UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:	)	**DOCKET NUMBER**
	)	
Craig Bolton and	)	**AK1200300, F/V Pacific Challenger**
Pacific Dawn LLC,	)	
	)	
Respondents.	)	

INITIAL DECISION AND ORDER

Date: February 9, 2015

Before: Susan L. Biro, Chief Administrative Law Judge[1]
U.S. Environmental Protection Agency

Appearances: For the Agency:

Paul Ortiz, Esq.
NOAA Office of General Counsel
Enforcement Section (Southwest)
501 W. Ocean Blvd., Rm. 4470
Long Beach, CA 90802

For Respondents:

James P. Walsh, Esq.
Davis Wright Tremaine, LLP
505 Montgomery St., Ste. 800
San Francisco, CA 94111

[1] Pursuant to 5 U.S.C. § 3344 and 5 C.F.R. § 930.208, the U.S. Office of Personnel Management approved an Interagency Agreement authorizing the Administrative Law Judges of the United States Environmental Protection Agency to hear cases pending before the National Oceanic and Atmospheric Administration, effective for a period beginning September 8, 2011.

I. PROCEDURAL HISTORY

On August 27, 2012, counsel for the National Oceanic and Atmospheric Administration ("NOAA" or "Agency"), on behalf of the Secretary of Commerce, initiated this action by issuing a Notice of Violation and Assessment of Administrative Penalty ("NOVA") to Craig Bolton and Pacific Dawn LLC, in reference to the fishing vessel ("F/V") Pacific Challenger. The NOVA charges Respondent Craig Bolton as the vessel operator, and Respondent Pacific Dawn LLC as the vessel owner, jointly and severally, in three counts of violating the Magnuson-Stevens Fishery Conservation and Management Act ("the Act"), as amended, at 16 U.S.C. § 1857(1)(A), and certain regulations implementing the Act, 50 C.F.R. § 679.4(k)(1)(i) and § 679.7(i)(6). NOVA at 1–3. Specifically, Respondents are charged with engaging in three instances of "directed fishing" with the Pacific Challenger for Pacific cod in the Western Gulf area of the Gulf of Alaska in late January 2011, without the requisite License Limitation Permit. *Id.* at 1. For the three violations, the Agency proposes penalties totaling $325,441.76. *Id.* at 2.

On May 8, 2013, acting through counsel, Respondents requested a hearing on the charges, and the following day, NOAA forwarded the case to the undersigned for processing pursuant to the applicable procedural rules, 15 C.F.R. Part 904 ("Rules"). An Assignment of Administrative Law Judge and Order to Submit Preliminary Positions on Issues and Procedures ("PPIP Order") was issued on July 2, 2013. On September 24, 2013, the undersigned was re-designated to preside over this matter, and on September 25, 2013, I issued a Hearing Order setting forth certain prehearing deadlines and scheduling the hearing.

The hearing in this matter was held on November 19, 2013, in Seattle, Washington.[2] The Agency did not call any witnesses to testify. Respondents offered the testimony of two witnesses: Burton Charles Parker, Sr., and Christopher Daniel Peterson, Sr. Tr. 20–80 (testimony of Mr. Parker); Tr. 81–101 (testimony of Mr. Peterson). Also admitted into the record were forty-two joint exhibits,[3] one Court exhibit consisting of the parties' Joint Stipulations of Facts and Agreement on Admission of Evidence,[4] and one exhibit offered by Respondents.[5] Tr. 5-8, 35. On December 3, 2013, a digital version of the transcript was e-mailed to counsel for the Agency and counsel for Respondents pursuant to 15 C.F.R. § 904.260(b). A Post-Hearing Scheduling Order was issued on December 4, 2013. On December 18, 2013, the undersigned issued an Order granting the parties' Joint Motion to Conform Hearing Transcript to Testimony.

On January 16, 2014, the Agency filed its initial Post-Hearing Brief ("Agency's Brief," cited as "A's Br."). On January 31, 2014, Respondents filed their Post-Hearing Memorandum

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[2] Citations herein to the transcript of the hearing in this case are made as follows: "Tr. [page]."

[3] Citations herein to the forty-two joint exhibits are made as follows: "Jt. Ex. [number]."

[4] Citations herein to the Joint Stipulations are made as follows: "Jt. Stip. ¶ [number]." By consent, at hearing, the parties orally corrected typographical errors in Joint Stipulations 42 and 45. Tr. 5–6.

[5] Citations herein to Respondents' exhibit are made as follows: "RE 1."

("Respondents' Brief," cited as "Rs' Br."). On February 13, 2014, the Agency filed its Post-Hearing Reply Brief ("Agency's Reply Brief," cited as "A's Reply Br."). On February 28, 2014, Respondents filed their Post-Hearing Reply Memorandum ("Respondent's Reply Brief," cited as "Rs' Reply Br."). The record closed upon that filing.

II. 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," Congress enacted the Fishery Conservation and Management Act in 1976 ("the Act") (later amended and renamed the Magnuson-Stevens Fishery Conservation and Management Act) (codified as amended at 16 U.S.C. §§ 1801–1891d). 16 U.S.C. § 1801(a)(6); *see* Pub. L. No. 94-265, 90 Stat. 331 (1976); Pub. L. No. 96-561, 94 Stat. 3275 (1980); Pub. L. No. 104-297, 110 Stat. 3559 (1996); Pub. L. No. 109-479, 120 Stat. 3575 (2007) (reauthorization). The provisions of the Act are designed to, *inter alia*, "promote domestic commercial and recreational fishing under sound conservation and management principles" and "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."[6] 16 U.S.C. § 1801(b)(3)–(4). Under the Act, "[i]t is unlawful . . . for any person . . . to violate any provision of this chapter or any regulation or permit issued pursuant to this chapter." 16 U.S.C. § 1857(1)(A). Violators of the Act may be subject to penalties up to $140,000 for each violation, as adjusted for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321. 15 C.F.R. § 6.4(f)(14); Jt. Stip. ¶ 15.

Pursuant to the Act, NOAA has promulgated regulations applicable to all federally managed Alaska-based fisheries, including those in the Gulf of Alaska ("GOA").[7] 50 C.F.R.

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[6] A "fishery" is "one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and[/or] economic characteristics" or method of catch. 16 U.S.C. § 1802(13)(A); 50 C.F.R. § 600.10. The term "optimum," "with respect to the yield from a fishery, means the amount of fish which . . . will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems," and in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield. 16 U.S.C. § 1802(33); 50 C.F.R. §§ 679.2, 679.20(a)(1).

[7] The "Gulf of Alaska" is that part of the Pacific Ocean bounded on the north by the southern coast of Alaska, and defined by regulation more specifically as "that portion of the EEZ [Exclusive Economic Zone] contained in Statistical Areas 610, 620, 630, 640, and 650" (areas established using set geographic coordinates). 50 C.F.R. § 679.2; 50 C.F.R. Part 679 Figure 3. The EEZ is "that area adjacent to the United States which, except where modified to

Part 679; Jt. Stip. ¶ 5.[8] The regulations cover the Alaska Groundfish Fishery ("AGF"), which includes the Pacific cod. 50 C.F.R. § 679.1(a); Jt. Stip. ¶ 5.

"Directed fishing" is a technical term defined in 50 C.F.R. § 679.2. Commonly understood, a vessel conducts "directed fishing" for a given species when that species constitutes the majority of what the vessel offloads. *See* A's Br. at 8 n. 4. NOAA regulations require that to lawfully conduct directed groundfishing in the AGF, commercial fishing vessels must have both a Federal Fisheries Permit ("FFP" or "fisheries permit") and a License Limitation [for] Groundfish ("LLG" or "groundfish license"). 50 C.F.R. § 679.4(b)(1), (k)(1); Jt. Stips. ¶¶ 6, 7. These permits and licenses are issued by NOAA's National Marine Fisheries Service ("NMFS"), Restricted Access Management Program, Alaska Region ("the RAM"). 50 C.F.R. § 679.4(a)(3), (b)(4), (k)(1); Jt. Stips. ¶¶ 6, 8.

FFPs are issued without charge upon request of the owner of the vessel. 50 C.F.R. § 679.4(b)(1); Jt. Stip. ¶ 6. FFPs are valid only for the vessel (specified by name and length) for which they are issued, are of limited duration, and are non-transferable. 50 C.F.R. § 679.4(b)(3), (b)(4), (b)(5)(iii), (6)(8); Jt. Stip ¶ 6.

LLGs are issued to U.S. vessels under the License Limitation Program ("LLP") for commercial ground fisheries in the EEZ off Alaska. *See* 50 C.F.R. § 679.1(j) (outlining the scope of the LLP); Jt. Stip. ¶ 7. The LLP is one of NMFS' fishery management measures for regulating "the amount of fishing in the North Pacific Ocean to ensure that fisheries are conservatively managed and do not exceed established biological thresholds." Fisheries of the Exclusive Economic Zone off Alaska; Bering Sea and Aleutian Islands (Amendment 92) and Gulf of Alaska License (Amendment 82) Limitation Program, 74 Fed. Reg. 41,080, 41,080 (Aug. 14, 2009) (hereinafter "Latent LLP Rule" or "Rule"). Among other things, the LLP is "intended to limit entry into federally managed fisheries." *Id.* For vessels fishing in the GOA, the LLP regulations provide in pertinent part that:

> [E]ach vessel within the GOA . . . must have an LLP groundfish license [i.e., an LLG] on board at all times it is engaged in fishing activities defined in § 679.2 as directed fishing for license limitation groundfish. This groundfish license, issued by NMFS to a qualified person, authorizes a license holder to deploy a vessel to conduct directed fishing for license limitation groundfish only in accordance with the specific area and species endorsements, the vessel and gear designations, and the MLOA [maximum length overall] specified on the license.

50 C.F.R. § 679.4(k)(1)(i). *See also*, Jt. Stips. ¶¶ 7, 9, 11.

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accommodate international boundaries, encompasses all waters from the seaward boundary of each of the coastal states to . . . 200 nautical miles [out from shore]." 50 C.F.R. § 600.10.

[8] All citations to regulations provided herein are to those in effect at the time of the violations in 2011, unless otherwise indicated.

In terms of the specific areas that may be identified on the license, the possible endorsements include the areas of the Bering Sea, Aleutian Islands, Western Gulf, Central Gulf and Southeastern Gulf. 50 C.F.R. § 679.4(k); Jt. Stip. ¶ 9. The species endorsements include Pacific cod, Pollock, etc. *Id.;* Jt. Stip. ¶ 9. The MLOA is a numerical cap on a vessel's allowable "length overall" ("LOA"). 50 C.F.R. § 679.2; Jt. Stip. ¶ 9. The regulations provide that the LLG "may be used only on a vessel named on the license, a vessel that complies with the vessel designation and gear designation specified on the license, and a vessel that has an LOA less than or equal to the MLOA specified on the license." 50 C.F.R. § 679.4(k)(3)(i)(A); Jt. Stip. ¶ 12. The regulations further make it unlawful for any person to "[u]se a vessel to fish for LLP groundfish . . . or allow a vessel to be used to fish for LLP groundfish . . . that has an LOA that exceeds the MLOA specified on the license that authorizes fishing for LLP groundfish . . . ." 50 C.F.R. § 679.7(i)(6); Jt. Stip. ¶ 13. However, unlike FFPs, the regulations do permit the transfer of LLGs upon application and with the approval of the RAM under certain circumstances. 50 C.F.R. § 679.4(k)(7).

III. FACTUAL BACKGROUND

The Pacific Challenger (U.S. Coast Guard Doc. No. 518937) is a "medium-scale trawl fishing[9] vessel" that uses Seattle, Washington, as its hailing port and operates in the Pacific Ocean off the coast of Alaska. Jt. Stips. ¶¶ 23, 27–28. The vessel uses trawl fishing gear to target groundfish species, including Pacific cod. *Id.* ¶ 27.

During the times relevant here in 2011, the Pacific Challenger was owned by Respondent Pacific Dawn, LLC ("the Company"). Jt. Stips. ¶ 2. The Company was owned in equal shares by Burton Charles Parker and Christopher Daniel Peterson (collectively, "owners"). Tr. 23. Both owners have extensive personal experience with commercial fishing: Mr. Parker's first trip on a commercial fishing vessel occurred when he was only six years old, and he has owned numerous vessels over his multi-decade career. Tr. 21–22. Mr. Peterson has a similarly long commercial fishing career, and has fished aboard the Pacific Challenger since the vessel was built in 1969. Tr. 81. As partners in the Company, Mr. Parker and Mr. Peterson each had organizational responsibilities with respect to the Pacific Challenger: Mr. Parker managed the "day-to-day" needs of the vessel, including some permitting issues, and Mr. Peterson generally captained the vessel, and was responsible for annually ensuring that all permits were in order. Tr. 21, 36, 81-82. However, in or about early 2011, the Company hired Respondent Craig Bolton as a "relief captain," to operate the Pacific Challenger so that Mr. Peterson could have

[9] Trawl fishing involves dragging a long, conical fishing net (the "trawl") near the seafloor. One end of the net - the "mouth," is held open between six and thirty feet wide. The long net then tapers toward a closed "codend" or "bag" at the trailing end. As the net is dragged through a school of fish, the fish entering the mouth are trapped at the codend. The crew then uses hydraulic winches to haul the entire net onto the deck of the fishing vessel, where the captured fish are stored in holds below deck. Jt. Stips. ¶ 29; *see also* James William Merrill, Note, *Trawling for Meaning: A New Standard for "Best Scientific Information Available" in the Magnuson-Stevens Fisheries Conservation Act*, 60 Cath. U. L. Rev. 475, 494 n. 119 (2011) (elaborating on trawl fishing).

some time off. Tr. 27, 87. Mr. Bolton was the "operator" of the vessel during all the trips in January 2011 at issue in this proceeding.[10] Jt. Stips. ¶ 3; Tr. 27–28. The parties stipulated that Respondents engaged in directed fishing for Pacific cod on each of the three fishing trips in this case. Jt. Stips. ¶¶ 39, 42, 45; Tr. 5–6.

A. The Loss of the Amber Dawn, the Creation of "Pacific Dawn LLC," and the Lengthening of the Pacific Challenger

Before Mr. Parker became a one-half partner in the Company, he owned a fishing vessel called the Amber Dawn. Tr. 22. As owner of the Amber Dawn, Mr. Parker possessed LLG 2608, a groundfish license authorizing the Amber Dawn to fish in the Western GOA. Jt. Stips. ¶ 10; Tr. 78-79; JE 4, 14 at 70, 41 at 436.

On March 5, 2001, the Amber Dawn sank, resulting in the loss of its captain and a crew member. Tr. 22, 41; JE 16 at 74, 33. Nevertheless, Mr. Parker retained possession of LLG 2608, and the fishing right thereunder it provided. *See* JE 14, Tr. 22-23. Although Mr. Parker considered replacing the Amber Dawn with an entirely new vessel, he believed that the vessel's LLG could "merge with another vessel that was similar in size and did the same things" so that "all the rights from the AMBER DAWN's would go" to the other vessel. Tr. 23. Mr. Parker discussed this prospect with Mr. Peterson, who had been operating the Pacific Challenger for many years. *Id.* Mr. Peterson possessed a groundfish license for the Pacific Challenger, LLG 1239, which contained endorsements nearly identical to those in Mr. Parker's LLG 2608. *See* JE 13. Both individuals agreed to transfer possession of their respective groundfish licenses to the Company, a new corporation that would own the Pacific Challenger, and in which they would be equal partners. Tr. 23.

By letter dated December 7, 2004, upon request, RAM verified that ownership of Mr. Parker's LLG 2608 was transferred to the Company, Pacific Dawn LLC, and named the Pacific Challenger as the authorized vessel for that license. Jt. Stips. ¶ 10; JE 14. That same day, RAM also verified that ownership of Mr. Peterson's LLG 1239 was transferred to the Company, retaining the Pacific Challenger as the authorized vessel on that license. Jt. Stips. ¶ 10; JE 13.

Pacific Challenger was now the authorized vessel on two groundfish licenses, both possessed by the Company, and both licenses (LLG 1239 and LLG 2608) authorized the Pacific Challenger to fish in the Western Gulf, as well as other areas. JE 4 at 31 (LLG 2608); JE 4 at 32 (LLG 1239). However, the licenses differed in one important respect. Specifically, LLG 2608 carried an MLOA of 124 feet (the length of the sunken Amber Dawn), while LLG 1239 had a shorter MLOA of 104 feet. JE 4 at 31–32. At the time of the 2004 transfer, this difference was not significant, as the Pacific Challenger's actual LOA was 104 feet, and within the maximum length provided by both licenses. *See* JE 3 at 28; Tr. 29–31.

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[10] The Company's owners testified that Mr. Bolton was not responsible for managing the Pacific Challenger's permits and, in fact, had been affirmatively told by the owners that the fishing efforts at issue were legal. Tr. 28, 87. Respondents reiterated this position in their Post-Hearing Brief, stating that Mr. Bolton "had no responsibility to apply for, obtain and maintain licenses or permits" from the Agency. R's Br. at 25. The Company's owners testified that if Respondents are assessed a penalty, the Company would pay the penalty in full. Tr. 28.

However, a couple of years later, the owners decided to lengthen the Pacific Challenger, because whenever the vessel was loaded with fish, its square stern sunk deep in the water, significantly reducing the vessel's hydrodynamics and fuel efficiency. Tr. 28-31. They hoped that by redesigning and extending the stern, they would save fuel and therefore, costs. *Id.* Before undertaking the redesign, the owners consulted their attorney, James Woeppel, and another outside expert, Steve Hughes, who, the owners say, opined that they could legally extend the 104-foot Pacific Challenger up to the MLOA authorized by LLG 2608, i.e. 124 feet, which had been the LOA of the Amber Dawn. Tr. 29–30, 63.

In 2008, the Company hired a marine architect, who lengthened the Pacific Challenger's stern by twelve feet. JE 3 at 28. The Pacific Challenger now had an LOA of 116 feet—within the MLOA on LLG 2608 transferred from the Amber Dawn, *but in excess of the MLOA of 104 ft on LLG 1239. See id.* When the Company reapplied for the Pacific Challenger's FFP permit in 2008, it noted the longer, 116-foot LOA in its application and included a letter from the marine architect attesting to the new LOA. *Id.*; Jt. Stips. ¶ 24; JE 12 at 65–66. Accordingly, RAM issued the Pacific Challenger a new, two-year FFP, effective January 1, 2009, listing the vessel's LOA as 116 feet. JE 12 at 59.

