UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	
JAXSEB ENTERPRISES, LLC, and BRADY LEE BOWMAN,	**Docket No. SE1105054FM**
	(F/V PERFECT SHOT)
Respondents.	

INITIAL DECISION AND ORDER

Date Issued: August 20, 2013

Issued By: M. Lisa Buschmann
Administrative Law Judge
United States Environmental Protection Agency[1]

Appearances:

Cynthia S. Fenyk, Esq.
NOAA Office of General Counsel
263 13th Avenue South, Suite 177
St. Petersburg, Florida 33701
For the National Oceanic and Atmospheric Administration

Christopher Whited
Pro Se
For the Respondents

[1] The Administrative Law Judges of the U.S. Environmental Protection Agency are authorized to perform adjudicatory functions under Chapter 5 of Title 5 of the United States Code in cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011.

I. Statement of the Case

On February 14, 2012, counsel for the National Oceanic and Atmospheric Administration ("NOAA" or the "Agency") issued a Notice of Violation and Assessment of Administrative Penalty ("NOVA") to Jaxseb Enterprises, LLC, and Brady Lee Bowman (collectively "Respondents"). The NOVA alleged that on or about November 30, 2011, Respondents jointly and severally violated the Magnuson-Stevens Fishery Conservation and Management Act (the "Magnuson-Stevens Act" or "the Act"), 16 U.S.C. § 1857(1)(A), and the implementing regulations at 50 C.F.R. § 622.7(gg), by failing to comply with the advance notice of landing requirements related to the Gulf red snapper Individual Fishing Quota ("IFQ") program, and the Gulf grouper and tilefish IFQ program, as specified in 50 C.F.R. §§ 622.16 and 622.20, respectively.[2] NOVA at 1. The NOVA proposed a total penalty of $5,000 for the alleged violations.

By a written communication dated March 9, 2012, Respondent Jaxseb Enterprises, LLC, through its representative, Christopher Whited, also known as Chris Whited, timely requested a hearing on the allegations in the NOVA. The hearing request from Respondent Jaxseb Enterprises, LLC, is considered under the applicable procedural rules, 15 U.S.C. Part 904, to be a request also by Respondent Brady Lee Bowman. 15 C.F.R. § 904.107(b).

On April 13, 2012, NOAA notified this Tribunal by letter that it received the request for hearing. On the same date, an Assignment of Administrative Law Judge and Order to Submit Preliminary Positions on Issues and Procedures ("PPIP") was issued, wherein Chief Administrative Law Judge Susan. L. Biro was designated to preside in this matter and the parties were directed to file PPIPs. After NOAA and Mr. Whited filed their PPIPs, and NOAA filed a correction and supplement to its PPIP, Judge Biro issued a Hearing Order setting the hearing in this matter to commence on July 31, 2012. On July 5, 2012, Judge Biro designated the undersigned to preside in this proceeding.

On July 31, 2012, the undersigned conducted a hearing in this matter at the M.C. Blanchard Judicial Building in Pensacola, Florida. Cynthia S. Fenyk, Esq., appeared on behalf of the Agency. Chris Whited, member of Respondent Jaxseb Enterprises, LLC, appeared on behalf of Respondent Jaxseb Enterprises, LLC and Respondent Brady Lee Bowman, who did not appear at the hearing.[3] The Agency presented at the hearing the testimony of four witnesses and offered sixteen exhibits, all of which were admitted into evidence. Respondents presented the testimony of Chris Whited and one other witness, and did not offer any exhibits. On September 20, 2012, the Agency filed a post-hearing brief, including proposed findings of fact and conclusions of law. Mr. Whited submitted post-hearing briefs by email on October 18 and 22, 2012. Although they were not "signed" as required by 15 C.F.R. § 904.3(d), with a handwritten

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[2] The regulation implementing the Act in regard to fisheries of the Caribbean, Gulf, and South Atlantic, 50 C.F.R. part 622, was amended on April 17, 2013 and the amendments became effective on that date. 78 Fed. Reg. 22950 (Interim Final Rule, April 17, 2013). Those amendments, which include renumbering of sections, do not apply to this proceeding. The regulatory provisions and section numbers cited in this Decision are those which were in effect at all times relevant to the NOVA.

[3] On June 22, 2012, Mr. Whited filed a written notice indicating that he would be appearing on behalf of both Respondents. *See* 15 C.F.R. § 904.5 (appearances).

signature, his name and phone number appear at the bottom of each email, and there is no reason to doubt that he in fact submitted them. Therefore they are accepted into the record. Neither party filed a reply brief.

After careful review of the entire record, this Tribunal finds that a preponderance of the evidence establishes that on November 30, 2011, Respondents jointly and severally did fail to comply with the advance notice of landing requirements specified in 50 C.F.R. §§ 622.16(b)(3) and 622.20(b)(3), in violation of section 307(1)(A) of the Magnuson-Stevens Fishery Conservation and Management Act, as amended, at 16 U.S.C. § 1857(1)(A), and 50 C.F.R. § 622.7(gg).

II. Statutory and Regulatory Background

The Magnuson-Stevens Act was enacted, *inter alia,* "to conserve and manage the fishery resources found off the coasts of the United States" and "to promote domestic commercial and recreational fishing under sound conservation and management principles." 16 U.S.C. § 1801(b)(1) and (b)(3). The Act authorizes the Secretary of Commerce, in conjunction with the Regional Fisheries Management Councils, to adopt fishery management plans and implement such plans through regulation. 16 U.S.C. §§ 1851–55. The Secretary may also take actions to protect and restore overfished fisheries. 16 U.S.C. § 1854(e). The Act states that it is "unlawful . . . for any person . . . to violate any provision of" the Magnuson-Stevens Act "or any regulation or permit issued pursuant to" the Magnuson-Stevens Act. 16 U.S.C. § 1857(1)(A). The term "person" includes any individual, corporation, partnership, association or other entity. 16 U.S.C. § 1802(31).

In 2006, the Gulf of Mexico Fishery Management Council, working with NOAA, resolved to establish an IFQ program for red snapper due to concerns that the red snapper fishery had become overcapitalized. Final Amendment 26 to the Gulf of Mexico Reef Fish Fishery Management Plan to Establish a Red Snapper Individual Fishing Quota Program, at 50–54 (Mar. 16, 2006), *available at* http://www.gulfcouncil.org/Beta/GMFMCWeb/downloads/Amend26031606FINAL.pdf ("The . . . commercial red snapper fishery is overcapitalized, which means the collective harvest capacity of fishery vessels and participants is in excess of that required to efficiently take their share" of the total allowable catch.); Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 26, 71 Fed. Reg. 50,012, 50,012–13 (proposed Aug. 24, 2006). An IFQ program for Gulf red snapper was implemented through regulations, effective in January 2007, under the authority of the Magnuson-Stevens Act. Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 26, 71 Fed. Reg. 67,447, 67,448 (Nov. 22, 2006); Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 29, 74 Fed. Reg. 44,739, 44,739 (Aug. 31, 2009). An IFQ program for grouper and tilefishes was implemented to address similar concerns in that fishery. Amendment 29 to the Reef Fish Fishery Management Plan, Effort Management in the Commercial Grouper and Tilefish Fisheries, at 8–9 (Dec. 5, 2008); Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 29, 74 Fed. Reg. 44,732, 44,732–33 (Aug. 31, 2009).

The IFQ program's regulatory requirements apply to Gulf red snapper, groupers, and tilefishes (collectively "IFQ species") in or from the Gulf EEZ[4] and, "regardless of where harvested or possessed," on a vessel with a Gulf red snapper or grouper and tilefish IFQ vessel account. 50 C.F.R. §§ 622.16(a)(1), 622.20(a)(1). For a vessel to fish commercially for IFQ species, "a commercial vessel permit for Gulf reef fish must have been issued to the vessel and must be on board." 50 C.F.R. § 622.4(a)(2)(v); *see* 50 C.F.R. § 622.2, app. tbl.3 (including red snapper, groupers, and tilefishes within definition of "Gulf reef fish"). The owner of the vessel must also have an IFQ shareholder account with IFQ shares for the designated species, and through that shareholder account, have established an IFQ vessel account for the permitted vessel. 50 C.F.R. §§ 622.4(b)(ix), 622.16(a), (b)(1), 622.20(a), (b)(1). Generally, a vessel cannot possess or land an IFQ species unless there are IFQ shares allocated to the IFQ vessel account equal to or greater than the gutted weight of the IFQ species being possessed or landed. 50 C.F.R. §§ 622.16(a)(4), (b)(1)(i), 622.20(b)(1)(i).

