UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	)	
John Hill, Brady Cooke, and Michael Redding	)	**Docket No. SE1201470FM**
	)	**(F/V Double Vision)**
Respondents.	)	
	)	**Date Issued: May 6, 2014**

INITIAL DECISION AND ORDER

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

Appearances:

For the National Oceanic and Atmospheric Administration:
Cynthia S. Fenyk, Esq.
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Respondents, *pro se*:

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

I. Statement of the Case

On September 25, 2012, counsel for the National Oceanic and Atmospheric Administration ("NOAA" or the "Agency") issued a Notice of Violation and Assessment of Administrative Penalty ("NOVA") to Michael Robert Redding and John Steven Hill, co-owners of the F/V Double Vision, and Brady S. Cooke, operator of the F/V Double Vision (collectively "Respondents"). The NOVA alleged that on or about March 17, 2012, Respondents jointly and severally violated the Magnuson-Stevens Fishery Conservation and Management Act (the "Magnuson-Stevens Act" or "the Act"), 16 U.S.C. § 1857(1)(A), and the implementing regulations at 50 C.F.R. § 622.7(ff), by failing to comply with the sea turtle conservation measures specified in 50 C.F.R. § 622.10(b)(1).[2] The NOVA proposed a total penalty of $5,000 for the alleged violations.

By a handwritten letter dated December 27, 2012, Respondent John Hill requested a hearing on the allegations in the NOVA. "A hearing request by one joint and several respondent is considered a request by the other joint and several respondent(s)." 15 C.F.R. § 904.107(b). Accordingly, Respondent Hill's hearing request is also considered a request by Respondents Michael Redding and Brady Cooke. *See id.*

In a memorandum dated January 7, 2013, NOAA notified this Tribunal that it had received the request for hearing. On January 16, 2013, Chief Administrative Law Judge Susan L. Biro was designated to preside in this proceeding, and she issued an order for each of the parties to submit a Preliminary Position on Issues and Procedures ("PPIP").

The Agency submitted a PPIP identifying one potential witness and containing six potential exhibits. Only one Respondent, John Hill, submitted a PPIP. His PPIP consisted of a single letter, identifying three individuals who were allegedly U.S. Coast Guard inspectors, who had inspected the F/V Double Vision "several times" in the past. The letter neither indicated whether those individuals would be called as witnesses nor offered a summary of their potential testimony. On February 21, 2013, Chief Administrative Law Judge Susan L. Biro issued a Hearing Order scheduling the hearing in this matter to begin on May 8, 2013. The order also directed Respondents to file a document clarifying the PPIP, or risk being barred from offering evidence at hearing. No clarification of the PPIP or other response to the order was received by this Tribunal.

On April 24, 2013, a staff attorney in this Tribunal's office attempted to contact each Respondent by telephone in order to arrange an informal prehearing conference, left voicemail messages for Respondents Hill and Redding, and was unable to contact Respondent Cooke. The next day, Respondent Hill telephoned the staff attorney and claimed not to have received

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[2] The regulations pertaining to fisheries in the Caribbean, Gulf, and South Atlantic, codified at 50 C.F.R. Part 622, were amended and re-codified on April 17, 2013. Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic, 78 Fed. Reg. 22,950, 22,950 (April 17, 2013). These amendments do not apply to this proceeding. *Id.* The regulatory provisions and section numbers cited in this Initial Decision are those which were published in 2011 and in effect on March 17, 2012.

notice of the hearing or other correspondence from the Tribunal. He confirmed his address of record and verified that he had received the January 16, 2013 Order to Submit Preliminary Positions on Issues and Procedures. He refused to participate in an informal prehearing conference, but affirmed that he would appear at the hearing. He was advised that it would be a formal hearing and that he may choose to hire an attorney to represent him at the hearing. On April 26, 2013, Respondent Michael Redding contacted the staff attorney by telephone and indicated he would likely not appear at the hearing.

On April 29, 2013, the staff attorney mailed a letter to each Respondent and to Agency counsel. The letter restated the time and location of the hearing, reaffirmed that each Respondent was free to obtain an attorney to represent him at hearing, and warned that failure to appear at the hearing could result in an entry of default. The letter also provided an informal explanation of how the hearing would be conducted and how each party could offer evidence and argument into the record. The letter directed the parties to the applicable procedural rules at 15 C.F.R. Part 904, and invited them to contact the staff attorney if they had any questions.

By Order of Redesignation dated May 1, 2013, the undersigned was designated to preside in this proceeding. On May 8, 2013, the undersigned conducted a hearing in this matter at the United States Tax Court in Tampa, Florida. Cynthia S. Fenyk, Esq., appeared on behalf of the Agency. Respondents Hill and Brady Cooke appeared at the hearing *pro se*. Respondent Redding did not appear at the hearing.

At the hearing, the Agency presented the testimony of one witness, Officer John Slater, U.S. Coast Guard Boatswain's Mate First Class, E-6. Tr. 22. The Agency offered six exhibits, all of which were admitted into evidence. Respondents Cooke and Hill testified on their own behalf, and did not call any additional witnesses. Respondent Cooke offered two exhibits concerning his ability to pay, both of which were admitted into evidence. Respondent Hill did not offer any exhibits into evidence. However, he did claim to have documentation showing that he had previously purchased certain sea turtle bypass mitigation gear, and therefore, the evidentiary record was left open for two weeks to allow Respondent Hill to supplement the record.

