision and Order, even accounting for all of Respondents' accepted rebuttal evidence, the charges are found proven by a preponderance of the evidence on 13 occasions.

50. Respondents also testified that they trimmed their carcasses to remove as much of the unusable portion of the carcass as they could, which increases fin to carcass ratio.

Ruling: Accepted and Incorporated.

51. There is no standardized method of trimming a carcass, nor is there any regulatory requirement, and fin to carcass ratios can be significantly increased by excess trimming of the carcass, or excess meat on the fins. Stipulation at Transcript, October 14, 2009, at Page 34, Lines 9 to Page 35, Line 11.

Ruling: Accepted and Incorporated.

52. The total carcass weight landed on the 18 alleged trips was 69514 pounds, Agency Exhibits 11-36, and Appendix A.

Ruling: Accepted and Incorporated. As discussed in this Decision and Order, each charge must be analyzed discretely.

53. The total fin weight landed on the 18 trips in question was 5371 pounds, Agency Exhibits 11-36, and Appendix A.

Ruling: Accepted and Incorporated. As discussed in this Decision and Order, each charge must be analyzed discretely.

54. The overall fin to carcass ratio for the 18 trips was 7.73%

Ruling: Accepted and Incorporated. As discussed in this Decision and Order, each charge must be analyzed discretely.

55. If the fin weight is reduce by 12% to adjust for excess meat left on the fins, the overall fin to carcass ratio is 6.80%. Agency Exhibits 11-36, and Appendix A.

Ruling: Rejected. See Appendix 2. For the reasons discussed in this Decision and Order, each charge must be analyzed as a discrete event and aggregate numbers are not an appropriate measure to analyze each charge.

56. If the fin weight is reduced by 12% to adjust for excess meat left on the fins, and the meat weight is adjusted to reflect additional meat cut from the carcass of 5%, the overall fin to carcass ratio is 6.48%, Agency Exhibits 11-36, and Appendix A.

Ruling: Rejected. See Appendix 2. For the reasons discussed in this Decision and Order, each charge must be analyzed as a discrete event and aggregate numbers are not an appropriate measure to analyze each charge.

57. If the fin weight is reduced by 12% to adjust for excess meat left on the fins, and the meat weight is adjusted to reflect additional meat cut from the carcass of 10%, the overall fin to carcass ratio is 6.18%, Agency Exhibits 11-36, and Appendix A.

Ruling: Rejected. See Appendix 2. For the reasons discussed in this Decision and Order, each charge must be analyzed as a discrete event and aggregate numbers are not an appropriate measure to analyze each charge. Furthermore, the undersigned did not accept the unfounded proposition that the additional meat from the carcass amounted to 10%.

58. The fin to carcass ratios reflected in Respondents' landings are consistent with the fins they landed coming from the carcasses they also landed.

Ruling: Accepted in Part and Incorporated and Rejected in Part. Each charge must be analyzed discretely. Thirteen (13) of the charges are found proven by a preponderance of the evidence; whereas five (5) of the charges are found not proven as discussed and analyzed in this Decision and Order.

Respondents' Proposed Conclusions of Law[45]

1. The burden is on the Agency to prove every aspect of its case.

[45] Respondents termed these Proposed Conclusions of Law as "Request for Rulings of Law" in their Post Hearing Brief.

Ruling: Accepted and Incorporated. However, the statutory presumption at issue in this case placed the burden of going forward with rebuttal evidence on Respondents.

2. The Agency must prove its case by a fair preponderance of the evidence, 5 USC § 556 (d), In the Matter of Cuong Vo, 2001 WL 1085351 (NOAA, 2001).

Ruling: Accepted and Incorporated.

3. The Agency has the burden of proving that the Respondents engaged in shark finning on each of the 18 occasions charged.

Ruling: Accepted and Incorporated.

4. The governing statute states
a. "there is a rebuttable presumption that any shark fins landed from a fishing vessel or found on board a fishing vessel were taken, held, or landed in violation of subparagraph (P) if the total weight of shark fins landed or found on board exceeds 5 percent of the total weight of shark carcasses landed or found on board." 16 U.S.C. § 1857(1)(P)(i)-(ii) (2006)

Ruling: Accepted and Incorporated.

5. The effect of the rebuttable presumption is that once the Respondents present evidence to challenge the underlying fact, the burden of proof shifts back to the Agency to prove the Respondents engaged in shark finning.

Ruling: Accepted in Part and Incorporated and Rejected in Part for the reasons stated in this Decision and Order.

