



UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:)	Docket Number:
)	
LT Seafood, LP,)	SE0700890FM
)	
Respondent.)	

INITIAL DECISION AND ORDER

Date: June 4, 2013

Before: Susan L. Biro, Chief Administrative Law Judge, U.S. EPA¹

Appearances: For the Agency:

Cynthia S. Fenyk, Esquire
Office of General Counsel
Enforcement Section (Southeast)
National Oceanic and Atmospheric Administration
U.S. Department of Commerce
263 13th Avenue South
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¹ 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 May 23, 2007, 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”) and a Notice of Permit Sanction (“NOPS”) to LT Seafood, LP (“Respondent”). The NOVA and NOPS both charge Respondent in four identical counts 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(a) and (gg), by failing to comply with requirements of the Gulf red snapper Individual Fishing Quota program set forth at 50 C.F.R. §§ 622.4, 622.16. NOVA at 2; NOPS at 1–2. The NOVA proposes the assessment of a civil penalty of \$30,000 for each of the first three counts of violation, and \$10,000 for the fourth count, for a total proposed penalty amount of \$100,000. NOVA at 1. The NOPS proposes that all federal dealer permits issued to Respondent be suspended for 45 days per count, for a total of 180 days. NOPS at 2. The NOVA and NOPS each contain a provision notifying the Respondent of its right to respond and request a hearing before an Administrative Law Judge on the charges therein within thirty days of receiving the notices. NOVA at 1; NOPS at 1.

The NOVA and NOPS reflect that upon their issuance in May 2007, the Agency sent copies of the documents by certified mail to Respondent at 415 E. Hamilton Street, Houston, Texas 77076 (“Hamilton Street address”).² Five and a half years later, on October 10, 2012, the Agency filed a cover letter with this Tribunal stating that the “attached request for hearing was received . . . on September 11, 2012.” The referenced attachment to the Agency’s cover letter is correspondence dated September 11, 2012, sent certified mail by Seth A. Nichamoff, Esquire to Respondent LT Seafood, LP at the Hamilton Street address, and Respondent’s owner, Ten Lam³ at 15018 Terrace Oaks, Houston, Texas 77068 (“Terrace Oaks address”), upon which Agency counsel was copied, which references by name and number the aforementioned NOVA and NOPS. In the letter, Mr. Nichamoff states, *inter alia*, that:

LT Seafood properly and timely requested a hearing before an Administrative Law Judge to contest the permit sanction. Based upon LT Seafood’s failure to respond to our office as how to proceed with the referenced matter, the previous request for hearing was withheld and we have informed NOAA that we are uncertain as to whether LT Seafood still wants a hearing in this matter. As such, we are no longer able to serve as counsel for LT Seafood and withdraw in representing LT Seafood in the matter.⁴

² Respondent identified the Hamilton Street address as its business and mailing address in its 2005, 2006 and 2007 annual applications for Federal fish dealer permits submitted to NOAA. Agency’s Hearing Exhibit (“AE”) 7.

³ Respondent identified Mrs. Ten Lam of 15018 Terrace Oaks, Houston, Texas 77068 as the “owner” and/or “President/CEO” of LT Seafood in its 2005, 2006 and 2007 applications for a Federal fish dealer permit. AE 7.

⁴ As explanation for the 5 year delay in prosecution, the Agency counsel at hearing acknowledged that Respondent’s counsel had timely filed a “protective hearing request and

Thereafter, on October 24, 2012, the undersigned issued an Assignment of Administrative Law Judge and Order to Submit Preliminary Positions on Issues and Procedures (PPIP) ("PPIP Order"). In the PPIP Order, the parties were each ordered to submit a PPIP in accordance with 15 C.F.R. § 904.240 no later than November 30, 2012. Copies of the PPIP Order were sent by regular mail and by certified mail to Respondent at both the Hamilton Street and Terrace Oaks addresses. The copies sent to Respondent at the Hamilton Street address via regular mail and certified mail were both returned to the undersigned's office, marked undeliverable. The certified mail sent to the Terrace Oaks address was also later returned; however, the PPIP Order sent via regular mail to that address was not returned.

The Agency timely filed its PPIP on or before November 30, 2012, but the Respondent did not. As such, on December 14, 2012, the undersigned issued an Order to Respondent to Show Cause, requiring therein that Respondent file a document on or before January 4, 2013, explaining its failure to submit a PPIP and why an order adverse to its interests should not be issued. Copies of the Order to Respondent to Show Cause were sent by regular mail and by certified mail to Respondent at the Hamilton Street and Terrace Oaks addresses. The certified mail sent to Terrace Oaks was returned, marked "undeliverable as addressed," but no other mailing of the Order to Respondent to Show Cause was returned.

On December 18, 2012, Agency counsel informed staff of this Tribunal that its PPIP had been successfully delivered to Respondent via UPS to 10107 Woodico Drive, Houston, Texas 77038 ("Woodico Drive address"), which local real property records had indicated to the Agency as a valid address for "Lam Ten Kha." Staff of the undersigned promptly mailed a copy of the PPIP Order and the Order to Respondent to Show Cause to that address via regular mail and certified mail. The certified mail was returned, marked "unclaimed." The regular mail was not returned.

On January 14, 2013, staff of the undersigned attempted to contact Respondent at the only e-mail address for Respondent in the record; however, an error message notified staff that it was not delivered and stated that "Mailbox quota exceeded." It was then discovered that the U.S. Postal Service on one of the returned mailings had suggested an alternative address: "Lam, 3303 Pebble Trace Dr, Houston, TX, 77068-2049" ("Pebble Trace address"). In response, copies of the two orders that had been issued and a letter from staff of this Tribunal requesting that Respondent contact her about this proceeding, were sent to Respondent at the Pebble Trace address via UPS on January 15, 2013. The next day, UPS confirmed that the mail had been delivered to the "FRONT DOOR" of the addressee. Still, no response from the Respondent to any of the mailings in regard to this matter was received by this Tribunal.