When Respondent Hill did not submit any document after the hearing, on May 31, 2013, the undersigned issued an Order Closing the Evidentiary Record and Scheduling Post-Hearing Briefs. The Order directed the Agency to file its post-hearing brief no later than July 12, 2013, and Respondents to file post-hearing brief(s) no later than July 26, 2013. The Agency filed a Post Hearing Brief Including Proposed Findings of Fact and Conclusion of Law on July 12, 2013. No post-hearing brief was received from any of the Respondents.

After careful review of the entire record, this Tribunal finds that a preponderance of the evidence establishes that on March 17, 2012, Respondents jointly and severally did fail to comply with the sea turtle bycatch mitigation measures specified in 50 C.F.R. § 622.10(b)(1), in violation of Section 307(1)(A) of the Magnuson-Stevens Fishery Conservation and Management Act, as amended, at 16 U.S.C. § 1857(1)(A), and 50 C.F.R. § 622.7(ff), as alleged in the NOVA.

II. Statutory and Regulatory Background

The Magnuson-Stevens Act was enacted, *inter alia,* "to conserve and manage the fishery resources found off the coasts of the United States" and "to promote domestic commercial and recreational fishing under sound conservation and management principles . . . ." 16 U.S.C. § 1801(b)(1), (b)(3). The Act authorizes the Secretary of Commerce, in conjunction with Regional Fisheries Management Councils, to adopt fishery management plans and implement such plans through regulation. 16 U.S.C. §§ 1851–55. The Secretary may also act to protect and restore overfished fisheries. 16 U.S.C. § 1854(e). The Act states that "It is unlawful . . . for any person . . . to violate any provision of this Act or any regulation or permit issued pursuant to this Act." 16 U.S.C. § 1857(1)(A). The term "person" includes any individual, corporation, partnership, association or other entity. 16 U.S.C. § 1802(36).

The Gulf of Mexico Fishery Management Council administers the Gulf of Mexico Fishery Management Plan ("GMFMP") under the Act. 16 U.S.C. § 1852. Regulations implementing the GMFMP under the Act are codified in Title 50, Part 622 of the Code of Federal Regulations. *See* 50 C.F.R. Part 622 (2011). The applicable regulations are those in Title 50 Part 622 as amended and published in 2011, which were in effect on the date of the alleged violation on March 17, 2012. Section 622.10 of those regulations lists conservation measures for protected resources, including sea turtle conservation measures. 50 C.F.R. § 622.10(b)(1) (2011). Section 622.10(b)(1) of Title 50 provides as follows, in pertinent part:

> Sea turtle conservation measures.
>
> (i) The owner or operator of a vessel for which a commercial vessel permit for Gulf reef fish . . . has been issued, . . . must post inside the wheelhouse . . a copy of the document provided by NMFS [National Marine Fisheries Service] titled "Careful Release Protocols for Sea Turtle Release With Minimal Injury," and must post inside the wheelhouse, the sea turtle handling and release guidelines provided by NMFS.
>
> (ii) Such owner or operator must also comply with the sea turtle bycatch mitigation measures, including gear requirements and sea turtle handling requirements, specified in §§ 635.21(c)(5)(i) and (ii) of this chapter, respectively.
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> (iii) Those permitted vessels with a freeboard height of four ft. (1.2 m) or less must have on board a dipnet, tire, short-handled dehooker, long-nose or needle-nose pliers, bolt cutters, monofilament line cutters, and at least two types of mouth openers/mouth gags. This equipment must meet the specifications described in §§ 635.21(c)(5)(i)(E) through (L) of this chapter with the following modifications: the dipnet handle can be of variable length, only one NMFS-approved short-handled dehooker is required (i.e., § 635.21(c)(5)(i)(G) or (H) of this chapter); and life rings, seat cushions, life jackets, and life vests or any other comparable, cushioned, elevated surface that allows boated sea turtles to be immobilized, may be used as alternatives to tires for cushioned surfaces as specified in § 635.21(c)(5)(i)(F) of this chapter

50 C.F.R. § 622.10(b)(1) (2011). The regulations thus require vessels with a freeboard height of up to four feet to have onboard the seven items listed in 50 C.F.R. § 622.10(b)(1)(iii), as specified in Section 635.21(c)(5)(i)(E) through (L) and modified by Section 622.10(b)(1)(iii),

hereinafter referenced as "Turtle Mitigation Gear." The general regulatory prohibitions for fisheries provide that "it is unlawful . . . for any person to . . . [f]ail to comply with the protected species conservation measures as specified in § 622.10." 50 C.F.R. § 622.7(ff). Failure to have onboard the seven Turtle Mitigation Gear items is therefore unlawful under the Act, 16 U.S.C. § 1857(1)(A).

All six species of sea turtles found in United States waters are either threatened or endangered, and are listed under the Endangered Species Act. *See* 50 C.F.R. § 17.11(h) (2011) (containing the "List of Endangered and Threatened Wildlife"); 50 C.F.R. § 223.102(b) (2011) (listing threatened species of sea turtles); 50 C.F.R. § 224.101(c) (2011) (listing endangered species of sea turtles). NOAA has reported that "[i]ncidental take, or bycatch, in fishing gear is one of the main sources of sea turtle injury and mortality nationwide," and has repeatedly explained that "[i]ncidental capture (bycatch) of sea turtles in fisheries is a primary factor hampering the recovery of sea turtles in the Atlantic Ocean and the Gulf of Mexico." 2011 Annual Determination for Sea Turtle Observer Requirement, 75 Fed. Reg. 81,201, 81,202 (Dec. 27, 2010); Endangered and Threatened Wildlife, Sea Turtle Conservation Requirements, 72 Fed. Reg. 7382, 7382 (proposed Feb. 15, 2007).

