

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
WASHINGTON, D.C. 20230

In the Matters of:)	Docket Numbers:
)	
Lars Axelsson)	NE0704313 F/V FLICKA
H & L Axelsson, Inc.)	
)	
Dan Axelsson)	NE0704311 F/V DYRSTEN
H & L Axelsson, Inc.)	
)	
Respondents.)	

ORDER MODIFYING INITIAL DECISION

This matter arises from a petition for discretionary review filed by Dan Axelsson, Lars Axelsson, and H & L Axelsson, Inc. (Respondents). Respondents appeal an Initial Decision issued by an Administrative Law Judge (ALJ) on December 8, 2009. In that decision, the ALJ found that Respondents violated the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by failing to timely submit multiple weekly and monthly reports documenting their commercial fishing for Atlantic herring. Respondents do not deny liability. Rather, they appeal the sanctions imposed by the ALJ.¹ On April 27, 2010, I granted discretionary review on the issue of whether the suspended sanctions imposed by the ALJ were appropriate. For the following reasons, the Initial Decision is modified as described below.

LEGAL BACKGROUND

Regulations implementing the Magnuson-Stevens Act establish several reporting requirements for commercial fisheries in the Northeastern United States. Relevant to this case, the owner or operator of a vessel issued an Atlantic herring permit must submit weekly reports that document herring fishing activity. These weekly reports are submitted to the National Marine Fisheries Service (NMFS) on an automated telephone call-in system known as the Interactive Voice

¹ In his Initial Decision, the ALJ assessed civil monetary penalties and permit sanctions against the Respondents. For clarity, this Order will use the term "penalty" when referring to civil monetary penalties, "permit sanction" when referring to permit sanctions, and "sanction" when referring to both civil monetary penalties and permit sanctions.

Response system.² Separately, the owner or operator of any permitted vessel must submit a more extensive monthly report, known as a Fishing Vessel Trip Report (Monthly Trip Report), which documents all commercial fishing activity.³ NMFS uses these reports to: (1) determine when to close the fishery and impose incidental harvest limits; (2) track the number of vessels engaged in the fishery; (3) establish vessel harvest levels; and (4) perform accurate stock assessments.⁴ Failure to comply with any these reporting requirements constitutes a violation of the Magnuson-Stevens Act.⁵

FACTUAL AND PROCEDURAL BACKGROUND

The material facts of this case are not in dispute. Respondents Dan and Lars Axelsson are brothers who have been commercial fishermen for over 30 years. They each own a 33.3% interest in H & L Axelsson, Inc., a New Jersey corporation.⁶ H & L Axelsson, Inc. owns two fishing vessels: the F/V DYRSTEN and the F/V FLICKA. Each vessel holds a Federal limited-access permit to commercially fish for Atlantic herring.

On multiple occasions during 2007, Respondents failed to timely submit reports documenting their commercial fishing activities. In response, on October 18, 2008, the Enforcement Section of NOAA's Office of General Counsel (NOAA Enforcement) filed charges against Respondents for violating these reporting requirements. Separate charges were filed against each of the company's two vessels. Specifically:

- Case No. NE0704311: NOAA Enforcement alleged that Respondents Dan Axelsson and H & L Axelsson failed to timely submit weekly reports to NMFS for herring fishing that occurred aboard the F/V DYRSTEN between January and March of 2007. Rather, all herring catches were reported on October 18, 2007, six to nine months after the reports were due. NOAA Enforcement sought a \$90,000 penalty (joint and several) and a four month suspension of Respondents' vessel and operator permits.
- Case No. NE0704313: NOAA Enforcement alleged Respondents Lars Axelsson and H&L Axelsson failed to timely submit weekly reports for herring fishing and monthly trip reports for all commercial fishing that occurred aboard the F/V FLICKA between January and June of 2007. Rather, fishing activities were reported fourteen days to nine months after the reports were due. NOAA

² 50 C.F.R. § 648.7(b)(2)(i).

³ 50 C.F.R. § 648.7(b)(1)(i).

⁴ Initial Decision at 11; Transcript at 38-42, 45, 82.

⁵ 16 U.S.C. § 1857(1)(A).

⁶ The remaining third is owned by their father and the Axelssons' engineer, neither of whom is named as a Respondent in this action.

Enforcement sought an \$180,000 penalty (joint and several) and an eight month suspension of Respondents' vessel and operator permits.

Respondents conceded liability, but requested a hearing to contest the sanctions assessed. Both cases were consolidated for hearing, which was held on July 16, 2009.

