



**UNITED STATES DEPARTMENT OF COMMERCE**  
**NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

In the Matter of:	)	Docket Number:
David Eugene Smith,	)	SE1104625FM, F/V Lady Diane
Respondent.	)	

**INITIAL DECISION AND ORDER**

**Date:** February 4, 2013

**Before:** Susan L. Biro, Chief Administrative Law Judge, U.S. EPA<sup>1</sup>

**Appearances:** Karen Antrim Raine, Esq.  
Office of the General Counsel for Enforcement, Southeast Region,  
National Oceanic and Atmospheric Administration, U.S. Department of  
Commerce, St. Petersburg, Florida, for the Agency

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<sup>1</sup> The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011.

## **I. PROCEDURAL HISTORY**

On March 16, 2012, counsel for the National Oceanic and Atmospheric Administration (“NOAA” or “Agency”), on behalf of the Secretary of Commerce, instituted this action by issuing a Notice of Violation and Assessment of Administrative Penalty (“NOVA”) to Lady Diane, Inc., and David Eugene Smith, owner/operator of the F/V Lady Diane (“Lady Diane”) (“Respondents”). The Agency sent the NOVA to Respondent Smith at his physical address, 2268 Mayport Road Lot 59, Atlantic Beach, Florida 32233 (hereinafter the “record address”), and identified thereon its certified mail number.<sup>2</sup> The NOVA charges Respondents with one count of violating the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A), and Agency regulations at 50 C.F.R. §§ 622.7(l) and 622.35(i)(1)(vi), and proposes a total penalty of \$11,250. Respondents were advised therein of their right to respond and request “a hearing before an Administrative Law Judge (ALJ)” within thirty days of receiving the notice.

On April 16, 2012, the Agency filed a letter with this Tribunal stating that it had received a request for a hearing from Respondents on April 9, 2012, and that the Agency prefers the hearing be held in Jacksonville, Florida, for the convenience of Respondents, the Agency’s witnesses, and because the violations occurred in that general area.<sup>3</sup> The Agency submitted a copy of Respondents’ hearing request and a copy of the Agency’s NOVA with its letter. Respondents’ request, dated April 3, 2012, reads as follows: “To whom it may concern, I, David Eugene Smith and Lady Diane Inc. Request a Hearing concerning case # SE1104625 - NOVA.” The request was signed by David Smith and identified his address as 2268 Mayport Rd. #59 Atlantic Beach, Florida 32233 and his cell phone number as (904) 414-9487. Respondent Smith’s forwarded hearing request constitutes the entirety of his contact with this Tribunal during this proceeding.

On April 24, 2012, the undersigned issued an Assignment of Administrative Law Judge and Order to Submit Preliminary Positions on Issues and Procedures (PPIP) (“PPIP Scheduling Order”). The PPIP Scheduling Order was sent by this Tribunal to Respondent Smith’s record address via regular mail. In the PPIP Scheduling Order, the undersigned set forth various prehearing filing deadlines and procedures, and ordered the parties to file their respective PPIPs on or before May 25, 2012.<sup>4</sup> The PPIP Scheduling Order also listed the record address that this Tribunal had on file for Respondent Smith, and stated: “If this information is inaccurate or incomplete, please contact the undersigned’s staff attorney, Michael Wright, at (202) 564-3247 or [wright.michaelb@epa.gov](mailto:wright.michaelb@epa.gov).” Further, the parties were warned that failure to comply with the PPIP requirements may result in adverse action.

On June 21, 2012, having previously received PPIPs from Lady Diane, Inc., and the Agency but not Respondent Smith, the undersigned issued an Order to Show Cause to

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<sup>2</sup> In his April 03, 2012 hearing request, Respondent also self-identified his mailing address as 2268 Mayport Rd. #59 Atlantic Beach, Florida 32233.

<sup>3</sup> On April 30, 2012, the Agency forwarded to this Tribunal a second hearing request dated April 9, 2012, from Charles Headley on behalf of Lady Diane, Inc., as its president and owner.