III. Findings of Fact

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

1. At all times relevant to this proceeding, Respondents John Hill and Michael Redding owned the F/V Double Vision, U.S. Documentation Number 987945. NOAA's Exhibit ("Ex.") 4, 5; Transcript ("Tr.") 25, 39, 68, 70.

2. At all times relevant to this proceeding, Respondents Hill and Redding held the following Federal Fisheries Permit for the F/V Double Vision: Gulf of Mexico Reef Fish Commercial, Permit Number RR-1037, which was effective July 1, 2011 through June 30, 2012. NOAA's Ex. 5.

3. Respondents Hill and Redding purchased the F/V Double Vision in December 2009, and it is the only vessel that they owned. Respondent Hill never operated it. NOAA's Ex. 4 (at p. 5); Tr. 61, 68, 75.

4. The F/V Double Vision has a freeboard height of four feet or less, and is 33.8 feet in length. NOAA's Exs. 3, 4, 5.

5. Respondents Hill and Redding hired Respondent Brady Cooke to operate the F/V Double Vision. Tr. 69. Respondent Cooke worked under a percentage split agreement, whereby he received a specified percentage of the proceeds from the fishing effort aboard the F/V Double Vision, and Respondents Hill and Redding retained the rest of the proceeds. Tr. 68–69, 81–82.

6. On or about March 14, 2012, Respondent Cooke, as captain, with one crew member, departed from the port of Hudson, Florida, aboard the F/V Double Vision for a commercial fishing trip that continued through at least March 17, 2012. NOAA's Exs. 1, 2.

7. Prior to that trip, Respondent Cooke had taken several other fishing trips aboard the F/V Double Vision. Tr. 69, 71–72. He had operated commercial vessels for over 20 years, since he was 19 years old. Tr. 55, 57.

8. Officer Joseph Slater serves as a U.S. Coast Guard Boatswain's Mate First Class, E-6, and has worked for the U.S. Coast Guard for nine and a half years. Tr. 22. He estimates that he has boarded over 300 commercial fishing vessels. Tr. 23.

9. On March 17, 2012, Officer Slater was conducting "a cold hit inspection" of commercial fishing vessels in the Florida Middle Grounds, when he observed the F/V Double Vision at anchor actively engaged in fishing with rod and reel in the Florida Middle Grounds. NOAA's Exs. 1, 2; Tr. 23, 24, 61.

10. Officer Slater, serving as boarding officer, along with one U.S. Coast Guard Boarding Team Member, boarded the F/V Double Vision with the consent of Respondent Cooke. Tr. 24; NOAA's Ex. 2.

11. After verifying Respondent Cooke's identity and the F/V Double Vision's documentation, Officer Slater commenced a safety inspection of the F/V Double Vision., in which he found several discrepancies. Tr. 26; NOAA's Exs. 2, 6.

12. After completing the safety inspection, Officer Slater commenced a fisheries inspection, and asked Respondent Cooke to present the vessel's Turtle Mitigation Gear. NOAA's Ex. 2; Tr. 26-27.

13. At the time of Officer Slater's inspection, Respondents Cooke and Hill did not know the seven items of Turtle Mitigation Gear that were required to be kept onboard the vessel. Tr. 27, 50, 62, 63, 72-74, 76. Respondent Cooke did not know where Turtle Mitigation Gear would be kept on the vessel. Tr. 27.

14. Officer Slater gave suggestions as to where the Turtle Mitigation Gear could be on the vessel, based on his experience as to where the gear tends to be kept on other boats. Tr. 27-28. He and Respondent Cooke looked around the boat for the Turtle Mitigation Gear, but Officer Slater "didn't open up anything that [he's] not authorized to open." Tr. 28.

15. During the inspection, Respondent Cooke produced only two of the seven required Turtle Mitigation Gear items, namely short needle nose pliers and a short handled dehooker for external hooks. NOAA's Exs. 1 (at p. 5), 2, 3; Tr. 27–28, 31.

16. Officer Slater and Respondent Cooke looked around the vessel for Turtle Mitigation Gear for about ten minutes, until Mr. Cooke determined that the other Turtle Mitigation Gear items were not on the vessel. Tr. 27-28, 50.

17. Officer Slater gave Mr. Cooke an Enforcement Action Report, a notification that the vessel was missing four or more items of Turtle Mitigation Gear, in violation of 50 C.F.R. § 622.7. NOAA's Ex. 3; Tr. 2936.

18. Respondent Cooke elected to submit an optional Master's statement to accompany the Violations Report, in which he stated: "We are glad to be updated on TMG. Will update things on vessel." NOAA's Ex. 1 (at p. 4); Tr. 31–32. Mr. Cooke said that he would ensure that on the gear is onboard once he returns to shore. Tr. 29.