On February 5, 2013, the Agency filed a Motion to Allow Additional Discovery and to Compel Response to Attached Written Request for Admissions ("Motion" or "Mot."). As

directed the Agency to withhold sending the hearing request forward" to an Administrative Law Judge while an administrative search warrant was executed and the Agency reviewed the information produced from the search. Tr. 5-8. The Agency courteously complied with such request, but in the interim Respondent's counsel lost contact with his client, leading to further delay and the eventual withdrawal of representation. Tr. 7-8.

justification for its request for additional discovery and/or compelled response, the Agency advised that its PPIP “was signed for and successfully delivered via UPS” to the Woodico address which 2012 Harris County, Texas’ land records reflect as property owned by “Lam Ten Kha,” Respondent’s President/CEO. Mot. at 1; Mot. Attachment (“Att.”) 1. In support thereof, the Agency attached records from UPS indicating that the package with its PPIP was signed for by “Nguyen” at 9:41 a.m. on December 6, 2012. Att. 1. NOAA further advised that on January 15, 2013, it had attempted to deliver to Ten Kha Lam at that same address via UPS copies of this Tribunal’s Show Cause Order with other pertinent documents, but that UPS records reflected that at both 10:16 a.m. and 6:52 p.m. on that date that “[t]he receiver did not want the order and refused this delivery.” Mot. at 2, n.2; Att. 2. Finally, the Agency noted in its Motion that despite Respondent’s apparent receipt of the Agency’s PPIP, and the subsequent issuance of a Show Cause Order by this Tribunal, the Respondent had failed to provide the Agency with any discovery. Mot. at 2. NOAA served the Motion on Ten Kha Lam at the Woodico Drive address on February 5, 2013 by regular mail.

No response to the Motion from the Respondent was received by this Tribunal. On February 6, 2013, the undersigned issued a Notice of Hearing, Order on Motion for Additional Discovery, and Hearing Order (“Hearing Order”), setting forth additional prehearing filing deadlines and scheduling the hearing for March 12, 2013 in Houston, Texas. In the Hearing Order, the undersigned also granted the Agency’s request to serve its Written Request for Admissions (“Request for Admissions”) on Respondent, and ordered Respondent to respond to such document within 20 days of receipt pursuant to 15 C.F.R. § 904.243(b). Moreover, the Hearing Order set deadlines for the filing of any additional discovery motions, joint stipulations, and prehearing briefs, listed this Tribunal’s various addresses, and explained the filing and service requirements set forth in the rules governing this proceeding set forth at 15 C.F.R. Part 904 (“Rules of Practice”). The Hearing Order advised the Agency and Respondent that failure to appear at the hearing, without good cause being shown, may result in default judgment being entered against the absent party. Copies of the Hearing Order were sent to Respondent by regular mail and UPS to the Woodico Drive, Pebble Trace and Terrace Oaks addresses; none were returned.

On February 13, 2013, the Agency filed a Motion to Exclude Respondent’s Introduction into Evidence of Testimony, Documents, or Other Evidence (“Motion to Exclude”), seeking therein restrictions on what Respondent could introduce into evidence or otherwise rely upon at the hearing. The Agency also filed a document certifying that when it served its Request for Admissions on Respondent, it attached exhibits identical to those the Agency intended to submit for the record at hearing. The Agency submitted with this document a certificate of service, photocopies of the UPS mailing labels for the Request for Admissions, and three UPS “Proof of Delivery” notices confirming delivery of copies of its Request for Admissions on February 8, 2013, to the front door at the three addresses on file for Respondent.

On February 22, 2013, the Agency filed a statement indicating that it had sent proposed Joint Stipulations to Respondent on February 12, 2013, via UPS to the Woodico Drive, Terrace Oaks, and Pebble Trace addresses. The Agency further indicated that it had not received a response from Respondent regarding the proposed Joint Stipulations and that its “efforts to initiate a telephone call . . . to discuss the served Joint Stipulations . . . were not successful”

By Order dated March 5, 2013, the undersigned granted the Agency's Motion to Exclude, and, because Respondent had not responded to the Agency's Request for Admissions as ordered, found that pursuant to 15 C.F.R. § 904.243, each matter stated in such Request was deemed admitted by Respondent and conclusively established in this proceeding. Copies of the undersigned's Order were sent by regular mail and UPS to the Woodico Drive, Terrace Oaks, and Pebble Trace Drive addresses.⁵

The hearing in this matter was held on March 12, 2013, at the Bob Casey United States Court House, 515 Rusk Street, Room 7006, Houston, Texas. Respondent did not appear at the hearing, nor did any person appear on Respondent's behalf. Finding that Respondent had been given proper notice of its opportunity for a hearing, had waived its right to such hearing, and had consented to a decision on the record, the undersigned entered default judgment against Respondent and found all facts as alleged in the NOVA and NOPS to be true. Tr. 10-11.⁶ During the hearing, the Agency offered into evidence nine exhibits and all were admitted.⁷ Tr. 11-12. Additionally, the Agency presented the testimony of one witness, Special Agent Charles Tyer of the NOAA Office of Law Enforcement. Tr. 12-34.

On April 1, 2013, an electronic copy of the hearing transcript was received by this Tribunal and forwarded on to Agency counsel. On April 3, 2013, the Hearing Clerk received the original transcript. On April 4, 2013, the undersigned issued a Post-Hearing Scheduling Order ("Post-Hearing Order"), establishing a briefing schedule. The Post-Hearing Order and a copy of the transcript were sent to Respondent at the Terrace Oaks address by regular mail. To date, this mailing has not been returned. No post-hearing briefs were filed and, as such, the record closed.

II. THE LAW AND REGULATIONS APPLICABLE TO LIABILITY

Finding that a "national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, to facilitate long-term protection of essential fish habitats, and to realize the full potential of the Nation's fishery resources," in 1976, Congress first enacted the Magnuson-Stevens Fishery Conservation and Management Act ("the Act").⁸ Pub. L. 94-265 § 2(b), 90 Stat.

⁵ On March 25, 2013, after the hearing had taken place, the copy of the Order granting the Agency's Motion to Exclude sent by regular mail to the 10107 Woodico Drive address was returned to this office; none of the other mailings were returned.

⁶ Citations herein to the transcript are made as follows: "Tr. [page]."

⁷ Citations herein to the Agency's exhibits are made as follows: "AE [number] at [page]."