<sup>4</sup> On May 24, 2012, the undersigned granted Respondent Lady Diane, Inc.’s Request for an Extension to submit its PPIP until June 8, 2012.

Respondent Smith at his record address.<sup>5</sup> The Order to Show Cause ordered Respondent Smith to file a document on or before July 6, 2012, explaining any good cause for his failure to submit his PPIP information and why an order adverse to his interests should not be issued.

After receiving no response from Respondent Smith, the undersigned issued a Decision on Response to Order to Show Cause and Hearing Order on July 19, 2012 (the "July 19 Order"). The July 19 Order was sent via regular mail to Respondent Smith's record address. That Order informed Respondent Smith that he would "not be permitted to introduce any defenses, testify, offer any evidence, call any witnesses, or otherwise introduce matters at hearing that he was required to identify in his PPIP." The July 19 Order also set forth prehearing filing deadlines and scheduled the hearing for September 19, 2012, in Jacksonville, Florida. Finally, the July 19 Order provided that "[i]f any party does not intend to attend the hearing, or has good cause for not being able to attend the hearing as scheduled, it shall notify Michael Wright, a staff attorney for the undersigned, at (202) 564-3247 or wright.michaelb@epa.gov, at the earliest possible moment."

On August 3, 2012, NOAA filed and served a Motion for Change in Hearing Date in Response to Decision on Response to Order to Show Cause and Hearing Order, requesting therein that the hearing date be moved to October 12, 2012. On August 14, 2012, the Agency filed and served an Updated Status Report, representing that the Agency settled with Respondent Lady Diane, Inc. The Agency stated that it was not engaged in settlement negotiations with Respondent Smith, and requested that Respondent Lady Diane, Inc., be removed from this case.

On August 20, 2012, the undersigned issued an Order of Dismissal of Respondent Lady Diane, Inc. and Order on Motion for Change in Hearing Date (the "August 20 Order"). That Order was sent via regular mail to Respondent Smith's record address. The August 20 Order informed the parties that the hearing would now take place on October 12, 2012. Four days before the August 20 Order was issued the Hearing Clerk sent via regular mail to Respondent Smith's record address a Notice of Hearing Location informing the parties of the time and place for hearing.

None of the orders served upon Respondent Smith by this Tribunal at his record address were returned by the United States Postal Service as undeliverable. In accordance with the Notice of Hearing Location, the hearing in this matter was held beginning at 9:30 a.m., on Friday, October 12, 2012, at the United States Courthouse Room #6A, 300 North Hogan Street, Jacksonville, Florida 32202. Respondent Smith did not appear for hearing, and no person appeared on his behalf. Upon consideration, and finding that Respondent Smith had waived his right to a hearing and consented to a judgment on the record, the undersigned entered default judgment against Respondent in accordance with 15 C.F.R. § 904.211. Tr. 8 at 4-9.<sup>6</sup> The Agency then presented its evidence, introducing thirty-two exhibits and the testimony of two witnesses: Lieutenant Brad Givens and Dr. Jack McGovern in support of its proposed penalty. At hearing, Agency counsel advised the Tribunal that it was now seeking a reduced penalty of \$10,750 against Respondent Smith, representing the balance of the proposed penalty after it

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<sup>5</sup> On June 14, 2012, a staff attorney for the undersigned attempted to reach Respondent Smith at the cell phone number that he provided but discovered that the number was no longer in service.

<sup>6</sup> Citations herein to the transcript are made as follows: "Tr. [page] at [line]" or "Tr. [page]."

settled with Lady Diane, Inc., for \$500. Tr. 8 at 18-25; 9 at 1-7. Agency counsel chose not to make a closing statement or file a post-hearing brief. Tr. 26 at 11-19.