B. The Latent LLP Rule and LLG 2608's Western Gulf Endorsement

On August 14, 2009, NMFS promulgated regulations that would ultimately call into question Respondents' ability to use LLG 2608 (acquired from the Amber Dawn) to trawl for Pacific cod in the Western Gulf. *See* Latent LLP Rule, 74 Fed. Reg. 41,080. The Latent LLP Rule was concerned with the "substantial number" of so-called "'latent' LLP licenses" for trawlers that "were not being used for fishing in some, or all, of the regulatory areas for which they were endorsed." *Id.* at 41,081. For NMFS, these latent LLP licenses presented a potential management problem: If a fishery's value or total allowable catch increased, license-holders that had been sitting on the sidelines might swarm to the area. *Id.*; JE 41 at 470-473. That could result in exceedance of the fishery's total allowable catch, and would otherwise interfere with NMFS' ability to close fisheries in a timely manner. *Id.*

To obviate this problem, the Latent LLP Rule authorized the removal of "latent trawl regulatory area endorsements on LLP licenses," i.e., endorsements "assigned to a vessel that has not made a minimum of two (2) landings using trawl gear in a specific regulatory area during the period 2000 through 2006."[11] *Id.* An endorsement not satisfying this landing requirement could nevertheless avoid removal if it had been "assigned to a vessel that made more than 20 landings in at least one of the regulatory areas of the GOA from 2005 through 2007." *Id.* at 41,082.

Pursuant to the Latent LLP Rule, RAM began a review of all groundfish licenses in the Alaska fisheries. JE 41 at 470-473. During the course of its review, RAM determined that the Western Gulf endorsement on LLG 2608 transferred to the Pacific Challenger from the Amber Dawn should be revoked because it had not been used to make the required minimum number of landings. Jt. Stips. ¶ 30; *see* JE 16 at 74.

[11] The Latent LLP Rule contained a few exemptions from the minimum landing requirements that are not relevant to this proceeding. *See* Latent LLP Rule, 74 Fed. Reg. at 41,082–83.

On September 22, 2009, RAM issued a Preliminary Determination to the Company, stating that the Western Gulf endorsement on LLG 2608 would be removed upon a final agency action. Jt. Stips. ¶ 30. The Preliminary Determination explained that this was because the Amber Dawn had failed to satisfy the Rule's minimum landing requirement. JE 16 at 74.

On November 6, 2009, RAM issued an Initial Administrative Decision ("IAD"), affirming that Preliminary Determination. Jt. Stips. ¶ 31. On December 18, 2009, the Company, timely appealed the IAD to NOAA's Office of Administrative Appeals ("OAA"), pursuant to 50 C.F.R. § 679.43(c). *Id.* ¶ 32; JE 16 at 74.

The Company's appeal was unsuccessful; on March 2, 2010, Administrative Judge Mary Alice McKeen issued a Decision affirming the finding of the IAD. Jt. Stips. ¶ 33. The Company then filed a Motion for Reconsideration with Judge McKeen on March 11, 2010. *Id.* ¶ 34.

The Company's reconsideration motion was unsuccessful as well; on December 8, 2010, Judge McKeen issued a Decision on Reconsideration again affirming the finding of the IAD that LLG 2608 should lose its Western Gulf endorsement under the Latent LLP Rule. Jt. Stips. ¶ 35; *see* JE 16 (Decision on Reconsideration). Specifically, Judge McKeen found that LLG 2608 had not been used enough to meet the minimum landing requirements of the Rule.[12] JE 16 at 76–77. Judge McKeen held that LLG 2608 had only been used for one qualifying landing by the Amber Dawn before it sank on March 5, 2001 – one short of what would have been required to keep the endorsement.[13] *Id.* at 76. In her Decision on Reconsideration, Judge McKeen also considered the extent to which the Company could use landings made by the Pacific Challenger, but concluded that, regardless, that vessel "did not make any" qualifying landings with LLG 2608 during the relevant timeframes. *Id.* at 76–77.

On December 8, 2010, the OAA Decision was served by e-mail on James Woeppel (the Company's attorney), who received it that day. Jt. Stips. ¶ 36. Mr. Woeppel informed the Company of the OAA Decision. Tr. 43-44. Five days later, on December 13, 2010, a hardcopy of the OAA Decision was served on Mr. Woeppel by certified mail. Jt. Stips. ¶ 36. The OAA Decision concluded: "The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect January 7, 2011, unless by that date the Regional Administrator orders review of the Decision." JE 16 at 85.

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[12] Specifically, the OAA Decision found that LLG 2608 had not satisfied the Rule's requirement that an endorsement be used either for two landings in 2000–2006, or twenty groundfish landings in 2005–2007. JE 16 at 76–77.

[13] Judge McKeen also considered "an affidavit from the [Amber Dawn]'s managing owner" attesting that the Amber Dawn had made "an additional landing or landings" during the relevant timeframes. JE 16 at 76. Judge McKeen found this evidence "insufficient" given that NMFS regulations require an LLG's landings to be based on either "State of Alaska fish tickets or NMFS weekly production reports," neither of which was produced or alleged to exist. *Id.* (citing 50 C.F.R. § 679.4(k)(4)(x)(C)).

On January 7, 2011, RAM reissued a new LLG 2608 without the Western Gulf trawl endorsement, although it did not yet send the reissued license to the Company. *See* JE 4 at 30.

C. Misdirected Mail and the Fishing Trips

On January 10, 2011, Mr. Peterson took the now 116-foot Pacific Challenger to Alaska as usual to begin the fishing season. Tr. 90. At that point, Mr. Parker testified, he believed that the Agency "was still in the final stages of making a decision," whether "to let Respondents keep the permit [LLG 2608]." Rs' Reply Br. at 2 (citing Tr. 48).

In a letter to the Company entitled, "FINAL AGENCY ACTION: NOTICE OF INVALID GROUNDFISH/CRAB LICENSE," and dated January 12, 2011, Jessica Gharrett, RAM's Program Administrator, reiterated the procedural history of the Company's appeal, and concluded by stating that:

> The OAA Decision has become the Final Agency Application [sic], effective January 7, 2011. Accordingly, your LLP groundfish license LLG-2608 issued containing a Western Gulf of Alaska groundfish area endorsement is **VOID** and **INVALID**. Enclosed is your revised permanent LLP groundfish license reflecting the endorsements for which it was determined you qualify.

JE 15 at 71. NOAA mailed this notice letter and the updated LLG 2608 to the address "2171 N 122nd Place, Seattle Washington 98133," which was no longer the Company's address. *Id.*; Jt. Stips. ¶ 37. It had not been the Company's address of record with RAM for nearly five-and-a-half years. JE 40. Rather, it was the home of Mr. Peterson's father, Chester "Chet" Peterson. Tr. 25. The Company's actual address was 2324 N.W. 90th Street, Seattle, Washington 98117. Jt. Stips. ¶ 10; JE 40. Mr. Peterson had informed RAM of that correct address by letter on August 11, 2005. JE 40. Indeed, RAM had issued the Pacific Challenger's FFP to that correct address in 2006, and again in 2009. JE 12 at 55, 59. It was also the address listed as the "Contact Address" on the updated LLG 2608 enclosed with RAM's misdirected notice letter. JE 4 at 30.

At the same time that RAM's notice letter was traveling by mail towards the wrong address, the now 116-foot Pacific Challenger, captained by Mr. Bolton, embarked on its first of three fishing trips in the Western Gulf. *See* Jt. Stips. ¶ 39. From January 21 through January 23, 2011, the vessel conducted directed fishing for Pacific cod in the Western Gulf. *Id.* That trip yielded approximately 338,886 pounds of Pacific cod and pollock, which together had an ex-vessel value of $91,441.02. *Id.* ¶¶ 40–41.

The Pacific Challenger's second trip began on January 24, 2011. *Id.* ¶ 42; Tr. 5. On January 26, two days into this trip, the misdirected letter from RAM arrived at Chet Peterson's home in Seattle. JE 15 at 72–73. The letter, which was addressed to "Mr. Burton C. Parker," was signed for by Chet Peterson's housekeeper. Tr. 25; JE 15 at 71. When Chet Peterson discovered the "big white envelope," he placed it in his car so that he could he could give it to Mr. Parker during their weekly bookkeeping meetings. Tr. 25.

According to Mr. Parker, the envelope "fell between the seats" of Chet Peterson's car, and stayed there, forgotten and unopened, for approximately six months. Tr. 25–26.

On January 28, 2011, back in Alaska, Respondents returned to port from their second fishing trip. Jt. Stips. ¶ 42; Tr. 5. Respondents landed approximately 497,261 pounds of Pacific cod and pollock from that trip, with an ex-vessel value of $120,706.36. Jt. Stips. ¶¶ 43–44.

The Pacific Challenger's third fishing trip lasted from January 28 through January 31, 2011. *Id.* ¶ 45; Tr. 5–6. Respondents landed approximately 380,836 pounds of Pacific cod and pollock from that trip, with an ex-vessel value of $100,794.38. Jt. Stips. ¶¶ 46–47.

Approximately six months later, sometime in the summer of 2011, Chet Peterson realized that he had misplaced the unopened, misdirected letter from RAM in his car. Tr. 26. He called Mr. Parker. *Id.* Mr. Parker drove to Chet Peterson's home, opened the envelope, and read that the Western Gulf endorsement on LLG 2608 had been voided and invalidated. *Id.*

Mr. Parker went straight to his office, where he had the LLC's bookkeeper, Nancy Fortis, file the letter with the date it was received. Tr. 26–27. Because the fishing season had concluded, Mr. Parker also called one of his attorneys. Tr. 27. After that consultation, Mr. Parker elected not to do anything about it because, as he testified at hearing, "we still thought we had another permit [LLG 1239]" and "we really couldn't do anything about it because we didn't . . . know it until it was . . . six months later." *Id.*

D. Investigation by RAM

On January 18, 2012, almost exactly a year after the aforementioned three fishing trips, Agency personnel notified NMFS Special Agent Andrew Stoffa that the Pacific Challenger might have fished in violation of LLP regulations governing the Western Gulf. JE 1.

On January 28, 2012, another NMFS Special Agent, Doug Marsden, spoke in person with Mr. Peterson aboard the Pacific Challenger in Dutch Harbor, Alaska. JE 21. After measuring the vessel's LOA at 116 feet, Agent Marsden looked at the groundfish licenses on board. *Id.* at 90–91. Mr. Peterson stated that the Pacific Challenger was significantly over the 104 MLOA for LLG 1239. *Id.* at 91. The version of LLG 2608 on board was the older version that contained a Western Gulf endorsement, not the updated version that Mr. Parker had received in the summer of 2011. *Id.* at 91; *see* JE 4 at 31. Mr. Peterson informed Agent Marsden that his next fishing trip would be to either the Bering Sea or Western Gulf management area. JE 21 at 91. After leaving the vessel, Agent Marsden looked up LLG 2608 in RAM's database and determined that the Pacific Challenger was not endorsed for the Western Gulf. *Id.* Mr. Peterson acted "surprised" when Agent Marsden called him with the news, and stated that he would communicate that information "to the home office." *Id.*

On January 30, 2012, Agent Stoffa interviewed Mr. Parker by telephone for nearly an hour. *See* JE 22. Mr. Parker told Agent Stoffa that he did not know which groundfish license the Pacific Challenger used to fish for Pacific cod in the Western Gulf, and that it was Mr. Peterson

who was responsible for keeping track of fishing permits. *Id.* at 93. Mr. Parker further stated that he could not remember whether he had received notice of the outcome of the appeal regarding LLP 2608,[14] or anything that occurred after the appeals process. *Id.*

Soon after, Agent Stoffa called Mr. Peterson. *See* JE 23. Mr. Peterson represented to the Agent that the Pacific Challenger was currently using both LLP 1239 and LLP 2608 to lawfully fish. *Id.* at 96. In response, Agent Stoffa told Mr. Peterson that the owners had "disqualified" the Pacific Challenger from using LLP 1239 by lengthening the vessel beyond the 104 ft MLOA authorized by that license. *Id.* Mr. Peterson replied that his attorney had told him that lengthening the Pacific Challenger "wasn't going to be an issue" affecting LLP 1239. *Id.* When Agent Stoffa asked about the appeal of LLP 2608, Mr. Peterson stated that he remembered the appeal, but told Agent Stoffa he thought that the appeal would not affect Pacific Challenger's ability to fish because the vessel still had a Western Gulf endorsement from LLP 1239. *Id.* at 97. Agent Stoffa informed Mr. Peterson that the decision to remove LLP 2608's endorsement had become final on January 7, 2011. *Id.*

IV. DISCUSSION

As indicated above, regulations promulgated pursuant to the Magnuson Act require vessels that conduct directed fishing in the AGF to be named on an LLG, and to comply with that LLG's terms. 50 C.F.R. §§ 679.4(k)(1)(i), 679.4(k)(3)(i)(A), 679.7(i)(6). The terms of an LLG include endorsements authorizing the vessel to fish in certain areas, and a limitation on the vessel's MLOA.

The Agency contends that Respondents' fishing activities violated 50 C.F.R. §§ 679.4(k)(1)(i) or 679.7(i)(6).[15] For purposes of this case, § 679.4(k)(1)(i) requires a vessel in the GOA to have an valid LLG on board at all times it is engaged in directed fishing for LLP groundfish. Section 679.7(i)(6) prohibits a person from using a vessel to fish for LLP groundfish (or allowing a vessel to be so used) if that vessel's LOA exceeds the MLOA specified on the license authorizing that fishing.

To prevail on its claim that Respondents violated the Act and corresponding regulations, the Agency must prove the alleged violations by a preponderance of the evidence. *Cuong Vo*, Docket No. SE010091FM, 2001 NOAA LEXIS 11, at *16–17 (ALJ, Aug. 17, 2001) (citing 5 U.S.C. § 556(d); *Dep't 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 the Agency must show it is more likely than not a respondent committed the charged violation." *Tommy Nguyen*, Docket No. SE0801361FM, 2012 NOAA LEXIS 2, at *10 (ALJ, Jan. 18, 2012) (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983)). A sanction may not be imposed "except on

[14] References to "LLP 1239" and "LLP 2608" in Joint Exhibits 23 and 24 are synonymous with "LLG 1239" and "LLG 2608."

[15] The Agency consolidated the possible regulatory violations for each of the three fishing trips at issue because, according to the Agency, Respondents held two LLGs with differing endorsements and restrictions during the relevant period. A's Br. at 10 n.8.

consideration of the whole record," and must be "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(a)(2) ("All evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing."); *id.* § 904.270(a) (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).

Many of the facts relevant to liability are undisputed. The parties agree that all Respondents are "persons" subject to jurisdiction under the Magnuson Act. Jt. Stips. ¶ 22; *see* 16 U.S.C. § 1802(36). The parties also agree that Respondents used the Pacific Challenger to conduct "directed fishing" in the "Western Gulf" for Pacific cod (an LLP groundfish species) on three trips occurring between January 21–23, January 24–28, and January 28–31, 2011. *Id.* ¶¶ 27, 39–47; Tr. 5–6.

The crux of this dispute concerns the legal significance of the two groundfish licenses held by the Company and whether those licenses—operating together or independently—authorized the fishing efforts at issue. On this matter too, the parties agree on a number of facts relevant to liability. These include that, at the time of the three fishing trips, the Pacific Challenger had an LOA of 116 feet, Jt. Stips. ¶¶ 24, 28; that LLG 1239 had an area endorsement for the Western Gulf and an MLOA restriction of 104 feet, *id.* ¶ 25; and that LLG 2608 had an MLOA restriction of 124 feet. *Id.* ¶ 26.

The parties dispute a number of issues relevant to whether Respondents may be held liable for violating the Magnuson Act and its regulations. Broadly speaking, these disputes concern three questions: First, did either of the groundfish licenses independently authorize Respondents' fishing efforts? *See infra* pt. IV.A. Second, if not, were the licenses "merged" in such a way that their combined endorsements and restrictions authorized Respondents' fishing efforts? *See infra* pt. IV.B. And finally, should the Agency be estopped from enforcing these charges? *See infra* pt. IV.C.

For the following reasons, the answer to each question is "no."

A. Did Either Groundfish License Independently Authorize the Fishing Efforts at Issue?

The Agency's Post-Hearing Brief starts with the proposition that "there is no dispute over the facts relevant to the fishing effort elements" of the alleged violations, and centers on the argument that Respondents are liable if "neither of the LLGs assigned to the [Pacific Challenger] authorized such fishing effort during the relevant time period." A's Br. at 10. The Agency contends that neither groundfish license could independently authorize the fishing efforts at issue in the Western Gulf because the 116-foot Pacific Challenger exceeded the 104 MLOA on LLG 1239, and LLG 2608 did not authorized the vessel to fish in the Western Gulf. *Id.* at 10–13. Respondents disagree, arguing that "both endorsements were improperly revoked" and that, alternatively, "notice of revocation" of both endorsements "falls well below the due process standard." Rs' Br. at 6.

1. Did LLG 1239 Independently Authorize the Fishing Trips at Issue?

The Agency argues that LLG 1239 did not authorize Respondents' fishing efforts because the Pacific Challenger exceeded the 104-foot MLOA restriction that LLG 1239 "has always included." A's Br. at 10–11 (citing JE 4 at 32). Regulations implementing the Act state that an LLG "may only be used" on a vessel with an LOA "less than or equal to the MLOA specified in the LLG." *Id.* at 11 (citing 50 C.F.R. § 679.4(k)(3)(i)(A)). Accordingly, by lengthening the Pacific Challenger to 116 feet in 2008, the Agency contends that the LLC "invalidated LLG #1239 for directed fishing for groundfish in the [Western Gulf], or any other area, because the Vessel now exceeded the MLOA restriction on the license by 12 feet." *Id.*

Respondents do not dispute the 116-foot length of the vessel or the existence of a 104-foot MLOA restriction on LLG 1239. Jt. Stips. ¶¶ 10, 25. Rather, Respondents primarily charge that by relying on these two facts, the Agency is effectively depriving them of their property interest in LLG 1239 without procedural due process.[16] Rs' Br. at 12 (citing *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998)). The Agency's decision "to revoke an endorsement," as Respondents characterize it, "without any notice or opportunity to challenge such a decision," violates their due process rights. *Id.* at 13. First, with regard to lack of notice, Respondents contend that they never received prior notice of either 1) the Agency's "initial determination" that the Pacific Challenger exceeded the MLOA for purposes of the LLP or, subsequently, 2) that the agency had revoked the endorsement for LLG 1239. *Id.* Second, Respondents argue that they lacked an opportunity 1) "to contest the agency's decision" that the Pacific Challenger's LOA "was limited to 104 feet under the LLP," and 2) to argue that the Pacific Challenger "was a complete replacement vessel" for the 124-foot Amber Dawn under the American Fisheries Act.[17] *Id.* at 12–13.