⁸ The title of the Act was initially "The Fishery Conservation and Management Act" but was changed in 1980 to the "Magnuson Fishery Conservation and Management Act," Pub. L. 94-561 § 238, 94 Stat. 3275 (1980), and then to the Magnuson-Stevens Fishery Conservation and Management Act with the enactment of the Sustainable Fisheries Act on October 11, 1996, Pub.

331, 332–33 (1976) (codified at 16 U.S.C. § 1801 *et seq.*). The purpose of the Act is “to promote domestic commercial and recreational fishing under sound conservation and management principles” and “to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery.”⁹ 16 U.S.C. § 1801(a)(6), (b)(3),(4) (1976). The Act mandates the establishment of eight Regional Fishery Management Councils, including a Gulf of Mexico Fishery Management Council,¹⁰ and requires each council to design fishery management plans “for each fishery under its authority that requires conservation and management.” 16 U.S.C. § 1852(a)(1)(E), (h)(1) (2007). Such management plans are required to “assess and specify” the “maximum sustainable” and “optimum yield” from the fishery as well as the “capacity and extent,” on an annual basis, to which fishing vessels will harvest the optimum yield and fish processors will process that portion of such optimum yield harvested. 16 U.S.C. § 1852(a)(1)(4)(A)-(C) (2007).

Pursuant to the Act, fishery management plans may “require a permit to be obtained from, and fees to be paid to, the Secretary, with respect to . . . any United States fish processor who first receives fish that are subject to the plan.” 16 U.S.C. § 1853(b)(1)(C). Fishery management plans may also require fish processors who receive fish subject to the plan to “submit data which are necessary for the conservation and management of the fishery.” 16 U.S.C. § 1853(b)(7). The Act defines “United States fish processors” as “facilities located within the United States for, and vessels of the United States used or equipped for, the processing of fish for commercial use or consumption.” 16 U.S.C. § 1802(46).

Section 307 of the Act makes it “unlawful [] for any person [] to violate any provision of [Chapter 38. Fishery Conservation and Management] or any regulation or permit issued pursuant to this chapter.” 16 U.S.C. § 1857(1)(A). The Act defines “person” to include “any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any state)” 16 U.S.C. § 1802(36).

In 1984, NOAA issued regulations implementing the Gulf of Mexico Fishery Management Council’s Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (“Gulf Reef Fish Management Plan”). 49 Fed. Reg. 39,548, 39,548 (Oct. 9, 1984) (to be codified at 50 C.F.R. Part 641). Responding to concerns about the “continuing problems associated with overcapacity in the fishery and the adverse impacts associated with the derby fishery, i.e., the competitive race for available fish,” in January 2007, the Gulf of Mexico Fishery Management Council, working with NOAA, amended the Gulf Reef Fish Management Plan to establish an Individual Fishing Quota (“IFQ”) program for the Gulf red snapper taken in or from

.L. 104-208 § 211, 110 Stat. 3009-41 (1996). The Act was reauthorized and amended in 2007. P.L. 109-479, 120 Stat. 3575 (January 12, 2007).

⁹ A “fishery” is a stock of fish that is treated as a unit, based on geographical, scientific, technical, recreational, and economic characteristics. 16 U.S.C. § 1802(13(A))(2007).

¹⁰ “The Gulf of Mexico Fishery Management Council shall consist of the States of Texas, Louisiana, Mississippi, Alabama, and Florida and shall have authority over the fisheries in the Gulf of Mexico seaward of such States” 16 U.S.C. § 1852 (a)(1)(E)(2007). § 1802(13)(A).

the Gulf Exclusive Economic Zone (“EEZ”).¹¹ 71 Fed. Reg. 67,447, 67,459 (Nov. 22, 2006) (Final Rule effective January 1, 2007) (to be codified at 15 C.F.R. Part 902, 50 C.F.R. Part 622). Under the IFQ program, shares (in pounds gutted weight) of the total allowable annual catch of Gulf red snapper are allocated to eligible participants setting the limit in the amount of the fish each shareholder is authorized to possess, land, or sell in a given calendar year. Both fishing vessels and fish dealers are participants in the program and subject to IFQ limits. 71 Fed. Reg. 67,459.

In order to effectuate the IFQ program, the Gulf fishery regulations require a dealer to have a dealer permit in order to “receive Gulf reef fish.”¹² 50 C.F.R. § 622.4(a)(4)(i) (2007). Moreover, in addition to such permit, a dealer must also have a Gulf red snapper IFQ dealer endorsement in order to receive red snapper subject to the IFQ program. 50 C.F.R. § 622.4(a)(4)(ii). A “dealer” is defined as the “person who first receives fish by way of purchase, barter, or trade.” 50 C.F.R. § 600.10. The regulations provide, in pertinent part, that “it is unlawful for any person to . . . [e]ngage in an activity for which a valid Federal permit, license, or endorsement is required under § 622.4 without such permit, license, or endorsement.” 50 C.F.R. § 622.7(a).¹³

Section 622.16 sets forth additional procedural requirements imposed upon participants in the IFQ program for Gulf red snapper. 50 C.F.R. § 622.16. Pursuant to this section, a dealer “is responsible for completing a landing transaction report for each landing and sale of Gulf red snapper via the IFQ website . . .” 50 C.F.R. § 622.16(c)(1)(iii). This report reflects the “date, time, and location of transaction; weight and actual ex-vessel value of red snapper landed and sold; and information necessary to identify the fisherman, vessel, and dealer involved in the transaction.” *Id.* The dealer is also responsible for collecting the “applicable cost recovery fee for each IFQ landing from the IFQ allocation holder specified in the IFQ landing transaction

¹¹ The EEZ extends approximately a distance of 200 nautical miles from the coastline. *See*, 16 U.S.C. § 1802(11) citing Proclamation Numbered 5030, dated March 10, 1983, 45 Fed Reg. 10605 (March 14, 1983).

¹² “Reef fish” include fish in the snapper category, including Gulf red snapper. 49 Fed. Reg. 39,548, 39,554 (Oct. 9, 1984) (to be codified at 50 C.F.R. pt. 641).