19. Throughout the entire boarding, Respondent Cooke was cooperative with Officer Slater. NOAA's Ex. 2; Tr. 24, 27–28, 46–47.

20. Respondents Cooke and Hill admitted that the F/V Double Vision did not have all of the Turtle Mitigation Gear onboard during the inspection. Tr. 54, 61, 63, 82, 85.

21. Having Turtle Mitigation Gear onboard commercial reef fish boats enables the effective and safe release of the turtle back into its natural habitat if incidentally caught. Tr. 45.

22. If Turtle Mitigation Gear is not readily available, the turtle could suffer casualty, or a person could try releasing the turtle without the proper gear which could cause harm to either the turtle or the person. Tr. 45–46.

IV. Liability

A. Burden of Proof

In an action to establish civil liability under the Magnuson-Stevens Act, the Agency has the burden of proving each alleged violation by the preponderance of the evidence. 5 U.S.C. § 556(d); *Cuong Vo*, NOAA Docket No. SE010091FM, 2001 NOAA LEXIS 11, at **16–17 (ALJ, Aug. 17, 2001) (citing 5 U.S.C. § 556(d); *Dept. of Labor v. Greenwich Colleries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100–03 (1981)). Preponderance of the evidence means that the Agency must show that it is more likely than not that a respondent committed the charged violation. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). The Agency "may rely on either direct or circumstantial evidence to establish a violation and satisfy the burden of proof." *Cuong Vo*, NOAA Docket No. SE010091FM, 2001 NOAA LEXIS 11, at *17 (ALJ Aug. 17, 2001) (citing *Reuben Paris, Jr.*, 4 O.R.W. 1058, 1987 NOAA LEXIS 13 (ALJ Sept. 30, 1987) (finding liability on basis of circumstantial evidence)).

B. Elements of Violation

To establish a violation of the Magnuson-Stevens Act, 16 U.S.C. 1857(1)(A) and 50

C.F.R. § 622.7(ff) by Respondents' failure to comply with 50 C.F.R. § 622.10(b)(1), NOAA must prove that: (1) Respondents are "persons" (2) and owners or operators of a vessel, (3) with a freeboard height of four feet or less, (4) for which a Gulf reef fish commercial vessel permit has been issued, and (5) the vessel failed to have onboard the following required equipment for sea turtle mitigation ("Turtle Mitigation Gear"): dipnet, tire (or life vest or other comparable cushioned surface), short-handled dehooker, long-nose or needle-nose pliers, bolt cutters, monofilament line cutters, and at least two types of mouth openers or mouth gags. 50 C.F.R. § 622.10(b)(1)(iii) (2011).

C. Discussion and Conclusions as to Liability

Respondents Cooke, Hill and Redding are each a "person" under the Act, 16 U.S.C. § 1802(31), and Findings of Fact 1, 3, 5 and 6 establish that Respondents Hill and Redding were the owners and Respondent Cooke was the operator of the F/V Double Vision on March 17, 2012. Findings of Fact 2 and 4 establish that the F/V Double Vision had a commercial vessel permit and had a freeboard height of four feet or less. Therefore the first four elements of the violation are shown. As to the final element, Findings of Fact 6, 9, 12, 15, 16, 17 and 18, establish that while the vessel was in the Gulf of Mexico on a commercial fishing trip on March 17, 2012, the vessel did not have onboard all of the sea turtle bycatch mitigation gear required by 50 C.F.R. § 622.10(b)(1)(iii). It is concluded that NOAA has proven by a preponderance of the evidence that Respondents failed to comply with the sea turtle mitigation measures, in violation of 50 C.F.R. § 622.10(b)(1) and therefore violated the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A) and 50 C.F.R. § 622.7(ff), as alleged in the NOVA.

Respondents are charged jointly and severally in this matter. The procedural rules provide:

> A final administrative decision by the Judge . . . after a hearing required by one joint and several respondent is binding on all parties including all other joint and several respondent(s), whether or not they entered an appearance unless they have otherwise resolved the matter through settlement with the Agency.

15 C.F.R. § 904.107(c). Holding the Respondents jointly and severally liable is consistent with the rationale of respondeat superior, to "prevent vessel owners and operators from reaping the benefits of illegal fishing activities while avoiding the responsibility that goes along with such tactics." *James Chan Song Kim, et al.*, 2003 NOAA LEXIS 4 **28–29 (ALJ, Jan. 7, 2003). Accordingly, it is concluded that Respondents are jointly and severally liable for the violation alleged in the NOVA.

Respondent Hill testified that he had previously purchased Turtle Mitigation Gear and that it may have been stolen from the F/V Double Vision. Tr. 61, 64-65, 67, 73-74, 82. Assuming this were true, the mere fact of having previously purchased the equipment, and thus having an intent to comply, does not excuse liability. Violations of the Magnuson-Stevens Act and implementing regulations are strict liability offenses. *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999); *Roche v. Evans*, 247 F. Supp. 2d 47, 59 (D. Mass. 2003); *see*

Timothy A. Whitney, 6 O.R.W. 479, 1991 NOAA LEXIS 33, at *10 (ALJ July 3, 1991) (quoting *Accursio Alba*, 2 O.R.W. 670, 1982 NOAA LEXIS 29, at *7 (NOAA App. 1982)) ("'[S]cienter is not an element of a civil offense under . . . 16 U.S.C. § 1857.'"); *cf.*, *Tart v. Massachusetts*, 949 F.2d 490, 502 (1st Cir. 1991) (legislative silence as to state of mind should not be construed as including a mens rea requirement in a statute for a criminal offense where it is a regulatory offense not known at common law).