To enhance enforceability of the IFQ programs, the regulations provide that "[t]he owner or operator of a vessel landing IFQ red snapper is responsible for ensuring that NMFS [National Marine Fisheries Service] is contacted at least 3 hours, but no more than 12 hours, in advance of landing to report the time and location of landing, estimated red snapper landings in pounds gutted weight, vessel identification number, . . . and the name and address of the IFQ dealer where the red snapper are to be received." 50 C.F.R. § 622.16(b)(3)(i). The same notification requirement applies to Gulf grouper and tilefishes. 50 C.F.R § 622.20(b)(3)(i). For the purpose of the IFQ programs, the term "landing" means "to arrive at a dock, berth, beach, seawall, or ramp."[5] 50 C.F.R. §§ 622.16(b)(3)(i), 622.20(b)(3)(i). The regulations specify that "[a]uthorized methods for contacting NMFS and submitting the report include calling IFQ Customer Service" at a toll-free number, submitting to NMFS the notification form provided through the VMS unit, or providing the required information to NMFS through the form available on the IFQ program website. *Id.* The regulations state that "[f]ailure to comply with this advance notice of landing requirement is unlawful and will preclude authorization to complete the landing transaction report" and "will preclude issuance of the required transaction approval code." *Id.*

With regard to the latter report, the regulations require that after a vessel lands and offloads IFQ species to an IFQ dealer, the dealer must weigh the IFQ species and submit a landing transaction report through NOAA's online data collection system. 50 C.F.R.

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[4] The "Exclusive Economic Zone" of the United States, commonly referred to as the "EEZ," is an area extending "to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea [of the United States] is measured," within which the United States claims certain sovereign rights and jurisdiction. Proclamation No. 5030, 48 Fed. Reg. 10,605, 3 C.F.R. 22 (Mar. 10, 1983); *see* 16 U.S.C. § 1602(11) (defining "exclusive economic zone" by reference to Proclamation No. 5030). For the purpose of the Magnuson-Stevens Act, "the inner boundary of [the EEZ] is a line coterminous with the seaward boundary of each of the coastal States." 16 U.S.C. § 1602(11). The seaward boundary of the State of Florida extends three marine leagues, or nine nautical miles, into the Gulf of Mexico. *United States v. Florida*, 363 U.S. 121, 121–22, 129 (1960); *see* 43 U.S.C. §§ 1301, 1312 (describing nautical boundaries set by the Submerged Lands Act of 1953).

[5] It is noted that elsewhere in the Magnuson-Stevens Act, the term "land" is defined as "to begin offloading fish, to offload fish, *or* to arrive in port or at a dock, berth, beach, seawall, or ramp." 50 C.F.R. § 600.10 (emphasis added).

§§ 622.16(b)(1)(iii), 622.20(b)(1)(iii). The landing transaction report must include the "date, time, and location of [the] transaction; weight and actual ex-vessel price of [the IFQ species] landed and sold; and information necessary to identify the fisherman, vessel, and dealer involved in the transaction." 50 C.F.R. §§ 622.16(b)(1)(iii), 622.20(b)(1)(iii). The fisherman must validate the transaction with a unique personal identification code associated with the IFQ account. 50 C.F.R. §§ 622.16(b)(1)(iii), 622.20(b)(1)(iii); Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 26, 71 Fed. Reg. 67,447, 67,448 (Nov. 22, 2006). "After the dealer submits the report and the information has been verified," the dealer receives a transaction approval code verifying that the transaction was legal. 50 C.F.R. §§ 622.16(b)(1)(iii), (b)(3)(iv), 622.20(b)(1)(iii), (b)(3)(iv). A copy of the transaction approval code and "the dealer endorsement must accompany any [IFQ species] from the landing location through possession by a dealer." 50 C.F.R. §§ 622.16(b)(3)(iv), 622.20(b)(3)(iv). A landing transaction approval code cannot be obtained if the owner or operator of the vessel failed to provide advance notice of the landing. 50 C.F.R. §§ 622.16(b)(3)(i), 622.20(b)(3)(i).

The general regulatory prohibitions for fisheries provide that "it is unlawful . . . for any person to . . . [f]ail to comply with any provision related to the Gulf red snapper IFQ program as specified in § 622.16, or the IFQ program for Gulf groupers and tilefishes as specified in § 622.20." 50 C.F.R. § 622.7(gg). Failure to comply with the IFQ programs' advance notification of landing requirements is therefore unlawful under the Act, 16 U.S.C. § 1857(1)(A).

III. Findings of Fact

The following findings are based on a thorough and careful analysis of the testimony of witnesses, the exhibits entered into evidence and the entire record as a whole.

1. At all times relevant to this proceeding, Respondent Jaxseb Enterprises, LLC, owned the F/V Perfect Shot, U.S. Documentation number 946080. NOAA's Exhibit ("Ex.") 14 at 1; Transcript ("Tr.") 60–63.

2. At all times relevant to this proceeding, Christopher Whited was an officer and/or member of Respondent Jaxseb Enterprises, LLC. Ex. 13; see, Tr. 75, 84, 91.

3. At all times relevant to this proceeding, Respondent Jaxseb Enterprises, LLC held the following Federal Fisheries Permit for the F/V Perfect Shot: Gulf of Mexico Reef Fish Commercial, Permit Number RR-493. Ex. 13 at 1, 7–12; Tr. 61–62.

4. At all times relevant to this proceeding, Gulf Reef Fish IFQ vessel account PERF2752 was assigned to the F/V Perfect Shot. Ex 10; Tr. 74-76.

5. On November 30, 2011, and other relevant times herein, Respondent Brady Lee Bowman operated the F/V Perfect Shot with the authorization of Respondent Jaxseb Enterprises, LLC. Ex. 3 at 1; Ex. 6 at 1; 3–5; Ex. 7 at 1; Ex. 9 at 1; Tr. 73-74, 80, 84.

6. At all times relevant to this proceeding, Respondent Bowman held the following Federal Fisheries Permits or endorsements for the F/V Perfect Shot: Historical Captain Endorsement for Gulf of Mexico Charter / Headboat for Coastal Migratory Pelagics, Permit Number HCHG-1705; Historical Captain Endorsement for Gulf of Mexico Charter / Headboat for Reef Fish, Permit Number HRCG-1616. Ex. 13 at 2–4.

7. Respondent Jaxseb Enterprises, LLC purchased the F/V Perfect Shot and obtained its Federal Fisheries permit for the F/V Perfect Shot in 2007. Tr. Ex. 14 at 2; Tr. 84, 86–87.

8. In 2010, Mr. Whited and his brother opened a seafood market named "Cool Fish" in Niceville, Florida. Tr. 78, 84, 94. Mr. Whited purchases the fish for Cool Fish. Tr. 84.

9. Respondent Bowman first operated the F/V Perfect Shot for commercial fishing in 2007. Tr. 86–87. Between 2007 and 2011, Mr. Bowman made approximately six to ten commercial fishing trips with the F/V Perfect Shot per year.

10. Respondent Bowman and Mr. Whited were aware of the three-hour notification requirement on November 30, 2011. Tr. 90–91.

11. Mr. Whited testified that prior to November 30, 2011, Mr. Bowman had caught IFQ fish from F/V Perfect Shot and that Mr. Whited had called in notifications of landing. Tr. 102-103.

12. On or before November 30, 2011, Respondent Bowman contacted Mr. Whited and indicated that he was going to go commercial fishing. Tr. 84.

13. Early in the morning on November 30, 2011, Respondent Bowman informed Mr. Whited "that a deck reel motor was acting up," but that he and the crew were going to try to fix it. Tr. 84. At approximately 10:00 a.m. CST, Respondent Bowman contacted Mr. Whited and indicated that they could not fix the deck reel and that Mr. Whited would have to obtain another one. Tr. 84–85, 93.

14. Mr. Whited initially planned to meet Respondent Bowman and the F/V Perfect Shot at the vessel's slip to replace the deck reel motor. Tr. 97.

15. Mr. Whited determined that he could obtain a replacement deck reel motor in Panama City, Florida. Tr. 85.

16. During a telephone conversation with Mr. Whited that morning, Respondent Bowman indicated that he was approximately twenty miles off shore, and that "[h]e had a basket of snappers at the time and he was going to make one more snapper spot because . . . he was only 20 miles out, and he was trying to judge the time so he didn't get in too early." Tr. 85, 88.