¹³ The Agency, in the NOVA, NOPS, and PPIP, cites 50 C.F.R. § 622.7(a)(4)(i) and (ii), as the provisions Respondent allegedly violated by receiving Gulf red snapper without the appropriate IFQ endorsement (Count 1). NOVA at 2; NOPS at 1; Agency PPIP at 1. Those particular subsections ((a)(4)(i) and (ii)), do not exist in the 2007 regulations and the undersigned believes this to be a scrivener’s error. The correct regulatory provision for this violation would be § 622.4(a)(4)(i) and (ii). Section 622.7(a) of 50 C.F.R. does however, reference the endorsement requirements in § 622.4 and this issue of mis-citation was not raised at the hearing or otherwise by Respondent in this proceeding. Thus, the error is found not to rise to the level of failing to give Respondent fair notice of the allegations against it and the discussion herein will be directed to Respondent’s liability under § 622.4(a)(4)(i) and (ii).

report.” 50 C.F.R. § 622.16(c)(2)(ii). Further, the regulations require a transaction approval code and state:

Possession of IFQ red snapper from the time of transfer from a vessel through possession by a dealer is prohibited unless the IFQ red snapper are accompanied by a transaction approval code verifying a legal transaction of the amount of IFQ red snapper in possession.

50 C.F.R. § 622.16(c)(3)(iv).

Finally, the regulations establish that “it is unlawful for any person to . . . fail to comply with any provision related to the Gulf red snapper IFQ program as specified in § 622.16.” 50 C.F.R. § 622.7(gg).

III. FACTUAL BACKGROUND

Respondent LT Seafood, LP, is a domestic limited partnership formed under the laws of the State of Texas on February 10, 2005, and owned and operated by Ten Kha Lam and her brother Douglas Lam. AE 2; AE 1 at 4, 7; AE 9 (Request for Admissions), Admission (“Adm.”) 10. At all times relevant hereto, Respondent operated as a commercial wholesale fish dealer out of Houston, Texas. AE 1 at 4; AE 6, 7. As such, it would buy fish for the purposes of commercial resale from commercial fishing vessels. AE 1 at 6; AE 9, Adm. 1. Starting in March 2005 and continuing through February 2008, Respondent applied for and held validly issued annual “Snapper-Group Dealer (S. Atlantic)” “Shark Dealer,” and/or “Atlantic Dolphin/Wahoo dealer” permits by NOAA. AE 7; AE 9, Adm. 15. However, at no time relevant hereto did Respondent have a dealer permit for Gulf reef fish or a Gulf red snapper Individual Fishing Quota dealer endorsement. AE 1 at 2, 11-12; AE 9, Adm. 2, 9.

On March 28, 2007, at 3:19 a.m., Texas Parks and Wildlife (“TPW”) received a copy of a three-hour advance notification to NOAA of a Red Snapper Landing from the commercial Fishing Vessel (“F/V”) Richard II. AE 1 at 4; AE 3: AE 9, Adm. 9. The notification indicated that the F/V Richard II would be “landing” at “415 E. HAMILTON ST HOUSTON TX 77076.” AE 3. TPW Game Warden Kevin Webb identified the landing location as the address for LT Seafood and went to the site to conduct an inspection. AE 1 at 4–5. After inspecting the 415 E. Hamilton Street location, Game Warden Webb notified NOAA Special Agent Charles Tyer that he had discovered Gulf red snapper in a freezer at LT Seafood, LP, which had been purchased from the F/V Richard II earlier that day. *Id.* at 5. Agent Tyer then joined Game Warden Webb at the 415 E. Hamilton Street location to conduct further investigation and interview LT Seafood, LP, employees. *Id.*; *see also* Tr. 24.

On the date of inspection, Agent Tyer found Respondent had not completed an online transaction report for the IFQ Gulf red snapper it had received from the F/V Richard II, nor had it collected and paid the requisite cost recovery fee for the transaction. AE 1 at 11–12, AE 9, Adm. 5, 8. According to Agent Tyer, Ten Kha Lam stated during her interview that she thought the Federal Dealer Permit for Snapper-Grouper the business held authorized LT Seafood, LP, to

purchase Gulf red snapper. AE 1 at 8; *see also* Tr. 24. Agent Tyer seized 59 boxes and one cardboard vat of Gulf red snapper from the 415 E. Hamilton Street premises, determined the fair market value of the fish, and sold them to Katie's Seafood Market in Galveston, Texas for \$14,502.55. AE 1 at 10-11; AE 5.

During his investigation and after reviewing documents that were later seized, Agent Tyer discovered that in addition to the purchase made on March 28, 2007, Respondent had received EEZ Gulf red snapper from the F/V Richard II on three other prior occasions in 2007, specifically on February 13, 2007, March 1, 2007, and March 15, 2007. AE 1 at 9; AE 5 (Purchase Orders); AE 9, Adm. 3, 4, 13 The total Gulf red snapper received by Respondent from the F/V Richard II in 2007 was approximately 12,000 pounds.¹⁴ *Id.* Agent Tyer also found that Respondent had purchased Gulf red snapper from two other fishing vessels between January and February 2007, and that since 2005, Respondent had purchased a total of 378,000 pounds of reef fish worth over 1.12 million dollars. Tr. 23; AE 1 at 12. Nevertheless, Respondent had never applied for or purchased a federal reef fish dealer permit, possessed a Gulf red snapper IFQ endorsement, completed an online landing transaction report, obtained a transaction approval code, or collected and submitted the cost recovery fee for any Gulf red snapper it purchased in 2007. AE 1 at 8, 11-13, AE 9, Adm. 2, 5, 7, 8; Tr. 21.

IV. DISCUSSION

A. Default Judgment

The applicable 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 documents is considered effective "upon the date of postmark . . . , facsimile transmission, delivery to third party commercial carrier, electronic transmission, or upon personal delivery." *Id.* The Rules of Practice provide that a "NOPS will be served on the permit holder as provided in § 904.3." 15 C.F.R. § 904.302.

The Agency mailed the NOVA and NOPS to Respondent at its last known address, 415 E. Hamilton Street, by certified mail, in accordance with 15 C.F.R. § 904.3. Respondent's actual receipt of the NOVA and NOPS is evidenced by its attorney's correspondence dated September 11, 2012 wherein he represents that Respondent "properly and timely requested a hearing before an Administrative Law Judge to contest the permit sanction," a claim corroborated by NOAA's counsel at hearing. Tr. 6, 7. There is nothing in the record to suggest that Respondent ever

¹⁴ Agent Tyer noted a 72-pound discrepancy between the weights of the Gulf red snapper as measured at the dock (4,200 pounds) on March 28, 2007 and as measured by LT Seafood, LP, at their Houston facility (4,128 pounds). AE 1, Supplement at 1. Agent Tyer stated that "[n]either the fisherman nor the dealer could explain" the discrepancy. *Id.* at 2.

raised any challenge to the service of process of the NOVA and/or NOPS in the hearing request or otherwise. Therefore, pursuant to 15 C.F.R. § 904.3(a), it is hereby found that the Agency properly served Respondent with the NOVA and NOPS.