VI. Penalty

A. Statutory and Regulatory Provisions

Any person found to have committed an act made unlawful by the Magnuson-Stevens Act "shall be liable to the United States for a civil penalty" not to exceed $140,000 per violation. 16 U.S.C. § 1858(a); 15 C.F.R. § 6.4(f)(14) (maximum penalty of $100,000 in the Act increased to $140,000 as authorized by the Inflation Adjustment Act). The Magnuson-Stevens Act states that, in determining the amount of such penalty, "the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require" shall be taken into account. 16 U.S.C. § 1858(a); *see* 15 C.F.R. § 904.108.

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

The Administrative Law Judge is responsible for "[a]ssess[ing] a civil penalty or impos[ing] a permit sanction, condition, revocation, or denial of permit application, taking into account all of the factors required by applicable law." 15 C.F.R. § 904.204(m) (2012); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631–32 (June 23, 2010). The current regulation "eliminates any presumption in favor of the civil penalty or permit sanction assessed by NOAA in its charging document," and "requires instead that NOAA justify at a hearing . . . that its proposed penalty or permit sanction is appropriate, taking into account all the factors required by applicable law." 75 Fed. Reg. at 35,631–32.

B. Penalty Policy

On March 16, 2011, NOAA issued a "Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions" ("Penalty Policy") which provides guidance for penalty assessments under multiple statutes enforced by NOAA. 76 Fed. Reg. 20959 (Apr. 14, 2011). While it states that it "provides guidance for the NOAA Office of General Counsel" and refers to NOAA attorneys determining proposing penalties, it may be useful, yet is not binding, for Administrative Law Judges to use as an analytical framework for determining a penalty in an initial decision. See *Student Public Interest Research Group v. Hercules,* Civ. No. 83-3262, 1989

U.S. Dist. LEXIS 16901 (D. NJ, April 6, 1989) (a penalty policy "provides a helpful analytical framework" for the court in arriving at a civil penalty).

The Penalty Policy was not included as an exhibit by the Agency, but was referenced in the Agency's Post Hearing Brief (at p. 9) and on the Penalty Assessment Worksheet attached to the NOVA, along with the Penalty Policy's Federal Register citation and a web address to access the Penalty Policy electronically through NOAA's website.

Under the applicable procedural rules, official notice may be taken of "any reasonably available public document; provided that the parties will be advised of the matter noticed and given reasonable opportunity to show the contrary." 15 C.F.R. § 904.204(1). The Penalty Policy is a reasonably available public document. It was specifically made reasonably available to Respondents at the commencement of this proceeding, although they are not represented by counsel, where the web address to access the Penalty Policy was provided to them with the NOVA. Official notice is taken of the Penalty Policy.

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

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

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

Next, the culpability of the alleged violator is assessed as one of four levels in increasing order of severity: (A) unintentional, including accident and mistake; (B) negligence; (C) recklessness; and (D) intentional. *Id.* at 8–9. The Penalty Policy lists factors to be considered when assigning culpability, including whether the alleged violator took reasonable precautions

against the events constituting the violation, the level of control the alleged violator had over these events, whether the alleged violator knew or should have known of the potential harm associated with the conduct, and "other similar factors as appropriate." *Id.* at 9. Under the Penalty Policy, negligence is described as "failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances" and "[t]he failure to know of applicable laws/regulations or to recognize when a violation has occurred may itself be evidence of negligence." *Id.* On the other hand, recklessness is described as a "conscious disregard of a substantial risk of violating conservation measures that involves a gross deviation from the standard of conduct a law-abiding person would observe in a similar situation," such as where "someone does not intend a certain result, but nonetheless foresees the possibility that his or her actions will have that result and consciously takes that risk." *Id.*

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

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

Another adjustment factor in the Penalty Policy provides for a decrease in the penalty in certain circumstances where the violation arises from non-commercial activity. *Id.* at 11.

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

Id.

Added to the adjusted base penalty is any value of proceeds gained from unlawful activity and any economic benefit of noncompliance to the violator. *Id.* at 12-13. The Penalty Policy (at p. 12) provides that "[t]he value of proceeds from the unlawful activity and any additional economic benefit to an alleged violator are factored in to prevent violators from profiting from illicit behavior and engaging in improper behavior because the sanctions imposed are merely a 'cost of doing business' (i.e. because the economic benefit of their unlawful activity exceeds the cost of a potential penalty)." Included as economic benefit are avoided costs, expenditures that are not made by the violator leading to a failure to comply with the law. *Id.* at 13.

C. Agency's Proposed Penalty and Arguments in Support

The Agency proposes that Respondents be held jointly and severally liable for a penalty of $5,000 for the violation alleged in the NOVA. The Agency calculated this amount pursuant to the statutory factors and the Penalty Policy. Agency Post-Hearing Brief ("NOAA's Br.") at 9–10.