In his Initial Decision, the ALJ discussed the evidence as it related to the sanctions. In doing so, the ALJ concluded the following:

- There was no evidence that the reporting violations were intentional or an attempt to conceal illegal fishing activity. Rather, Respondents fell out of compliance due to negligence, after the individual who historically submitted weekly reports on their behalf stopped doing so.⁷ Once informed of their failure, Respondents cooperated with NMFS in addressing the problem. Indeed, Respondent Lars Axelsson submitted his late monthly trip Reports before the violations were called to his attention by NMFS.
- Respondents' failure to submit timely reports caused no injury to the resource, as their failure did not result in overfishing of Atlantic herring stocks.
- Respondents have been in the fishing industry for over 30 years with no history of any prior fishing violations.
- While technically able to pay the assessed penalties, Respondents are in a weakened financial condition and a large penalty or permit sanction may bankrupt the business. Individually, Lars and Dan Axelsson made only a modest income from fishing activities during each of the preceding three years, and most of their equity is in their respective homes.

Given these considerations, the ALJ assessed sanctions consistent with those collectively recommended by NOAA Enforcement in both enforcement actions: (a) a penalty of \$270,000 against all Respondents (jointly and severally); and (b) a permit sanction against each Respondent, ranging from four to twelve months. The ALJ then suspended, subject to a two-year probationary period, all but a \$54,000 penalty against Respondents (jointly and severally) and a one-month permit sanction against each Respondent. In the event of any violation by any Respondent during this two-year probation, the remaining sanctions would become immediately due as follows: (a) the suspended penalty of \$216,000 would become due against all Respondents (jointly and severally); and (b) the suspended permit sanctions would be reinstated against the violator. If there were no further violations during the two-year probation period, the suspended penalty and permit sanctions would be discharged.

⁷ Prior to 2007, Respondents' longstanding practice was to submit the information to the State of Maine, Division of Marine Resources. Although the applicable regulations did not require it to do so, the State then submitted the weekly reports to NOAA on behalf of the fishermen. Respondents' violations occurred after the State provided notice that, following the 2006 season, it would no longer submit reports to NMFS on the behalf of fishers.

Respondents timely appealed. On April 27, 2010, I accepted discretionary review, limited to the following issue: whether the suspended portion of the sanctions (both the penalties and permit sanctions) imposed by the ALJ are appropriate and reasonably related to the offenses.⁸

DISCUSSION

It is axiomatic that sanctions must be commensurate with the offense. The Magnuson-Stevens Act ensures this by requiring that the ALJ consider certain factors when imposing sanctions: the nature, circumstances, extent, and gravity of the prohibited acts committed; and with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require.⁹ The violator's ability to pay may also be considered, provided the relevant information is timely provided.¹⁰ Past administrative decisions consistently have held that there must be a reasonable relationship between the nature of the offense - informed by consideration of these factors - and the sanction imposed.¹¹

Subject to the modification discussed below, I find that the ALJ's penalty assessment of \$54,000 against Respondents was appropriate. However, the suspended sanctions imposed by the ALJ were not appropriate in two respects. First, the suspended sanctions are not supported by the evidence. Second, the suspended penalties are inequitably tailored, in that violations committed by one Respondent could result in penalties against another Respondent who lacks culpability for that future violation.¹²

⁸ In their briefs on appeal Respondents also assert, as they did in their Petition for Discretionary Review, that the assessed penalty violates the Eighth Amendment to the United States Constitution. Because this issue goes beyond the scope of what I accepted for discretionary review, no consideration is given to the argument.

A fine within the range permitted by statute is presumptively constitutional. *See United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304, 1309 (11th Cir. 1999); *see also Salisbury v. United States*, 386 Fed.Appx. 310, 2010 WL 772095 (C.A.3 (Pa)) (penalty assessed under the Magnuson-Stevens Act was not in violation of the Eighth Amendment, as it was well below the statutory maximum). Because the sanctions imposed by the ALJ in this case were within the range permitted by the Magnuson-Stevens Act, Respondents have a heavy burden to show that the sanctions imposed are constitutionally excessive.

⁹ See 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(a). The same factors must be considered when imposing either a monetary penalty or a permit sanction. *See* 16 U.S.C. § 1858(g)(2)..

¹⁰ See 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(e).

¹¹ *See e.g., The Fishing Company of Alaska v. United States*, 195 F. Supp. 2d 1239, 1254 (D. Wash. 2002); *Duckworth v. United States*, 2006 WL 753081, at *5 (D. R.I. 2006) (citing *Fishing Company of Alaska*); *In re Jody Domingo*, 2000 WL 33174647, 2000 NOAA LEXIS 1, *8-9 (NOAA App. Mar. 29, 2000) (justification for adjusting proposed civil monetary penalty must be clearly stated); *In re Rio Fishing Corp.*, 1996 WL 1352595, 1996 NOAA LEXIS 27, at *4-5 (NOAA App. Sept. 4, 1996) (permit sanction dismissed on appeal where ALJ provided no reason for imposition of permit sanction).