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[16] Respondents further proffer three other arguments in the section of their brief nominally arguing that the fishing efforts were "authorized . . . under LLG 1239." *See* Rs' Br. at 9, 13–15. However, because none of these arguments concern whether the terms of LLG 1239 *alone* authorized the fishing efforts at issue, they are addressed in different portions of this Initial Decision. The first argument concerns the effect of a purported "merger" of LLG 1239 and LLG 2608 under the American Fisheries Act. *See id.* at 14–15. That argument is addressed in Part IV.B. The second concerns the fact that "NOAA issued an LLP ***to the vessel***" Pacific Challenger on December 7, 2004, "with an MLOA of 124 feet and an endorsement for the Western Gulf." *See id.* at 13 (citing JE 4 at 31). That license was LLG 2608 and, accordingly, that argument is addressed in Part IV.A.2. The third and final argument concerns claims that NOAA told Respondents they "had the legal right" to lengthen the Pacific Challenger, was aware of the lengthened vessel as early as 2008, and issued the vessel an FFP in 2009 reflecting the vessel's longer LOA. *See id.* at 13. Those arguments concern not whether LLG 1239 actually authorized the trips, but rather whether the Agency should be estopped from enforcing the charges. Accordingly, those arguments are addressed in Part IV.C.

[17] The merits of this "complete replacement vessel" argument are addressed *infra* Part IV.B.

In response, the Agency challenges the underlying premise of Respondents' due process claim—contending that there never was a "revocation" of endorsements from LLG 1239, or that there was an "agency[] decision" for Respondents to contest:

> [T]here was no Agency "decision" to contest because there was no action for RAM to take—on its face, LLG 1239 remains exactly as it did when it was issued by RAM in 2004. None of the authorizations or endorsements on LLG 1239 have changed, and it can still be used today on a vessel less than 104 feet to fish for Pacific cod in the [Western Gulf]. The only thing that changed was Respondents' lengthening of the Vessel to a length overall which exceeded the Maximum Length Overall restriction of LLG 1239.

A's Reply Br. at 7.

The Agency is correct. The Company, which owns LLG 1239, continues to possess the same fishing rights under that it always had: The transferable right to deploy a catcher vessel (currently, the "Pacific Challenger") to fish with trawl gear for groundfish in the Western Gulf and Bering Sea, provided that the vessel's length overall does not exceed 104 feet. *See* JE 4 at 32. Nothing in the record changes or contradicts the clear terms of the license. However, by lengthening the Pacific Challenger beyond LLG 1239's 104-foot restriction, Respondents on their own terminated their ability to rely on LLG 1239 for legal authorization for the fishing trips in the Western Gulf on that vessel.

Unlike with LLG 2608, discussed *infra* Part IV.A.2, the Agency never made a regulatory determination to revoke or alter any term in LLG 1239. The Company retains possession of LLG 1239 "and it can still be used today on a vessel less than 104 feet to fish for Pacific cod in the WGRA." A's Reply Br. at 7. Respondents accurately state that they "never received notice that [NOAA] revoked LLG 1239" (R's Br. at 13), because LLG 1239 was never revoked. *Id.*

The applicable regulations clearly provide that it is "unlawful for any person" to "[u]se a vessel to fish for LLP groundfish . . . or allow a vessel to be used to fish for LLP groundfish . . . that has an LOA that exceeds the MLOA specified on the license that authorizes fishing for LLP groundfish." 50 C.F.R. § 679.7(i)(6). Additional regulations implementing the Act state that each vessel in the Gulf of Alaska "must have an LLP groundfish license on board at all times it is engaged in . . . directed fishing for license limitation groundfish." *Id.* § 679.4(k)(1)(i). That license authorizes a license holder to act "only in accordance with . . . the MLOA specified on the license." *Id.* The preponderance of evidence shows that, at the time of the fishing efforts at issue, the Pacific Challenger's 116-foot LOA exceeded the 104-foot MLOA specified on LLG 1239. Accordingly, LLG 1239 did not independently authorize the fishing efforts at issue in this case. As such, insofar as Respondents used LLG 1239 to authorize their fishing trips, they did so in violation of 16 U.S.C. § 1857(1)(A), 50 C.F.R. §§ 679.7(i)(6), and 679.4(k)(1)(i).

2. Did LLG 2608 Independently Authorize the Fishing Trips at Issue?

a. Parties' Arguments

i. Agency's Brief

The Agency argues that Respondents could not use LLG 2608 to fish in the Western Gulf because the license's Western Gulf endorsement had been revoked. A's Br. at 11–12. The Agency admits that when LLG 2608 was transferred from the Amber Dawn to the Company in 2004, the license contained an endorsement to fish for groundfish in the Western Gulf, as well as in the Bering Sea and Central Gulf. *Id.* at 11; *see* JE 4 at 31; JE 14. In 2009, however, as "part of a management effort to . . . limit access to certain management areas" in the Gulf of Alaska, NMFS began "the process of revoking latent [Western Gulf] endorsements from fishermen that had not used them to land fish" in those areas. A's Br. at 11; *see supra* pt. III.B. As part of that process, Respondents lost the Western Gulf endorsement for LLG 2608 after "one review by the RAM and two reviews by OAA Administrative Judge Mary Alice McKeen." *Id.* at 12. The Agency contends that the OAA Decision to revoke the Western Gulf endorsement became effective on January 7, 2011, when, thirty days after being issued, the NMFS Regional Administrator had not intervened and the LLC had not appealed to federal court. *Id.* (citing 50 C.F.R. § 679.43(o)). The OAA Decision stated as much itself and, according to the Agency, no "further action or notification by NMFS" was necessary to make the Decision final. *Id.*

ii. Respondents' Brief

Respondents argue that NOAA "failed in its constitutional and statutory obligations to provide proper notice that LLG2608 had been revoked for use in the Western Gulf." Rs' Br. at 9. According to Respondents, revocation of the Western Gulf endorsement required both a "final agency action by the Regional Administrator" and "proper notice of such final decision delivered to Respondents"—one or both of which were absent in this case. *Id.* at 12. Receipt of the OAA Decision was not enough, because additional notice "is required by agency regulations." *Id.* at 10 (citing 50 C.F.R. § 679.43(o)). Accordingly, Respondents argue that the endorsement "remained valid at the time they went fishing," and that they "had no reason to think otherwise." *Id.* at 12. Respondents' arguments are organized around the twin premises that they did not receive adequate notice from either: 1) RAM's misdirected notice letter of January 12, 2011, or 2) the OAA Decision of December 8, 2010.

First, Respondents argue that the misdirected letter sent by RAM Program Administrator Jessica Gharrett on January 12, 2011, "fails to satisfy the requisite notice requirements and due process for revocation of a permit." Rs' Br. at 9. Respondents argue that notice is "required by agency regulations," (*id.* at 9-10 (citing 50 C.F.R. § 679.43(o)), and that "sending that notice to the wrong address is unreasonable and ineffective." *Id.* at 10 (citing *Barrera-Montenegro v. United States*, 74 F.3d 657 (5th Cir. 1996)). Respondents emphasize that they are blameless for NOAA's misdirected letter given that the Company had "affirmatively informed NOAA" of its new address in 2005, *id.* (citing JE 40), and that NOAA consistently had sent correspondence to the Company at its "new, correct address since 2005." *Id.* (citing JE 39 at 411 (2009 letter from Jessica Gharrett); JE 12 at 59–61 (2009 FFP); Jt. Stips. ¶ 10 (2011 FFP)). Because of NOAA's error, Respondents "did not learn of the revocation until nearly six months later . . . after the vessel had been fishing in the Western Gulf in 2011." *Id.* (citing Tr. 25–27).

Second, Respondents argue that their receipt of the OAA Decision in December 2010 "did not serve as notice" that the Western Gulf endorsement on LLG 2608 "was or would in fact be revoked" on January 7, 2011. Rs' Br. at 11. Respondents reject the Agency's "erroneous[]" argument that "no other action or notification was required" in order for the OAA Decision to become a final agency action on January 7, 2011. *Id.* As Respondents put it, Judge McKeen had "no authority to revoke" the Western Gulf endorsement, but rather could only "make a recommendation to the agency." *Id.* Respondents rest this argument on 1) a joint stipulation stating that RAM "is responsible for . . . revoking FFP permits and LLP licenses," Jt. Stips. ¶ 8, and 2) testimony from Tracy Buck that RAM must "revoke a permit in order to effect" an administrative judge's decision. JE 41 at 429–30. Accordingly, even though the OAA Decision nominally stated that it would become effective on January 7, 2011, the only "notice" provided by the Decision was that Judge McKeen "had made her recommendation" to the Agency. A's Br. at 11. Respondents thus "reasonably believed the agency was considering what final action to take after the appeal," and that they "might get to keep" the Western Gulf endorsement on LLG 2608. *Id.* at 20 (citing Tr. 48).

iii. Agency's Reply

In reply, the Agency makes no attempt to argue that the RAM's misdirected letter provided Respondents with legal notice that the Western Gulf endorsement on LLG 2608 had been revoked. *See* A's Reply Br. at 5 (citing JE 15).

Instead, the Agency argues, "the only notification required" of the revocation was the prior "service of the [OAA] Decision itself, " asserting that the misdirected letter was merely part of RAM's voluntary "practice . . . following the issuance of an OAA decision." *Id.* at 3 (citing 50 C.F.R. § 679.43(k)). This was because, contrary to Respondents' claims, Judge McKeen had the legal authority to revoke Respondents' Western Gulf endorsement without independent action by RAM. *Id.* at 3–4. The Agency calls Respondents' argument "contrary to law and the plain language of the regulations authorizing the OAA procedures" which state that "an appellate officer's decision takes effect 30 days after it is issued and, upon taking effect, is the final agency action for purposes of judicial review." *Id.* at 3-4 (quoting 50 C.F.R. § 679.43(k)) (emphasis by the Agency). The Agency argues that requiring some "secondary action" by RAM would frustrate the purpose of that procedural rule, which was "to speed achievement of final agency action on appeals." *Id.* at 4 (quoting Limited Access Management of Federal Fisheries In and Off Alaska; Determinations and Appeals, 60 Fed. Reg. 6,448, 6,450 (Feb. 2, 1995)). Finally, the Agency directly addresses Respondents' reliance on the testimony of Tracy Buck, by declaring that the quote selected by Respondents "is completely undermined" by Ms. Buck's subsequent statement that RAM "would not have to take any further action . . . in order for [an OAA] decision to be the final agency action." *Id.* at 5 (citing JE 41 at 478).

The Agency notes that all parties agree that the OAA Decision was "timely served on Respondents through their attorney, and Respondents were aware of it in December 2010," *id.* (citing tr. 44, 91), when they received "actual notice of the Decision, complete with an explicit reference to the final agency action deadline." *Id.* at 3 (citing JE 17–19). Despite that, Respondents "made no further effort to determine the status of their [Western Gulf]

endorsement" after January 7, 2011, "and just went fishing."[18] *Id.* at 6 (citing Tr. 48, 92). According to the Agency, because the OAA Decision revoked the Western Gulf endorsement as a matter of law on January 7, 2011, Respondents could not subsequently rely on LLG 2608 as independent authorization for their fishing efforts at the end of January 2011. *Id.*

iv. Respondents' Reply

In reply, Respondents reiterate their position that the OAA Decision did not become effective on January 7, 2011, because revocation required further action from RAM and notice thereof. Rs' Reply Br. at 2.

First, Respondents point to the same procedural regulation cited by the Agency, emphasizing the final words stating that "an appellate officer's decision 'is final agency action ***for purposes of judicial review.***'" *Id.* (quoting 50 C.F.R. § 679.43(k)) (emphasis by Respondents). According to Respondents, this is a far cry from stating that such a decision "serves as final, effective revocation of a permit." *Id.* If an OAA decision can effectuate the final revocation of a permit, Respondents contend that the regulation would have expressly said so, as does the procedural regulation for non-transferable licenses, which expressly provides that "a 'non-transferable license expires upon resolution of the appeal.'" *Id.* (quoting 50 C.F.R. § 679.43(p)).

Second, Respondents argue that in addition to service of the OAA Decision, "separate notice of a permit's revocation" is "consistent" with the Regional Administrator's authority to act with respect to such decisions. *Id.* Specifically, Respondents point to regulations stating that the Regional Administrator "may affirm, reverse, modify, or remand the appellate officer's decision before the 30-day effective date of the decision," *id.* at 3 (quoting 50 C.F.R. § 679.43(o)(1)), and "must notify a respondent of any action." *Id.* at 3 (citing 50 C.F.R. § 679.43(o)(4)). Accordingly, RAM's decision to "affirm[]" the OAA Decision required separate notice to Respondents. *Id.* Respondents argue that the misdirected letter of January 12, 2011 was *supposed* to be that notice, but that the Agency's failure to send it to the right address rendered it ineffective. *Id.*

b. Discussion

Perhaps the most basic notion of due process is that a person receive notice before being deprived of property. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Actual notice means "that which a person actually knows or could discover by making a

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[18] The Agency also preemptively argues that Respondents cannot seek refuge in any "incorrect legal advice" that the LLC's owners either received from the LLC's attorney, James Woeppel, or "believe[d] that Mr. Woeppel told them." A's Reply Br. at 6. The Agency notes that "the record does not include Mr. Woeppel's recollection" of the discussion, because Respondents failed to have him testify at the hearing and that, in any event, "the actual regulatory deadline for final agency action trumps" any actual or perceived legal advice. *Id.* Respondents maintain that it was "reasonable for [Mr. Parker] to expect final revocation notice one way or the other" following the Decision, given Mr. Parker's undisputed testimony that he "was hopeful the agency would change its mind." Rs' Reply Br. at 3, n.1.

reasonable investigation." *Perry v. O'Donnell*, 749 F.2d 1346, 1351 (9th Cir. 1984). Put another way, actual notice can be "express" or "implied." 58 Am. Jur. 2d Notice § 5. Implied notice is –

> inferred or imputed to a party by reason of his or her knowledge of facts and circumstances collateral to the main fact, of such a character as to put him or her upon inquiry, and that, if the inquiry were followed up with due diligence, would lead him or her directly to the knowledge of the main fact.

Id.

As the parties' arguments lay bare, there are two communications relevant to resolution of whether Respondents received proper notice of the revocation of LLG 2608's Western Gulf endorsement: 1) the OAA Decision issued December 8, 2010, and 2) RAM's misdirected letter, dated on January 12, 2011. *See* Jt. Stips. ¶ 36; JE 15–19.

The preponderance of evidence in the record indicates that, regardless of whether RAM's letter was mandatory (as Respondents contend) or merely a voluntary agency practice (as the Agency contends), that letter did not provide Respondents notice that the Western Gulf endorsement had been revoked. The blame for what the Agency calls an "unfortunate clerical error," lies with the Agency alone. The Company made a good faith effort to inform the Agency of its proper address, *see* JE 40, never tried to hide its proper address, *see, e.g.*, JE 12 at 56, 60, 66, and had no reason to foresee the Agency's error given the Agency's years of properly addressed documents and correspondence. *See, e.g.*, JE 12 at 55, 59, 61, 64; JE 39. The Agency makes no argument, and offers no evidence, that the Company had actual or constructive notice of the letter until the summer of 2011—months after the fishing efforts had concluded.[19] *See* Tr. 25–27. Accordingly, the letter itself did not give Respondents notice that their Western Gulf endorsement had been revoked from LLG 2608.

Service of the OAA Decision, however, did provide Respondents with the notice of revocation required in this case. The OAA Decision affirmed RAM's IAD—which itself affirmed RAM's Preliminary Determination—to remove the Western Gulf endorsement from

[19] Although the Agency does not argue it, the record obliquely suggests that Chet Peterson (who received the misdirected letter and subsequently misplaced it for several months) may have been involved in the operations of the Company at the time. Mr. Parker testified that when Chet Peterson received the misdirected letter, he placed the letter in his car "so he could bring it to me," "because once a week we'd meet to do books and sign checks and pay bills." Tr. 25. It is not clear from the transcript what Chet Peterson's role was vis-à-vis Pacific Dawn, LLC, at the time, or even if these weekly meetings involved the Company at all. However, Chet Peterson did appear to have a significant role in the Company in 2004, when RAM sent a letter addressed to "Mr. Chester Peterson, Pacific Dawn, LLC," as well as to Mr. Parker. JE 30. Without further information about Chet Peterson's role in 2011, however, his knowledge of the misdirected mail cannot be imputed to the Company itself. *Cf. Am. Surety Co. of N.Y. v. Pauly*, 170 U.S. 133, 150 (1898) ("Ordinarily, a corporation, like any other principal, is chargeable with the knowledge of any facts which are known against its agents.").

LLG 2608 "upon a final agency action." Jt. Stips. ¶¶ 30–31; *see supra* Part III.B. The Decision concluded with the statement that, "[t]he IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect January 7, 2011, unless by that date the Regional Administrator orders review of the Decision." JE 16 at 85.

As explained below, the OAA Decision provided express notice that, unless the Regional Administrator acted before January 7, 2011, the Decision's regulatory conclusion would take effect, rendering void and invalid the Western Gulf endorsement on LLG 2608. *See infra* pt. IV.2.b.i. Because Respondents had express notice of the OAA Decision,[20] and did not hear from the Agency by January 7, 2011, Respondents had implied notice that the LLG 2608's Western Gulf was no longer valid at the time they went fishing.