The Agency asserts that under the Penalty Policy, "failing to have required gear onboard" constitutes a Level II offense. NOAA's Br. at 10. The Agency notes that the Penalty Policy makes clear that failure to know of applicable laws and regulations or to recognize that a violation has occurred "may itself be evidence of negligence." *Id.* at 10 (citing Penalty Policy at 9). Accordingly, the Agency deems Respondents' level of culpability "negligent." *Id.* at 10. The Agency determined a base penalty range of $4,000 to $6,000 as assigned by the Penalty Policy matrix based on the classification of a Level II offense resulting from negligence. *Id.* at 10 (citing Penalty Policy, at 25).

NOAA states that its regulations "stand as the last line of defense against the permanent loss of sea turtles for this and future generations." *Id.* at 10. The Agency explains that all species of sea turtles found in the Gulf of Mexico are either endangered or threatened, and that the sea turtle mitigation regulations "are designed to protect endangered and threatened sea turtles" and that Respondents' violation of these regulations "put any endangered or threatened sea turtle at risk if caught." *Id.*

NOAA explains that the purpose of the requirement to have sea turtle mitigation gear on board all federally permitted commercial Gulf reef fishing vessels, is "to minimize the harm to these endangered or threatened sea turtles if incidentally caught so future generations may witness these wonderful creatures." *Id.* Noting that "[e]xtinction is forever," the Agency urges that "this simple but fundamental truth should serve as the court's lodestar in its deliberation on an appropriate penalty." *Id.*

D. Respondents' Arguments

Respondent Hill argues that the proposed penalty of $5,000 "is very excessive," that he owns just a single small fishing boat which uses a single hook, that it never caught a turtle. Tr. 14, 16, 61. He testified that he purchased a kit of Turtle Mitigation Gear about a year and a half

or two years ago, but that the Turtle Mitigation Gear must have been stolen, pointing out that his vessel docks at a public marina and that "every now and then we have generators come up missing" and that "[p]eople steal." Tr. 61, 64-65, 67, 72-74, 77-79, 82; *see*, Tr. 13. He testified that he has filed at least two police reports in response to equipment being stolen from the F/V Double Vision, and that a locked compartment had previously been broken into on the vessel. Tr. 15, 61, 79. He stated that he did not know that the Turtle Mitigation Gear was missing from the F/V Double Vision. Tr. 14, 15, 61. He argued that they did not intentionally break the law as they know the vessel will be boarded and inspected by NOAA. Tr. 14-16. He argued that neither he nor Respondent Cooke have past violations. Tr. 13, 15.

Respondent Hill also claimed that the proposed penalty would be "just devastating to [him] and to Mr. Brady [Cooke] financially." Tr. 18. Respondent Cooke testified that he earns $14 per hour and works up to 30 hours per week at a seasonal job. Tr. 55. Two exhibits concerning his ability to pay, including a financial statement and a credit report, were admitted in evidence. Respondent Cooke's Exs. 1–2. He testified that he is "a single father of two girls," that "it's real hard to make ends meet right now," that paying even half of the penalty would take him "a couple of years," and he asked "for forgiveness from NOAA and the courts." Tr. 55-56.

Respondent Hill did not submit any financial documentation, although he acknowledged that he received "some papers" from the Agency, including financial forms concerning ability to pay. Tr. 7, 65–67. He explained that he did not complete the financial forms provided by the Agency "because [he] didn't think [Respondents] were guilty." Tr. 67–68.

E. Discussion and Conclusions

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

The requirement that a vessel have all of the Turtle Mitigation Gear on board allows safe and effective release of sea turtles caught in fishing gear, with minimal injury to the turtle. Finding of Fact 21. If Turtle Mitigation Gear is not readily available, the turtle could die or become severely injured if a person tries to release the turtle from the fishing gear without the proper equipment. Finding of Fact 22. Appendix 3 of the Penalty Policy provides that under the Magnuson-Stevens Act, the violation of "failing to have required gear onboard" is a gravity Level II offense, although the listing is not specific to Turtle Mitigation Gear. Penalty Policy p. 32. It is noted that Appendix 3 specifically lists "[f]ailing to comply with sea turtle mitigation gear and handling requirements by international agreement," in the context of tuna fishing, as a gravity Level III offense. Penalty Policy p. 39. It is further noted that Appendix 3 lists under the Endangered Species Act (which has a different penalty matrix than the Magnuson-Stevens Act) violations involving discrepancies in Turtle Excluder Devices: those that are "likely to kill some turtles encountered" is assigned Level II and those that are "likely to kill most turtles encountered" is assigned Level III. Penalty Policy at 50. It is concluded that the relative gravity of failure have the required Turtle Mitigation Gear onboard is appropriately assessed as a Level II offense according to the Penalty Policy.

Nevertheless, the gravity level of a violation in particular instances may vary, as gravity reflects not only the nature of the violation, but also the extent and circumstances of the

violation. Some of the evidence of record presents the question of whether the penalty should be reduced to reflect a lesser extent of violation, or to reflect the particular circumstances of this case. First, two of the items of Turtle Mitigation Gear were onboard the vessel on the date of Officer Slater's inspection. Finding of Fact 15. This fact loses some of its significance, however, considering Respondent Hill's testimony that the pliers was one of many in the toolbox on the vessel, so it may have been kept for general purposes rather than intended for releasing sea turtles. Tr. 61. Furthermore, a short handled dehooker and short needle nose pliers may not be useful without a dipnet or a cushioned surface for bringing a turtle onboard.