¹² This concern does not apply to the suspended permit sanctions. Unlike the penalty that was assessed against all Respondents, the ALJ issued separate permit sanctions to each Respondent.

Unsuspending Penalty

I find that a penalty of \$54,000 collectively imposed against all Respondents is appropriate. The ALJ carefully considered all of the statutory factors and arrived at a reasonable assessment. As noted in the Initial Decision, the regulatory reporting requirements that Respondents violated serve important management purposes. NMFS uses these reports to establish harvest levels, track the level of fishing effort, and determine when to close the fishery. Balanced against this, however, the ALJ determined that the violations were not intentional and did not adversely impact the resource. Moreover, Respondents have no prior history of violations over the past 30 years, and a significant penalty could bankrupt the company.

I disagree, however, with the way the penalty is allocated between the Respondents. The Initial Decision assesses a single \$54,000 penalty against all four Respondents, jointly and severally. This assessment fails to reflect the fact that the proceeding before the ALJ involved two separate cases that were consolidated only for purposes of hearing. Each case was separately charged, because each case involved different parties who committed different violations on different dates. As such, the ALJ should not have merged the penalties sought in two cases into a single assessment. Rather, he should have separately assessed each of the parties, consistent with the nature and number of violations they committed. In the present case, a single penalty, particularly one that makes each Respondent jointly and severally liable for the entire amount, fails to equitably sanction each Respondent.

The charging documents and the Initial Decision collectively provide a way to equitably assess penalties against each party. In NE0704311, NOAA Enforcement alleged nine reporting violations and recommended a penalty of \$90,000 (\$10,000 per violation). In NE0704313, NOAA Enforcement alleged 18 reporting violations and recommended an \$180,000 penalty (\$10,000 per violation). The ALJ agreed with NOAA Enforcement's recommendation and imposed a single penalty of \$270,000, which is plainly the combined total for both cases. The unsuspended \$54,000 penalty can be seen as a penalty of \$2,000 per violation (27 violations at \$2,000 per violation). With a penalty of \$2,000 per violation the actual unsuspended penalty in each case would be \$18,000 in NE0704311, and \$36,000 in NE0704313.¹³

Suspended Sanctions

1. Size of Suspended Sanctions.

With regard to the suspended sanctions, the ALJ imposed a \$270,000 penalty (jointly and severally) and permit sanctions of up to one year. The ALJ then suspended all but a \$54,000 penalty (jointly and severally) and a one-month permit sanction against each Respondent, on the condition that Respondents commit no subsequent violations during the following two years.

¹³ I am mindful that this issue was neither raised by the parties nor a basis upon which I accepted discretionary review. Under the procedural regulations that govern these proceedings, I am not limited to those issues initially raised by the parties or the original basis for discretionary review. Rather, I am authorized to rule upon any issue contained in the petition for review, responses, and the existing record. See 15 C.F.R. § 904.273(j).

Under the ALJ's decision, the consequences for committing a subsequent violation are severe. In the event of any subsequent violation of the Magnuson-Stevens Act (regardless of the nature of the offense), all suspended sanctions will become due immediately – in other words, the overall penalty would increase 400%, and the overall permit sanction would increase up to 1,200% (in the case of H & L Axelsson).

The only explanation the ALJ provides for imposing such a large suspended sanction is the deterrent effect it will serve against future violations. According to the ALJ:

While a review of the factors listed in 15 C.F.R. § 904.108(a) establish good cause exists to impose a reduction in the proposed sanction, the undersigned concurs with NOAA that “[t]o be effective, enforcement must result in the removal of the incentive to commit further violations.” (Agency PHB at 28). A partially suspended sanction will achieve that goal. Such a sanction will deter others from violating the regulations, as it shows that even a negligent violation of the regulations will result in significant time and money expenditures contesting the charges. A suspended penalty will also deter Respondents from committing further violations, for a future violations [sic] will result in the entire sanction being imposed.¹⁴