17. Mr. Whited understood that "a basket could be anywhere from 50 to 80 pounds." Tr. 88.

18. Harbor Docks in Destin, Florida is an IFQ dealer. Tr. 64; Ex. 1, 10.

19. Mr. Whited was not sure whether he had to give a three hour IFQ notification "since we were just coming to pick up a part," so he went to Harbor Docks and asked Shannon, a manager or owner of Harbor Docks, whether an IFQ notification was required when his vessel has some fish onboard but is coming in to the dock to get a new part, not unloading. Tr. 85, 88, 94, 105. Shannon, and Anthony Morgan, who is a partner/owner of Harbor Docks, were not sure whether a three- hour IFQ notification was required. Tr. 85, 94, 105.

20. While Mr. Whited was at Harbor Docks, Anthony Morgan asked him whether the F/V Perfect Shot had any "pogies" for an order for a 20 pound shipment out of state. [6] Tr. 95, 97–98, 104–05, 107, 118. Mr. Whited told Mr. Morgan that he thought the F/V Perfect Shot did have some "pogies" on board. Tr. 98, 105.

21. At 10:25 a.m. CST (11:25 a.m. EST) while he was at Harbor Docks, Mr. Whited called the IFQ customer service line to ask whether a three-hour notification was required under the circumstances. Ex. 1; Ex. 6 at 2; Tr. 85, 95, 105. Mr. Strelcheck received the call on the IFQ customer service phone line from Mr. Whited. Ex. 1; Ex. 6 at 2; Tr. 17.

22. Andrew J. Strelcheck is a fish and wildlife administrator for the National Marine Fisheries Service (NMFS), Southeast Regional Office in St. Petersburg, Florida. Tr. 9. One of Mr. Strelcheck's primary responsibilities is overseeing the commercial IFQ programs in the Gulf of Mexico. Tr. 10.

23. In the telephone conversation with Mr. Strelcheck, Mr. Whited indicated that his vessel was having a problem and needed to return to shore, but that he had some red snapper on board. Mr. Whited asked whether a three-hour notification was required where he had IFQ species on board, but would offload only the non-IFQ species at Harbor Docks and return the vessel to sea to finish the fishing trip. Ex. 1; Ex. 6 at 2; Tr. 17, 21. Mr. Strelcheck told Mr. Whited that he would contact law enforcement and would call Mr. Whited back. Ex. 1; Tr. 18.

24. At 11:37 a.m. EST, Mr. Strelcheck contacted Special Agent Paige Casey and recounted his conversation with Mr. Whited. Ex. 1; Tr. 18, 22. Special Agent Casey and Mr. Strelcheck agreed that Mr. Whited was required to report a three-hour notification because his vessel was returning to shore with IFQ species on board. Ex. 1; Tr. 18.

25. Mr. Strelcheck then contacted Mr. Whited and told him that a three-hour notification was necessary. Ex. 1; Ex. 6 at 2; Tr. 18.

26. Mr. Strelcheck entered a three-hour notification for the F/V Perfect Shot at 11:44 a.m. EST, which is 10:44 CST. Ex. 1, 4; Tr. 18, 22. Mr. Whited indicated that the vessel would be

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[6] It is noted that the term "pogy" is an alternative name for a marine fish known as "menhaden." Webster's Third New International Dictionary 1410 (2002). They are generally caught in nets, are very oily, are often used for bait, chum, oil, livestock feed and fertilizer, and are not popular for human food consumption. Mr. Morgan may have been referring to "porgies" (family *Sparidae*) which are also found in the Gulf and are valued for human consumption. It is noted, however, that the handwritten list of fish on Harbor Docks' invoice for fish from F/V Perfect Shot on November 30, 2011 shows a quantity of 11 "pogy." Ex. 12; Tr. 58.

landing at 1:45 p.m. CST, and Mr. Strelcheck gave Mr. Whited a confirmation number for his landing transaction. Tr. 18, 22, 45, 95, 96; Ex. 1, 4, 10.

27. Mr. Whited informed Mr. Strelcheck during the phone conversation that the F/V Perfect Shot had approximately 50 pounds of red snapper because the vessel had made an additional stop when returning to shore, and that there was one red grouper on board weighing 10 pounds. Ex. 1, 4, 6.

28. Mr. Morgan understood from Mr. Whited, after the conversation with Mr. Strelcheck, that the three hour notification was required. Mr. Morgan was informed by either Mr. Whited or Shannon that if the vessel comes into the dock, all of the fish must be offloaded and Harbor Docks must complete paperwork for IFQ fish that were landed. Tr. 105-106, 118. Mr. Morgan testified that he only needed the "pogies" and already had enough snapper. Tr. 118.

29. Mr. Whited left Harbor Docks and informed Respondent Bowman that he was going to retrieve the new deck reel motor in Panama City and leave it at Harbor Docks. Tr. 85, 90-91, 96-97.

30. Mr. Whited told Respondent Bowman to land at Harbor Docks and pick up the motor and give Harbor Docks "whatever pogies they needed." Tr. 97.

31. Mr. Whited did not discuss the landing time with Respondent Bowman or inform Respondent Bowman that the F/V Perfect Shot had a designated landing time of 1:45 p.m. CST. Tr. 90–91, 97. Mr. Whited testified that Mr. Bowman told him "to call the three hour notification," and that "he was on his way in." Tr. 90-91. Mr. Whited explained that he "got sidetracked looking for parts," and "was worried about getting the part and getting back out fishing." Tr. 88–89, 90.

32. While traveling toward Panama City, Mr. Whited contacted a friend and learned that the friend had a deck reel motor in Destin, Florida, that Mr. Whited could have. Tr. 86. Instead of going to Panama City, Mr. Whited obtained the deck reel motor from the friend in Destin, brought it to Harbor Docks, and left to go to work at Cool Fish. Tr. 86, 97–98.

33. Respondent Bowman arrived in the F/V Perfect Shot at Harbor Docks at 1:15 p.m. CST. Tr. 45, 46, 49, 70; Ex. 6 at 3; Ex. 7, 8, 9.

34. Employees of Harbor Docks walked out to the dock and the crew of the F/V Perfect Shot handed all of the fish to them. Tr. 99, 117.

35. On November 30, 2011, Officer Ryan Nelson, a law enforcement officer for the Florida Fish and Wildlife Conservation Commission ("FWC") was on water patrol in Okaloosa County. Ex. 3; Tr. 26–27.

36. At approximately 11:23 a.m. CST, Officer Nelson was dispatched to an IFQ landing for the F/V Perfect Shot, with an expected time of arrival at Harbor Docks of 1:45 p.m.. Ex. 3, 4; Tr. 27–28, 33-34.

37. Officer Nelson arrived at Harbor Docks at approximately 1:30 p.m. CST, and observed the F/V Perfect Shot backed into a slip. Ex. 3; Tr. 28.

38. As Officer Nelson tied up his boat to the adjacent dock, he observed the F/V Perfect Shot begin to pull away from the dock. Ex. 3; Tr. 28.

39. Officer Nelson approached the F/V Perfect Shot and asked the captain to stop. The captain stopped and tied the vessel to the dock. Ex. 3; Tr. 28, 31.

40. The captain identified himself as Mr. Brady Bowman. Ex. 3; Tr. 29.

41. Officer Nelson boarded the F/V Perfect Shot and asked Respondent Bowman whether they had already offloaded or just arrived. Ex. 3; Tr. 28–29.

42. Respondent Bowman told Officer Nelson that they had already offloaded and were leaving. Ex. 3, 6; Tr. 28–29. He further explained that they "had trouble with one of their electric fishing reel motors and decided to end their trip a few days early." Ex. 3; Tr. 40.

43. Officer Nelson asked Respondent Bowman what had been caught and offloaded. Respondent Bowman responded that they offloaded approximately 122 pounds of red snapper, 5 pounds of red grouper, 10 pounds of trigger fish, and 244 pounds of vermillion snapper.[7] Ex. 3; Tr. 29.

44. Officer Nelson informed Respondent Bowman that there was an IFQ violation and that the three-hour notification had been submitted at 10:44 a.m. CST for landing at 1:45 p.m. CST. Ex. 3; Tr. 29–30.

45. Officer Nelson went back to his patrol vessel, and at 1:37 p.m. CST called NOAA Special Agent Allan Coker, and informed him of the IFQ violation. Ex. 3, 5, 6, 7; Tr. 30, 36-37; Tr. 43–44.

46. Officer Nelson informed Respondent Bowman that he was documenting the IFQ violation and forwarding the information to NOAA, and that Respondent Bowman "was free to leave." Ex. 3; Tr. 31.