Second, it is noted that on the date of the inspection, there were several personal flotation devices onboard the F/V Double Vision. NOAA Ex. 6 (at p. 2); Tr. 75. However, neither Officer Slater nor Respondents suggested that they could serve as a cushioned, elevated surface instead of a tire for immobilizing a sea turtle brought onboard. In any event, Respondent Cooke did not identify a personal flotation device as an item of Turtle Mitigation Gear during the inspection, and furthermore, he opined that bringing a turtle onboard is dangerous to the turtle and to the crew, and is not a good idea. Tr. 57. Consequently, any personal flotation devices on the vessel would not have served as Turtle Mitigation Gear and cannot be considered as sufficient to meet one of the seven items required by 50 C.F.R. § 622.10(b)(1)(iii) or to reduce the penalty.

Third, Respondent Cooke testified that after he returned to port, he "ripped the boat apart" during a dockside examination for the Coast Guard and found "[c]hocking blocks for the mouth of the turtle" and either "the long pole mono-cutter or the long pole dehooker" in the vessel's engine room. Tr. 54, 57–58. In addition, Respondent Hill testified that he bought Turtle Mitigation Gear but that he suspects it was stolen. Tr. 61, 64-65, 67, 72-74, 77-79, 82. Even if this testimony is credited, these circumstances do not weigh in favor of reducing the penalty where the Respondents failed to ensure that the required items were on the vessel prior to the fishing trip, and did not know the required items of Turtle Mitigation Gear or where they were located on the F/V Double Vision during fishing trips. Findings of Fact 13, 14; Tr. 65, 75. Indeed, Officer Slater testified that he "tried to work with [Respondent Cooke] to find the [Turtle Mitigation] gear" and that he "read off the items" on his checklist, but that Respondent Cooke "didn't know where any of the gear was" and "really didn't even know what it was," and asked him, "What is turtle mitigation gear?" Tr. 27, 50. Viewing the evidence as a whole, the purpose of the regulatory requirement to have Turtle Mitigation Gear onboard the vessel was wholly thwarted in this case.

Fourth, Respondent Hill emphasizes the small size of the F/V Double Vision, which is only 33.8 feet in length, and that they fished only with a single hook rod and reel. Findings of Fact 4, 9; Tr. 61. On the other hand, and counterbalancing those circumstances to some degree, Respondent Cooke had taken several other fishing trips on the F/V Double Vision. Finding of Fact 7. These circumstances warrant some reduction in the penalty.

2. Culpability

The evidence shows that Respondents' culpability at least meets the "negligence" level of culpability, that is, a "lack of diligence, a disregard of the consequences likely to result from

one's actions, or carelessness." Penalty Policy at 9. Even if Respondent Hill's testimony that he purchased Turtle Mitigation Gear is credited, his failure to point it out to Respondent Cooke, and the latter's failure to check the vessel to ensure that it had Turtle Mitigation Gear onboard prior to taking it out on a commercial fishing trip, was a failure on the part of both Respondents "to exercise the degree of care that a reasonably prudent person would exercise." Penalty Policy at 9. Respondents' lack of knowledge of applicable regulations, not knowing what items constitute Turtle Mitigation Gear, also supports a finding of negligent level of culpability. Finding of Fact 13. Respondent Hill testified that he merely heard about Turtle Mitigation Gear from other fishermen, and "thought" he had turtle mitigation equipment, including a dip net and a dehooker, on the vessel, but he did not know what items of Turtle Mitigation Gear he purchased. Tr. 61-63, 64-65, 72-78. Thus the violation was not merely "unintentional" or "the result of an accident or mistake." Penalty Policy at 9.

There is some support in the record for a finding that Respondents' conduct was more than negligent, and was reckless. Given Respondent Hill's testimony that items had been stolen from the vessel previously, he could have foreseen the possibility that Turtle Mitigation Gear could be stolen, resulting in a situation where a sea turtle is caught and the crew does not have the gear to safely release it. His testimony suggests that he did not consider Turtle Mitigation Gear to be important, stating that "it was just something that you'd throw around because it was in the way." Tr. 75, 78. His view of releasing sea turtles reflects a conscious disregard of the risks to sea turtles, in his testimony, "if we ever did catch a turtle we would just cut the line and the hook would melt away within a week out of the turtle anyway, where the turtle wasn't in stress . . ." and "all that takes is a pair of pliers." Tr. 61. As to Respondent Cooke, his complete ignorance of Turtle Mitigation Gear requirements despite his years of commercial fishing experience, and his disinclination to bring a turtle onboard (Finding of Fact 7; Tr. 57), is tantamount to a gross deviation from the standard of conduct of a law-abiding person. Neither Respondent took reasonable precautions to ensure compliance with sea turtle bycatch mitigation gear requirements, and they should have known of the potential harm of not having the gear onboard.

Respondents' conduct in regard to the violation, viewing the evidence as a whole, is best characterized as negligent but approaching the level of recklessness, considering the factors listed in the Penalty Policy for assessing the level of culpability.

3. Matrix Value

Under the penalty matrix for violations of the Magnuson-Stevens Act, negligent violations of a Level II offense are assessed a penalty within the range of $4,000 to $6,000, and reckless violations of a Level II offense are assessed a penalty of $6,000 to $10,000. Penalty Policy at 25. Starting with $5,000, the midpoint of the range for a negligent Level II offense, the gravity of the violation is reduced to account for the extent and circumstances of Respondents' violation as discussed above. However, the higher level of Respondents' culpability counterbalances that reduction, resulting in a value of $5,000 as an initial base penalty.