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). On February 6, 2013, the undersigned issued a Hearing Order in this matter, scheduling the hearing for March 12, 2013 in Houston, Texas. The Hearing Order was sent via regular mail and UPS to Respondent and/or Respondent’s President at the Woodico Drive, Pebble Trace and Terrace Oaks addresses. The Rules of Practice state that 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). Further, when mail is properly addressed and proper postage has been affixed, there is a strong presumption that it was delivered in the ordinary course of mail and was received by the addressee. *Ark. Motor Coaches, Ltd. v. CIR*, 198 F.2d 189, 191 (8th Cir. 1952). Thus, the undersigned finds that Respondent 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).

The Rules of Practice further 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, NOPS . . . and enter a default judgment against the respondents.” 15 C.F.R. § 904.211(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. § 904.211(d).

Having been properly served with the NOVA and NOPS, duly notified of the time and place of the hearing, and served effectively throughout this proceeding, Respondent failed to appear and thereby waived its right to further contest the alleged violations. Thus, default judgment was properly entered against Respondent at the hearing on March 12, 2013.

B. The Agency’s Burden of Proof

Default judgment having been entered, all facts alleged in the NOVA and NOPS are deemed true. 15 C.F.R. § 904.211(a)(2). Additionally, when a party serves any other party with a written request for admissions each matter set forth in the request is “admitted unless a written answer or objection is served within 20 days of service of the request, or within such other time as the Judge may allow.” 15 C.F.R. § 904.243(a), (b). Respondent failed to timely respond to the Agency’s written Request for Admissions (hereinafter cited as “Admissions.”). As such, by Order dated March 5, 2013, all matters contained in the Agency’s Request for Admissions were deemed admitted.¹⁵

To prevail on its claims that Respondent violated the Act and the Gulf red snapper IFQ regulations, the Agency must prove each alleged violation by the preponderance of the evidence. *Cuong Vo*, NOAA Docket No. SE010091FM, 2001 WL 1085351, at *6 (ALJ Aug. 17, 2001) (citing 5 U.S.C. § 556(d); *Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994));

¹⁵ The Admissions were marked and accepted in to the record as Exhibit 9 at hearing. Tr. 11-12

Steadman v. SEC, 450 U.S. 91, 100–03 (1981)). “Preponderance of the evidence means the Agency must show it is more likely than not a respondent committed the charged violation.” *Tommy Nguyen*, NOAA Docket No. SE0801361FM, 2012 WL 1497024, at *4 (ALJ Jan. 18, 2012) (citing *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 (1983)). A sanction may not be imposed “except on consideration of the whole record . . . and supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. § 556(d); *see also* 15 C.F.R. § 904.251 (“All evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing.”); 15 C.F.R. § 904.270 (stating that the exclusive record of decision consists of the official transcript of testimony; exhibits admitted into evidence; briefs; pleadings; documents filed in the proceeding; and descriptions or copies of matters, facts, or documents officially noticed in the proceeding). Direct and circumstantial evidence may establish the facts constituting a violation of law. *Cuong Vo*, 2001 WL 1085351, at *6.

C. Ultimate Findings of Fact and Conclusions of Law as to Liability

Having imposed default judgment against Respondent, and the facts 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 LT Seafood, LP, 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); 1857(1)(A); 50 C.F.R. § 622.7(a), (gg); AE 2.
2. Respondent is a “dealer” as defined by the National Oceanic and Atmospheric Administration. 50 C.F.R. § 600.10; AE 4, 5, 7; Tr. 19, 21, 23; AE 9, Adm. 1.
3. On February 13, 2007, March 1, 2007, March 15, 2007, and March 28, 2007, Respondent received from the F/V Richard II by way of purchase for approximately \$49,900 wholesale, a total of approximately 12,000 pounds of EEZ harvested Gulf red snapper.¹⁶ AE 1 at 9, 4, 6; AE 5; AE 9, Adm. 3, 4; Tr. 27;
4. At the time of its receipt of the Gulf red snapper from F/V Richard II on February 13, 2007, March 1, 2007, March 15, 2007, and March 28, 2007, Respondent was not in possession of a federal dealer permit for Gulf reef fish snapper and did not have a Gulf red snapper IFQ endorsement as required by 16 U.S.C. § 1857(1)(A) and 50 C.F.R. § 622.4(a)(4)(i), (ii). AE 1, 7; Tr. 19, 21; AE 9, Adm. 2.

¹⁶ The Agency Request for Written Admissions and the Investigation Report of Agent Charles Tyer indicate that Respondent purchased a total of 12,109 pounds of Gulf red snapper with a total value of \$50,943.80. AE 9, Adm. 4; AE 1 at 14. The undersigned finds discrepancies in the Agency’s price per pound indications and, based on the invoices submitted as the Agency’s exhibits and the undersigned’s calculations, Respondent received 12,099 pounds of Gulf red snapper from the F/V Richard II with a total value of \$49,906.15. *See* AE 1, 5.