## **II. FACTUAL BACKGROUND**

On October 14, 2011, at approximately 7:50 p.m., Florida Fish and Wildlife Commission (“FWC”) Officers Rob Geib, Jill Izsak, and Lieutenant Brad Givens observed commercial fishing vessel Lady Diane at anchor within the North Florida Marine Protected Area (“MPA”). NOAA Exs. 1, 2, 10, 12-14, 20-23. Officer Izsak verified the vessel’s location within the MPA with a global positioning satellite (“GPS”) no less than three times during the encounter. NOAA Ex. 2. “Officers Izsack and Geib boarded the Lady Diane to conduct an inspection and discovered that there were grouper / snapper complex species on board . . . [including] red porgy, triggerfish, rock hind and tomtate” in the amount of approximately 150 pounds. NOAA Exs. 1, 10, 15. At the time that she boarded the vessel, Officer Izsak recorded its location at 30°26.388’ N latitude and 080°12.566’ W longitude. NOAA Exs. 2, 10, 16, 23; *see and compare* NOAA Ex. 7 (Respondent Smith’s plotted location and initials on NOAA nautical chart 11480), 8 (the Lady Diane’s coordinates within MPA boundaries mapped by Lt. Givens on NOAA nautical chart 11480).

The vessel, anchored within the North Florida MPA area approximately 60 miles offshore of Mayport, Florida, “had bandit gear on the gunnels and a rod and reel in a rod holder which was baited with squid.” NOAA Exs. 1, 10, 20. Upon boarding the vessel, Officer Izsack contacted three crew members on board - Respondent Smith (the captain), David Herndon and James Ray Morgan, all of whom admitted to have been fishing for at least an hour at the spot where they were anchored and boarded. NOAA Exs. 10, 12-14. Respondent Smith’s sworn statement that he provided to Officer Izsack states the following:

I was Fishing at the Location Pointed out on the chart For appox. [sic] 1 Hr. at 7:00 PM and About 4 miles South throughout the day. I Have Been Fishing Here in this Area ON and OFF throughout a 25 year perid [sic]. I HAd NO IDEa of any protected or closed Bottom in the area.

NOAA Ex. 12. The Officers seized the fish that was on board and sold it at auction for \$292.00. NOAA Exs. 1, 17-18, 22.

## **III. APPLICABLE LAW AND REGULATIONS**

### **A. Liability**

#### **i. Magnuson-Stevens Fishery Conservation and Management Act**

The Magnuson-Stevens Fishery Conservation and Management Act (“Act”) provides in pertinent part that “[i]t is unlawful . . . for any person . . . to violate any provision of this chapter or any regulation or permit issued pursuant to this chapter.” 16 U.S.C. § 1857(1)(A).

ii. Regulations

The regulations pertaining to certain seasonal or closed areas provide in pertinent part:

[I]t is unlawful for any person to . . . [f]ish in violation of the prohibitions, restrictions, and requirements applicable to seasonal and/or area closures, including but not limited to: Prohibition of all fishing, gear restrictions, restrictions on take or retention of fish, fish release requirements, and restrictions on use of an anchor or grapple, as specified in § 622.33, § 622.34, or § 622.35, or as may be specified under § 622.46 (b) or (c).

50 C.F.R. § 622.7(1). Section 622.35, regarding Atlantic Exclusive Economic Zone (“EEZ”) seasonal and/or area closures, provides in pertinent part:

(i) MPAs.

(1) No person may fish for a South Atlantic snapper-grouper in an MPA, and no person may possess a South Atlantic snapper-grouper in an MPA. However, the prohibition on possession does not apply to a person aboard a vessel that is in transit with fishing gear appropriately stowed as specified in paragraph (i)(2) of this section. In addition to these restrictions, see § 635.21(d)(1)(iii) of this chapter regarding restrictions applicable within these MPAs for any vessel issued a permit under part 635 of this chapter that has longline gear on board. MPAs consist of deepwater areas as follows:

\* \* \*

(vi) North Florida MPA is bounded on the north by 30°29' N. lat.; on the south by 30°19' N. lat.; on the east by 80°02' W. long.; and on the west by 80°14' W. long.

