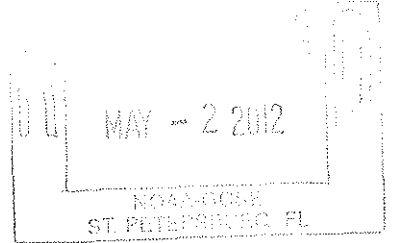


UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of )  
 )  
CHARLES G. MORRIS )  
 )  
Respondent. )  
\_\_\_\_\_ )

Docket Number:  
SE1000092ES



**INITIAL DECISION AND ORDER**

Date Issued: April 27, 2012

Issued By: Hon. Dean C. Metry

Appearances:

For the National Oceanic and Atmospheric Administration

Duane R. Smith, Esq.  
National Oceanic and Atmospheric Administration  
Office of General Counsel, Southeast Region  
263 13<sup>th</sup> Avenue South, Suite 177  
St. Petersburg, FL 33701

For Respondent

Charles G. Morris  
*Pro Se*

## STATEMENT OF THE CASE

### Procedural History

The National Oceanic and Atmospheric Administration (NOAA or Agency) initiated this proceeding for the assessment of a civil penalty against Charles G. Morris (Respondent). These proceedings are conducted in accordance with NOAA's procedural regulations at 15 C.F.R. Part 904 and the Administrative Procedure Act, 5 U.S.C. §§ 551-559.

On August 16, 2010, NOAA issued a Notice of Violation and Assessment of Administrative Penalty (NOVA) in the amount of Three Thousand Dollars (\$3,000.00) charging Respondent as owner of the F/V TAMARAH SUE with non-compliance with 50 C.F.R. § 223.206(d) in violation of the Endangered Species Act of 1973 at 16 U.S.C. § 1538(a)(1)(G) and 50 C.F.R. § 223.205(b)(1).

On September 24, 2010, the Agency received an Answer and Request for Hearing postmarked September 22, 2010. Pursuant to 15 C.F.R. § 904.102, Answers are due within thirty (30) days of receipt of a NOVA.

On October 7, 2010, the Agency filed a Motion in Opposition to Untimely Hearing Request, asserting that the hearing request was untimely and should be denied. On October 13, 2010, the matter was assigned to the undersigned Administrative Law Judge (ALJ).

On February 23, 2011, the undersigned issued an Order Denying Agency's Motion in Opposition to Untimely Hearing Request, finding that, although Respondent's hearing request was five (5) days late, an ALJ may rule on the timeliness of hearing requests, and, in the interest of justice, may waive any defects. 15 C.F.R. § 904.201(b), §

904.204(a). On March 15, 2011, the Agency filed a Petition for Reconsideration of the Court's Order Denying Agency's Motion in Opposition to Untimely Hearing Request, and, on March 24, 2011, the Agency filed its Preliminary Position on Issues and Procedures (PPIP).

On April 26, 2011, the undersigned issued an Order Denying Agency's Petition for Reconsideration of the Court's Order Denying Agency's Opposition to Untimely Hearing Request in Part and Order to Show Cause. In the Order, the undersigned provided Respondent until May 13, 2011 to explain his failure to file his Answer within the time allotted by the regulations. On June 24, 2011, the undersigned issued an Order of Dismissal, noting that Respondent failed to respond to the Order to Show Cause, and ordering that the August 16, 2010 NOVA constituted the Final Administrative Decision and Order.

On or about July 6, 2011, the Docketing Center received correspondence from Respondent dated June 15, 2011. In the correspondence, Respondent asserted that he did not owe the civil penalty, suggesting that the Agency lacked the constitutional authority to proceed against him, and that he "...did not own the boat at the time of citation." As a result of the correspondence, the Chief ALJ reassigned the matter to the undersigned on July 7, 2011.

On July 19, 2011, the undersigned issued a subsequent Order to Show Cause, providing Respondent an additional opportunity to explain why his request for a hearing was not timely filed. Subsequently, on July 21, 2011, the Agency filed a Notice to Court Regarding Collection Activities, informing the undersigned that the Agency erroneously believed the NOVA had become the Final Administrative Decision and Order on

September 18, 2010, and, as a result, had forwarded the case for collection activity on September 23, 2010.