As also explained below, no further notice was required by regulations.[21] The Western Gulf endorsement on LLG 2608 was revoked as a matter of law on January 7, 2011, after RAM had failed to take any interim action to prevent the Decision from becoming effective. *See infra* pt. IV.2.b.ii.

i. The Plain Language of the Regulation

"As a general interpretive principle, 'the plain language of a regulation governs.'" *Safe Air for Everyone v. E.P.A.*, 488 F.3d 1088, 1097 (9th Cir. 2007) (quoting *Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv.*, 307 F.3d 1214, 1219 (9th Cir. 2002)). Accordingly, I look first to the text of the NOAA regulations governing the OAA Decision:

> (k) Appellate officers' decisions. The appellate officer will close the record and issue a decision after determining there is sufficient information to render a decision on the record of the proceedings and that all procedural requirements have been met. The decision must be based solely on the record of the proceedings. *Except as provided in paragraph (o) of this section, an appellate officer's*

[20] The parties do not seriously dispute that Respondent Pacific Dawn, LLC, had notice of the OAA Decision. The Decision was twice served on the LLC's attorney. *See* JE 19 (e-mail read receipt of December 8, 2010); JE 18 (certified mail receipt of December 13, 2010). A party is "considered to have 'notice of all facts, notice of which can be charged upon [that party's] attorney.'" *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)). Accordingly, notice of Judge McKeen's Decision to the LLC's attorney constituted notice to the LLC itself, which is "deemed bound by the acts of [its] lawyer-agent." *Id.*

[21] Respondents contend that additional notice of the revocation was "jurisdictional as it is required by agency regulations." Rs' Br. at 9–10 (citing 50 C.F.R. § 679.43(o)). Respondents erroneously use the word "jurisdictional" instead of "mandatory." *See EPA v. EME Homer City Generation, L.P.*, 134 S.Ct. 1584 (2014) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006) (cautioning against the "'profligate use' of the label 'jurisdictional,'" explaining that "[a] rule may be 'mandatory,' yet not 'jurisdictional.'")).

> *decision takes effect 30 days after it is issued and, upon taking effect, is the final agency action for purposes of judicial review.*

50 C.F.R. § 679.43(k) (emphasis added). The regulation establishes a thirty day "period of delayed effectiveness" during which an appellate officer's decision can travel two alternative paths through NOAA's administrative process. *See* 60 Fed. Reg. at 6,449.

First, the default course of action—occurring "[e]xcept as provided in paragraph (o)"—is that an appellate decision "takes effect 30 days after it is issued." 50 C.F.R. § 679.43(k). "[U]pon taking effect," that appellate decision "is the final agency action for purposes of judicial review." *Id.*

Second, and alternatively, the appellate decision can be stopped from "tak[ing] effect 30 days after it is issued" by a circumstance "provided in paragraph (o)." 50 C.F.R. § 679.43(k). Paragraph (o) establishes the rules for when "[a]n appellate officer's decision is subject to review by the Regional Administrator" of NMFS. *Id.* § 679.43(o). Those rules provide that –

> (1) The Regional Administrator may affirm, reverse, modify, or remand the appellate officer's decision *before the 30-day effective date of the decision* provided in paragraph (k) of this section.
>
> (2) The Regional Administrator may take any of these actions on or after the 30-day effective date by issuing a stay of the decision *before the 30-day effective date*. An action taken under paragraph (o)(1) of this section takes effect immediately.
>
> (3) The Regional Administrator must provide a written explanation why an appellate officer's decision has been reversed, modified, or remanded.
>
> (4) The Regional Administrator must promptly notify the appellant(s) of any action taken under this paragraph (o).
>
> (5) The Regional Administrator's decision to affirm, reverse, or modify an appellate officer's decision is a final agency action for purposes of judicial review.

50 C.F.R. § 679.43(o)(1)–(5) (emphasis added). Notably, any action taken by the Regional Administrator of NMFS requires at least *some* action before the thirty day deadline, whether it is a decision to "affirm, reverse, modify, or remand" the appellate officer's decision, *id.* § 679.43(o)(1), or to "issu[e] a stay" so that one of those actions can be taken after the 30-day deadline. *Id.* § 679.43(o)(2). Furthermore, the "may" language of Subparagraphs (1) and (2) indicates that review of a decision by the Regional Administrator is discretionary, particularly when contrasted with the "shall" and "must" language of Subparagraphs (3) and (4). *See Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("[U]se of the permissive 'may' . . . contrasts with . . . use of

a mandatory 'shall' in the very same section."). The Regional Administrator has "the authority, but not the duty" to review an appellate officer's decision under Paragraph (o). *Id.*

The OAA Decision for LLG 2608 was issued on December 8, 2010. JE 16 at 74. The preponderance of the evidence indicates that no action under Paragraph (o) altered that Decision's default, thirty day trajectory toward taking effect: The Regional Administrator did not either "affirm, reverse, modify, or remand" the Decision "before the 30-day effective date of the decision," 50 C.F.R. § 679.43(o)(1), or issue a stay "before the 30-day effective date."[22] *Id.* § 679.43(o)(2). Accordingly, the OAA Decision "[took] effect 30 days after it [was] issued," on January 7, 2011, and became "the final agency action for purposes of judicial review." *See id.* § 679.43(k); JE 16 at 85.

ii. The Western Gulf Endorsement on LLG 2608 was Revoked on January 7, 2011, the Date the OAA Decision Took Effect

The Western Gulf endorsement was revoked as a matter of law on January 7, 2011, after the Decision's thirty day period of delayed effectiveness concluded without action by the Regional Administrator.

Respondents draw a false distinction between whether the OAA Decision was the "final, effective revocation of a permit," or merely, as the regulations state, "the final agency action ***for purposes of judicial review***." Rs' Reply Br. at 2 (citing 50 C.F.R. § 679.43(k)) (emphasis by the Respondents). Respondents appear to be arguing that an OAA Decision to revoke an endorsement may be final for purposes of judicial review (hence their bold italics), but not for purposes of actually revoking the endorsement. According to Respondents, the regulatory language cannot mean that an appellate officer's decision effectuates a "final, effective revocation of a permit," because it differs from the provision regarding non-transferable licenses, which states they "expire[] upon resolution of the appeal." *Id.* (citing 50 C.F.R. § 679.43(p)).

First, Respondents emphasis on "for purposes of judicial review" is misplaced. The phrase "final agency action for purposes of judicial review" is most naturally used in

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[22] Respondents incorrectly argue that RAM's misdirected letter is evidence that the Regional Administrator actively "affirm[ed]" the OAA Decision under Paragraph (o), which would have required independent notice to Respondents. *See* Rs' Reply Br. at 3 (citing 50 C.F.R. § 679.43(o)(4)). To the contrary, the misdirected letter suggests that the Regional Administrator did *not* take any affirmative action with respect to the Decision. *See* JE 15 at 71. The letter states that, "*The OAA Decision* has become the Final Agency [Action]." *Id.* (emphasis added). If the Regional Administrator had "affirm[ed]" the Decision, as Respondents contend, then the *Regional Administrator's* decision would have been the final agency action. *See* 50 C.F.R. § 679.4(o)(5). The OAA Decision could only become the final agency action if, after 30 days, the Regional Administrator did *not* exercise review authority under Paragraph (o). *See id.* § 679.43(k). Accordingly, the letter (misdirected as it was) actually supports the conclusion that the Regional Administrator took no action, and thereby allowed the OAA Decision to naturally "become" the Agency's final word on the matter at the end of the thirty day deadline set forth in § 679.43(k). *Id.*; JE 15 at 71. No additional notice was required under § 679.4(o)(4).

administrative law to refer to the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 702–06. *See, e.g.*, 5 U.S.C. § 706; *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 979 (9th Cir. 2006) (addressing whether instructions issued by the federal agency were "final agency action for purposes of judicial review under the [APA]"). Under the APA, an action is final for purposes of judicial review if it is one in which the agency has "determined rights or obligations," or from which "legal consequences flow." *Sackett v. E.P.A.*, 132 S.Ct. 1367, 1371 (2012) (quoting *Bennett v. Spear*, 520 U.S. 154, 178) (alterations omitted). The OAA Decision was not the final agency action "for purposes of judicial review [and nothing more]," as Respondents suggests. Rs' Reply Br. at 2 (citing 50 C.F.R. § 679.43(k)). The Decision was the final agency action and, as such, was subject to judicial review. *See, e.g.*, 60 Fed. Reg. at 6,449 (calling it "the final agency action subject to judicial review").

The OAA Decision was the culmination of a lengthy administrative review process in which the Company actively participated. Initially, RAM made a Preliminary Determination that the Western Gulf endorsement "would be removed from the license *upon a final agency action.*" Jt. Stips. ¶ 30 (emphasis added). RAM then issued an IAD that "confirm[ed] the finding of the Preliminary Determination *upon a final agency action.*" *Id.* ¶ 31 (emphasis added). When the issue reached Judge McKeen in OAA, she issued one decision "affirming the finding of the IAD," followed by the OAA Decision at issue here, "again affirming the IAD." *Id.* ¶¶ 33, 35. Finally, after the thirty day review period passed without action by the Regional Administrator, the OAA Decision "[took] effect" on January 7, 2011, and became the "final agency action for purposes of judicial review." 50 C.F.R. § 679.43(k).

The purpose of the thirty day period of delayed effectiveness is to allow the Regional Administrator a chance to act upon an appellate officer's decision, if he or she so chooses. Limited Access Management of Federal Fisheries in and off of Alaska; Determinations and Appeals, 60 Fed. Reg. 6,448 (Feb. 2, 1995); *see* A's Reply Br. at 4. If the Regional Administrator does not review an appellate officer's decision within that period, there is no longer reason to delay the decision's effect.[23] At that point, the Agency has determined a

[23] For the same reason, when the Regional Administrator *does* affirmatively review the appellate officer's decision—for example, by affirming it under 50 C.F.R. § 679.43(*o*)(1)—that decision "takes effect immediately," rather than after 30 days. *See id.* § 679.43(*o*)(2). That is, there is no longer a need to postpone the decision's effectiveness, because the decision represents the consummation of the Agency's decision-making process. *Bennett v. Spear,* 520 U.S. 154 (1997). Under Respondents' theory, the Regional Administrator's decision (which cannot be construed as a mere "recommendation") would not take effect "immediately" because it would still require some administrative action by RAM to technically revoke the license. The harshness of a decision that takes effect "immediately," however, is lessened by the fact that the regulations expressly require the Regional Administrator to "promptly notify the appellant(s)" of any action taken. *See id.* § 679.43(o)(4). By contrast, the appellate officer is only required to "issue a decision . . . ." *Id.* § 679.43(k). This further suggests that the thirty day lead time following issuance of an appellate officer's decision is what the regulations envisioned as prior notice of the decision's legal consequences.

respondent's rights, and legal consequences flow from the decision—in this case, revoking the endorsements. *Cf. Sackett*, 132 S.Ct. 1367.

The phrase "take effect" means "to become operative." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2331 (Philip Babcock Gove ed., 2002); *cf. Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1272 (interpreting "take effect" in context to mean "take legal effect"). What "became operative" on January 7, 2011, was the OAA Decision concluding that, *inter alia*, "Pacific Dawn, LLC, may not retain the Western Gulf trawl gear endorsement on LLG 2608 based on the landings of the F/V PACIFIC CHALLENGER," that "NMFS properly removed the Western Gulf trawl gear endorsement," and that, "[t]he IAD that is the subject of this appeal is AFFIRMED." JE 16 at 85. The un-reviewed OAA Decision thus represented the "consummation" of NOAA's decision-making process, that determined the LLC's rights, and from which "legal consequences flow[ed]."[24] *See Sackett v. E.P.A.*, 132 S.Ct. 1367, 1371 (2012) (quoting *Bennett v. Spear*, 520 U.S. 154, 178) (alterations omitted).

Second, Respondents' reliance on the non-transferable license provision is inaccurate. The non-transferable license provision, 50 C.F.R. § 679.43(p), addresses a much narrower issue than the provision governing all appellate officer decisions, § 679.43(k). NOAA's procedural regulations reveal that a non-transferable license is intended to address the unique problem: If an IAD denies an *application* for a license, should the license-applicant be able to fish during the appeal? On the one hand, the applicant should not be denied the ability to fish while he or she pursues a potentially meritorious appeal, which possibly violates the license renewal provisions of the APA, 5 U.S.C. § 558. But on the other hand, if the applicant is issued a full-blown, transferable LLP license, he or she might sell it to someone else. The solution is the *non-transferable* license, which is issued to a license-applicant "upon acceptance of his or her appeal," which then "expires upon the resolution of the appeal." 50 C.F.R. § 679.43(p); *see also* Fisheries of the Exclusive Economic Zone Off Alaska; License Limitation Program, 64 Fed. Reg. 42,826, 42,827 (Aug. 6, 1999) (explaining the purpose of a non-transferable license).

A non-transferable license expires upon resolution of the appeal, because at that point it no longer serves its original purpose. The appeal will either reverse the IAD (in which case the applicant will receive a *transferable* license such as an LLG) or affirm the IAD (in which case the applicant receives no license at all). *See* 64 Fed. Reg. at 42,827.

Contrary to Respondents' claim, the non-transferable license provision actually *bolsters* the conclusion that an OAA Decision effectuated the final, effective revocation of the Western Gulf endorsement. Rules and regulations indicate that what § 679.43(p) refers to as "resolution of the appeal," is synonymous with "final agency action." *See, e.g.*, 50 C.F.R. § 679.4(g)(4)(ix) (a "non-transferable license will expire upon final agency action"); Fisheries of the Exclusive Economic Zone Off Alaska; License Limitation Program for the Scallop Fishery, 65 Fed. Reg. 78,110, 78,112–13 (Dec. 14, 2000) ("Depending on the final agency action, the person will

[24] Although the substance of the misdirected letter serves no part in this analysis, it is worthwhile to point out that the Agency viewed the OAA Decision in the same light: "Accordingly," i.e. because the "OAA Decision has become" the final agency action, "your LLP groundfish license LLG-2608 issued containing a Western Gulf of Alaska groundfish area endorsement is **VOID** and **INVALID**." JE 15 at 71.

receive either a permanent, transferable license, or no license at all."). If, as Respondents contend, there was an additional step required beyond the OAA Decision becoming effective, then an individual with a non-transferable license would lose that license after the thirty day window and have to wait for that additional step to get their actual license. That would frustrate the purpose of the non-transferable license provision, which is to serve as a stop-gap measure so that a worthy applicant can fish while the actual license is under appeal. Accordingly, § 679.43(p) (non-transferable licenses) can be read consistently with § 679.43(k) (appellate officers' decisions): After thirty days, the appellate officer's decision becomes the final agency action[25] and—to the extent it concerned an appeal of an IAD denying a license application—any non-transferable license expires.

Finally, Respondents' reliance on a joint stipulation that RAM "is responsible for . . . revoking . . . LLP licenses," and on Tracy Buck's testimony that RAM must "revoke a permit in order to effect" an administrative judge's decision, is similarly misplaced. *See* Rs' Br. at 11–12 (citing Jt. Stips. ¶ 8; JE 41 at 429–30).

As an initial matter, Respondents never state what "further action by RAM" was required to revoke the endorsement in accordance with the OAA Decision. Rs' Br. at 5. Prior to the LLC's appeal to Judge McKeen, RAM had twice determined that the endorsement "would be removed upon a final agency action." Jt. Stips. ¶¶ 30–31. Those twin determinations by RAM—to remove the endorsement "upon a final agency action"—were thus effectuated on their own terms when the OAA Decision became a "final agency action" on January 7, 2011. RAM's pre-Decision determinations to revoke the endorsement suggest that no "further action" from RAM was necessary.

But more importantly, Respondents stretch the quoted language of the Joint Stipulation and Tracy Buck's testimony too far. The Joint Stipulation merely states that RAM is responsible for revoking LLP licenses—not that, after notice and resolution of all administrative appeals (including within RAM itself), RAM must give additional notice that a clerical action has been taken in accordance with those determinations. Under that logic, even a Regional Administrator's decision to "affirm" an OAA Decision under Paragraph (o)—which the regulations state, "takes effect immediately"—would not actually revoke the endorsement as a matter of law until someone in RAM takes the steps necessary to delete the endorsement from the LLP database. Tracy Buck's statement similarly appears to have been about the clerical actions necessary to comply with an OAA decision. In no portion of her testimony does she indicate that RAM has any basis to act contrary to the final agency action—which could theoretically come from the Regional Administrator under § 679.43(o)—much less to provide notice thereof. To the contrary, she expressly rejected the contention later in her deposition. *See* JE 41 at 478.

In this case, the only notice required came in the form of the OAA Decision of December 8, 2010: "This Decision takes effect January 7, 2011, unless by that date the Regional

[25] Indeed, what 50 C.F.R. § 679.43(p) refers to as "resolution of the appeal," is referred to elsewhere in the regulations as the "final agency action." *See, e.g.*, 50 C.F.R. § 679.4(g)(4)(ix) (a "non-transferable license will expire upon final agency action").

Administrator orders review of the Decision." JE 16 at 85. If the Regional Administrator had ordered review of the Decision, the Regional Administrator would have had to take some action before the "30-day effective date" of that appellate decision. *See* 50 C.F.R. § 679.43(o)(1)–(2).[26] Any such action would have required the Regional Administrator to "promptly notify" the LLC. *Id.* § 679.43(o)(4). By January 7th, the LLC had not received any notice that the Regional Administrator was exercising his or her discretionary right to review, and the owners should have realized that the OAA Decision had become effective as promised. Certainly, Respondents should not have "reasonably believed the agency was considering what final action to take after the appeal," or that they "might get to keep" the Western Gulf endorsement on LLG 2608. *See* Rs' Br. at 20 (citing Tr. 48).