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

The record does not contain evidence that any of the Respondents have ever been cited for a violation of natural resource protection laws prior to the violation charged in the instant proceeding. The Penalty Policy matrix values are set consistent with the policy therein that the penalty is only adjusted upward for a history of prior violations and is not reduced for lack of prior violations. Penalty Policy at 10-11. Accordingly, the penalty is not reduced for the Respondents' lack of prior offenses.

As to Respondents' good or bad faith after the violation, the evidence shows that Respondent Cooke welcomed the boarding team onboard the vessel and cooperated with Officer Slater during the boarding on March 17, 2013. Findings of Fact 10, 19; NOAA's Ex. 2. Respondents Hill and Cooke and accepted responsibility for the violation. Finding of Fact 20; Tr. 54, 57, 63, 67. However, in the circumstances of a simple inspection for gear and a failure to have it onboard, and where there was no ongoing investigation, these facts are not significant in allowing for greater efficiency in administering the enforcement program. Therefore a reduction in the penalty is not warranted.

NOAA did not adjust its proposed penalty to reflect any avoided costs stemming from Respondents' failure to obtain the required turtle bycatch mitigation gear. Testimony at hearing suggested that the gear cost approximately $400. Tr. 77-78. The penalty assessed in this case far exceeds the cost of the gear and is sufficient to deter a violator from avoiding purchase of Turtle Mitigation Gear as a cost of doing business. An increase to the penalty for economic benefit of noncompliance is not warranted in this case.

5. Ability to Pay

The NOVA advised Respondents that they could seek to have the proposed penalty amount modified on the basis that they did not have the ability to pay, and that any such modification request would have to be made in accordance with 15 C.F.R. § 904.102 and be accompanied by supporting financial information. NOVA at 2. Respondent Cooke provided NOAA timely with documentation concerning his ability to pay a penalty prior to hearing, and that documentation was offered into evidence at hearing without objection. Tr. 6–8, 59–60. Respondent Hill refused to submit any documentation as to his financial condition to NOAA in response to NOAA's requests. Tr. 65-68. He also did not offer any such documentation into evidence at hearing or in the two week period provided to him after the hearing. Tr. 20-21. Respondent Hill's testimony as to his financial circumstances is uncorroborated and assumed to be self-serving. Respondent Hill is therefore "presumed to have the ability to pay the civil penalty." 15 C.F.R. § 904.108(c)-(h). A respondent's refusal or failure to respond to NOAA's requests for financial information "may serve as the basis for inferring that such information would have been averse to any claim by respondent of inability to pay the assessed civil penalty." 15 C.F.R. § 904.108(h).

Because liability is assessed jointly and severally in this case, and one of the Respondents is presumed able to pay the civil penalty, the remaining Respondents' ability to pay need not be considered. Even if Respondent Cooke's exhibits are considered, they consist only of a financial

questionnaire stating his employment, income, assets, expenses, and bank account balances, and a credit profile report. There are no documents in evidence which verify the information, so a determination as to whether it is complete and accurate cannot be made. The penalty will not be reduced on the basis of Respondents' ability to pay.

F. Ultimate Conclusion

Taking into account the nature, circumstances, extent, and gravity of the violation and Respondents' degree of culpability, an initial base penalty of $5,000 is assessed. No adjustments are warranted for any history of prior offenses or other matters as justice may require. Therefore, Respondents are assessed jointly and severally a civil penalty in the amount of $5,000.

ORDER

IT IS HEREBY ORDERED THAT a civil penalty in the total amount of **$5,000** is assessed jointly and severally against Respondents John Hill, Michael Redding, and Brady Cooke.

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

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

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

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

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

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

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

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

15 CFR 904.271-273

§ 904.271 Initial decision.

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

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

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

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

(4) A statement of further right to appeal.

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

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

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

(1) Otherwise provided by statute or regulations;

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

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

§ 904.272 Petition for reconsideration.

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

§ 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse,

modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

(c) Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for discretionary review, or review is timely undertaken on the Administrator's own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

(d) A petition for review must comply with the following requirements regarding format and content:

(1) The petition must include a concise statement of the case, which must contain a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;

(2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;

(3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations, and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;

(4) A copy of the Judge's initial decision must be attached to the petition;

(5) Copies of all cited portions of the record must be attached to the petition;

(6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and

(7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.

(f) No oral argument on petitions for discretionary review will be allowed.

(g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.

(h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.

(i) If the Administrator issues an order denying discretionary review, the order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.

(j) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be briefed and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

(l) An initial decision shall not be subject to judicial review unless:

(1) The party seeking judicial review has exhausted its opportunity for administrative review by filing a petition for review with the Administrator in compliance with this section, and

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section.

(m) For purposes of any subsequent judicial review of the agency decision, any issues that are not identified in any petition for review, in any answer in support or opposition, by the Administrator, or in any modifications to the initial decision are waived.

(n) If an action is filed for judicial review of a final agency decision, and the decision is vacated or remanded by a court, the Administrator shall issue an order addressing further administrative proceedings in the matter. Such order may include a remand to the Chief Administrative Law Judge for further proceedings consistent with the judicial decision, or further briefing before the Administrator on any issues the Administrator deems appropriate.