On August 4, 2011, Respondent filed a response to the Order to Show Cause. Respondent asserted that he resides in a rural area, and, as such "...there is a possibility that the mail was delayed in pickup or postmarking." He further explained that he believed the situation to be an oversight as he no longer owned the vessel. Respondent also requested a jury trial in the matter.

On August 12, 2011, the Agency filed a Reply to Respondent's Answer to the Court's July 19, 2011 Order to Show Cause. In the Reply, the Agency asserted that Respondent had incorrectly alleged that his response was timely mailed, and that, although Respondent claimed he did not own the vessel, Respondent's own submissions to the court show that he did, in fact, own the vessel at the time of the alleged violations. On August 15, 2011, the Agency filed a Supplement to Agency's Reply to Respondent's Answer to the Court's July 19, 2011 Order to Show Cause providing documentation showing that Respondent did not transfer ownership of the vessel until November 19, 2010.

On August 23, 2011, the undersigned issued a General Order noting that Respondent had provided a cognizable reason for the tardiness of his Answer, and that, in the interest of justice, the undersigned would consider Respondent's hearing request to be timely. Subsequently, the undersigned ordered Respondent to file a PPIP no later than December 2, 2011. Respondent failed to submit a PPIP.

On December 28, 2011, the undersigned issued a Notice of Hearing Location and Date, setting the matter for hearing on February 2, 2012 in Gulfport, Mississippi. On

January 30, 2012, Respondent indicated to both Agency Counsel and the undersigned that he did not intend to appear at the hearing. However, both parties indicated that they believed a settlement could be reached in the matter. Accordingly, the undersigned provided the parties until February 14, 2012 to come to a settlement in the matter; the parties were unable to do so. As such, on February 23, 2012, the undersigned issued a Scheduling Order providing the parties until March 26, 2012 to submit any briefs or evidence they wished to have considered for a decision on the record.

On March 26, 2012, the Agency filed a Brief for Decision on the Record providing argument and seven (7) exhibits. All seven (7) exhibits are admitted into the record and listed in **ATTACHMENT A**. Respondent failed to file a brief or offer any exhibits.<sup>1</sup>

#### **FINDINGS OF FACT**

1. Respondent is a “person” as defined by 16 U.S.C. § 1532(13) and subject to the jurisdiction of the United States.
2. On July 23, 2009, Respondent was the owner of the F/V TAMARAH SUE. (Agency Ex. 1, Agency Ex. 2, Agency Ex. 3, Agency Ex. 4).
3. At all relevant times herein, the F/V TAMARAH SUE was a flagged vessel of the United States. (Agency Ex. 3, Agency Ex. 4).
4. On July 23, 2009, the F/V TAMARAH SUE was actively trawling for shrimp in the United States Exclusive Economic Zone (EEZ) in the Gulf of Mexico. (Agency Ex. 4).

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<sup>1</sup> On February 14, 2012, Respondent submitted an email to both Agency Counsel and the undersigned’s Paralegal Specialist. The e-mail was forwarded to the Docketing Center and made a part of the record. The email read, in relevant part:

“My response and answer is the same as the original answer to this cause. There is no Constitutional Authority for the existence of an Administrative Law Court and such a court has no Constitutional Authority to take or levy against the property of an American Citizen. Only a Justice Court by a Jury of my peers has such an authority. There has been no response to my original filing of the answer in this case. It is my contention also that i have committed no crime and have not have any part in the commission of a crime. There has been no harm done to anyone or anything due to my actions.” [sic].

The undersigned will consider Respondent’s submission as argument for purposes of the Decision and Order.

5. On July 23, 2009, personnel from the U.S. Coast Guard Cutter SKIPJACK boarded the F/V TAMARAH SUE and recorded measurements of the F/V TAMARAH SUE's Turtle Excluder Devices (TEDs). (Agency Ex. 4).
6. The F/V TAMARAH SUE's starboard net number one was a seventy-one (71) inch offshore single flap design with a horizontal escape opening of fifty-two (52) inches and a vertical escape opening of fifteen (15) inches. (Agency Ex. 4, Agency Ex. 6, Agency Ex. 7).