47. During the encounter, Respondent Bowman was cooperative and not evasive with Officer Nelson. Tr. 40.

48. Following his conversation with Officer Nelson, Special Agent Coker spoke with Mr. Strelcheck about the conversation with Mr. Whited. Tr. 45; Ex. 6 at 2.

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[7] Vermillion snapper are also known as mingos. Tr. 59.

49. At 2:39 p.m. CST, Special Agent Coker contacted Respondent Bowman by phone, introduced himself and interviewed him about the time of landing and the offload of fish. Tr. 45; Ex. 6 at 3.

50. During the phone interview, Respondent Bowman told Special Agent Coker that the F/V Perfect Shot had returned to the dock because it had a broken reel and needed to pick up a new part for it, and that he had arrived at the dock around 1:15 p.m. CST and offloaded all of his catch, including red snapper and red grouper. Upon inquiry he stated that he had offloaded at Harbor Docks approximately 122 pounds of red snapper and 10 pounds of red grouper, and other fish. Ex. 6 at 3; Ex. 7, 8; Tr. 45–46.

51. Special Agent Coker testified that during the phone interview, Respondent Bowman "was cooperative but a little confused." Tr. 69.

52. Special Agent Coker then contacted Officer Nelson and informed him that he was going to seize the catch, and went to Harbor Docks. Tr. 47; Ex. 3. When he arrived at Harbor Docks he spoke to the manager, Shannon, who told him that all of the fish offloaded from the F/V Perfect Shot was still in Harbor Docks' cooler. Ex. 6 at 3; Tr. 47.

53. From the F/V Perfect Shot, 122 pounds of red snapper, 5 pounds of red grouper, and approximately 235 pounds of other assorted reef fish, including 11 pounds of "pogy" were unloaded at Harbor Docks on November 30, 2011. Ex. 6 at 3; Ex. 11, 12; Tr. 48, 58–59. Shannon gave Special Agent Coker the Harbor Docks invoice, which showed that these fish had been unloaded from F/V Perfect Shot in those amounts. Tr. 48, 58; Ex. 6 at 3; Ex. 12.

54. Shortly after Special Agent Coker arrived at Harbor Docks, Mr. Whited arrived and Special Agent Coker informed him that the vessel had offloaded in violation of the three hour notification and that he would be seizing the red snapper and red grouper. Ex. 6 at 3-4; Tr. 47.

55. Mr. Whited was upset, briefly talked with Special Agent Coker, and departed. Tr. 47-48; Ex. 6 at 4.

56. Special Agent Coker completed a seized property receipt and took custody of the red snapper and red grouper that had been offloaded from the F/V Perfect Shot.[8] Ex. 6 at 4; Ex. 11.

57. Harbor Docks had not purchased the fish offloaded from the F/V Perfect Shot, and the manager of Harbor Docks refused to bid on the fish when Special Agent Coker asked if he wanted to bid on it. Tr. 68; Ex. 6 at 4. Special Agent Coker contacted several other dealers and sold the fish to the highest bidder, Destin Ice House. Tr. 56–57. On December 14, 2011, a check in the amount of $626.13, "for the sale of the seized fish" was sent by certified mail to the NOAA lock box.[9] Ex. 6 at 5.

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[8] The Seized Property Receipt was not offered into evidence, but was referenced in and listed as an attachment to the Investigative Report of Special Agent Coker. Ex. 6 at 5.

[9] Neither an invoice for Destin Ice House nor a copy of the check was offered into evidence, but the check was specifically referenced and both the invoice and copy of check were listed as attachments to the Investigative Report of Special Agent Coker. Ex. 6 at 5.

58. On December 7, 2011, Special Agent Coker interviewed Respondent Bowman on board the F/V Perfect Shot at its slip in Destin, Florida. Ex. 6 at 4; Ex. 9; Tr. 48–49.

59. During the interview, Respondent Bowman was cooperative and not evasive, and confirmed that he had arrived at 1:15 p.m. CST. When Special Agent Coker asked about the offloading time and amount of IFQ species Mr. Whited had reported, Respondent Bowman indicated that he was not sure, and that there was a confusion. He indicated further that he had been trying to get Mr. Whited to allow him to call in the three hour notification himself and that with a "middle man" there is "some conflict as to what's going on." Tr, 49, 69-70; Ex. 6 at 4.

60. Since the interview, Respondent Bowman calls in the three hour advance notifications for the F/V Perfect Shot. Tr. 49–50, 91.

61. In his testimony, Mr. Whited acknowledged that on November 30, 2011, the F/V Perfect Shot landed early, before the 1:45 landing time according to the three-hour notification. Tr. 93. He explained that it landed early because of a miscommunication and mistake on his part. Tr. 93.

62. There is no evidence that the IFQ fish offloaded on November 30, 2011 exceeded or came close to exceeding the quota or pounds of allocation in F/V Perfect Shot's Gulf Reef Fish IFQ vessel account for that fishing year. The vessel account had sufficient allocation for at least 50 pounds of red snapper and 10 pounds of red grouper on November 30, 2011. Ex. 4. Reports of landing significant amounts of red snapper were provided for three fishing trips the vessel made in December 2011. Ex 10.

63. Elizabeth Nelson is a Special Agent with the U.S. Department of Commerce and NOAA office for law enforcement, who investigates potential violations of the regulations of the Magnuson-Stevens Act and Marine Mammal Protection Act and conducts outreach and education for the public. Tr. 71–72.

64. On March 1, 2010, Special Agent Nelson conducted an investigation of the F/V Perfect Shot, on the basis of a report that it had landed at Harbor Docks without giving a three-hour notification. Tr. 73. Special Agent Nelson boarded the F/V Perfect Shot on that day, and along with Special Agent Coker and an officer, met with Mr. Whited, Respondent Bowman, who was the captain of the vessel, and its crew. Tr. 73-75.

65. Special Agent Nelson testified that on March 1, 2010 the vessel was "in violation of almost every step of their trip." Tr. 74, 78. Respondents had not declared their trip, had not transferred IFQ share allocations from the IFQ shareholder account to the IFQ vessel account, the vessel monitoring system (VMS) was not recording, and had not provided an advance notification of landing. Tr. 75–77; Ex. 16.

66. Mr. Whited testified that he did not have to report landings of IFQ species until the grouper IFQ requirements went into effect, because he "didn't have any snappers" before then. Tr. 86-87. Special Agent Nelson was under the impression that it was one of the first fishing

trips that the vessel had been on, and therefore she "took [the incident] as an educational opportunity and [she] corrected them on everything they needed to know how to do." Tr. 78. She provided them with information and websites for further information, and her contact information. Tr. 78-79.

67. Special Agent Nelson issued Mr. Whited and Respondent Bowman each an Enforcement Action Report ("EAR"), "indicating where they were in violation," but did not forward the incident to general counsel or assess a penalty. Tr. 80; Ex 16.

68. Special Agent Nelson testified that during her interaction with Mr. Whited and Respondent Bowman, the two men "were very pleasant," appeared not to know "what they had done wrong, and . . . were willing to cure how to do it correctly [sic]." Tr. 82.

IV. Liability

A. Burden of Proof

In an action to establish civil liability under the Magnuson-Stevens Act, the Agency has the burden of proving each alleged violation by the preponderance of the evidence. 5 U.S.C. 556(d); *Cuong Vo*, NOAA Docket No. SE010091FM, 2001 NOAA LEXIS 11, at **16–17 (ALJ, Aug. 17, 2001) (citing 5 U.S.C. § 556(d); *Dept. of Labor v. Greenwich Colleries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100–03 (1981)). Preponderance of the evidence means that the Agency must show that it is more likely than not that 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 a violation and satisfy the burden of proof." *Cuong Vo*, NOAA Docket No. SE010091FM, 2001 NOAA LEXIS 11, at *17 (ALJ Aug. 17, 2001) (citing *Reuben Paris, Jr.*, 4 O.R.W. 1058, 1987 NOAA LEXIS 13 (ALJ Sept. 30, 1987) (finding liability on basis of circumstantial evidence)).

B. Elements of Violation

To establish a violation of the Magnuson-Stevens Act, 16 U.S.C. 1857(1)(A) and 50 C.F.R. § 622.7(gg) by Respondents' failure to comply with 50 C.F.R. § 622.16(b)(3) and § 622.20(b)(3), NOAA must prove that: (1) Respondents are "persons" (2) and owners or operators of a vessel, (3) that landed Gulf IFQ red snapper, Gulf groupers or tilefishes, from the Gulf EEZ zone or from any location if the vessel has a Gulf red snapper or grouper and tilefish IFQ vessel account, and (4) failed to contact NMFS at least 3 hours in advance of the landing to report the time and location of landing and other required information. 50 C.F.R. § 622.16(b)(3), 50 C.F.R § 622.20(b)(3).