\* \* \*

(2) For the purpose of paragraph (i)(1) of this section, transit means direct, non-stop progression through the MPA. Fishing gear appropriately stowed means - -

\* \* \*

(iv) Terminal gear (i.e., hook, leader, sinker, flasher, or bait) used with an automatic reel, bandit gear, buoy gear, handline, or rod and reel must be disconnected and stowed separately from such fishing gear. A rod and reel must be removed from the rod holder and stowed securely on or below deck.

50 C.F.R. § 622.35(i).

**B. Penalty**

The Act provides, in pertinent part, that “[a]ny person who is found by the Secretary, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, to have

committed an act prohibited by section 1857 of this title shall be liable to the United States for a civil penalty,” which shall not exceed \$100,000. 16 U.S.C. § 1858(a). The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended by the Debt Collection and Improvement Act of 1996, Pub. L. 104-134, resulted in the Secretary increasing this amount to \$140,000 per violation. 15 C.F.R. § 6.4(f)(14); 15 C.F.R. § 6.4 (Dec. 11, 2008). “In determining the amount of such penalty, the Secretary shall take into account 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.” 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(a).<sup>7</sup>

Pursuant to 5 U.S.C. § 3344 and 5 C.F.R. § 930.208, the U.S. Office of Personnel Management approved an agreement between the Agency and the U.S. Environmental Protection Agency (“EPA”), which holds that EPA Administrative Law Judges may preside over certain Agency administrative enforcement proceedings initiated pursuant to the Magnuson-Stevens Fishery Conservation and Management Act and other statutes.

#### **IV. DISCUSSION**

##### **A. Default Judgment**

The Rules of Practice provide that the Agency may serve a NOVA “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.” 15 C.F.R. § 904.3(a). Service is considered effective upon receipt. *Id.* After the NOVA is served and a hearing is requested, all other documents must be served on the respondent “by first class mail (postage prepaid), facsimile, electronic transmission, or third party commercial carrier, to an addressee’s last known address or by personal delivery.” 15 C.F.R. § 904.3(b). Service for these papers is considered effective “upon the date of postmark . . . , facsimile transmission, delivery to third party commercial carrier, electronic transmission or upon personal delivery.” *Id.* For both a NOVA and all subsequently filed documents, service “may effectively be made on the agent for service of process, on the attorney for the person to be served, or other representative.” 15 C.F.R. § 904.3(c).

On March 16, 2012, the Agency issued and mailed the NOVA to Respondent at the 2268 Mayport Road address, which was his known address at the time, by certified mail, in accordance with 15 C.F.R. § 904.3. Respondent Smith’s receipt of the NOVA is evidenced by his subsequent written request for a hearing dated April 3, 2012. Therefore, pursuant to 15 C.F.R. § 904.3(a), the Agency served Respondent with the NOVA on or before that date. *Gonzalez et al. v. NOAA*, 420 Fed. Appx. 364, 368 (5th Cir. 2011) (under the Rules of Practice, NOAA may serve the NOVA by certified mail to the respondent’s last known address

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<sup>7</sup> Recent modifications to the Rules of Practice removed any presumption in favor of the Agency’s proposed penalty and the requirement that the presiding judge state good reason(s) for departing from the Agency’s analysis. 75 Fed. Reg. 35631-01 (June 23, 2010). Instead, the presiding judge has the “authority and duty” to “[a]ssess a civil penalty . . . , taking into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m).

“regardless of who signs for receipt”) (citing *United States v. Robinson*, 434 F.3d 357, 366 (5th Cir. 2005) (“Due process does not require actual notice or actual receipt of notice.”)); *United States v. Ngo Tra*, 1994 U.S. Dist. LEXIS 8948, \*11 (E.D. La.).

The presiding officer in an administrative proceeding is required by the Rules of Practice to “promptly serve on the parties notice of the time and place of hearing,” which “will not be held less than 20 days after service of the notice of hearing . . . .” 15 C.F.R. § 904.250(a). Respondent Smith was first notified of the updated time and place for hearing by the Hearing Clerk’s August 16, 2012 Notice of Hearing Location, and then again in the undersigned’s August 20, 2012 Order of Dismissal of Respondent Lady Diane, Inc. and Order on Motion for Change in Hearing Date. Both were sent via regular mail to Respondent Smith at his record address. Thus, it is found that Respondent Smith was properly notified of the time and place of the hearing in accordance with the Rules of Practice. 15 C.F.R. § 904.250(a).