5. Respondent did not complete landing transaction reports for its purchase of Gulf red snapper from the F/V Richard II on February 13, 2007, March 1, 2007, March 15, 2007, and March 28, 2007, as required by 50 C.F.R. § 622.16(c)(1)(iii). AE 1 at 8, 12; Tr. 19; AE 9, Adm. 5.
6. On February 13, 2007, March 1, 2007, March 15, 2007, and March 28, 2007, Respondent was in possession of Gulf red snapper from the time of its transfer from the fishing vessel without having obtained a transaction approval code as required by 50 C.F.R. § 622.16(c)(3)(iv). AE 1 at 7; AE 9, Adm. 7; Tr. 18–19.
7. Respondent did not collect and submit the IFQ cost recovery fee for Gulf red snapper purchased from the F/V Richard II on February 13, 2007, March 1, 2007, March 15, 2007, and March 28, 2007, as required by 50 C.F.R. § 622.16(c)(2)(ii). AE 1 at 12; Tr. 19; AE 9, Adm. 8.
8. Respondent is found to have violated the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A) and its implementing regulations requiring the possession of a Gulf reef fish permit and a Gulf red snapper endorsement as part of the IFQ program codified at 50 C.F.R. §§ 622.4(a)(4)(i), (ii), 622.7(a), (gg), as alleged in Count 1 of the NOVA and NOPS.
9. Respondent is found to have violated the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A) and its implementing regulations requiring the completion of a landing transaction report as part of the Gulf red snapper IFQ program codified at 50 C.F.R. §§ 622.16(c)(1)(iii), (ii), 622.7 (gg), as alleged in Count 2 of the NOVA and NOPS.
10. Respondent is found to have violated the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A) and its implementing regulations requiring the acquisition of a transaction approval code as part of the IFQ program codified at 50 C.F.R. §§ 622.16(c)(3)(iv), (ii), 622.7 (gg), as alleged in Count 3 of the NOVA and NOPS.
11. Respondent is found to have violated the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A) and its implementing regulations requiring the collection and submission of the IFQ cost recovery fee as part of the IFQ program codified at 50 C.F.R. §§ 622.16(c)(2)(ii), 622.7 (gg), as alleged in Count 4 of the NOVA and NOPS of the NOVA and NOPS.

D. Civil Penalty and Permit Sanction Assessment

The Act provides, in pertinent part, that “[a]ny person who is found . . . to have committed an act prohibited by section 1857 of this title shall be liable to the United States for a civil penalty.” 16 U.S.C. § 1858(a). At the time of the alleged violation, the maximum civil penalty for each violation was \$130,000, as adjusted for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, amended by the Debt Collection and Improvement Act of 1996, Pub. L. 104-134. 15 C.F.R. § 6.4(e)(14).

The Rules of Practice state that the following factors “may” be taken into account when assessing a civil penalty: (1) the nature, circumstances, extent, and gravity of the alleged violation; (2) the respondent’s degree of culpability, any history of prior violations, and ability to pay; and (3) such other matters as justice may require. 15 C.F.R. § 904.108(a).

The Act further provides that the Secretary may revoke any permit or suspend a permit “for a period of time considered by the Secretary to be appropriate” when any person who has been issued or applied for a permit under 16 U.S.C. ch. 38 “has acted in violation of section 1857.” 16 U.S.C. § 1858(g)(1). The Act states that the Secretary “shall” take into account the following factors when imposing a permit sanction: (1) the nature, circumstances, extent, and gravity of the prohibited acts; and (2) the respondent’s degree of culpability, any history of prior violations, and such other matters as justice may require. 16 U.S.C. § 1858(g)(2).

The Rules of Practice state that the bases for a permit sanction include “[t]he commission of any violation prohibited by any statute administered by NOAA, including violation of any regulation promulgated or permit condition or restriction prescribed thereunder.” 15 C.F.R. § 904.301(a). The sanction may be imposed “with respect to the particular permit pertaining to the violation” or “any NOAA permit held . . . by the permit holder.” 15 C.F.R. § 904.301(b). Further, a permit may be suspended for a specified period of time or contingent upon stated requirements. 15 C.F.R. § 904.320(b). If suspension is contingent on stated requirements, “the suspension is with prejudice to issuance of any permit until the requirements are met” and the suspended permit is eligible for reinstatement “only by order of NOAA” once the stated requirements are met. 15 C.F.R. §§ 904.320(b), 904.321(b). The Rules of Practice provide that “[a] permit suspended for a specified period of time will be reinstated automatically at the end of the period.” 15 C.F.R. § 904.321(a).

There is no presumption that the Agency’s proposed penalty is appropriate, nor that the Agency’s penalty analysis is accurate. *Tommy Nguyen*, NOAA Docket No. SE0801361FM, 2012 WL 1497024, at *8 (ALJ Jan. 18, 2012); *see also* 15 C.F.R. § 904.204 (m). An Administrative Law Judge is not required to “state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document.” *Tommy Nguyen*, 2012 WL 1497024, at *8; 75 Fed. Reg. 35,631, 35,631 (June 23, 2010). An Administrative Law Judge must assess a civil penalty or permit sanction “taking into account all of the factors required by the applicable law.” 15 C.F.R. § 904.204(m). When assessing a civil penalty, the Magnuson-Stevens Act requires that the presiding Judge account for “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 (enumerating factors that may be considered in assessing a civil penalty). The Act requires consideration of these same factors when assessing a permit sanction. 16 U.S.C. § 1858(g)(2).

Additionally, the Act allows consideration of a respondent’s inability to pay a civil penalty. 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(b)–(h). According to the Act, a respondent who wishes to have inability to pay considered by the Administrative Law Judge must provide relevant information no fewer than thirty days prior to hearing. 16 U.S.C. § 1858(a). 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(c); *Tommy Nguyen*, 2012 WL 1497024, at *8. In this case, Respondent has not claimed that it is unable to pay a penalty and has not provided any information concerning its financial condition. Respondent is therefore “presumed to have the ability to pay the civil penalty.” 15 C.F.R. § 904.108(c).

i. The Agency’s Civil Penalty and Permit Sanction Analysis

For the violations committed, the Agency proposed the imposition upon Respondent of a total civil penalty in the amount of \$100,000 and a permit sanction of 180 days suspension of all federal dealer permits, but did not provide explanation or support of its proposed civil penalty or permit sanction in the NOVA, NOPS, or PPIP. However, at hearing, the Agency offered the testimony of Agent Charles Tyer to address the factors considered when assessing a civil penalty and permit sanction in this matter. Tr. 11. Counsel for the Agency further advised at the hearing that the penalty policy used at the time of the alleged violation has been superseded by a new policy. Tr. 34. Therefore, the Agency’s proposed penalty and permit sanction are assessed in accordance with the factors set out in the Act, 16 U.S.C. § 1858, and the Rules of Practice, 15 C.F.R. § 904.108(a).