## **DISCUSSION**

### **Burden of Proof**

In order to prevail, NOAA must prove the violations alleged by a preponderance of the evidence. See 5 U.S.C. § 556(d); see also In the Matter of: Cuong Vo, 2001 WL 1085351 (NOAA 2001). Preponderance of the evidence means the Agency must show it is more likely than not Respondent committed the alleged violation. See In the Matter of: John Fernandez, III, 1999 WL 1417462 (NOAA 1999). The Agency may rely on either direct or circumstantial evidence to establish the violation and satisfy the burden of proof. See In the Matter of: Cuong Vo, supra. 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. Id.

### **Applicable Law**

The Endangered Species Act (ESA), codified at 16 U.S.C. § 1531 et seq., establishes a program for the conservation of endangered and threatened species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). As such, "...it is unlawful for any person subject to the jurisdiction of the United States to violate any regulation

pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title...”. 16 U.S.C. § 1538(a)(1)(G).

Various species of sea turtles found in U.S. waters are listed as either endangered or threatened under the ESA. 50 C.F.R. §§ 223.102(b); 224.101(c). As a result, pursuant to 50 C.F.R. § 223.205(b)(1), it is illegal for any person subject to the jurisdiction of the United States to “[o]wn, operate, or be on board a vessel, except if that vessel is in compliance with all applicable provisions of [50 C.F.R.] § 223.206(d).”

Pursuant to 50 C.F.R. § 223.206(d)(2)(i), “[a]ny shrimp trawler that is in the Atlantic Area or Gulf Area<sup>2</sup> must have an approved TED installed in each net that is rigged for fishing. A net is rigged for fishing if it is in the water, or if it is shackled, tied, or otherwise connected to any trawl door or board, or to any tow rope, cable, pole or extension, either on board or attached in any manner to the shrimp trawler.” (emphasis added).

The regulations provide requirements for measurements of approved TEDs. 50 C.F.R. § 223.207(a)(7)(ii). Specifically, with regards to single-grid hard TEDs, the overall size of the escape must match one of three enumerated specifications. 50 C.F.R. § 223.207(a)(7)(ii). For devices with a 71-inch offshore opening, “[t]he two forward cuts of the escape opening must not be less than 26 inches (66 cm) long from the points of the cut immediately forward of the TED frame. The resultant length of the leading edge of the escape opening cut must be no less than 71 inches (181 cm) with a resultant circumference of the opening 142 inches (361 cm)...”. 50 C.F.R. § 223.207(a)(7)(ii)(B).

### **Discussion**

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<sup>2</sup> The Gulf Area is defined at 50 C.F.R. § 222.102 as: “...all waters of the Gulf of Mexico west of 81° W. long. (the line at which the Gulf Area meets the Atlantic Area) and all waters shoreward thereof (including ports).”

**a. Respondent was the Owner of the F/V TAMARAH SUE**

Through its exhibits, the Agency has demonstrated that Respondent was the owner of the F/V TAMARAH SUE on July 23, 2009. Although Respondent alleged in his pleadings that he had transferred ownership of the vessel and was not the owner of the vessel at the time of the violation, Certificates of Documentation for the vessel issued on January 8, 2009 and January 28, 2010 list solely Respondent as the owner of the F/V TAMARAH SUE. (Agency Ex. 1, Agency Ex. 3).

The Agency also provided, inter alia, NOAA Fishery Permit documents for the vessel from 2009 and 2010, all of which indicate that Respondent was the vessel owner as of July 23, 2009. (Agency Ex. 1, Agency Ex. 2, Agency Ex. 3). While the documentation shows that Respondent transferred vessel permits on November 19, 2010, there is nothing in the record indicating that anyone other than Respondent owned the vessel on or around July 23, 2009. (Agency Ex. 3).

Notably, although Respondent provided documentation in the pleadings to proffer that he was not the owner of the vessel at the time of the violation, the documents that Respondent himself submitted indicate that he was, in fact, still the vessel owner as of July 23, 2009. The Sales Contract Respondent submitted suggests that ownership was transferred from Respondent to Richard Bennett on November 27, 2009, some four months after the date of the violation. Thus, the undersigned finds that Respondent was the owner of the F/V TAMARAH SUE on July 23, 2009. See 50 C.F.R. § 223.205(b)(1).