As to default, the Rules of Practice provide that “[i]f, after proper service of notice, any party appears at the hearing and an opposing party fails to appear, the Judge is authorized . . . [w]here the respondents have failed to appear, [to] find the facts as alleged in the NOVA . . . and enter a default judgment against the respondents.” 15 C.F.R. § 904(a). Further, the Judge “may deem a failure of a party to appear after proper notice a waiver of any right to a hearing and consent to the making of a decision on the record.” 15 C.F.R. § 904(d). Having been properly served with the NOVA, duly notified of the time and place of the hearing, and served effectively throughout this proceeding, Respondent Smith failed to appear and thereby waived his right to further contest the proceedings. Default judgment was properly entered against him at the hearing on October 12, 2012.

### **B. The Agency’s Burden of Proof**

Default judgment having been entered, all facts alleged in the NOVA are deemed true. 15 C.F.R. § 904.211(a)(2). Findings based on the facts alleged in the NOVA and the evidence presented at the hearing are made below. *See O’Neil*, NOAA Docket No. 315-189, 1995 WL 1311366, at \*5 (ALJ, June 14, 1995) (addressing each of respondent’s defenses raised before the hearing even though respondent failed to appear at the hearing and was found in default, so as to ensure a “full and fair hearing” nonetheless).

To prevail on its claims that Respondent Smith violated the Act and the regulations, the Agency must prove facts constituting the violations by a preponderance of reliable, probative, substantial, and credible evidence. 5 U.S.C. § 556(d); *Cuong Vo*, NOAA Docket No. SE010091FM, 2001 WL 1085351 (ALJ, Aug. 17, 2001) (citing *Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100-103 (1981)); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). Direct and circumstantial evidence may establish the facts constituting a violation of law. *Id.*

### **C. Ultimate Findings of Fact and Conclusions of Law**

Having imposed default judgment against Respondent Smith, and the factual background having been stated in detail above, it is appropriate to set forth abbreviated findings of fact and

conclusions of law. Upon thorough and careful review of the documentary and testimonial evidence in the record of this proceeding, I find that the Agency has proven by a preponderance of the evidence the following:

1. Respondent David Eugene Smith is a “person” as defined by the Magnuson-Stevens Fishery Conservation and Management Act, and is subject to the jurisdiction of the United States. 16 U.S.C. § 1802(36); NOAA Exs. 11, 12, 15.
2. On October 14, 2011, Respondent Smith was operating the F/V Lady Diane, which was anchored within the North Florida MPA, had bandit gear on the gunnels rigged for fishing, and a rod and reel on board baited with squid. NOVA at 1; NOAA Exs. 1, 2, 7, 8, 10-12, 19-23.
3. On October 14, 2011, while fishing in the North Florida MPA on board the F/V Lady Diane, Respondent Smith was in possession of approximately 150 pounds of South Atlantic snapper / grouper species. NOVA at 1; NOAA Exs. 1, 10-12, 14, 15, 20-22.
4. Respondent Smith is liable under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A), for violating fishing regulations issued pursuant to the Act, at 50 C.F.R. §§ 622.7(l) and 622.35(i)(1)(vi). 16 U.S.C. § 1857(1)(A); NOVA at 1.
5. Because Respondent Smith violated regulations promulgated under the Magnuson-Stevens Fishery Conservation and Management Act, the Secretary may assess a civil penalty against him in an amount no greater than \$140,000. 16 U.S.C. § 1858(a); 15 C.F.R. § 6.4(f)(14); 73 Fed. Reg. 75321-01 (Dec. 11, 2008).