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

At hearing, Agent Tyer testified credibly to the nature, circumstances, extent and significant gravity of violations of the Gulf red snapper IFQ regulations and permitting requirements. Agent Tyer has 20 years of experience working for NOAA in the fisheries in the Gulf of Mexico. Tr. 12, 14. According to Agent Tyer, the Gulf red snapper is the “most overfished fishery in the United States.” Tr. 13. To avoid depletion, NOAA stringently regulates the fishery, imposing the IFQ system that essentially divided an overall Gulf red snapper quota among fishermen who had historically fished that species. Tr. 13, 15.

Agent Tyer testified that the IFQ regulations were devised in consultation with the commercial fishing industry, which would suffer as a result of the depletion of the Gulf red snapper fishery. Tr. 20, 22. Under the quota system, Agent Tyer noted, all the fishermen operating in the Gulf red snapper fishery have a stake in the fishery’s sustainability and that in essence “each fisherman owns a percentage of the fishery.” Tr. 26. It is important both to NOAA and the fisherman that NOAA “sustain the fishery for all years to come.” Tr. 20-21. The IFQ regulations thus promote a system of self-reporting and self-enforcement. *See* Tr. 26-27. Further, compliance with the regulations levels the playing field for all participants in the fishery. Tr. 30.

Failing to obtain the proper permit and endorsement or report a transfer of Gulf red snapper from a vessel to a dealer, by completing a landing transaction report and obtaining a transaction approval code, as Respondent repeatedly did in this case, leads to the unregulated depletion of a sensitive and overfished Gulf resource, Agent Tyer asserted. Dealers who fail to comply with these IFQ regulations allow sensitive resources to be extracted from the fishery without the catch counting against the overall quota. Tr. 15, 19. Thus, Respondent could, without reporting, cause the extraction of the resource to go above the total allowable catch. *See* Tr. 18-19, 33-34. Moreover, Respondent’s non-participation in the IFQ program creates an

unfair incentive for fishing vessels to sell to them as those sales would not be counted against the vessel's allotted portion of the quota. *See* Tr. 33–34.

Further, Agent Tyer testified that the required cost recovery fee is spent to further the enforceability of the Act and regulations intended to manage the Gulf red snapper fishery. Tr. 20. The fee can be spent on a number of measures, including enforcement training, equipment, or personnel. *Id.* Respondent's failure to collect the mandatory 3% cost recovery fee from fishing vessels both deprives NOAA of resources for enforcement of the Act and provides an unfair competitive advantage to Respondent and an economic advantage to those fishing vessels unlawfully selling their catch to it. Tr. 30.

Respondent, on at least four separate occasions in 2007, transferred Gulf red snapper from a vessel without a transaction approval code, received Gulf red snapper without completing a landing transaction report, and failed to pay any cost recovery fee. Furthermore, Respondent engaged in these transactions without the proper IFQ endorsement or federal dealer permit for Gulf red snapper. These violations resulted in the removal of least 12,000 pounds of Gulf red snapper from the Gulf fishery (worth approximately \$49,000 wholesale) without deduction of those resources from the quota implemented for their conservation. Tr. 18-19; AE 9, Adm. 6. It also resulted in the loss of approximately \$1,500 in cost recovery fees.

Repeatedly failing to comply with the necessary permitting, endorsement, reporting, and cost recovery fee requirements not only undermines the IFQ system but harms the Gulf red snapper fishery and the livelihood of commercial fishermen and other dealers in compliance with the law. Considering the vulnerability of the Gulf red snapper to overfishing and the potential harm to that resource, in addition to the cooperation of commercial fishermen and dealers necessary to sustain the fishery's resources, the nature, circumstances, extent and gravity of Respondent's violations are found to be significant.

iii. Respondent's Degree of Culpability, History of Prior Violations, and Ability to Pay

In terms of culpability, the record reflects that during his investigation Agent Tyer interviewed Respondent's owner and manager, Ten Kha Lam, who informed him that she is "responsible for obtaining all the necessary business documentation such as State and Federal permits." AE 1 at 8. After Agent Tyer explained the Gulf reef fish permit, endorsement, and reporting requirements, Ten Kha Lam then informed Agent Tyer that she had believed the Federal Dealer Permit for "Snapper-Grouper" the business held to be the permit necessary to purchase Gulf red snapper. *Id.* at 8.

There is some nominal support for Ms. Lam's claim of confusion in the record. Specifically, while Respondent's Federal Fisheries Permit as a Snapper-Grouper Dealer issued in 2005 and 2006, explicitly indicate thereon that the permit is for "S[outh] Atlantic" Snapper-Grouper, the 2007 annual Permit, issued on March 8, 2007, contains no such limitation. AE 7. However, on the Permit Application completed by Mrs. Lam on January 22, 2007, Respondent indicated by its marks that it was applying for a renewal of its Permit, *inter alia*, for "South Atlantic Snapper-Group," and explicitly declined to mark its request for a permit for "Gulf of Mexico Reef Fish." As such, it appears that Ms. Lam did have, or should have had, actual

knowledge of the limits of the business' permit she possessed before the time of the violations in February and March of 2007.

Regardless, the duty to know and follow the law falls squarely on Respondent. *O'Neil*, NOAA Docket No. 315-189, 1995 WL 1311365, at *3 (ALJ, June 14, 1995) (“[C]ommercial 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 WL 288720, at *4 (“When one engages in a highly regulated industry, that person bears the responsibility of knowing and interpreting the regulations governing that industry.”). Moreover, publication of regulations in the Federal Register gives legal notice of their contents regardless of actual knowledge. *O'Neil*, 1995 WL 1311365, at *3 (noting that this legal presumption is now codified at 44 U.S.C. § 1507). It is well settled that “ignorance of the law will not excuse.” *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910); *Guiseppe Taormina*, 6 O.R.W. 249, 251, 1990 WL 322735, at *3 (NOAA App. 1990).

Furthermore, formulation of the IFQ regulations for Gulf red snapper which went into effect in January 2007 was a public process. Agent Tyer testified that NOAA “held at least 10 scoping meetings prior to regulations coming out and then ten workshops afterwards across the Gulf . . .” Tr. 22. He further testified that NOAA engaged vessel owners and dealers in the commercial fishing industry for “well over a year prior to the regulations.” *Id.* Both the proposed and final regulations resulting from this process were published in the Federal Register. 71 Fed. Reg. 50,012, 50,012–13 (proposed Aug. 24, 2006) (to be codified at 50 C.F.R. pt. 622); 71 Fed. Reg. 67,447, 67,447 (Nov. 22, 2006) (to be codified at 15 C.F.R. pt. 902, 50 C.F.R. pt. 622).