6. This principle is embodied in the Federal Rules of Evidence which provide: a. "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." F.R.E. Rule 301

Ruling: Accepted in Part and Incorporated and Rejected in Part for the reasons stated in this Decision and Order.

7. Respondents have met their burden of going forward to rebut the presumption by: a. Testifying that they did not fin sharks. b. Establishing that 86% of the sharks they landed fins from were sandbars, which have a fin to carcass ratio of 6.4%, based on four fins.

Ruling: Accepted in Part and Incorporated and Rejected in Part for the reasons stated in this Decision and Order. Respondents effectively rebutted the presumption on five of the charges, but not the remaining thirteen.

8. The Agency admits that their own fin to carcass ratio for sandbar sharks is 5.3% for four fins alone, which constitute 86% of the sharks at issue in this case, Appendix A and Agency Exhibits 11-16, and hence may not rely on the presumption of finning at all under the regulation and statute, and must provide affirmative evidence of finning, which it has not done.

Ruling: Rejected for the reasons stated in this Decision and Order. Respondents effectively rebutted the presumption on five of the charges, but not the remaining thirteen.

9. There is no regulatory requirement as to how shark fins must be cut. Transcript, October 14, 2009, at Page, 34, Lines 9 to Page 35, line 6.

Ruling: Accepted and Incorporated.

10. There is no regulatory requirement as to how shark carcasses must be cut. Transcript, October 14, 2009, at Page, 35 Lines 7 to 11.

Ruling: Accepted and Incorporated.

11. The Agency has the burden of proving the reasonableness of the fine, 15 CFR 904.204(m).

Ruling: Accepted and Incorporated.

12. The Agency has offered no evidence to support its claim that the fines sought of $180,000 and 180 days or permit sanctions, are appropriate or supported by law as required by 15 CFR 904.204(m).

Ruling: Rejected for the reasons discussed in this Decision and Order. The Agency relied on its prior analysis for justification of the sanction.

13. Agency Exhibit 43 purports to establish a value of improperly landed fins based on the amount fin weights exceed 5% of carcasses, but the Agency admits that the actual fin to carcass ratios for sandbars, which constitute 86% of the weight of sharks involved in this case, was at least 5.3%, based on only 4 fins, hence the Exhibit no longer has any

factual basis or relevance to the issue of the appropriateness of the fines and sanctions in this case.

Ruling: Accepted in Part and Incorporated and Rejected in Part for the reasons stated in this Decision and Order. The undersigned considered the evidentiary value of Agency Exh. 43 and made appropriate adjustments to the sanction imposed for the 13 proven violations based on all the record evidence and the factors to be considered in assessing a civil penalty.

ATTACHMENT C: PROCEDURES GOVERNING ADMINISTRATIVE REVIEW

904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse, modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

(c) Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for discretionary review, or review is timely undertaken on the Administrator's own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

(d) A petition for review must comply with the following requirements regarding format and content:

(1) The petition must include a concise statement of the case, which must contain a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;

(2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;

(3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations, and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;

(4) A copy of the Judge's initial decision must be attached to the petition;

(5) Copies of all cited portions of the record must be attached to the petition;

(6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and

(7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.

(f) No oral argument on petitions for discretionary review will be allowed.

(g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.

(h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.

(i) If the Administrator issues an order denying discretionary review, the order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.

(j) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be briefed and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final

administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

(l) An initial decision shall not be subject to judicial review unless:

(1) The party seeking judicial review has exhausted its opportunity for administrative review by filing a petition for review with the Administrator in compliance with this section, and

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section.

(m) For purposes of any subsequent judicial review of the agency decision, any issues that are not identified in any petition for review, in any answer in support or opposition, by the Administrator, or in any modifications to the initial decision are waived.

(n) If an action is filed for judicial review of a final agency decision, and the decision is vacated or remanded by a court, the Administrator shall issue an order addressing further administrative proceedings in the matter. Such order may include a remand to the Chief Administrative Law Judge for further proceedings consistent with the judicial decision, or further briefing before the Administrator on any issues the Administrator deems appropriate.

CERTIFICATE OF SERVICE

I hereby certify that I have served the attached Decision and Order upon the following parties and limited participants (or designated representatives) in this proceeding via the methods indicated below:

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Done and dated on this 5th day of January 2011,
at Alameda California.

Curtis E. Renoe
Attorney Advisor to the
Hon. Parlen L. McKenna