#### **D. Civil Penalty Assessment**

##### **i. The Agency’s Penalty Analysis**

At the hearing, the Agency submitted a Penalty Assessment Worksheet (“Worksheet”) (NOAA Ex. 32), which states that the penalty proposed “is based on a review and application of the facts that comprise the violation(s) charged, penalty schedules, penalty matrixes, adjustment factors, and economic considerations set forth in NOAA’s ‘Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions’” (“Penalty Policy”).<sup>8</sup> The Penalty Policy, dated March 16, 2011, was designed to help NOAA attorneys determine fair, consistent and appropriate penalties that would serve as a deterrent to potential violators and eliminate economic incentives for noncompliance. 76 Fed. Reg. 20959, 20959 (Apr. 14, 2011).

The Penalty Policy’s first calculation is the gravity-of-offense level, which takes into account the nature, circumstances and extent of a violation, and ranges from least significant (“I”) to most significant (“IV”). Penalty Policy at 7-8. At this stage, the Penalty Policy also contemplates, among other considerations, whether the species at issue is particularly vulnerable because of its slow reproduction rate; whether the violation involves fishing in closed areas; and whether the violation is difficult to detect without an on-scene enforcement presence. *Id.* at 8.

<sup>8</sup> This Agency Penalty Policy is accessible to the public at the following URL:  
[http://www.gc.noaa.gov/documents/031611\\_penalty\\_policy.pdf](http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf)

The Agency's position as stated in its Worksheet is that the gravity-of-offense level in this case is "III." NOAA Ex. 32.

The second metric is the violator's culpability level. The Penalty Policy considers four: intentional, recklessness, negligence, and unintentional (including accident, mistake, and strict liability). Penalty Policy at 8-9. Determining the violator's culpability level requires consideration of whether the violator took reasonable precautions against the events constituting the violation, how much control the violator had over the events constituting the violation, whether the violator knew or should have known about the potential harm, and other similar factors as appropriate. *Id.* at 9. The Agency's position is that Respondent Smith's culpability at the time of the violation was "Negligent."

Viewing the Agency's selected gravity-of-offense level ("III") and culpability level ("Negligent") as they relate on the Agency's Penalty Matrix for the Magnuson-Stevens Fishery Conservation and Management Act ("Matrix") (Penalty Policy at 25), the base penalty range available for this violation is \$10,000-\$15,000.

After determining the base penalty range, the Penalty Policy instructs Agency attorneys to consider whether certain adjustment factors should increase or decrease the base amount, starting from the mid-point of the available range, which is \$12,500 in this case. Penalty Policy at 10; NOAA Ex. 32. These factors are: the violator's history of noncompliance, whether the violator's conduct involves commercial or recreational activity, and the violator's conduct after the violation. *Id.* In its Worksheet, the Agency proposes a downward adjustment of \$1,250 for Respondent Smith's "Activity After Violation/Cooperation." NOAA Ex. 32. The Agency does not propose an adjustment for history of compliance or the commercial/recreational distinction.

The Penalty Policy then directs the Agency to determine the violator's economic benefit from noncompliance and to add that amount to the penalty. Penalty Policy at 12. The Agency determined that Respondent Smith's total economic benefit is \$0, as measured by the Penalty Policy's two economic adjustment factors: proceeds of unlawful activity (\$0), and any additional economic benefit (\$0). NOAA Ex. 32. Finally, the violator's ability to pay is to be considered if raised and supported by the alleged violator "at the appropriate stage." Penalty Policy at 14; 15 C.F.R. § 904.108. No evidence of Respondent Smith's inability or ability to pay was submitted at any time in this proceeding, and the Agency did not adjust its proposed penalty based on this factor.

Pursuant to this analysis, the Agency sought the imposition of an \$11,250 penalty against Respondent Smith and Respondent Lady Diane, Inc., for one count. NOAA Ex. 32. Now, the Agency seeks to reduce that amount by \$500 due to Lady Diane, Inc.'s settlement, for a total amount sought against Respondent Smith of \$10,750. Tr. 8 at 18-25; 9 at 1-7.