**b. The F/V TAMARAH SUE was actively trawling shrimp in the Gulf Area**

The Agency has also demonstrated that the F/V TAMARAH SUE was actively trawling for shrimp in the EEZ of the Gulf of Mexico by providing, inter alia, the



Enforcement Action Report, Fisheries Violation Report, and a GPS Verification Form, all containing the coordinates of the F/V TAMARAH SUE at the time the Coast Guard Cutter SKIPJACK observed and boarded the vessel. The Agency also provided maps of the Gulf Area with the position of the F/V TAMARAH SUE distinctively marked. (Agency Ex. 4). Pursuant to 50 C.F.R. § 222.102, all waters west of 81° W. long. and all waters shoreward constitute the “Gulf Area.” Both the coordinates and the maps demonstrate that the vessel was clearly within the “Gulf Area” at the time of the violation.

The Fisheries Violation Report indicates that the vessel was “actively trawling”, and both the Report and a typed written statement provided by U.S. Coast Guard Officer Jacob B. Mitchell indicate that, at the time of boarding, the vessel had a catch of approximately 2,500 pounds of brown shrimp onboard. (Agency Ex. 4). The Fisheries Violation Report specifically indicates that the vessel’s nets were “rigged for fishing.” (Agency Ex. 4). Respondent did not dispute these allegations.<sup>3</sup> Thus, for purposes of 50 C.F.R. § 223.206(d)(2)(i), the undersigned finds that the F/V TAMARAH SUE was actively trawling shrimp in the Gulf Area at the time of the violation.

**c. The TED was not “approved” pursuant to 50 C.F.R. § 223.206**

As discussed supra, in order for the F/V TAMARAH SUE’s TEDs to be “approved” for purposes of 50 C.F.R. § 223.206(d)(2)(i), “[t]he two forward cuts of the escape opening must not be less than 26 inches (66 cm) long from the points of the cut immediately forward of the TED frame. The resultant length of the leading edge of the

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<sup>3</sup> While Respondent generally denied “each and every allegation” in his Answer, at no time did he provide specific argument or evidence disputing this element.

escape opening cut must be no less than 71 inches (181 cm) with a resultant circumference of the opening 142 inches (361 cm)...". 50 C.F.R. § 223.207(a)(7)(ii)(B).

In the instant case, the NOAA Fisheries Enforcement Complaint Action Report, Fisheries Violation Report, and Statement by Officer Jacob B. Mitchell all indicate that the single TED flap escape on starboard net number one was non-compliant. The escape had a vertical length of fifteen (15) inches, whereas the regulations require a length of at least twenty-six (26) inches. The escape had a horizontal length of fifty-two (52) inches, and was therefore non-compliant with the requirement of no less than seventy-one (71) inches. (Agency Ex. 4, Agency Ex. 6).

The Agency also provided photographs of the F/V TAMARAH SUE's TEDs. The photographs depict a person holding a measuring tape alongside the devices, and support the measurements as recorded in the Reports and Statement. Further, the Fisheries Violation Report contains a notation indicating that "The captain agrees with all measurements." (Agency Ex. 4). Respondent presented no argument challenging the device measurements. Accordingly, the undersigned finds that the TED of starboard net number one was non-compliant and therefore not "approved" for purposes of 50 C.F.R. § 223.206.

#### **d. Conclusion**

The Agency has shown by a preponderance of the evidence that Respondent was the owner of the F/V TAMARAH SUE and that the vessel was trawling for shrimp in the Gulf Area with a non-compliant TED. Respondent has not introduced evidence to rebut or discredit the Agency's evidence. As such, the undersigned finds the charge of non-

compliance with 50 C.F.R. § 223.206(d) in violation of the Endangered Species Act of 1973 at 16 U.S.C. § 1538(a)(1)(G) and 50 C.F.R. § 223.205(b)(1) **PROVED**.