Given the terms of OAA Decision—and the Regional Administrator's silence within the Decision's thirty day period of delayed effectiveness—Respondents (and their counsel) had adequate notice that the LLG 2608's Western Gulf endorsement had been effectively administratively revoked, and could not be relied upon to validly fish in that area.[27]

In sum, the regulations implementing the Magnuson Act state that each vessel in the GOA "must have an LLP groundfish license on board at all times it is engaged in . . . directed fishing for license limitation groundfish." 50 C.F.R. § 679.4(k)(1)(i). That license authorizes a license holder to act "only in accordance with the specific area and species endorsements . . . specified on the license." *Id.* The preponderance of the evidence shows that the fishing efforts at issue involved directed fishing for Pacific cod (a license limitation groundfish) in the Western GOA, and that LLG 2608 did not authorize Respondents to fish in the Western Gulf at that time. Thus, insofar as Respondents relied on LLG 2608 alone as the authorization for their fishing trips, they did so in violation of 16 U.S.C. § 1857(1)(A) and 50 C.F.R. § 679.4(k)(1)(i).

B. Did the LLGs "Merge" in a Way Sufficient to Authorize the Fishing Trips?

1. Parties' Arguments

Respondents argue that, regardless of whether either LLG *independently* authorized their fishing efforts, "they were authorized to lengthen the vessel up to 124 feet and fish in the

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[26] As discussed above, the Regional Administrator can "affirm, reverse, modify, or remand" the appellate decision, but only "*before* the 30-day effective date of the decision." 50 C.F.R. § 679.43(o)(1) (emphasis added). If the Regional Administrator wishes to take one of those actions *after* the 30-day deadline, he or she can only do so by "issuing a stay of the decision *before* the 30-day deadline." *Id.* § 679.43(o)(2) (emphasis added); *see discussion supra* pt. IV.2.b.i.

[27] There is no evidence in the record that the Company made any effort at any point to seek judicial review of the OAA Decision. *See* Tr. 44-45 (Mr. Parker indicating that the Company decided not to seek an appeal in part because "it cost a lot of money to fight this stuff" and they thought they had the other LLG to authorize fishing).

Western Gulf by virtue of the merger" of LLG 1239 and LLG 2608.[28] Rs' Br. at 14. As Respondents assert in numerous portions of their Brief:

> Respondents also were authorized to fish in the [Western Gulf] in January 2011 under LLG1239 because LLG1239 and LLG2608 had been merged upon the agency's acceptance of Respondents' application to replace the AMBER DAWN with the PACIFIC CHALLENGER in 2004. As a result of the merger of the permits, all of the endorsements on the AMBER DAWN were attributable to the PACIFIC CHALLENGER, including the MLOA of 124 feet.

Rs' Br. at 28 (citing Tr. 23–25, 29–30, 47; JE 3; JE 4 at 31; JE 12 at 59; JE 30).

According to Respondents, the legal authority for this proposition flows from the American Fisheries Act of 1998 ("AFA"), Pub. L. 105-277, 112 Stat. 2681 (Oct. 21, 1998) (codified as 16 U.S.C. § 1851 note).[29] Rs' Br. at 8. Specifically, Respondents argue that under the AFA, "a vessel owner may designate a replacement vessel in the event of an actual or total loss 'which shall be eligible in the same manner as . . . the eligible vessel.'" *Id.* at 3 (quoting AFA § 208(g)) (alterations by Respondents); *see* JE 29 at 223–24. When the Amber Dawn sank in 2001, the Pacific Challenger was designated "as a replacement vessel" for the Amber Dawn. R's Br. at 4. (citing AFA § 208; JE 30; Tr. 41). Respondents contend that the merger thus occurred "by operation of the plain terms of the AFA," under which the Pacific Challenger "became a vessel with an MLOA of 124 feet on December 7, 2004." *Id.* at 8.

In addition to the text of the AFA, Respondents repeatedly cite a number of exhibits that purportedly support their argument. First, they cite testimony by Mr. Parker saying that, in 2008, NOAA told the LLC that it had "the legal right" to "lengthen the [Pacific Challenger]." *Id.* at 14; *see* 16, 25 (all citing Tr. 56); *see also id.* at 40 (citing Tr. 29–30, 47). It "makes no sense," argue Respondents, that they could have lengthened the Pacific Challenger in 2008, but were "not so authorized a year or two later." Rs' Br. at 14. Second, Respondents cite to a December 8, 2004 letter from RAM to Mr. Parker and Chet Peterson (the "AFA letter"), informing them that their AFA "Permit for Replacement Vessel" had been approved. JE 30; *see* R's Br. at 4, 13, 28 (all citing JE 30). Third, Respondents cite a September 18, 2009 letter from RAM informing them that LLG 1239 was not affected by the Latent LLP Rule. *See* R's Br. at 28, 37–39, 40 (all citing JE 39); Rs' Reply Br. at 3-4 n.2 (citing JE 39). Finally, Respondents cite a FFP issued for the Pacific Challenger in 2009, which listed the vessel as having a 116-foot LOA. *See* Rs' Br. at 13, 16, 28, 36, 37–40 (all citing JE 12 at 59). According to Respondents, all of this evidence supports the "simply common sense" conclusion that the LLGs were merged under the AFA—any other conclusion "makes no sense" or would be "absurd." *Id.* at 13–15.

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[28] In addition to arguing that that there was an actual, legal merger of the LLGs, Respondents also repeatedly argue that they "believed" there was such a merger. *See, e.g.*, Rs' Br. at 13. This estoppel-based argument is addressed below in Part IV.C.

[29] A copy of the AFA was entered into the record as Joint Exhibit 29.

In reply, the Agency calls the merger argument a "red herring," given that "[t]he regulatory program for the AFA, 50 C.F.R. § 679.4(l), is separate and distinct from the regulatory program behind the License Limitation Program supporting the two LLGs at issue here, 50 C.F.R. § 679.4(k)." A's Reply Br. at 1–2. According to the Agency, the AFA's regulatory program "deal[s] solely with targeting pollock in the Bering Sea and Aleutian Islands," and "has nothing to do with the directed fishing for Pacific cod in the Western Gulf Regulatory Area." *Id.* at 2.

The Agency also quotes the AFA letter relied on by Respondents, as stating that, "'in accordance with 50 C.F.R. 679.4(l)(7)(F), the inshore cooperative catch history of both vessels may be merged in the replacement vessel, the PACIFIC CHALLENGER, for the purpose of determining inshore cooperative allocations.'" *Id.* (quoting JE 30) (emphasis by the Agency). The Agency interprets this letter as advising Respondents that, for purposes of "AFA catch history only," the Pacific Challenger was credited with harvesting all fish harvested by the Amber Dawn.[30] *Id.*

Finally, the Agency calls the AFA merger argument a "crafty attempt to re-litigate . . . arguments that failed at the [OAA] level and which Respondents did not timely appeal to federal court." *Id.* The Agency writes that, to the extent that Respondents believed there had been a merger of groundfish licenses under the LLP, "they were wrong." *Id.*

In reply, Respondents contend that the Agency's explanation of the AFA "does not change the analysis here." Rs' Reply Br. at 3 n.2. According to Respondents, the reason they mention the AFA is "to illustrate the confusion" between the statutory and regulatory requirements, and that the AFA's replacement vessel provisions "illustrate that their belief" in a merger "was reasonable, particularly given their communication with NOAA that apparently ratified the length of the vessel." Rs' Reply Br. at 3-4 n.2. (citing Tr. 56; JE 12 at 59; JE 39).

2. Discussion

a. The Text of the AFA Does Not Support Respondents' Merger Theory.

"'[T]he starting point for interpreting a statute is the language of the statute itself.'" *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 25 (1989) (quoting *Consumer Prod. Safety Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

The AFA's text provides Respondents no refuge from the charges alleged in this case. Respondents have failed to articulate a valid legal basis for their contention that their groundfish

[30] According to the Agency, for practical purposes this meant that "Respondents could either fish this quota themselves or, if they were part of an AFA cooperative, allow one of the cooperative vessels to fish the quota." A's Reply Br. at 2.

licenses "merged" by operation of the AFA, allowing Respondents to fish in January 2011 for Pacific cod in the Western Gulf (per LLG 1239) with a vessel up to 124 feet long (per LLG 2608).[31]

The text of AFA has nothing to do with either Pacific cod or the Western Gulf, much less groundfish licenses issued under the License Limitation Program. The AFA's replacement vessel provisions appear in Subtitle II, titled "*Bering Sea Pollock* Fishery."[32] JE 29 at 207 (emphasis added). The relevant substantive portion of the AFA is Section 206(b)(3), which reserves a percentage of the "*pollock* total allowable catch in the *Bering Sea and Aleutian Islands Management area*" as "directed fishing allowances" for "catcher vessels harvesting *pollock* for processing by motherships."[33] AFA § 206(b)(3) (emphasis added); JE 29 at 210. Section 208(c) provides that only certain catcher vessels are "eligible" to partake in those directed fishing allowances for pollock, including the Amber Dawn and Pacific Challenger:

> (c) CATCHER VESSELS TO MOTHERSHIPS. – Effective January 1, 2000, only the following catcher vessels shall be eligible to harvest the directed fishing allowance under section 206(b)(3) pursuant to a federal fishing permit:
>
> * * *
>
> (3) AMBER DAWN (United States official number 529425);
>
> * * *
>
> (14) PACIFIC CHALLENGER (United States official number 518937)

AFA §§ 208(c), 208 (c)(3), (c)(14); JE 29 at 217–18. However, Section 208(g)—the replacement vessel provision that Respondents cite as support—establishes a way for additional

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[31] As an aside, regulations implementing the LLP (not the AFA) suggest that a severance and merger of endorsements would not have been possible. *See* 50 C.F.R. § 679.4(k)(7)(viii)(A) ("Area endorsements or area/species endorsements specified on a license are not severable from the license and must be transferred together.").

[32] Of course, the heading of a title cannot be used to contradict the plain meaning of the text. *See Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 483 (2001). However, as discussed below, the substantive text of the AFA is of no help to Respondents either.

[33] A catcher vessel is a fishing ship which delivers its harvested catch to a mothership, shoreside processing plant, or catcher-processor vessel. Motherships are vessels which process the catch at sea presumably, but do not harvest the fish. The total allowable catch (TAC) is allocated among the various entities. Tr. 60-61. Mr. Parker indicated that "we're the catcher boat that delivers to the mothership," "[w]e have just a little of the shoreside [quota], and we have mostly all [the] mothership quota for the pollock only. But then we have the side boats . . . to fish our cod . . . . " Tr. 61.

catcher vessels to become eligible for that directed fishing allowance by replacing an eligible vessel that was lost:

> (g) REPLACEMENT VESSELS. – In the event of the actual total loss or constructive total loss of a vessel eligible under subsections (a), (b), (c), (d), or (e), the owner of such vessel may replace such vessel with a vessel *which shall be eligible in the same manner under that subsection as the eligible vessel*, provided that [certain conditions are satisfied].

AFA § 208(g) (emphasis added); JE 29 at 223–24.

As applied to the instant case, the Amber Dawn was a vessel "eligible under" Section 208(c) of the AFA. *See* AFA § 208(c)(3); JE 29 at 217. When the Amber Dawn sank, Mr. Parker incurred a "total loss" permitting him to replace the Amber Dawn with another vessel, the Pacific Challenger. Resolution of Respondents' argument requires determining what it means for the Pacific Challenger to have been made "eligible in the same manner under that subsection" as the Amber Dawn had been.

Respondents' improper use of ellipses when quoting Section 208(g) masked the crucial words, "under that subsection." *See* Rs' Br. at 3 (quoting the AFA as saying the replacement vessel "shall be eligible in the same manner as...the eligible vessel"). Those ellipses materially changed the meaning of the Section 208(g). An AFA replacement vessel is not "eligible in the same manner" as the vessel it replaces, but rather is more narrowly "eligible in the same manner *under that subsection*." (Emphasis added). *Compare id.* (citing AFA § 208(g)), *with* AFA § 208(g); JE 29 at 223–24.

Accordingly, as a replacement vessel, the Pacific Challenger was only "eligible in the same manner under" Section 208(c) as the Amber Dawn was, not with respect to every other legal right. Looking to the Amber Dawn's eligibility under Section 208(c), this means that the Pacific Challenger was thus as "eligible to harvest the directed fishing allowance under section 206(b)(3)" as the Amber Dawn was before it sank. AFA § 208(c). As discussed above, this directed fishing allowance concerns pollock (not Pacific cod) in the Bering Sea and Aleutian Islands Management Area (not the Western Gulf).

In short, the AFA provides no basis for concluding that the MLOA of LLG 2608 merged with the Western Gulf endorsement from LLG 1239. Given that pollock are not Pacific cod, this argument is indeed a red herring. *See* A's Reply Br. at 1.

b. The Record Evidence Does Not Support Respondents' Merger Theory

Even less compelling are the testimony and exhibits that Respondents cite in support of the merger theory.

First, Mr. Parker's testimony does not support a conclusion that the LLGs had actually merged. Rather, his testimony was solely about what Respondents believed or had been told

about the LLGs: Specifically, he alleged that Respondents "were *told* [they] could go ahead and lengthen" the Pacific Challenger, Tr. 29 (emphasis added); Respondents "*understood* that [they] could make the boat as big as the Amber Dawn's legal size," *id.* (emphasis added); Respondents "*believed* everything was a package," Tr. 30 (emphasis added); Respondents "were *told* that all the rights of the AMBER DAWN went on the PACIFIC CHALLENGER," Tr. 47 (emphasis added); and Respondents were "*told* . . . [they had] the legal right" to "lengthen the boat." Tr. 56 (emphasis added). While such testimony may be relevant for an estoppel-based defense, *see infra* Part IV.C, it cannot substitute for an argument that the permits actually merged as a matter of law.

Second, the AFA letter written by RAM on December 8, 2004—informing the LLC that the Pacific Challenger had been approved as an AFA replacement vessel—similarly does not support the merger theory. As the Agency correctly points out, the letter says absolutely nothing about a merger of groundfish licenses.[34] A's Reply Br. at 2 (citing JE 30). Rather, the letter expressly states that despite the fact that "the Amber Dawn's *AFA permit* . . . has been made inactive," the "*inshore cooperative catch history* of both vessels may be merged in the replacement vessel . . . *for the purpose of determining inshore cooperative allocations*." JE 30 (citing 50 C.F.R. § 679.4(l)(7)(F)) (emphasis added). Nothing in this letter supports a conclusion that groundfish licenses administered under a separate program had been or would be merged.

Third, RAM's September 18, 2009, letter does not support the merger theory. The letter informs Respondents that "groundfish license *LLG-1239* is not affected" by the Latent LLP Rule. JE 39 (emphasis added). All this supports is that sufficient landings were made under LLG 1239 to avoid losing its area endorsements under the Latent LLP Rule. It is not evidence that LLG 1239 merged with LLG 2608. The letter says nothing at all about LLG 2608, which of course *was* affected by the Latent LLP Rule, as described at length above and in the OAA Decision that Respondents did not appeal. *See* JE 16.

Finally, the FFP issued in 2009 offers no support to Respondents either. The fact that the FFP accurately listed the Pacific Challenger's LOA as 116 feet in 2009, does not mean that in 2011 the Pacific Challenger was authorized to conduct directed fishing for Pacific cod in the Western Gulf with a MLOA of 124 feet. An FFP is not a groundfish license, and a vessel's actual LOA is not the same as the MLOA authorized by a groundfish license.

Because Respondents have failed to articulate a valid basis in law for concluding that their groundfish licenses "merged" by operation of the AFA, and have pointed to no record evidence to make up for this deficit, this affirmative defense is denied.

C. Should NOAA be Estopped from Enforcing the Charges?

1. Parties' Argument

[34] The letter only references AFA permits, and even then does not state that those permits have merged. *See* JE 30.

Respondents' final argument is that "fairness requires" that the Agency "be estopped from enforcing the violations against Respondents." Rs' Br. at 16. According to Respondents, estoppel applies against the United States where "justice and fair play require it." *Id.* at 15 (quoting *United States v. Lazy FC Ranch*, 481 F.2d 985, 988 (9th Cir. 1973)).[35] In this case, Respondents argue that the Agency "bears significant responsibility" for circumstances that led them to undertake the fishing efforts at issue. *Id.* at 15.

In reply, the Agency argues generally that the standard for applying equitable estoppel against the government "is very high," As' Reply at 7, and cites an initial decision stating that estoppel against the United States requires government conduct that is "severe, perhaps to the point of an *ultra vires* act." *Id.* (quoting *In the Matter of Alaska Spirit, Inc.*, 2001 NOAA LEXIS 9, at *26 (Nov. 15, 2011)). According to the Agency, estoppel is not warranted in this situation, and Respondents' estoppel argument is merely a "reiteration" of its previous arguments. *Id.*

In response, Respondents more zealously proffer their estoppel argument. Rs' Reply Br. at 4. Respondents cite case law stating that "estoppel against the government is appropriate 'where the government's wrongful act will cause a serious injustice and the public's interest will not suffer undue damage by imposition of liability.'" *Id.* at 5 (quoting *Watkins v. U.S. Army*, 875 F.2d 699, 709 (9th Cir. 1989)). As applied to the facts of this case, Respondents argue that imposition of the penalties sought would result in a "serious injustice" given the circumstances of this case, and that the revocation of the Western Gulf endorsement from LLG 2608 ensures that the public's interest "will not suffer undue damage." *Id.* "If ever there was a case justifying estoppel against the government," write Respondents, "the facts here make such a case." *Id.* at 4.

Throughout their briefing, Respondents articulate five interrelated circumstances that, in their view, justify estopping the government in this proceeding:

1. NOAA's "sloppy enforcement efforts" involving revocation of the Western Gulf endorsement from LLG 2608, including the misdirected letter, Rs' Br. at 16;

2. NOAA's "confusion and misdirection" about the legality of lengthening the Pacific Challenger generally, and its effect on LLG 1239 in particular, *Id.* at 16; *see id.* at 13;

3. NOAA's "confusion and misdirection" about the effect that lengthening the Pacific Challenger would have on LLG 2608, *id.* at 16;

4. An "underst[anding] from NOAA officials" that the groundfish licenses were merged, *id.* at 4; and

[35] Respondents cite two additional Ninth Circuit cases for the similar propositions that "estoppel against the government will apply 'where the government's wrongful act will cause a serious injustice and the public's interest will not suffer undue damage by imposition of the liability,'" Rs' Br. at 15 (quoting *Watkins v. U.S. Army*, 875 F.2d 699, 709 (9th Cir. 1989)); and that "equitable estoppel [has been] applied against the government in the interests of 'morals and justice.'" *Id.* (quoting *United States v. Georgia-Pac. Co.*, 421 F.2d 92, 97 (9th Cir. 1970)).