C. Discussion and Conclusions as to Liability

Respondent Jaxseb Enterprises, LLC and Respondent Bowman are each a "person" under the Act, defined as "any individual, corporation, partnership, association or other entity." 16 U.S.C. § 1802(31). Findings of Fact 1, 5 and 40 establish Respondents as owner and operator of

the F/V Perfect Shot, and Findings of Fact 34 and 53 establish that the vessel landed Gulf IFQ snapper and grouper on November 30, 2011. Finding of Fact 4 shows that F/V Perfect Shot had an IFQ vessel account. Thus, the first three elements are proven.

As to the fourth element, Finding of Fact 33 establishes that F/V Perfect Shot "landed," or arrived at the dock, at 1:15 p.m. CST.[10] Therefore, under 50 C.F.R. §§ 622.16(b)(3)(i) and 622.20(b)(3)(i), Respondents were required to have contacted NMFS no later than 10:15 a.m. CST to allow for the three hour advance notice of landing. However, Mr. Whited first contacted NMFS by calling the IFQ customer service line at 10:25 a.m. CST, and then at 10:44 a.m. confirmed that the vessel would land three hours later, at 1:45 p.m. CST. Findings of Fact 21, 26. Respondents therefore failed to contact the IFQ customer service line at least three hours in advance of landing, in violation of the requirements of 50 C.F.R. §§ 622.16(b)(3)(i) and 622.20(b)(3)(i). Consequently, NOAA has proven by a preponderance of the evidence that Respondents violated the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A) and 50 C.F.R. § 622.7(gg) as alleged in the NOVA.

The fact that Mr. Whited contacted IFQ customer service and reported the information well in advance of landing, and accepting as true Mr. Whited's testimony that the early landing was a mistake and not intentional, does not excuse liability. Violations of the Magnuson-Stevens Act and implementing regulations are strict liability offenses. *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999); *Roche v. Evans*, 247 F. Supp. 2d 47, 59 (D. Mass. 2003); *see Timothy A. Whitney*, 6 O.R.W. 479, 1991 NOAA LEXIS 33, at *10 (ALJ July 3, 1991) (quoting *Accursio Alba*, 2 O.R.W. 670, 1982 NOAA LEXIS 29, at *7 (NOAA App. 1982)) ("'[S]cienter is not an element of a civil offense under . . . 16 U.S.C. § 1857.'"); *cf.*, *Tart v. Massachusetts*, 949 F.2d 490, 502 (1st Cir. 1991) (legislative silence as to state of mind should not be construed as including a mens rea requirement in a statute for a criminal offense where it is a regulatory offense not known at common law).

As to the assessment of joint and several liability for the violation, Respondent Bowman did not participate in the proceedings, and Mr. Whited accepted responsibility for the violation, admitting it was his fault and that he made a mistake. Tr. 93; Finding of Fact 62. The procedural rules provide that "[a] final administrative decision by the Judge . . . after a hearing required by one joint and several respondent is binding on all parties including all other joint and several respondent(s), whether or not they entered an appearance unless they have otherwise resolved the matter through settlement with the Agency." 15 C.F.R. § 904.107(c). Holding the Respondents jointly and severally liable is consistent with the rationale of respondeat superior, to "prevent vessel owners and operators from reaping the benefits of illegal fishing activities while avoiding the responsibility that goes along with such tactics." *James Chan Song Kim, et al.*, 2003 NOAA LEXIS 4 *28-29 (ALJ, Jan. 7, 2003). Accordingly it is concluded that Respondents are jointly and severally liable for the violation alleged in the NOVA.

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[10] It is noted that in his Investigative Report, Special Agent Coker states that the vessel was required to wait until 13:45 to "offload" rather than "land" and refers to "unloading early" and "offloaded in violation." Ex. 6. These references do not affect liability in this case. In any event, F/V Perfect Shot both landed and offloaded before the appointed time. Findings of Fact 37, 42.

VI. Penalty

A. Statutory and Regulatory Provisions

Any person found to have committed an act made unlawful by the Magnuson-Stevens Act "shall be liable to the United States for a civil penalty" not to exceed $140,000 per violation. 16 U.S.C. § 1858(a); 15 C.F.R. § 6.4(e)(14) (maximum penalty of $100,000 in the Act increased to $140,000 as authorized by the Inflation Adjustment Act). The Magnuson-Stevens Act states that, in determining the amount of such penalty, "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" shall be taken into account. 16 U.S.C. § 1858(a); *see,* 15 C.F.R. § 904.108.

The Act also allows consideration of a respondent's ability or inability to pay a penalty. 16 U.S.C. § 1858(a); *see also*, 15 C.F.R. § 904.108(b)–(h). Under the Act, "any information provided by the violator relating to the ability of the violator to pay" may be considered, but only if "the information [was] served . . . at least 30 days prior to [the] administrative hearing." 16 U.S.C. § 1858(a); *see* 15 C.F.R. § 904.108(b)–(h). The regulations provide that the burden is on the respondent to prove "such inability by providing verifiable, complete, and accurate financial information to NOAA." 15 C.F.R. § 904.108(b), (c), (e), (g).

The Administrative Law Judge is responsible for "[a]ssess[ing] a civil penalty or impos[ing] a permit sanction, condition, revocation, or denial of permit application, taking into account all of the factors required by applicable law." 15 C.F.R. § 904.204(m) (2012); 75 Fed. Reg. 35,631 (Final Rule, June 23, 2010). The current regulation "eliminates any presumption in favor of the civil penalty or permit sanction assessed by NOAA in its charging document," and "requires instead that NOAA justify at a hearing . .. that its proposed penalty or permit sanction is appropriate, taking into account all the factors required by applicable law." 75 Fed. Reg. at 35,631.

B. Penalty Policy

On March 16, 2011, NOAA issued a "Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions" ("Penalty Policy") which provides guidance for penalty assessments under multiple statutes enforced by NOAA. While it states that it "provides guidance for the NOAA Office of General Counsel" and refers to NOAA attorneys determining proposing penalties, it may be useful, yet is not binding, for Administrative Law Judges to use as an analytical framework for determining a penalty in an initial decision. See, *Student Public Interest Research Group v. Hercules,* Civ. No. 83-3262, 1989 U.S. Dist. LEXIS 16901 (D. NJ April 6, 1989)(a penalty policy "provides a helpful analytical framework" for the court in arriving at a civil penalty). The Penalty Policy was not included as an exhibit by the Agency, but was referenced on the last page of the NOVA along with citations to access the Penalty Policy online, 76 Fed. Reg. 20959 (April 14, 2011) and www.gc.noaa.gov/documents/031611_penalty _policy.pdf. Under the applicable procedural rules, official notice may be taken of "any reasonably available public document; provided that

the parties will be advised of the matter noticed and given reasonable opportunity to show the contrary." 15 C.F.R. § 904.204(l). Official notice is taken of the Penalty Policy.

Under the Penalty Policy, a civil penalty is calculated as follows:

> (1) A "base penalty," which represents the seriousness of the violation, calculated by:
>
> (a) an initial base penalty amount reflecting:
>
> (i) the gravity of the violation and
>
> (ii) the culpability of the violator,
>
> and
>
> (b) adjustments upward or downward to reflect:
>
> (i) history of non-compliance,
>
> (ii) commercial or recreational activity, and
>
> (iii) good faith efforts to comply after the violation, cooperation/non-cooperation;
>
> (2) plus an amount to recoup the proceeds of any unlawful activity and any additional economic benefit of noncompliance.

Penalty Policy at 4. To determine the gravity component of an initial base penalty, a search is made for the particular violation on the schedules in Appendix 3 of the Penalty Policy. The schedules assign an "offense level" to the most common violations charged by the Agency, which levels under the Magnuson-Stevens Act range from least significant ("I") to most significant ("VI") and are designed to reflect the nature, circumstances, and extent of the violations. *Id.* at 4–5, 7–8. Where no offense level has been assigned to a violation, the Penalty Policy directs use of the offense level of an analogous violation or, if no similar offense can be identified, by assessing the gravity based on criteria listed in the Penalty Policy. *Id.* at 5 n.4, 7–8.

Next, the culpability of the alleged violator is assessed as one of four levels in increasing order of severity: A) unintentional, including accident, mistake, and strict liability; B) negligence; C) recklessness; and D) intentional. *Id.* at 8–9. The Penalty Policy lists factors to be considered when assigning culpability, including whether the alleged violator took reasonable precautions against the events constituting the violation, the level of control the alleged violator had over these events, whether the alleged violator knew or should have known of the potential harm associated with the conduct, and "other similar factors as appropriate." *Id.* at 9.