The Agency's analysis is not presumed accurate, and its proposed penalty is not presumed appropriate. 75 Fed. Reg. 35631-01 (June 23, 2010); *Nguyen & Harper*, NOAA Docket No. SE0801361FM, 2012 WL 1497024, at \*8 (ALJ, Jan. 18, 2012); 15 C.F.R. § 904.204(m). Further, there is no obligation imposed upon the presiding judge to state good reasons for departing from the Agency's analysis or the guidelines set forth in the Penalty Policy

materials. *Id.* However, given the similarities between the Penalty Policy’s considerations and the factors listed in the Rules of Practice, it may be useful to consider the Agency’s application of the Policy to the facts at bar. Therefore, in view of the Agency’s determinations in the Worksheet and of the Penalty Policy, the following penalty is assessed in accordance with the factors set forth in 15 C.F.R. § 904.108(a).

ii. Nature, Circumstances, Extent and Gravity of the Alleged Violation

At the hearing, witnesses testified to factors relevant to the gravity of the violation, e.g., whether the species at issue is particularly vulnerable, whether the violation involves fishing in closed areas, and whether the violation is difficult to detect without an on-scene enforcement presence. Penalty Policy at 8.

Dr. McGovern testified that the snapper / grouper fish species are “extremely vulnerable to overfishing” because they are long-lived, and the “Marine Protected Areas are intended to allow fish to achieve their maximum potential in terms of age and size, reproductive potentials.” Tr. 19; *see* NOAA Exs. 27, 30.

Dr. McGovern also explained generally why it is more difficult for law enforcement agents to enforce regulations within the North Florida MPA, a Type II MPA. Tr. 24-25. Unlike Type I MPAs where no transit is allowed whatsoever, in Type II MPAs, some fishing and transit is still permitted. *Id.* Therefore, whereas in a Type I MPA, law enforcement could simply fly over to detect violations, or merely witness a vessel in transit within the area, in a Type II MPA, agents need to be on-scene and board the vessels in order to enforce the particular prohibitions. *Id.* Dr. McGovern added that this difficulty in enforcement is one reason why the National Marine Fishery Service and the South Atlantic Council decided that a substantial penalty for violations in a Type II MPA would be appropriate. *Id.*; NOAA Ex. 29.

Lt. Givens credibly testified more specifically regarding how difficult the North Florida MPA area is to patrol because of its location at about “60 miles due east of the St. Johns River entrance” and the fuel range of his vessel limits the amount of time that FWC officers are able to patrol the MPA. Tr. 10-11. The Sea Hawk is the primary patrol vessel that would patrol the North Florida MPA, but between March 2011 and October 2012, Lt. Givens has only been able to patrol the area four times because of fuel and weather limitations. Tr. 11-12.

Considering the vulnerabilities of snapper / grouper species to overfishing and the potential harm to that resource, which is only compounded by the fact that the North Florida MPA is difficult to patrol, the Agency’s characterization of Respondent Smith’s violation as level “III” in gravity is deemed well-founded.

iii. Respondent’s Degree of Culpability, Any History of Prior Violations, Ability to Pay

The Agency asserts that Respondent was “negligent” in violating the MPA regulations, which the Penalty Policy defines as “the failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances,” or “carelessness.” Penalty Policy at 9.

Though Respondent Smith reported at the time the Lady Diane was boarded that he did not know the area in which he was anchored was closed to fishing, the duty to know and follow the law is squarely on him. NOAA Ex. 12; *O'Neil*, 1995 WL 1311366, at \*5 (“commercial fishing is regulated and those engaged in it for profit activities are required to keep abreast of and abide by the laws and regulations that affect them”); *Peterson & Weber*, 6 O.R.W. 486, 1991 NOAA LEXIS 34, at \*9 (ALJ, July 19, 1991) (“When one engages in a highly regulated industry, that person bears the responsibility of knowing and interpreting the regulations governing that industry.”). The difficulty involved in staying apprised of closed fishing areas is mitigated by the public nature of the rulemaking process, Dr. Jack McGovern, South Atlantic Branch Chief for Sustainable Fisheries at the Southeast Regional Office NOAA testified, especially because here the public was able to make comments and recommendations at least twice before the rule was even officially proposed, and could do so even online or at various public hearings. Tr. at 16-18; see NOAA Exs. 27, 31. “It’s a very public process,” he testified.