5. NOAA's "vague and ambiguous practices" regarding the merger of LLGs and application of the AFA, *id.* at 16.

First, Respondents argue that because of NOAA's "sloppy enforcement efforts"—and "by no fault of [the LLC's] own"—the LLC did not receive notice that LLG 2608's Western Gulf endorsement had been revoked until "after it had been fishing and the season was over." *Id.* at 15–16. According to Respondents, NOAA should not be able to bring an enforcement action that could have been avoided if not for the Agency's "confus[ion] or . . . poor record keeping." *Id.*

In reply, the Agency counters that "the clerical error leading to the incorrectly addressed letter from RAM is not sufficient" to meet the "very high" standard for equitable estoppel. A's Reply Br. at 7 (citing *In the Matter of Alaska Spirit, Inc.*, 2001 NOAA LEXIS at *26).

Respondents counter that the Agency's "failure to provide proper notice of the revocation goes beyond mere negligence," given the Agency's knowledge and prior use of the LLC's correct address. Rs' Reply Br. at 4 (citing JE 10; JE 12 at 59–61; JE 39; JE 40).

Second, Respondents argue that "the confusion and misdirection by the agency about the lengthening of the vessel . . . justifies estoppel." Rs' Br. at 16 (citing *United States v. Hedges*, 912 F.2d 1397, 1405 (11th Cir. 1990)). Respondents make an argument for entrapment by estoppel, stating that, "NOAA also affirmatively confirmed Respondents' belief that they had authority to lengthen their vessel." *Id.* at 16 (citing Tr. 56); *see id.* at 13 (same). In support of this argument, Respondents offer the testimony of Mr. Parker, to the effect that in 2008 he "called NOAA . . . and told them we were going to lengthen the boat . . . , and they told us . . . you're okay to do that. You have the legal right to do that." Tr. 56. Respondents also point to the Federal Fisheries Permit issued for Pacific Challenger in 2009, "acknowledging, without challenge, the 116 feet LOA." Rs' Br. at 16 (citing JE 12 at 59); *see id.* at 13 ("NOAA did not challenge the lengthening of the vessel at that time.").

In reply, the Agency disputes the significance of Respondents' factual contentions. The Agency argues that the advice it gave Respondents in 2008 about lengthening the Pacific Challenger "was correct at the time" because "there was no legal bar to Respondents' proposed action." A's Reply Br. at 8. According to the Agency, any failure by Respondents "to understand the implications of their decision" with respect to LLG 1239 "is their error," because it is "not in the RAM's purview to find out why any fisherman might chose [sic] to alter a vessel or question which LLG he/she is relying on." A's Reply Br. at 7.

Third, as further evidence of NOAA's purported "confusion and misdirection" on the lengthening, Respondents note that when LLG 2608 was issued to the LLC on December 7, 2004, it named the Pacific Challenger and gave an MLOA of 124 feet. *See* Rs' Br. at 16 (citing JE 4 at 31). When the LLC told NOAA in 2008 that it intended to lengthen the Pacific Challenger, NOAA "had not yet challenged LLG2608." *Id.* (citing Jt. Stips. ¶ 24). Accordingly, Respondents had no notice that "NOAA would contend that the PACIFIC CHALLENGER exceeded its maximum LOA under LLG1239." *Id.* at 13.

In reply, the Agency argues that in 2008, LLG 2608 *did* authorize the Pacific Challenger to fish in the Western Gulf. A's Reply Br. at 8. According to the Agency, Respondents' reliance on LLG 2608 only "became an issue" in 2009, when the Latent LLP Rule was implemented. *Id.* (citing 74 Fed. Reg. 41,080 (Aug. 14, 2009)). The Agency charges that Respondents missed their opportunity to challenge the Latent LLP Rule or its application to LLG 2608, and cannot now "boot-strap" the "no longer ripe" issue in the disguise of an estoppel-based argument. *Id.*

Respondents counter that they "acted reasonably under the circumstances," given that the Agency had "told Respondents they could lengthen their vessel, includ[ing] the longer LOA on the vessel's then current fishing permit, and issued an LLP to the vessel in 2004 with an MLOA of 124 feet." Rs' Reply Br. at 4. Under such circumstances, argue Respondents, the Agency "should not be permitted to impose drastic penalties." *Id.*

Fourth, as discussed in Part IV.B, Respondents state that they "understood from NOAA officials, that, because of the transfer of [LLG 2608] to the LLC and the decision not to replace [the Amber Dawn] with an entirely new vessel . . . the two LLPs were fully merged" for use on the Pacific Challenger. Rs' Br. at 4 (citing Tr. 29–30, 47; JE 30), 13 (citing Tr. 23–25, 29–30) (stating that Respondents "believed that the PACIFIC CHALLENGER was a complete replacement vessel for the sunken AMBER DAWN under the AFA and thus, the permits for both vessels had merged").

In reply, the Agency reiterates the arguments approved in Part IV.B, above, that the regulatory programs governing LLGs and AFA permits are "separate and distinct" as a matter of law. A's Reply Br. at 1–2 (citing 50 C.F.R. § 679.4(k), (l)). The Agency makes no mention of what Respondents allege they "understood from NOAA officials," Rs' Br. at 4, stating only that, "[i]f Respondents 'believed' that their LLGs had been 'merged' under the authority of the AFA to authorize the fishing at issue here, they were wrong." A's Reply Br. at 2 (quoting Rs' Br. at 8).

Fifth, and finally, Respondents contend without further explanation that estoppel is justified based on NOAA's "vague and ambiguous practices with regard to merger of LLP permits on a single fishing vessel and application of the provisions of the AFA." Rs' Br. at 16.

In reply, the Agency does not directly address Respondents' generalized contention about "vague and ambiguous practices," but does state that with respect to the AFA, Respondents' "apparent beliefs—perhaps more correctly assumptions—about their LLGs . . . are indicative of an overall troubling trend of an inability to understand the implications of their decisions or the notifications from NMFS about their various permits and authorizations." A's Reply Br. at 2–3.

2. Discussion

Respondents make two estoppel-based defenses. The first is a general defense of equitable estoppel based on the totality of NOAA's conduct. The second appears to be a more specific defense of entrapment by estoppel based on NOAA's alleged statements that Respondents "had the authority to lengthen their vessel." Rs' Br. at 16 (citing Tr. 56).

Respondents carry the burden of proof for both defenses. *See Lyng v. Payne*, 476 U.S. 926, 935 (1986) (equitable estoppel); *United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004) (entrapment by estoppel). Courts address each of these estoppel-based defenses independently. *See, e.g., United States v. Ullyses-Salazar*, 28 F.3d 932, 936–37 (9th Cir. 1994), *overruled on other grounds by United States v. Gomez-Rodriguez*, 96 F.3d 1262, 1264–65 (9th Cir. 1996).

a. Equitable Estoppel Against the United States

The party asserting a claim of equitable estoppel must satisfy seven elements—the four "traditional elements" of every equitable claim,[36] and three additional elements applicable to equitable claims against the government. *See Baccei v. United States*, 632 F.3d 1140, 1147 (9th Cir. 2011).

Courts analyze the three government-specific elements first. *See, e.g., Watkins*, 875 F.2d at 707. These elements require the party asserting equitable estoppel against the government to establish that "(1) the government engaged in affirmative misconduct going beyond mere negligence; (2) the government's wrongful acts will cause a serious injustice; and (3) the public's interest will not suffer undue damage by imposition of estoppel." *Baccei*, 632 F.3d at 1147.

Respondents' claim fails on the first element as they have not shown "affirmative misconduct" from NOAA going "beyond mere negligence." *Id.* (citing *Morgan v. Heckler*, 779 F.2d 544, 545 (9th Cir. 1985)). Affirmative misconduct requires "a 'deliberate lie' or 'a pattern of false promises.'" *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1184 (9th Cir. 2001) (en banc) (quoting *Mukherjee v. I.N.S.*, 793 F.2d 1006, 1009 (9th Cir. 1986)). Respondents have not alleged, and the record does not demonstrate, that any NOAA official ever deliberately lied to Respondents. Accordingly, in order to satisfy this element, Respondents must establish that NOAA engaged in a "pattern of false promises" going "beyond mere negligence." *Id.*; *Baccei*,

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[36] Those traditional elements are:

> (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Baccei v. United States, 632 F.3d 1140, 1147 (9th Cir. 2011) (quoting *Morgan v. Gonzales*, 495 F.3d 1084, 1092 (9th Cir. 2007)).

632 F.3d at 1147. Such a determination depends on the "particular facts and circumstances" of the case. *Lavin v. Marsh*, 644 F.2d 1378, 1382 n.6 (9th Cir. 1981).

The facts of and circumstances of this case reveal no pattern of false promises constituting "affirmative misconduct." Most of the circumstances cited by Respondents are not even *false*, much less part of a "pattern of false promises." When LLG 2608 was first issued to the Pacific Challenger in 2004, it *accurately* gave an MLOA of 124 feet, and has listed that MLOA ever since. JE 4 at 31; *see, e.g.*, *id.* at 33 (license issued January 12, 2012). Similarly, the FFP issued to Pacific Challenger in 2009 *accurately* listed the vessel's LOA as 116 feet, a length the vessel could indeed "legally" have—just not while operating under a groundfish license that, like LLG 1239, had a shorter MLOA. *See discussion supra* pt. IV.A.1. Nor was NOAA's failure to challenge LLG 2608 in 2008 an implied "false promise," given that the legal basis for NOAA's challenge to that license's Western Gulf endorsement did not arise until 2009. *See* Latent LLP Rule, 74 Fed. Reg. 41,080 (Aug. 14, 2009). When NOAA did eventually revoke the Western Gulf endorsement from LLG 2608 (for reasons *unrelated* to the vessel's length), the Agency acted consistent with its statutory and regulatory duties. *See discussion supra* pt. IV.A.2.b; A's Reply Br. at 3. Nor can RAM's failure to properly address a letter be construed as an affirmative "false promise" that the Western Gulf endorsement did or would remain in effect beyond January 7, 2011. *See discussion supra* pt. A.2.b.ii (discussing why Respondents erroneously hoped that no news was good news). Finally, regardless of Respondents' perception that NOAA was dilatory in enforcing the MLOA restriction for LLG 1239, delayed enforcement of a law is not inherently a "false promise" to never enforce the law, and is not the type of "affirmative misconduct" that can estop the government. *See Cavanagh v. Humboldt Cnty*, 1 F. App'x 686, 688 (9th Cir. 2001) (quoting *Mukherjee v. I.N.S.*, 793 F.2d 1006, 1008–09 (9th Cir. 1986)).

The only alleged facts that could even theoretically be construed as "affirmative misconduct" are 1) whatever circumstances led Respondents to "underst[and] from NOAA officials" that their groundfish licenses had merged, Rs' Br. at 4 (citing Tr. 29–30, 47; JE 30), and 2) Mr. Parker's telephone conversation in 2008, in which NOAA allegedly said the LLC had "the legal right" to lengthen the vessel. *Id.* at 14 (citing Tr. 56). In both instances, Respondents have failed to support their allegations with facts sufficient to find "affirmative misconduct."

First, regarding the allegation that Respondents "understood from NOAA officials" that their groundfish licenses had merged, Respondents fail to cite any record evidence establishing affirmative misconduct by NOAA. Respondents merely cite the AFA letter of December 8, 2004, *see* JE 30, and a number of testimonial statements from Mr. Parker that make vague, passing references to NOAA's alleged conduct. *See* Tr. 29–30, 47.

The AFA letter *accurately* states that the "*inshore cooperative catch history* of both vessels may be merged in the replacement vessel the [Pacific Challenger], for the purpose of determining inshore cooperative allocations." JE 30 (citing 50 C.F.R. § 679.4(l)(7)(F)) (emphasis added). That is all. The letter contains no false promise, implied or otherwise, that the LLC's groundfish licenses had also merged. *See discussion supra* pt.A.2.b.

The testimony from Mr. Parker cited by Respondents is too vague to establish affirmative misconduct by NOAA. Respondents cite several lines of testimony from Mr. Parker in support of the proposition that Respondents "understood from NOAA officials" that their groundfish licenses had merged. Rs' Br. at 4 (citing Tr. 29:1–30:22, 47:10–25). Most of the testimony cited was irrelevant to the issue at hand,[37] and the remainder fails to provide any meaningful information about NOAA's purported misconduct. For example, Respondents cite Mr. Parker's testimony that:

> We -- you know, we understood that we could make the boat as big as the AMBER DAWN's legal size, which is up to 125 feet, and we actually did the research even before we -- before we merged, what we could do and not do, and we were told we could go ahead and lengthen the boat.

Tr. 29: 6–11; *see* R's Br. at 4. Assuming arguendo, that NOAA officials told the LLC it "could go ahead and lengthen the boat,"[38] that advice would have been *correct*. This message, was conveyed as part of "the research" done by the LLC "before we merged," which would have been in 2004. Tr. 23, 29; *see* JE 30. In 2004, lengthening the Pacific Challenger would *not* have impacted the vessel's ability to fish for Pacific cod in the Western Gulf because of LLG 2608. *See* JE 4 at 31. Any similar advice given in 2008, at the time the LLC lengthened the vessel, would also have been accurate given that the Latent LLP Rule did not undermine LLG 2608 until 2009. *See supra* pt. III.B. More importantly, Mr. Parker's testimony fails to provide any context for the purported message from NOAA, making it impossible to determine whether the LLC was merely told they "could go ahead and lengthen the boat"—as they legally could do, *see supra* pt. III.B—or that the LLC was told it could do so *without impacting the vessel's ability to use any of its groundfish licenses*. Mr. Parker made another oblique reference to NOAA's conduct following a discussion of the construction firm that actually lengthened the vessel:

> And we actually lost a half a million dollars to [the construction firm]. They went broke. We'd put $460,000 down to put a new stern and a house on [the Pacific Challenger]. And I'm

[37] Aside from the excerpts discussed below, Respondents cite swathes of Mr. Parker's testimony that include the following topics irrelevant to this defense: The names of private individuals hired by the LLC to assist with the lengthening process, Tr. 29:1–6; the LLC's motivation for lengthening the vessel, Tr. 29:12–24; the vessel's provenance, Tr. 29:25–30:3; that a firm named "Nichols Brothers" did the physical construction, Tr. 30:3–4; that the LLC did not want to lose the rights to the Amber Dawn's catch history, Tr. 47:10–11; and Mr. Parker's frustration about losing the Western Gulf endorsement for LLG 2608. Tr. 47:4–25; *see* Rs' Br. at 4 (citing Tr. 29:1–30:22, 47:10–25).

[38] Mr. Parker's use of the passive-voice "we were told" makes it difficult to determine *who* told the LLC it could lengthen the vessel. The preceding portion of this excerpt included a discussion of the private individuals hired by the LLC—a lawyer and a fishery expert—to guide the lengthening process. This excerpt could be read as advice from those experts to the LLC, or advice from NOAA to the LLC and/or its experts.

> telling you that because, in all this stuff that was going on through this, you know, if you thought that we could have done some more research on these, you know, we thought we were -- legally could lengthen the boat, and we were told that.
>
> So anyway, go back to why we did that. And we had -- we had talked to NOAA through telephone conversations, and we were told we could leave things. And so we did in 2008 or [2009] or something like that.

Tr. 30. It is unclear what being told, "we could leave things," means. As with the testimony excerpted above, this excerpt falls far short of offering facts to substantiate Respondents' allegations of affirmative misconduct. Finally, Respondents cite testimony from Mr. Parker claiming that, when the LLC replaced the Amber Dawn with the Pacific Challenger, "we were told that all the rights of the AMBER DAWN went on the PACIFIC CHALLENGER." Tr. 47. As with the previous two excerpts discussed above, Mr. Parker did not testify here as to any details about this allegedly false promise—not who told him, when he was told, nor in what manner, or any other helpful context.

When pressed by this Tribunal, Mr. Parker testified that this NOAA official "never talked about" the groundfish licenses specifically –

> *We never talked about the LLPs.* We talked about all the fishing rights and that everything was going to get transferred over, all the history of the AMBER DAWN would go on the PACIFIC CHALLENGER and both boats would have the rights that we had and we could keep. That's for sure what we were told.

Tr. 75–76 (emphasis added). Mr. Parker explained he had interpreted the phrase "fishing rights" as encompassing not only the Amber Dawn's catch history (which was expressly discussed during the conversation), but also its LLP licenses (which were not). Tr. 76. As with Respondents' misinterpretation of the AFA letter, Mr. Parker's cursory recollection of this telephone conversation does not indicate that Respondents "were told" that the groundfish licenses had merged. And even assuming that the NOAA official *was* discussing groundfish licenses on this telephone call (which is far from clear), that official would have been *correct* to state that LLG 2608 was going to be transferred over to the Pacific Challenger, and that the Pacific Challenger would have all the rights under that groundfish license that the Amber Dawn had.[39] *See* JE 14 (confirming transfer of LLG 2608 to the LLC, naming the Pacific Challenger).

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[39] For example, the Pacific Challenger was able to operate in the Central Gulf because LLG 2608, unlike LLG 1239, had a Central Gulf endorsement. *See* Tr. 76; *compare* JE 4 at 31 (LLG 2608), *with id.* at 32 (LLG 1239).

Respondents' error was in believing that this transfer gave the Pacific Challenger rights *beyond* those held by the Amber Dawn.[40]

Second, and finally, regarding the allegation that NOAA told Mr. Parker he had "the legal right" to lengthen the Pacific Challenger, Respondents have similarly failed to point to facts and circumstances sufficient to find "affirmative misconduct" by NOAA. Respondents offer only the following testimony from Mr. Parker:

> So, that's why I'm trying to say that we didn't know, you know, we called NOAA up there and told them we were going to lengthen the boat and if there was an problems with that, and they told us no, that you're okay to do that. You have the legal right to do that. So we did.

Tr. 56. For the reasons stated above, the advice Mr. Parker received from NOAA was correct at the time it was given because LLG 2608 authorized the Pacific Challenger to fish in the Western Gulf with an MLOA of up to 124 feet. *See discussion supra* pt. C.2.a; A's Reply Br. at 7–8.[41]

Second, Respondents do not explain why they "understood from NOAA officials" that transferring ownership of LLG 2608 from Mr. Peterson to the LLC, combined with "the decision not to replace" the Amber Dawn with a physically new vessel, "fully merged" the two groundfish licenses for use on the Pacific Challenger.[42] Rs' Br. at 4 (citing Tr. 29–30, 47; JE 30).