The gravity component and culpability component form the two axes of penalty matrices for each of the statutes, set out in Appendix 2 of the Penalty Policy. A range of penalties appears in each box on the matrix. A penalty range is thus determined by selecting the appropriate level for gravity and culpability on the axes. The initial base penalty is the midpoint of the penalty range within that box. *Id.* at 5.

The adjustment factors provide a basis to increase or decrease a penalty from the midpoint of the penalty range within a box, or to select a different penalty box in the matrix. *Id.* at 10. The Penalty Policy states that a prior violation of natural resource protection laws are

evidence of intentional disregard for them, or reckless or negligent attitude toward compliance, and may indicate that the prior enforcement response was insufficient to deter violations. Therefore, the Penalty Policy provides that a penalty may be increased where a respondent had a prior violation. While it states that "[a]ll prior violations will be considered," it specifically refers only to violations subject to "final administrative adjudication . . . (including summary settlement, administrative settlement, final judgment, or consent decree)." *Id.* The degree of increase is based on the similarity of the prior violation, how recently it occurred, the number of prior violations, and efforts to correct prior violations. *Id.* For a prior similar violation that was settled or adjudicated in the past five years, the penalty range in increased by shifting one penalty box to the right in the penalty matrix. *Id.* at 10. For a prior violation that was subject to adjudication in the past five years and is not similar, or a prior violation that is similar but the final adjudication was more than five years ago, the penalty is increased within the range shown in the initial base penalty box. *Id.* at 10-11. Another adjustment factor in the Penalty Policy provides for a decrease in the penalty in certain circumstances where the violation arises from non-commercial activity. *Id.* at 11.

The final adjustment factor reflects the activity of the violator after the violation, in terms of good faith efforts to comply and cooperation or non-cooperation. The Penalty Policy lists the following examples of good faith factors to decrease a penalty: self-reporting, providing helpful information to investigators, and cooperating with investigators. The Penalty Policy states that no downward adjustments are made for efforts primarily consisting of coming into compliance, or for self-reporting where discovery of the violation was inevitable. *Id.* at 12. The Penalty Policy describes bad faith factors, to increase a penalty, as attempts to avoid detection, destroying evidence, intimidating or threatening witnesses, or lying. *Id.*

Added to the base penalty is any value of proceeds gained from unlawful activity and any economic benefit of noncompliance to the violator. The Penalty Policy provides that proceeds are likely recouped and for purposes of penalty assessment will typically be zero where the illegal catch or product was seized and forfeited by NOAA or voluntarily abandoned by the violator. *Id.* at 13.

C. Agency's Proposed Penalty and Arguments in Support

The Agency proposes that Respondents be held jointly and severally liable for a penalty of $5,000 for the violation alleged in the NOVA. The Agency calculated this amount pursuant to the statutory factors and the Penalty Policy. Agency Post-Hearing Br. at 9.

The Agency notes that the Penalty Policy has not assigned an offense level to a violation of the advance notice of landing requirements under the Magnuson-Stevens Act. Agency Post-Hearing Br. at 9. However, "submitting inaccurate or false data, statements, and reports" under the Magnuson-Stevens Act has been assigned offense levels of I, II, or III, depending on the significance of the violation. *Id.* (citing Penalty Policy at 33). The Agency also notes that the Penalty Policy has assigned an offense level of II to a violation of the advance notice of landing requirements under the Northern Pacific Halibut Act. *Id.* (citing Penalty Policy at 53). The Penalty Policy assigns a base penalty range of $4,000 to $6,000 for offense level II, negligent

violations under both the Northern Pacific Halibut Act and the Magnuson-Stevens Act. *Id.* at 9–10 (citing Penalty Policy at 25, 30); *see* 16 U.S.C. § 773e (unlawful to violate regulations issued pursuant to Northern Pacific Halibut Act of 1982); 50 C.F.R. § 679.5(*l*)(1) (halibut IFQ program advance notice of landing requirements). The Agency therefore assigned the violation alleged in this case an offense level of II. Agency Post-Hearing Br. at 9–10.

The Agency assigned Respondents a "negligent" level of culpability, stating "the Penalty Policy provides that failure to know of applicable laws/regulations or to recognize when a violation has occurred may itself be evidence of negligence." *Id.* (citing Penalty Policy at 9). The Agency states that based on these classifications, the Penalty Policy identifies a penalty range of $4,000 to $6,000, with a midpoint of $5,000. *Id.* at 9–10 (citing Penalty Policy at 10, 25). The Agency did not adjust the penalty for any of the adjustment factors, and did not add an amount to recoup any economic benefit because the Gulf IFQ red snapper and grouper offloaded from the F/V Perfect Shot on November 30, 2011, had been seized. *See id.* at 10; NOVA at 7 (penalty calculation worksheet).

NOAA argues that the penalty for undermining enforceability of the IFQ program must be sufficient to deter the unlawful conduct, and that "failure to sufficiently address Respondents' liability for their unlawful and premature landing before law enforcement personnel were advised the landing was to occur would frustrate and undermine the purposes of the advance notice of landing requirement." Agency Post-Hearing Br. at 7. NOAA explains that "'the function of fines and penalties is to protect the entire fishery,'" and that an appropriate consideration when determining a penalty "'is not just the economic hardship to the individual, but significantly the effect upon the fishery that would result if predatory behavior were condoned.'" *Id.* at 8 (quoting *Tony Tan Nguyen*, 7 O.R.W. 60, 1993 NOAA LEXIS 11, at *8 (ALJ Feb. 9, 1993)).

D. Respondents' Arguments[11]

Mr. Whited argues on behalf of Respondents that the penalty sought by the Agency is too high for what Respondents characterize as "a minor mistake . . . ." E-mail from Chris Whited, fishperfectshot@yahoo.com, to oaljsiling@epa.gov [sic] (Oct. 18, 2012, 1:15 p.m.)("Rs' First Brief"). He points out that they were "coming in for repairs and a few minutes early." *Id.* He asserts that on a given day he must "book trips, run to get parts, call in fish, and try to find IFQ shares" for the F/V Perfect Shot, as well as "buy shrimp, oysters, and many other things for the market." E-mail from Chris Whited, fishperfectshot@yahoo.com, to oaljsiling@epa.gov [sic] (Oct. 21, 2012, 7:10 p.m.)("Rs' Second Brief"). He contends that on November 30, 2011, he was required to do more than he does on a normal day, including getting the new part and trying to make it to work on time, and "it is very possible [he] could mess up." Rs' First and Second Briefs. Mr. Whited maintains: "I don't know how I made the mistake about the time [the F/V Perfect Shot was] to arrive, but I did. This was a mental error and nothing more. We have our permits, licenses and everything else required." Rs' Second Brief. He asserts that a $5,000 penalty is excessive under the circumstances, particularly considering the value of the catch that was seized. *Id.*

[11] Several of the arguments contained in Respondents' post-hearing communications refer to facts not in evidence.

Mr. Whited explains that the F/V Perfect Shot must lease IFQ shares from other fisherman so Respondents consequently have no incentive to "risk getting in trouble for very little money." Rs' First Brief. He opposes any implication that the prior incident involving his VMS and groupers being in the wrong account, which was their "very first trip involving the IFQ program," makes him a repeat offender. *Id.* Mr. Whited claims that since receiving that first warning, the F/V Perfect Shot has "run 40-50 trips without incident." *Id.*. Mr. Whited claims that "[w]e have our permits, licenses, and everything else required. We catch what we are allowed and make sure about the sizes. We report our fish, take out observers and even volunteer for other programs involving the FWC." Rs' Second Brief.

E. Discussion and Conclusions

1. Nature, Circumstances, Extent and Gravity of the Violation

Mr. Strelcheck testified as an expert witness in IFQ fisheries. Tr. 12. He testified that the NMFS has been managing the red snapper fishery in the Gulf of Mexico "since approximately the early 1980s." Tr. 12. The fishery had experienced over fishing for an extensive period of time, and needed to be rebuilt to higher, sustainable levels. Tr. 12. Before the IFQ program was adopted by the industry, "[t]he commercial fishery operated by racing out to catch the quotas that were set for red snapper," leading to "derby fishing conditions" resulting in short fishing seasons, unsafe fishing conditions for the fishermen, and lower prices paid by dealers. Tr. 12–14. The tilefish and grouper fishery had similar problems. Tr. 13–14. The IFQ program was created to enable participating vessels to allocate their effort and harvest throughout the entire fishing year, allowing for more sustainable harvest levels, better market prices and the opportunity to fish in safer conditions. Tr. 13, 65. Under the IFQ program, the quota that fishermen previously would race to catch was divided among the fishermen, so that each is individually allocated a specific amount of red snapper and grouper or tilefish. Tr. 14; *see* 50 C.F.R. §§ 622.16(a)(4), (b)(6)–(9), 622.20(a)(4), (b)(6)–(9). They can buy or sell additional fish poundage to increase or decrease their allotment. Tr. 15.