Moreover, Respondent was not new to the fishing dealer business or to the purchase of Gulf reef fish in particular. Agent Tyer testified at the hearing that Respondent had been purchasing Gulf reef fish from vessels since 2005, with total purchases of 378 thousand pounds of reef fish valued at over \$1.12 million. Tr. 23. Further, according to Agent Tyer’s testimony, prior to starting LT Seafood, LP, the Respondent here, Ms. Lam had worked for the Bayou City Fish Company, owned by her relatives, which was a permitted reef fish dealer and so “knew or should have known how to do business.” Tr. 32

Furthermore, Respondent’s manager, who transported the Gulf red snapper from the F/V Richard II on March 27, 2008, indicated in his interview with Agent Tyer that he at least knew of the IFQ regulations and their requirement for a transaction approval code, although he mistakenly thought the landing confirmation code for the F/V Richard II was the necessary transaction code. AE 1 at 7; *see also* AE 1 at 8 (indicating that Respondent’s owner and manager, Ten Kha Lam, also “believed that the confirmation code supplied by the captain of the F/V Richard II was the approval code required by the regulations”).

In light of the opportunity and burden on Respondent to know and comply with the pertinent statutory and regulatory requirements for receiving Gulf red snapper and Respondent’s repeated noncompliance with the requirements of the IFQ program, no penalty reduction based upon the claimed misunderstanding of the permit coverage or lack of knowledge of the legal requirements is deemed appropriate.

The record indicates that Respondent has no history of prior violations (tr. 32), and has not raised an issue as to the ability to pay.¹⁷ Neither factor appears to warrant penalty mitigation in this case.

iv. Such Other Matters as Justice May Require

Agent Tyer's Investigation Report suggests that Respondent's owner and manager Ten Kha Lam was cooperative and responsive to the Agency's inspection on March 28, 2007. After Agent Tyer explained the requirements of the IFQ program, Ten Kha Lam admitted that Respondent had "never completed an online transaction for any of the red snapper purchased in 2007." AE 1 at 8. Ten Kha Lam also located invoices for Respondent's four other purchases of Gulf red snapper from the F/V Richard II in 2007 and admitted that Respondent had not "complet[ed] an online transaction" for any of these purchases. AE 1 at 9. Additionally, Agent Tyer testified that Respondent may have obtained a federal dealer permit for Gulf reef fish subsequent to the March 28, 2007 violation, suggesting Respondent was attempting to come into compliance with at least the permit requirements for Gulf red snapper transactions after the subject violations occurred. Tr. 33. Finally, Respondent lost the value of the Gulf red snapper seized on the date of the inspection which were subsequently sold for \$14,502.55. AX. 1 at 11.

On the other hand, it is clear that Respondent derived at least some economic benefit from the unlawful purchase and subsequent sale of Gulf red snapper. Specifically, Respondent realized the economic benefit of engaging in at least four transactions involving Gulf red snapper, including February 13, 2007, March 1, 2007, March 15, 2007, and a partial sale on March 28, 2007, all without incurring any compliance costs associated with the IFQ program. It is also reasonable, but made impossible to calculate by Respondent's own failure to comply with reporting requirements, that Respondent realized an economic benefit from selling Gulf red snapper that it would not have otherwise been able to receive because of quota limitations.

v. Penalty Determination

Upon consideration of all the foregoing, it is hereby determined that it is appropriate to imposed upon Respondent a civil penalty of \$30,000 for each of the first three counts of violation relating in each count to four separate instances of failing to possess the requisite permit and endorsement, complete landing transaction reports, or obtain a transaction approval code, and \$10,000 for the fourth count relating to four instances of failing to collect and submit the IFQ coast recovery fee. Additionally, suspension of all of Respondent's federal dealer permits for a period of 45 days per count of violation, for a total of 180 days is deemed appropriate.

ORDER

For Count 1, a civil penalty in the amount of \$30,000 is appropriate and assessed.

¹⁷ It is noted that Respondent was advised by its counsel's letter of September 11, 2011 of the steps it could take if it wished to claim an inability to pay in connection with this matter. The record indicates Respondent has taken no such steps.

For Count 2, a civil penalty in the amount of \$30,000 is appropriate and assessed.

For Count 3, a civil penalty in the amount of \$30,000 is appropriate and assessed.

For Count 4, a civil penalty in the amount of \$10,000 is appropriate and assessed.

For Counts 1–4, a sanction suspending all Respondent’s federal dealer permits for a period of 45 days each, for a total of 180 days is appropriate and assessed.

A total penalty of **\$100,000** and a sanction of **180-day suspension** of all Respondent’s federal dealer permits are hereby **IMPOSED** on Respondent, LT Seafood, LP.

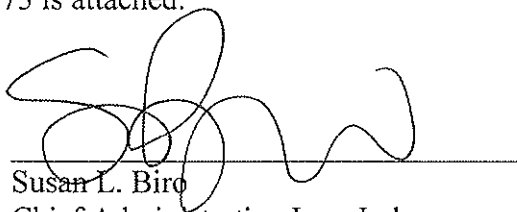
PLEASE TAKE NOTICE, that this Initial Decision becomes effective as the final Agency action **60 days** after service on **June 4, 2013**, unless the undersigned grants a petition for reconsideration or the Administrator reviews the Initial Decision. 15 C.F.R. § 904.271(d).

PLEASE TAKE FURTHER NOTICE, that a 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 will result in the total penalty becoming due and payable, and interest being charged at the rate specified by the U.S. Treasury regulations and an assessment of charges to cover the cost of processing and handling of the delinquent penalty. Further, in the event the penalty, or any portion thereof, becomes more than 90 days past due, Respondent may also be assessed an additional penalty charge not to exceed 6 percent per annum.

PLEASE TAKE FURTHER NOTICE, that any petition for reconsideration of this Initial Decision must be filed 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.

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency¹⁸

Dated: June 4 2013
Washington, DC

¹⁸ 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.

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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.