Given that a finding of affirmative misconduct depends on the "particular facts and circumstances" of a case, *Lavin*, 644 F.2d at 1382 n.6, and that Respondents carry the burden of proof for this defense, *Lyng*, 476 U.S. at 935, Respondents' failure to provide any meaningful details about the relevant facts and circumstances precludes a finding of "affirmative

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[40] *Compare, e.g.*, JE 25 at 99–100 (letter to Agent Stoffa from LLC's other counsel), *with* JE 16 at 77 (OAA Decision holding that, for purposes of retaining the Western Gulf endorsement, landings made by the Pacific Challenger *before* it was named to LLG 2608 could not be counted as landings made under LLG 2608).

[41] Mr. Parker's testimony is also too vague with regard to a false promise to support a claim of affirmative misconduct and in any event, the standard for affirmative misconduct requires a "pattern of false promises," *plural*, making it unlikely that a single innocent falsehood could justify finding estoppel against the government.

[42] Respondents state that they "also believed that the fishing history of the PACIFIC CHALLENGER would meet any landing requirements for LLG 2608 for the merged permits," and that "allowances would be made for the fact that the AMBER DAWN had sunk and could not meet the landing requirements of a vessel that had not sunk." Rs' Br. at 4 (citing Tr. 23–25, 29–30). Any legal foundation for those beliefs was addressed and dismissed in the OAA Decision. *See* JE 16 at 77–85.

misconduct," and thus of equitable estoppel. Even where Respondents have identified actions affirmatively taken by NOAA—such as the content of letters sent to the LLC, or vague statements made by telephone—those actions did not involve any false promise or deliberate lie.

Accordingly, Respondents general claim of equitable estoppel against the government is denied.

b. Entrapment by Estoppel

Entrapment by estoppel is the "unintentional entrapment by an official who mistakenly misleads a person into a violation of the law."[43] *United States v. Schafer*, 625 F.3d 629, 637 (9th Cir. 2010). In order to prevail on this affirmative defense, Respondents must show that

> (1) an authorized government official empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told [Respondents] the proscribed conduct was permissible, (4) that [Respondents] relied on the false information, and (5) that [Respondents'] reliance was reasonable. As to this last element . . . reliance is reasonable if a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.

Batterjee, 361 F.3d at 1216–17 (internal citations and quotations omitted). Respondents have failed to satisfy a number of the elements necessary for the defense of entrapment by estoppel.

First, for the reasons stated above with respect to equitable estoppel, Respondents have not made the predicate showing that NOAA communicated any "erroneous advice." *See discussion supra* pt. IV.C.2.a.

Second, Respondents have not shown that the "authorized government official" with whom Mr. Parker spoke, had been "made aware of all the relevant historical facts." *Batterjee*, 912 F.3d at 1216. Indeed, Respondents have offered no information at all about the NOAA official that Mr. Parker spoke with, except to say that, "I think it was the head -- the head, I think." Tr. 75. The Agency, for its part, suggests whoever Mr. Parker spoke with was not aware of what Respondents intended to do with the lengthened vessel. *See* A's Reply Br. at 7 ("It is not in the RAM's purview to find out why any fisherman might chose [sic] to alter a vessel or question which LLG he/she is relying on to go fishing.").

Third, and perhaps most critically, Respondents have failed to show that they were "affirmatively told" that "the prescribed conduct was permissible." *Batterjee,* 912 F.3d at 1216. Ninth Circuit precedent indicates that the allegedly entrapping official must expressly misstate the legality of specific illegal conduct. Implied assertions by an official—especially due to that

[43] The Ninth Circuit has sometimes referred to entrapment by estoppel as "official misleading." *United States v. Batterjee*, 361 F.3d 1210, 1216 n.6 (9th Cir. 2004) (citing examples).

official's failure to make relevant inquiries—are not sufficient. In *United States v. Brebner*, for example, a convicted felon was not affirmatively misled into believing that he could legally purchase a gun when a federally licensed dealer sold him a gun without asking about his prior convictions. *United States v. Brebner*, 951 F.2d 1017, 1025 (1991). The dealer's failure to inquire about the defendant's criminal record did not mean that the dealer "affirmatively told" the defendant that the sale was legal. *Id.* By contrast, in nearly identical facts in *United States v. Tallmadge*, a convicted felon *was* affirmatively misled by a firearm dealer who knew about the felony convictions, but incorrectly told him there was "no problem owning a gun because the felony conviction had been reduced to a misdemeanor." 829 F.2d 767, 770 (9th Cir. 1987).

The "proscribed conduct" here is not whether, in the abstract, Respondents could legally lengthen the Pacific Challenger to 116 feet. Rather, Respondents are charged with using that elongated vessel to fish for Pacific cod in the Western Gulf, without a license authorizing such conduct. As discussed above, Mr. Parker testified at hearing that he "never talked about" the groundfish licenses with NOAA officials specifically, even if they talked in generalities about "fishing rights." Tr. 75–76. Those type of "vague or even contradictory statements" are not enough to show entrapment by estoppel. *Raley v. Ohio*, 360 U.S. 423, 438 (1959). And under Ninth Circuit precedent in *Brebner*, any failure by RAM to inquire about Respondents' intended use of the lengthened vessel cannot constitute an "affirmative" statement that such fishing was permissible.[44]

Finally, even assuming Respondents satisfy all the other elements, which they have not, their reliance was not reasonable. For this element, courts look to whether '"a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries."' *Batterjee*, 912 F.3d at 1216–17 (quoting *Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000)); *see also United States v. Lansing*, 424 F.2d 225, 227 (9th Cir. 1970) (stating that reasonable reliance requires more than "a simple showing that the defendant was as a subjective matter misled"). Again, such a determination would require Respondents to put forward more than the meager facts that have proffered here.

Accordingly, for each of the independent reasons stated above, Respondents claim of entrapment by estoppel is denied.

D. Conclusion

Respondents have stipulated that they are "persons" subject to jurisdiction under the Magnuson Act, and have stipulated to the dates and fishing efforts alleged in each of the three counts. Jt. Stips. ¶¶ 22, 39, 42, 45; Tr. 5–6. As discussed above, at the time of the fishing efforts at issue, neither LLG 1239 nor LLG 2608 (nor some alleged merger of both), authorized Respondents to conduct directed fishing for Pacific cod in the Western GOA. *See supra* pts. A.1., A.2.b.

[44] And again, for the reasons state above, such advice would not have been "erroneous" because it was accurate at the time.

Consequently, for the reasons stated above and considering all the evidence of record, it is hereby found that the Agency has shown by a preponderance of evidence that Respondents violated the Magnuson Act, 16 U.S.C. § 1857(1)(A), and 50 C.F.R. §§ 679.4(k)(1)(i) and 679.7(i)(6), on each of the fishing trips alleged in Counts 1, 2, and 3 of the NOVA.

V. PENALTY

The Magnuson Act and its implementing regulations provide 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" not to exceed $140,000 per violation. 16 U.S.C. § 1858(a); 15 C.F.R. § 6.4(f)(14) (maximum penalty amount increased as authorized by the Inflation Adjustment Act).

When assessing a civil penalty under the Act, the presiding Judge "shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require."[45] 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(a).

In the NOVA, the Agency seeks to assess a civil administrative penalty of $95,607.69 for Count 1, $124,873.03 for Count 2, and $104,961.04 for Count 3—a total of $325,441.76. NOVA 1–3; JE 27. The Agency states that it calculated this penalty based on all the statutory factors recited above. *See* A's Br. at 13. However, in the end the calculation was simplified down to a single $12,500 "base penalty" divided evenly across the three counts, plus an "economic benefit" component representing the ex-vessel value of the catch from each unauthorized fishing trip.[46] *Id.* at 13 & n.9.

Respondents contend that the Agency's proposed civil penalty is inconsistent with the Act.[47] Rs' Br. at 17. According to Respondents, the facts of this case justify the assessment of

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[45] The Rules of Practice provide that, in addition to the statutory factors, an ALJ "may" take into account Respondents' ability to pay. 15 C.F.R. § 904.108(a). Respondents did not submit any information relevant to ability to pay at least thirty days prior to the hearing, and did not argue that they have an inability to pay. *See* 16 U.S.C. § 1858(a); A's Br. at 17. The Agency, also, did not argue or produce information indicating that Respondents have more than sufficient ability to pay, such that a higher than usual penalty would be warranted. *See* 15 C.F.R. § 904.108(b). Accordingly, Respondents are "presumed to have the ability to pay the civil penalty," and this factor will not be addressed further. 15 C.F.R. § 904.108(c).

[46] Thus, the proposed penalty for Count 1 is $4,166.67 + $91,441.02 = $95,607.69; for count 2 - $4,166.67 + $120,706.36 = $124,873.03; and for count 3 - $4,166.66 + $100, 794.38. A's Br. at 13 n. 9 citing JE 27, Stips. ¶¶ 19-21.

[47] Respondents also contend that the proposed penalty is "excessive within the meaning of the Eighth Amendment of the U.S. Constitution." Rs' Br. at 17. In NOAA proceedings, however, ALJs have "no authority to rule on constitutional issues." 15 C.F.R. § 904.200(b); *cf. Downen*

"no penalty" at all or, at most, a nominal penalty of "no more than $1.00." *Id.* at 17 & n.6; Rs' Reply Br. at 5.

In reply, the Agency calls Respondents' proposed $1 penalty an "outrage to both effective fishery management and to the lawful participants in the Alaska Groundfish Fishery," and urges this Tribunal to dismiss outright the idea of a *de minimis* penalty. A's Reply Br. at 9.

There is no presumption in favor of the penalty proposed by the Agency. 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631 (June 23, 2010). Rather, "the presiding Administrative Law Judge may assess a civil penalty *de novo*, 'taking into account all of the factors required by applicable law.'" *Pauline Marie Frenier*, NOAA Docket No. SE1103883, 2012 NOAA LEXIS 11, at *11 (ALJ, Sept. 27, 2012) (quoting 15 C.F.R. § 904.204(m)). Those factors are considered below.

A. Statutory Factors

1. The Nature, Circumstances, Extent, and Gravity of the Prohibited Acts Committed

a. Parties' Arguments

The Agency characterizes the violations in this case as "strik[ing] at the heart" of the regulatory scheme. A's Br. at 16. The license requirements that Respondents violated are an important, long-standing management measure intended "to regulate the intense competition for groundfish resources" and prevent overfishing. *Id.* at 14 & n.10 (citing JE 41 at 461; JE 42 at 509). According to the Agency, by fishing without appropriate authorization, Respondents inherently undermined NOAA's ability to manage the AGF, and harmed both law-abiding fishermen and the fishery resource itself. *Id.* at 14 & n.11. The Agency highlights that Respondents' "astonishing" catch of Pacific cod (over one million pounds) constituted 2.07% of the total allowable catch for all participants in the AGF that year. *Id.* at 15 (citing JE 11). As the Agency characterizes it, those Pacific cod should have either gone to law-abiding fishermen or remained in the water to reproduce more potential catch for the future. *Id.*

Respondents counter that the facts *most* relevant to the "nature and circumstances" of the violation are the Agency's own "lack of . . . accountability and confusing rules." Rs' Br. at 17–18. As Respondents characterize it, these violations occurred solely because of NOAA's 1) misdirected letter, 2) failure to notify Respondents about the likely effect of lengthening the Pacific Challenger beyond the MLOA of LLG 1239, and 3) "[u]nclear regulations and representations" that misled Respondents about the legal relationship between their groundfish licenses. *Id.* at 18. Absent these purported failings, Respondents contend that they never would have embarked on the fishing trips at issue. *Id.* (citing Tr. 50).

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v. Warner, 481 F.2d 642, 643 (9th Cir. 1973) (resolution of purely constitutional issues is "singularly suited to a judicial forum and clearly inappropriate to an administrative board").

Respondents also dispute the Agency's characterization of the "extent and gravity" of their actions. First, Respondents contend that they should be credited with "the net [beneficial] effect" of replacing the Amber Dawn with an existing vessel rather than a new one—eliminating an entire vessel's fishing capacity as a strain on the fishery. *Id.* at 19 (citing JE 41 at 436–38). Second, Respondents contend that lengthening the Pacific Challenger "had no effect on the fishery" because the construction was done to "make it more efficient and not to catch more fish." *Id.* (citing Tr. 29). Finally, Respondents dispute that they took fish away from other fishermen given that the Pacific Challenger stopped fishing after catching its quota. *Id.* at 21. Respondents characterize their 1.2 million-pound catch as "'not out of the ordinary' as there are 'a lot of fish up there.'" *Id.* (quoting Tr. 49–50).

The Agency vigorously disputes Respondents' "preposterous" argument that the fish they caught did not take away catch from law-abiding fisherman. A's Reply Br. at 11 (citing Rs' Br. at 21). Because the AGF is managed with a total allowable catch (TAC), any fish harvested reduces the amount available to law-abiding fishermen. *Id.* In the instant case, the 2011 TAC for Pacific cod in the Western Gulf was reached on February 16, 2011,[48] resulting in the immediate closure of the fishery. *Id.* Because Respondents unlawfully removed two percent of the TAC in January, the Agency argues that Respondents hastened achievement of the full TAC and thus "shorted" fishermen with valid Western Gulf endorsements. *Id.* (citing Jt. Stips. ¶¶ 39–47; JE 8 at 38–42).

b. Analysis

An evaluation of the nature, circumstances, extent, and gravity of the prohibited acts militates in favor of a significant penalty.

Respondents were not authorized to conduct directed fishing for Pacific cod in the Western Gulf regulatory area. When they did so anyway, their unlawful catch took a significant bite out of the TAC—the metric most relevant here. *Compare* JE 8 at 38–42 (Respondents' landing tickets), *with* JE 11 at 54 (relevant TAC). This inherently expedited achievement of the TAC, meaning that law-abiding fishermen were shut-out earlier than they should have been. Regardless of whether there were "a lot of fish up there," Respondents were not authorized to catch any of them, and there were a lot *fewer* fish remaining afterwards.

Exacerbating the severity of Respondents' prohibited acts is the AGF's status as a limited-access fishery with a recent history of intense competition. *See* JE 42 at 509, 511. Unauthorized fishing undermines the Agency's ability to manage the AGF in a way that "achieve[s] and maintain[s], on a continuing basis, the optimum yield." 16 U.S.C. § 1801(b)(4). The fact that Respondents' did not exceed their individual quota is of limited significance, given that they were not authorized to fish for Pacific cod in the Western Gulf at all.

Nor can Respondents claim credit for eliminating "an entire vessel" from the Western Gulf by replacing the Amber Dawn with an existing vessel instead of a new one. That decision, salutary as it was, has nothing to do with the prohibited acts in this case, which were that

[48] The 2011 TAC for Pacific cod in the Western Gulf was 22,785 metric tons. JE 11 at 54.

Respondents lacked a license for the vessel they *did* use. Respondents' argument is a non-sequitur in the same sense that the decision to carpool with a co-worker thereby eliminating an entire vehicle from the road, does not lessen the co-worker's failure to possess a valid driver's license.

Respondents miss the point when they argue that lengthening the Pacific Challenger "had no effect on the fishery." Rs' Br. at 19. As earlier recounted, *see supra* pt. V.A.1.a, the prohibited acts in this case are for unauthorized fishing, not merely lengthening the vessel. By fishing without a license—particularly in a limited-access fishery with a history of intense competition—Respondents inherently undermined the carefully calibrated regulatory program that manages the health of the fishery and ensures optimum yield.

Finally, while NOAA's actions and Respondents' confusion may be relevant to Respondents' degree of culpability, *see infra* pt.V.A.2, they have no bearing on the nature, circumstances, extent, or gravity of the prohibited acts themselves.

2. Respondents' Degree of Culpability and Any History of Prior Offenses

a. Parties' Arguments

All parties agree that Respondents have had no violations of the Magnuson Act within the past five years, and do not allege the existence of any other prior offenses. *See* A's Br. at 17 (citing Jt. Stips. ¶ 38); Rs' Br. at 20 (same). The parties disagree, however, on the Respondents' degree of culpability for the violations in this case.

The Agency characterizes Respondents' culpability as "negligent at best and willfully ignorant at worst." A's Br. at 16. Specifically, the Agency contends that regardless of Respondents' alleged confusion, the OAA Decision they received in December 2010 "clearly spelled out" what the Pacific Challenger could do under LLG 2608, "all Respondents had to do was read it." *Id.* at 14–15. The Agency asserts that Respondents were either willfully blind to the consequences of the Decision, or their attorney told them there *might* be an intervention from the Regional Administrator (per 50 C.F.R. § 679.43(o)) and Respondents "decided not to check up on that intervention." *Id.* at 16. In so doing, Respondents "unacceptabl[y]" abdicated their responsibility to know and comply with applicable management measures. *Id.* at 16-17 (citing *In the Matter of Chris Tsabouris, Faros Seafoods, Inc.*, 7 O.R.W. 2003 (NOAA 1993)). To the extent Respondents were genuinely confused, the Agency points out that they could have called RAM for clarification, "as many other fishermen do 'all the time.'" *Id.* at 15 (quoting JE 41 at 478–79).

In contrast, Respondents claim that any violations were "unintentional at best," making their culpability "negligible." Rs' Reply Br. at 5. Specifically, Respondents contend that they "made every effort to comply" with the replacement vessel regulations and, based on NOAA's representations, "reasonably believed" they could fish in the Western Gulf. Rs' Br. at 20; *see also id.* at 21 (citing Tr. 49–50). Respondents additionally charge that the Agency's pure "conjecture" about the owners' state of mind following the OAA Decision is contradicted by Mr. Parker's testimony that he genuinely believed NOAA was still considering whether to let Respondents keep the Western Gulf endorsement on LLG 2608. *Id.* at 20 (citing Tr. 48); *see*

also id. at 22 (stating that the Agency "presented no evidence" of willful blindness). Respondents argue that the proposed penalties fail to account for the "utter confusion and ambiguity" in this case, which they contend was of NOAA's own making. *Id.* at 21 (citing JE 4 at 31; Tr. 55–56, 59); *see also id.* at 17–18. Finally, Respondents dismiss the Agency's suggestion that a phone call to RAM could have clarified the status of their endorsements, given RAM's error with the misdirected letter and the lack of inter-office communication revealed by this case. *Id.* at 18–19 (citing JE 41 at 440–42).

b. Analysis

Respondents' lack of prior violations militates strongly in their favor, particularly given the owners' lengthy and apparently unblemished careers in the commercial fishing industry.