The requirement for a vessel to provide advance notice of landing allows "law enforcement as well as [NOAA's] core samplers that collect biological data to have an opportunity to meet that vessel at the dock and inspect the fish prior to them being off-loaded or during the time when they are off-loaded." Tr. 16, 65. If the advanced notice of landing requirements are not followed, "fish could go unreported," enabling fishermen "to make additional fishing trips and harvest[] more fish than are being reported, ultimately resulting in over harvest of those particular species." Tr. 16–17, 65.

In a decision discussing the nature of a failure to comply with the advance notice of landing requirement, an administrative law judge has stated that "noncompliance with the advance notice regulation is not a *de minimus* or technical violation." *Greg Abrams*, NOAA Docket No. SE0703601FM, 2011 NOAA LEXIS 9, at *27 (ALJ Nov. 3, 2011). In that case, the vessel was tied to the dock several hours before the scheduled landing time, the respondents' testimony at hearing was not credible and included several false statements, and they showed "unwillingness to conform their conduct to the requirements of the law." *Id.* at *10, 31. On the

other hand, in a case in which the vessel docked one hour before the scheduled landing time, and an officer notified of the scheduled landing was present when the vessel offloaded the IFQ fish but did not go to the vessel and supervise the offload, the administrative law judge held that the respondents' early landing was "a technical violation of the regulations" and found "no evidence that [the respondents'] actions harmed the fishery or contributed to the depletion of the natural resource." *Tommy Nguyen*, NOAA Docket No. SE0801361FM, 2012 NOAA LEXIS 2 at *23 (ALJ Jan. 18, 2012).

Appendix 3 of the Penalty Policy lists several "violations regarding the facilitation of enforcement, scientific monitors or observers" under the Magnuson-Stevens Act, but, as noted by the Agency, does not specifically include violations of the advance notice of landing requirement. Where a violation or even a similar violation is not listed, the Penalty Policy advises considering the following criteria to assign an offense level: nature and status of the resource at issue; extent of harm done or potential harm to the resource or regulatory scheme/program; whether the violation involves fishing in closed areas, in excess of quotas, without a permit, or with unauthorized gear; whether the violation provides a significant competitive advantage over those operating legally; nature of the regulatory program; and whether the violation is difficult to detect without on-scene enforcement presence or other compliance mechanisms. Penalty Policy at 8. One of the violations listed regarding the "facilitation of enforcement, scientific monitors or observers" is "[s]ubmitting inaccurate or false data, statements, and reports," and is assigned an offense level of I "where the adverse impact on the . . . program is insignificant and there is no economic gain from the violation." *Id.* at 33, n. 14. Such a violation is assigned level II where "the adverse impact on the . . . program is minor or there is some economic gain from the violation," or level III where "the adverse impact on the . . . program is significant, or there is a significant economic gain from the violation." *Id.* Other "violations regarding the facilitation of enforcement, scientific monitors or observers" included under offense level II are "[p]roviding false statements to an authorized officer" and "[o]pposing, impeding, or interfering with any NMFS-approved observer or authorized officer." *Id.* at 33-34. The Penalty Policy assigns an offense level of II to a violation under the Northern Pacific Halibut Act of "[n]o [p]rior [n]otice of [l]anding submitted prior to offload." *Id.* at 53.

The facts of this case indicate that the adverse impact on the regulatory IFQ program is either insignificant or minor, which suggests a level I or II offense. Analyzing further, the facts are not analogous to the violation of no notice of landing prior to offload, under the Northern Pacific Halibut Act, as Mr. Whited did submit a notice of landing prior to offload. The facts are also not quite on par with providing false statements or opposing, impeding or interfering with an authorized officer. Mr. Whited first notified NMFS at 10:25 a.m., two hours and fifty minutes before the vessel landed, although the three-hour notification was not entered until 10:44 a.m, two and a half hours before the vessel landed. Findings of Fact 21, 26, 50. Officer Nelson was given sufficient advance notice that he arrived before F/V Perfect Shot left the dock. Findings of Fact 36, 37. Mr. Whited testified credibly that the violation was the result of a mistake and miscommunication on his part. Finding of Fact 61. His testimony is not inconsistent with Respondent Bowman's explanation, as recounted by Special Agent Coker, that there was "confusion" as to the time scheduled for landing. Finding of Fact 59.

The testimony and evidence as a whole does not support a finding that Respondents acted to avoid government agents' inspection of the fish offloaded. F/V Perfect Shot had sufficient allocation in its IFQ vessel account for the red snapper and red grouper offloaded on November 30, 2011. Finding of Fact 62. Furthermore, Harbor Docks documented the receipt and accurate weights of IFQ fish from F/V Perfect Shot on November 30, 2011 and provided it to Special Agent Coker, and was subject to requirements for a landing transaction report and transaction approval code, which depends on the vessel having provided advance notice of landing. Finding of Fact 53; 50 C.F.R. §§ 622.16(b)(1)(iii), 622.16(b)(3)(i) and (iv), 622.20(b)(1)(iii). 622.20(b)(3)(i) and (iv).

Leaving aside the fact that the IFQ fish were seized by the government agents, there would no economic gain or competitive advantage to Respondents from landing before the three-hour period after notification, as the evidence does not show that they would have benefited more from sales of fish if they landed them before the scheduled landing time than afterward.

Finally, there is no evidence of harm to the Gulf red snapper or grouper fisheries, as Mr. Whited reported to NMFS an estimate of the amount and species of IFQ fish being landed, and the actual amount offloaded would be reported later. *Id.*, Finding of Fact 27. The gravity of the Respondents' offense is best characterized as level I.

2. Culpability

The evidence shows that the culpability of Mr. Whited and Respondent Bowman is relatively low, considering the factors listed in the Penalty Policy for assessing the level of culpability. The Penalty Policy states that the "negligence" level of culpability denotes a "lack of diligence, a disregard of the consequences likely to result from one's actions, or carelessness," and that it "may arise where someone exercises as much care as he . . . is capable of, yet still falls below the level of competence expected of him or her in the situation." Penalty Policy at 9. The Penalty Policy describes an "unintentional" level as "inadvertent, unplanned, and the result of an accident or mistake," and "not one aimed at or desired." *Id.*

Mr. Whited contacted the IFQ customer service line with his inquiry as to whether he needed to provide an advance notice of landing to ensure that he correctly understood his legal obligations, and then provided the 1:45 landing time, which indicates that he was attempting in good faith to comply with the law, and took reasonable precautions to avoid a violation. Findings of Fact 21, 23, 26. It is also worth noting that when Mr. Whited posed his question to Mr. Strelcheck over the IFQ customer service line, Mr. Strelcheck did not have a ready answer but instead had to confer with law enforcement before affirming that advance notice was required. Finding of Fact 24.

The evidence indicates that Respondent Bowman was concerned about not landing too early. Findings of Fact 16, 31. However, there is no evidence in the record indicating that he made efforts to confirm with Mr. Whited the landing time. Mr. Whited's intention to comply with the advance notice of landing requirement apparently faded to a lesser priority than getting the replacement fishing reel motor. Finding of Fact 31. This suggests some carelessness and

lack of diligence on the part of Respondents. Furthermore, the discrepancy between Mr. Whited's estimate to Mr. Strelcheck of only 50 pounds of red snapper and the actual amount of 122 pounds of red snapper offloaded shows some degree of negligence in providing the advance notice of landing. Mr. Whited apparently based the estimate on his knowledge that Respondent Bowman had a basket of red snapper on board and that a basket weighs 50 to 80 pounds, but did not add to the estimate to account for the additional stop Respondent Bowman was expected to make to fish for snapper. Findings of Fact 16, 17. It is concluded that the violation was a result of some negligence on the part of Respondents.

On the penalty matrix, a level I offense level and negligent culpability level yields a penalty range of written warning to $4,000, thus a midpoint of $2,000. With an unintentional culpability level, the range is written warning to $2,000, so the midpoint is $1,000. The level of culpability in this case warrants a matrix value of $1,700 for the initial base penalty.