However, there is nothing in the record to suggest that Respondent Smith was not being truthful, and his statements about how long he had been fishing at his location, and how long he intended to stay, was corroborated by the other crew on board. NOAA Exs. 12-14. It appears that he was cooperative throughout the Agency’s investigation, and that he waived, without protest, any claim he might have had to the fish that was aboard the Lady Diane. NOAA Ex. 15.

The weight of evidence supports the Agency’s finding that Respondent Smith was “negligent,” and also suggests that Respondent Smith’s cooperative behavior warrants a downward adjustment to the base penalty. The Agency’s proposed reduction of the mid-range base penalty by \$1,250 is appropriate.

The Rules of Practice state that if the respondent wants the presiding judge to consider his inability to pay the penalty, he must submit “verifiable, complete, and accurate financial information” to the Agency in advance of the hearing. 15 C.F.R. § 904.108(e). No evidence of Respondent Smith’s inability or ability to pay was submitted at any time in this proceeding. As such, no adjustment based on Respondent Smith’s ability or inability to pay shall be made.

#### iv. Proceeds of the Unlawful Activity and Additional Economic Benefit

Finally, though it has been said that for small scale commercial fishing operations, “it only stands to reason that . . . any sanction assessed would impact such individuals more significantly than if imposed against a larger commercial enterprise,” there is no evidence in the present record showing the size or profitability of Respondent Smith’s commercial operation as captain of a fishing vessel, or Respondent Smith’s personal financial status. *Churchman & Paasch*, NOAA Docket No. SW0703629, 2011 WL 7030841, at \*39 (ALJ, Feb. 18, 2011). The only related facts in the record are that approximately 150 pounds of fish were seized from on board the fishing vessel on October 14, 2011, and were sold at auction for \$292. NOAA Exs. 1, 15-18, 21, 22. There is no evidence showing that Respondent Smith gained any economic benefit from this particular noncompliance.

Upon consideration of all the foregoing, it is determined that for this single violation, a civil penalty in the amount of \$10,750 is appropriately imposed against Respondent Smith.

**ORDER**

A total penalty of **\$10,750** is hereby **IMPOSED** on **Respondent David Eugene Smith** for the violation upon which he was found liable herein.

As provided by 15 C.F.R. § 904.105(a), payment of the penalty in full shall be made within **30 days** of the date this decision become 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 13<sup>th</sup> Avenue South, Suite 177  
St. Petersburg, FL 33701

**PLEASE TAKE NOTICE**, that any petition for reconsideration of this Initial Decision must be filed with the undersigned within **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 **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 to have this Initial Decision reviewed by the NOAA Administrator must be filed with the Administrator within **30 days** after the date this Initial Decision is served and in accordance with the requirements set forth at 15 C.F.R. § 904.273. A copy of 15 C.F.R. §§ 904.271-273 is attached.

**PLEASE TAKE FURTHER NOTICE**, that this Initial Decision becomes effective as the final Agency action **60 days** after service, on **April 4, 2013**, 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 **30 days** from the date on which this decision becomes 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).

**SO ORDERED.**



Susan L. Bird  
Chief Administrative Law Judge  
U.S. Environmental Protection Agency<sup>9</sup>

Dated: February 4, 2013  
Washington, D.C.

<sup>9</sup> As stated above, the Administrative Law Judges of the U.S. EPA are authorized to hear cases pending before the Agency pursuant to an agreement effective September 8, 2011.

LEXISNEXIS' CODE OF FEDERAL REGULATIONS  
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\*\*\* This section is current through the January 31, 2013 \*\*\*  
\*\*\* issue of the Federal Register \*\*\*

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.

(1) 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.