While some suspended sanction may have been warranted, those imposed by the ALJ are inappropriate. The ALJ's decision fails to adequately explain why *any* subsequent violation of the Magnuson-Stevens Act within the next two years should warrant such a large increase above what the ALJ initially deemed an appropriate sanction. Indeed, such a harsh sanction is inconsistent with the ALJ's assessment of the circumstances surrounding the violation and the Respondents' financial position. The only justification offered by the ALJ is that a suspended sanction would serve to deter future non-compliance. In this instance deterrence, in and of itself, is an insufficient justification for such a high suspended sanction, and unnecessary considering that Respondents have no history of prior violations during the past 30 years of commercial fishing.¹⁵

2. Distribution of Suspended Penalties.

Additionally, the suspended penalties imposed by the ALJ are inappropriate because they are not apportioned equitably among the Respondents based on culpability. According to the Initial Decision, if *any* Respondent commits a subsequent violation within the probationary period, the suspended penalty becomes due against *all* Respondents. There is no explanation why it is

¹⁴ Initial Decision, at 20.

¹⁵ Respondents also argue that suspended penalties are unnecessary because subsequent misconduct is punished more harshly under NOAA's penalty schedule. Respondents correctly note that NOAA's penalty schedules typically authorize higher penalties for repeat violators, and that the risk of higher future penalties can serve a deterrent purpose. This method of deterring misconduct, however, is not exclusive. Suspended penalties historically have been imposed by the Agency and also serve as a useful deterrent to future misconduct. Moreover, suspended sanctions provide the added benefit of tailoring the punishment to the conduct the Agency seeks to deter.

equitable to hold all Respondents liable based on a violation by a single Respondent. By contrast, in the event of a subsequent violation, the suspended permit sanction is imposed against only the Respondent who committed the violation. To the extent that the purpose of a suspended sanction is to deter future misconduct, there is no purpose to imposing a suspended penalty upon a person who commits no subsequent violation.

3. Establishing a More Equitable Sanction

Because the suspended sanctions assessed by the ALJ are unsupported by the evidence and unfairly distributed, I hereby dismiss the suspended penalty and permit sanctions in their entirety; instead, I will impose a modified permit sanction. I direct the Enforcement Section to determine whether any Respondent has committed an additional violation of the Magnuson-Stevens Act between the date of the Notice of Permit Sanction and the date of this Order. If no violation has occurred, then no additional sanction is imposed. If a violation has occurred, then I impose a one month permit sanction against the Respondent who committed the violation. In my judgment, this modified permit sanction is appropriate. It acknowledges the importance of the reporting requirements that were violated, while also taking into consideration the circumstances under which the violations occurred. Moreover, given the facts of this case, it serves as a sufficient deterrent to future misconduct.

CONCLUSION

Accordingly, for the reasons set forth above, the Initial Decision is modified to impose the following sanctions against Respondents:

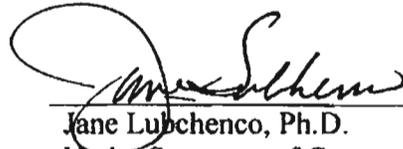
It is hereby ordered that in Case No. NE0704311, a civil penalty in the amount of **eighteen thousand dollars (\$18,000)** is assessed jointly and severally against Respondents Dan Axelsson, and H & L Axelsson, Inc.

It is hereby ordered that in Case No. NE0704313, a civil penalty in the amount of **thirty-six thousand dollars (\$36,000)** is assessed jointly and severally against Respondents Lars Axelsson, and H & L Axelsson, Inc.

It is hereby ordered that the Enforcement Section shall promptly determine whether any Respondent in Case Nos. NE0704311 and NE0704313 has committed a violation of the Magnuson-Stevens Act between the date of the Notice of Permit Sanction for that case and the date of this Order, and shall notify Respondents of their determination. If no violation has occurred, then no additional sanction is imposed. If a violation has occurred, I hereby order a one month permit sanction against the Respondent who committed the violation.

This Order constitutes the final administrative action of NOAA and becomes effective for the purpose of judicial review on the date of service.

Dec 10, 2012
Dated


Jane Lubchenco, Ph.D.
Under Secretary of Commerce
for Oceans and Atmosphere

Certificate of Service

I, Donna Robertson, hereby certify that on December 11, 2012, the Order Modifying Initial Decision was served on the parties or designated representatives by facsimile and certified mail, return receipt requested:

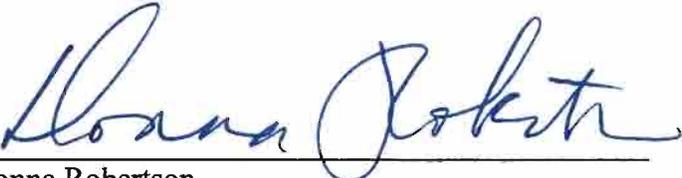
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11-Dec-2012
Dated



Donna Robertson