### CONCLUSIONS OF LAW

1. Respondent Charles Morris is a “person” as defined by 16 U.S.C. § 1532(13) and subject to the jurisdiction of the United States.
2. On July 23, 2009, the F/V TAMARAH SUE was a shrimp trawler in the Gulf Area. 50 C.F.R. § 222.102. 50 C.F.R. § 223.206(d)(2)(i).
3. On July 23, 2009, the F/V TAMARAH SUE was not in compliance with 50 C.F.R. § 223.206(d).
4. Respondent, as owner of the F/V TAMARAH SUE on July 23, 2009, violated 50 C.F.R. § 223.205(b)(1) and 16 U.S.C. § 1538(a)(1)(G) by failing to have an approved TED while trawling shrimp in the Gulf Area.

### CIVIL PENALTY

In assessing a civil penalty, the undersigned may take into account various considerations, including “...the nature, circumstances, extent, and gravity of the alleged violation; the respondent’s degree of culpability, any history of prior violations, and ability to pay; and such other matters as justice may require.” 15 C.F.R. § 904.108(a). Notably, 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 ALJ may assess a civil penalty de novo, taking into account all factors required by applicable law. 75 Fed. Reg. 35631-32 (June 23, 2010). As NOAA designated this change to be procedural in nature, the new rule will apply to the instant matter. See 75 Fed. Reg. 13050-51 (March 18, 2010).

At the offset, the undersigned notes that Respondent failed to submit any financial information. See 15 C.F.R. § 904.108(c). As such, pursuant to 15 C.F.R. § 904.108(g) and (h), the undersigned infers from Respondent’s failure to provide this information that

Respondent's financial information would not have supported an assertion of inability to pay.

In terms of aggravating factors, the Agency has shown that Respondent previously violated the National Marine Sanctuaries Act pursuant to 16 U.S.C. § 1437 and 15 C.F.R. § 922.164(d)(1)(vii) on March 19, 2009. (Agency Ex. 5). The undersigned also notes that, while Respondent failed to submit a brief in the matter, in his February 14, 2012 e-mail, Respondent stated that “[there was] no harm done to anyone or anything due to my actions,” suggesting a failure to accept responsibility and a lack of remorse for the violation. As owner of the F/V TAMARAH SUE on July 23, 2009, Respondent was responsible for ensuring the vessel was in compliance with all applicable regulations.

While there is no evidence that any turtles were actually caught in the gear of the F/V TAMARAH SUE, the undersigned notes that, as proffered by the Agency, the net likely would have killed most turtles it encountered. (Agency Ex. 7). The Endangered Species Act is designed to protect certain at risk species from extinction, and Respondent's actions threatened one such species. Considering both the aggravating and the mitigating factors, and in consideration of the Agency's penalty schedule at the time of the offense<sup>4</sup>, the undersigned finds that a civil penalty in the amount of Four Thousand Dollars (\$4,000.00) is appropriate.

## ORDER

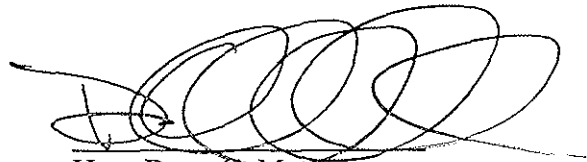
**IT IS HEREBY ORDERED**, that a civil penalty in the amount of **\$4,000.00 DOLLARS** is assessed against Respondent Charles G. Morris.

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<sup>4</sup> Available online at <http://www.gc.noaa.gov/enforce-office3.html#superceded>. The applicable table sets a penalty range of \$1,500 to \$8,500 for a first time offense.

Please be 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 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 to this order as **ATTACHMENT B**.

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

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end.

Hon. Dean C. Metry  
Administrative Law Judge  
United States Coast Guard

Done and Dated on this 27th day of April 2012  
Houston, Texas

## ATTACHMENT A

### Agency Exhibits

1. U.S. Coast Guard Documentation Records for the F/V TAMARAH SUE
2. 2009 F/V TAMARAH SUE NOAA Fishery Permit documents
3. 2010 F/V TAMARAH SUE NOAA Fishery Permit documents
4. Coast Guard Case Package
5. Documentation regarding Respondent's Prior Violation
6. Agency Guide for Checking 71 Inch Offshore TED
7. John Mitchell Affidavit with Attachments

## ATTACHMENT B

### 15 C.F.R. § 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.