3. History of Prior Offenses and Other Matters as Justice May Require

The two adjustment factors in the Penalty Policy relevant to this case are: (1) history of non-compliance, and (2) good faith efforts to comply after the violation and cooperation during the investigation.

As to history of noncompliance, this is not Respondents' first violation pertaining to the IFQ program. In March 2010, when the F/V Perfect Shot was reported for failing to provide advance notice of landing before landing at Harbor Docks with IFQ species, an investigation revealed that Respondents had failed to transfer IFQ share allocations from the IFQ shareholder account to the IFQ vessel account, had not declared their trip, did not have a properly operating VMS unit, and had not provided advance notification of landing. Findings of Fact 64, 65. Respondents cooperated with law enforcement during the incident, and it was apparent that Respondents were not aware of these requirements of the IFQ program, so they were instructed in their legal obligations and given the equivalent of a written warning. Findings of Fact 66-68.

The present violation is the same as one of the prior violations and occurred only one year later, but it was not subject to final adjudication. The Penalty Policy does not clearly include Enforcement Action Report without a penalty as a "prior violation" for purposes of adjusting the penalty, so it warrants only an insignificant upward adjustment at most. The fact that Mr. Whited contacted the IFQ customer service line on November 30, 2011 and that he and Respondent Bowman were concerned about complying with the advance notification of landing requirements indicates that Respondents had learned from their experience in 2010 and were actively attempting to comply with the law on November 30, 2011. There is no evidence of intentional disregard for the IFQ regulatory requirements or a reckless or negligent attitude toward compliance.

As to the second penalty adjustment factor, the evidence shows that Respondents were cooperative with law enforcement in the investigations, admitted the early landing and accepted responsibility for the violation, which allowed for greater efficiency in administering the enforcement program. Findings of Fact 47, 51, 55, 59, 61, 68. Evidence shows that after

November 30, 2011, Respondents altered their standard operating procedure such that Mr. Whited no longer provides advance notice of landing but instead, Respondent Bowman now contacts NMFS to provide advance notice of landing and confirm the designated landing time. Finding of Fact 60.

Other matters to consider in assessing a penalty are any proceeds of unlawful activity and any additional economic benefit of noncompliance. Penalty Policy at 12-14. The red snapper and grouper offloaded from the F/V Perfect Shot on November 30, 2011 were seized, so Respondents did not realize any proceeds from unlawful activity or any other economic benefit from their noncompliance. The Penalty Policy explains that proceeds from the unlawful activity and any additional economic benefit "are factored in to prevent violators from profiting from illicit behavior and engaging in improper behavior because the sanctions imposed are merely a 'cost of doing business (i.e. because the economic benefit of their unlawful activity exceeds the cost of a potential penalty).'" *Id.* at 12. The Penalty Policy explains further that "[t]aking these factors into account also levels the playing field for the regulated community, so violators do not gain economic or strategic benefits over their law-abiding competitors." *Id.* Specifically, "[i]n cases where fish or other product is caught in violation of the statutory or regulatory requirements, the proceeds from unlawful activity will be assessed based on the gross ex-vessel value of the fish or other product." *Id.* at 13. In this case, the fish were not "caught in violation of the statutory or regulatory requirements," but were caught legally; the vessel merely arrived at the dock and unloaded before the scheduled time for landing. As discussed above, there was no evidence of any additional profit or other economic benefit that Respondents would have gained from landing early rather than at the appointed time. The value of the fish seized was $626.13, the price at which they were bought upon seizure. Finding of Fact 57. This fact is considered with respect to the penalty assessment, in reducing the penalty as a whole for other matters as justice requires.

4. Ability to Pay

The NOVA advised Respondents that they could seek to have the proposed penalty amount modified on the basis that they did not have the ability to pay, and that any such modification request would have to be made in accordance with 15 C.F.R. § 904.102 and be accompanied by supporting financial information. NOVA at 2.

In this case, neither Respondent has claimed inability to pay a penalty and neither has provided any information concerning financial condition. Respondents are therefore "presumed to have the ability to pay the civil penalty." 15 C.F.R. § 904.108(c).

F. Conclusion

The base penalty of $1,700 is reduced by a net amount of $700 to account for the history of prior offenses and other factors as justice may require. Therefore, taking into account the nature, circumstances, extent, and gravity of the violation; Respondents' degree of culpability and history of prior offenses; and other matters as justice may require, Respondents are assessed jointly and severally a civil penalty in the amount of $ 1,000.

ORDER

IT IS HEREBY ORDERED THAT a civil penalty in the total amount of **$ 1,000** is assessed jointly and severally against Respondents Jaxseb Enterprises, LLC, and Brady Lee Bowman.

As provided by 15 C.F.R. § 904.105(a), payment of this penalty in full shall be made within **30 days** of the date this decision becomes final Agency action, by check or money order made payable to the Department of Commerce/NOAA, or by credit card information and authorization provided to:

Office of General Counsel
Enforcement Section (Southeast)
263 13th Avenue South, Suite 177
St. Petersburg, FL 33701

PLEASE TAKE NOTICE, that this Initial Decision becomes effective as the final Agency action, sixty (60) days after the date this Initial Decision is served, unless the undersigned grants a petition for reconsideration or the Administrator reviews the Initial Decision. 15 C.F.R. § 904.271(d).

PLEASE TAKE FURTHER NOTICE, that upon failure to pay the civil penalty to the Department of Commerce/NOAA within thirty (30) days from the date on which this decision becomes effective as the final Agency action, "NOAA may request the U.S. Department of Justice to recover the amount assessed," plus interest and costs, "in any appropriate district court of the United States . . . or may commence any other lawful action." 15 C.F.R. § 904.105(b).

PLEASE TAKE FURTHER NOTICE, that any petition for reconsideration of this Initial Decision must be filed within twenty (20) days after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. *Id.* Within fifteen (15) days after a petition is filed, any other party to this proceeding may file an answer in support or in opposition. The undersigned will rule on any petition for reconsideration.

PLEASE TAKE FURTHER NOTICE, that any petition for review of this decision by the Administrator of NOAA must be filed within thirty (30) days after the date this Initial Decision is served and in accordance with the requirements of 15 C.F.R. § 904.273. If neither party seeks administrative review within thirty (30) days after issuance of this order, this initial decision shall become the final administrative decision of the Agency. A copy of 15 C.F.R. §§ 904.271–904.273 is attached.

Lisa Busch

M. Lisa Buschmann
Administrative Law Judge
U.S. Environmental Protection Agency

TITLE 15 -- COMMERCE AND FOREIGN TRADE
SUBTITLE B -- REGULATIONS RELATING TO COMMERCE AND FOREIGN TRADE
CHAPTER IX -- NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE
SUBCHAPTER A -- GENERAL REGULATIONS
PART 904 -- CIVIL PROCEDURES
SUBPART C -- HEARING AND APPEAL PROCEDURES
DECISION

15 CFR 904.271-273

§ 904.271 Initial decision.

(a) After expiration of the period provided in § 904.261 for the filing of reply briefs (unless the parties have waived briefs or presented proposed findings orally at the hearing), the Judge will render a written decision upon the record in the case, setting forth:

(1) Findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law, or discretion presented on the record;

(2) An order as to the final disposition of the case, including any appropriate ruling, order, sanction, relief, or denial thereof;

(3) The date upon which the decision will become effective; and

(4) A statement of further right to appeal.

(b) If the parties have presented oral proposed findings at the hearing or have waived presentation of proposed findings, the Judge may at the termination of the hearing announce the decision, subject to later issuance of a written decision under paragraph (a) of this section. In such cases, the Judge may direct the prevailing party to prepare proposed findings, conclusions, and an order.

(c) The Judge will serve the written decision on each of the parties, the Assistant General Counsel for Enforcement and Litigation, and the Administrator by certified mail (return receipt requested), facsimile, electronic transmission or third party commercial carrier to an addressee's last known address or by personal delivery and upon request will promptly certify to the Administrator the record, including the original copy of the decision, as complete and accurate.

(d) An initial decision becomes effective as the final administrative decision of NOAA 60 days after service, unless:

(1) Otherwise provided by statute or regulations;

(2) The Judge grants a petition for reconsideration under § 904.272; or

(3) A petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative under § 904.273.

§ 904.272 Petition for reconsideration.

Unless an order or initial decision of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or initial decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of such order or initial decision. The filing of a petition for reconsideration shall operate as a stay of an order or initial decision or its effectiveness date unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the administrative proceeding may file an answer in support or in opposition.

§ 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.