In the instant case, the testimonial and documentary evidence in the record does not indicate that Respondents "willfully" violated the law, as the Agency suggests. However, their decision to fish the Western Gulf in the wake of an adverse OAA Decision, *see supra* pt. IV.A.2.b, as well as their failure to take reasonable precautions to clarify the status of their groundfish licenses, give rise to far more culpability than merely "unintentional" violations as urged by Respondents. In sum, the totality of the evidence shows that Respondents acted with a negligent degree of culpability, which weighs in favor of a significant penalty.

Respondents put on convincing evidence that they (and possibly their attorneys) were genuinely confused about what the law required. Although this evidence suggests that Respondents did not act deliberately, it also cuts the other way by suggesting that Respondents (as participants in a highly regulated industry) were on notice to more thoroughly investigate the legal status of their groundfish licenses before embarking on their commercial fishing operations for the season.

Finally, NOAA's conduct in this case, while not in violation of the law or sufficient to justify estoppel, does not go unnoticed. The regulated community and the public have a right to expect that their government will operate efficiently and effectively. The record indicates that the Agency was not operating at 100% in the circumstances leading up to this proceeding. For example, by properly addressing the misdirected letter, *see supra* pt. III.C, RAM could have obviated one of the contentious issues in this proceeding. And although it is ultimately the responsibility of a vessel's owners and operator to ensure compliance with an LLG, better communication between the offices that handle FFPs and LLP licenses could have caught this problem much earlier on. *See* JE 41 at 440–42; *see also* JE 1 at 2; JE 3 at 28. The Agency's actions (and inaction) marginally assuage the level of negligence that Respondents' exhibited in this case.

However, any failing on the Agency's part is counter-balanced by evidence that the LLC, too, suffered from poor internal communication on this issue. In January 2012—long after Mr. Parker received the misdirected letter and updated LLG 2608—the Pacific Challenger *still* had the revoked Western Gulf endorsement on board. JE 20; JE 21. Mr. Parker could no longer recall the outcome of the appeal, *see* JE 22 at 93, and Mr. Peterson was considering an imminent trip to the Western Gulf. *See* JE 21 at 91. Respondents are lucky that RAM initiated this

investigation when it did, rather than after Respondents might have returned for round four of unlawful fishing in the Western Gulf—this time, with far fewer excuses. In the instant case, however, Respondents' negligence was not so severe.

3. Such Other Matters as Justice May Require

a. Parties' Arguments

The Agency points to a number of additional matters that it believes would justify a significant penalty, and which are appropriate for consideration in the interests of justice. First, the Agency argues that the violation likely would have gone undetected but for a review of landing data by RAM and the NMFS Office for Law Enforcement. A's Br. at 17. This is particularly true, the Agency contends, given Respondents' continued "lack of oversight of their own operations," as evidenced by the fact that the Pacific Challenger continued to display the older version of LLG 2608 (with the revoked Western Gulf endorsement) many months after Mr. Parker actually received the updated LLG 2608 (without the Western Gulf endorsement). *Id.* (citing JE 21).

Second, the Agency contends that the significant "size or profitability" of the fishing operation is relevant to the interest of justice. *See id.* at 17–18 (citing *In the Matters of Churchman & Paasch*, NOAA Docket No. SW0703629, 2011 WL 7030841, at *39 (Feb. 18, 2011)). As evidence that Respondents operate a large-scale fishing operation in a valuable fishery, the Agency points to the value of Respondents' unlawful groundfish catch ($312,000), the value of the Pacific Challenger ($5,000,000), and the estimated value of their groundfish licenses ($228,000). *Id.* at 18 & n.12 (citing JE 42 at 53; Tr. 63–64; JE 41 at 469). With such a valuable resource at stake, and given the AGF's status as a limited-access fishery, the Agency posits that significant penalties are necessary to deter Respondents and others from engaging in similar behavior. *Id.* at 15–16, 18.[49]

Finally, the Agency argues that any penalty should not only sanction Respondents, but also "must remove any financial gain" so that others fishing in the AGF will be motivated to ensure their own compliance. *Id.* at 18–19. As the Agency puts it, Mr. Parker's assessment that the illegal fishing trips yielded "'a very good week' of fishing" speaks for itself, and justifies a significant penalty. *Id.* at 19 (citing Tr. 48).

Respondents contend that, regardless of what they "should or should not have done, justice requires that no penalty be assessed." Rs' Br. at 21. On this point, Respondents make a

[49] The Agency's argument about the need for deterrence appears twice in the Agency's Brief—regarding both the "nature of the violation," A's Br. at 15–16, and "other matters as justice may require." *See id.* at 18. Because these arguments are essentially identical, and Respondents' arguments on deterrence are addressed only in its "justice requires" argument, the Agency's arguments for deterrence are grouped for convenience in this section of the discussion.

number of arguments addressed above with respect to the gravity of the violation,[50] and Respondents' culpability,[51] which do not merit further consideration in the interests of justice.

Respondents dispute the deterrent value that penalties would provide in this case. They argue that no specific deterrence is necessary because liability was caused solely by NOAA's "confusion and misdirection," not something within Respondents' control. *Id.* at 22. Given those peculiarities, Respondents contend that penalties would not provide general deterrence either. *Id.* (citing A's Br. at 18).

Respondents also launch a particularly strong argument to the effect that the Agency's proposed penalty unreasonably overstates the fishing trips' value to Respondents by calculating economic benefit based on a gross ex-vessel value of the fish landed ($312,941.76), rather than Respondents' net profits ($112,204). *Id.* (citing RE 1; Tr. 33–34).

In reply, the Agency, in as robust terms, refutes the Respondents' contention that net profits would be a more appropriate way to calculate their economic benefit than gross ex-vessel value. A's Reply Br. at 8–10. As the Agency puts it, the distinction is between allowing Respondents to "recoup some of their costs" from unlawful acts, versus requiring "disgorgement" of the catch's full value. *Id.* at 9.

First, the Agency argues that as a practical matter, net profit cannot be realistically calculated by NOAA or an adjudicator because of the "vagaries" and variability among commercial fishing operations. *Id.* The Agency's case-in-point is Respondents' Exhibit 1—the LLC's "2011 Cod Season Net Income"—which the Agency characterizes as containing numerous expenditures that make calculating net profit difficult. *Id.* (citing RE 1) (questioning the meaning of, "e.g., 'fish' taxes, crew share, fuel, oil, dock charges, observer fees, repairs, depreciation, etc."). For the instant case, the Agency also contends that the late date at which Respondents provided this exhibit ("in the middle of the hearing"), without calling the bookkeeper who helped prepare it, left the Agency ill-prepared to critically evaluate the document. *Id.* at 9–10. Accordingly, the Agency urges that Respondents' net-income exhibit "should not be given significant weight." *Id.* at 10 (citing RE 1).

Second, the Agency affirmatively defends the use of gross ex-vessel as "the only reasonable and consistent" way to determine economic benefit: 1) "longstanding NOAA case law" has held that capturing the ex-vessel value of illegal catch is appropriate, *id.* (citing cases);

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[50] Specifically, Respondents argue that any illegally harvested fish did not take away fish from other fishermen. Rs' Br. at 21–22. That argument is rejected above, and justice does not require that it be considered as a mitigating factor. *See discussion supra* pt. V.A.1.b.

[51] For example, Respondents argue 1) that the penalties sought ignore the "utter confusion and ambiguity underlying this case," and 2) that the Agency "presented no evidence" that Respondents were willfully blind to the status of their groundfish licenses. Rs' Br. at 21–22. Those arguments are addressed above, and justice does not require that they be considered as additional mitigating factors.

2) gross ex-vessel value captures the market value of the catch, and was "presumably deemed a fair price" by the fisherman, *id.*; and 3) NOAA's penalty policy includes the gross ex-vessel value for all violations involving unlawfully caught fish. *Id.* (citing JE 28 at 153).

Respondents, in reply, argue that consideration of net profits in this case is warranted for three reasons. *See* Rs' Reply Br. at 5–7. First, use of gross ex-vessel value does not square "with the facts of this case," in which Respondents contend they were only negligibly culpable (if at all). *Id.* at 5. Second, Respondents defend the credibility and reliability of the "net income" spreadsheet they entered into the record as a "rebuttal" exhibit. *Id.* (citing RE 1); Tr. 33. This spreadsheet was prepared by the owners of the LLC along with their bookkeeper, and those owners were competent to testify about LLC's business operations. *Id.* at 5–6 (citing Tr. 33–34; RE 1). According to Respondents, the Agency's complaint that it lacked an opportunity to question the bookkeeper falls flat, given that the Agency did not object to admission of the spreadsheet, did not cross-examine the owners about it, and did not present conflicting evidence. *Id.* at 7 (citing A's Reply Br. at 9–10; Tr. 35). Third, Respondents dispute that the difficulty of calculating net profit is a reason to disregard Respondents' evidence and testimony in this case. *Id.* at 6 (citing A's Reply Br. at 9). Respondents argue that assessing the testimonial and documentary evidence is within this Tribunal's purview and responsibility, noting that the undersigned questioned Mr. Parker at hearing about the details of Respondents' Exhibit 1. *Id.* at 6–7 (citing Tr. 66–75; A's Reply Br. at 9).

b. Analysis

Difficulty of detecting the violation. Justice does not require an increased penalty based on the difficulty of detecting this violation. These were not fishing trips undertaken in the dead of night, with the unlawful catch sold off-the-books on the black market. Government observers were aboard the vessel during the trips, Tr. 32, and the unlawful landings were documented with electronic landing tickets issued by the State of Alaska. JE 8. All the information that NOAA needed to detect these violations was in the Agency's own databases—including the fact that the Pacific Challenger exceeded the MLOA for LLG 1239. *See* JE 1 at 2.

Deterrence. Justice does require a penalty that deters Respondents and others operating in the AGF from fishing without a clear understanding of which license they are authorized to fish under. As discussed above, Respondents' confusion should have put them on notice to verify the legal status of their groundfish licenses *before* going fishing. The penalty in this case must reinforce to Respondents (and others in the limited-access AGF) that they carry the burden of understanding what their licenses authorize.

Economic benefit. Justice also requires that the assessed penalty recapture the full economic benefit which accrued to Respondents as a result of the violations. Recapturing the economic benefit serves two purposes important as a matter of justice, both unrelated to "punishing" the violator: First, it discourages violations by dispelling the notion that penalties are merely a "cost of doing business." Second, it demonstrates to judicious, law-abiding fishermen that complying with the law will not put them at a competitive disadvantage.

In the instant case, the amount of economic benefit includes at least the "net profit" from the three fishing violations as calculated and admittedly received by Respondent Pacific Dawn,

LLC ($112,204), and Respondent Craig Bolton ($29,313).[52] RE 1; Tr. 34, 71. Further, in calculating such "net" profit from the trips, Respondents included the cost of certain post-trip capital improvements made to the Pacific Challenger that provide future value to the LLC in regard to fishing other fisheries, plus a deduction for general "wear and tear."[53] RE 1; Tr. 71-74. While Respondents' spotless compliance histories and merely negligent level of culpability may weigh in favor of generally using net value, to take into account ordinary and necessary expenses incurred in generating the income, these particular deductions from gross value totaling $37,388 in my opinion, are not. As to the other expenses, Respondents proof of them is slight, but as the Agency made no effort whatsoever to challenge them, they are accepted. Accordingly, justice requires that the penalty recapture $178,905 as Respondents' economic benefit. None of the Agency's contrary arguments are particularly persuasive in this case, as explained below.

First, just because gross profit is *easier* to use than net profit does not mean that all other methods should be disregarded. The adversarial process is more than capable of resolving complex issues, as occurs all the time in administrative adjudication. And while calculating net income may be difficult in the abstract, the task is made substantially easier in this case, where Respondents have offered some evidence of their itemized costs and profits. *See* RE 1; Tr. 66–75. Admittedly, Respondents offered this evidence late. But counsel for the Agency had time to review the evidence during a recess, did not object to its admission, did not cross-examine the owners about it, and presented no conflicting evidence. *See* Tr. 35. Given Mr. Parker's sufficiently credible, line-by-line testimony, *see* Tr. 66–75, and without challenge at hearing, Respondents' Exhibit 1 must be found to contain a legitimate representation of Respondents' net profit from these violations.

Second, the fact that NOAA precedent has typically used the gross ex-vessel value is merely an appeal to tradition, not logic or justice. None of the three cases that the Agency cites

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[52] Justice requires that Respondents may not deduct the full $83,543 listed as "crew shares." Mr. Parker testified that these crew shares included the approximately ten percent of adjusted income that went to Respondent Craig Bolton, the captain of the ship. *See* Tr. 70–71. Although the LLC's owners have repeatedly stated that Mr. Bolton bears no responsibility for the violations in this case, *see supra* p. 6 n.**Error! Bookmark not defined.**, and that the LLC would pay the full amount of any penalty owed, *see* Tr. 28, this penalty is assessed jointly and severally against all Respondents without regard to any private agreement or generosity. Accordingly, the economic benefit for Respondents (plural) must include Mr. Bolton's approximately ten percent share of the adjusted income—$29,313.

[53] These costs include post-trip net repairs ($7,161); repairs to the trawl doors used for cod ($4,002); the charge for docking at the repair dock ($1,225); and general "wear and tear" on the vessel ($25,000). *See* RE 1; Tr. 72-73. Unlike the cost of fuel and oil, observer fees, and taxes, all of which are commonly known and accepted costs of operating a commercial fishing vessel, Respondents have failed to sufficiently articulate and document how the costs of the repairs are attributable to prior trips rather than future ones, and how the sum for "wear and tear" was calculated at all or why it is reasonable to deduct the sum for penalty purposes, as to perhaps tax purposes. *See* Tr. 73–74.

are particularly helpful. One case cited by the Agency merely describes ex-vessel value as the "usual basis" for calculating the value of illegal catch, and expressly considers evidence of estimated profit—in that, *offered by NOAA*. *See In the Matter of Steve Kraske Kenneth*, 2 O.R.W. 50, 59 (NOAA 1979) (finding the government's profit estimates to be "far from a reality"). Another case used gross ex-vessel value not to calculate the economic benefit, but rather to assess a punitive penalty "*three times* the ex-vessel value" of each landing over the vessel's quota.[54] *See In the Matter of Salvatore Ferrara*, 2 O.R.W. 173, 174 (NOAA 1980). The final case merely states—without explanation or citation to legal authority—that "the fair market value" of an unlawful catch "must be accounted for and recouped by the sanction." *In the Matter of Josh W. Churchman,* 2011 NOAA LEXIS 2, at *3 (Feb. 18, 2011). But the ALJ goes on to say that the purpose is to make a sanction "large enough to alter the economic calculus" so that violators do not chalk-up penalties to a mere "cost of doing business." *Id.* at *61. That principle is shared here.

Third, although the gross ex-vessel value will often represent the fair market value of fish, it is not necessarily a proper valuation of the fisherman's economic benefit. The Agency repeatedly characterizes the gross ex-vessel value as Respondents' "economic benefit." *See, e.g.*, A's Br. at 13 & n.9; A's Reply Br. at 8 & n.3, 10. But the logic of Agency's "fair market value" argument would appear to be one concerned more with natural resource damages, a claim not made here.[55]

Finally, the Agency's appeal to its Penalty Policy is misguided in this case.[56] NOAA did not correlate its calculation of the proposed penalty to the guidelines in the Penalty Policy, *see* A's Br. at 13 & n.9 and A's Reply Br. at 8 & n.3, and regardless, ALJs are not bound by it.[57]

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[54] Indeed, the adjudicator was so incensed by the "particularly aggravating," "intentional," "flagrant violations" in that case that he described the unrelated sinking of the vessel involved as "a providence far more effective than these penalty proceedings." *In the Matter of Salvatore Ferrara*, 2 O.R.W. 173, 173 (NOAA 1980). The facts in the instant case are not comparable.

[55] The situation might also be different where there is evidence that a respondent intentionally sold unlawful fish. In such a circumstance, justice might require a penalty based on gross ex-vessel value in order to counteract a respondent's incentive to off-load the fish. This case involves no such circumstance.

[56] NOAA's penalty policy states that, "[i]n cases where fish . . . [are] caught in violation of the statutory or regulatory requirements, the proceeds from unlawful activity will be assessed based on the gross ex-vessel value of the fish." JE 28 at 153.

[57] Furthermore, in cases *not* involving unlawfully captured fish, the Penalty Policy recommends more nuanced ways of calculating economic benefit that could be just as complex (if not more so) than calculating gross profits. *See* JE 28 at 152–54 (recommending consideration of delayed costs and avoided costs). According to the Penalty Policy, the purpose behind capturing the "*proceeds* gained from an unlawful activity" is "to prevent violators from profiting from illicit behavior and engaging in improper behavior because the sanctions imposed are merely a 'cost of doing business.'" *Id.* at 152 (emphasis added). That purpose can

See Pauline Marie Frenier, NOAA Docket No. SE1103883, 2012 NOAA LEXIS 11, at *11 (ALJ, Sept. 27, 2012) (quoting 15 C.F.R. § 904.204(m)).

B. Conclusion

The undersigned finds that the Agency's proposed penalties are too high with respect to economic benefit, but too low with respect to a base penalty. As discussed above, the nature, circumstances, extent, and gravity of the prohibited acts weighs heavily against Respondents, as does the need for a penalty that deters Respondents and others from engaging in similarly negligent misconduct, regardless of whether such trips ultimately provide an economic net benefit. Respondents' negligent culpability weighs against them, while their apparent history of compliance weighs in their favor.

After weighing all applicable factors and the circumstances of Respondents' violations, the undersigned finds that an assessed sanction of $15,000 per violation (i.e., $45,000) plus Respondents' economic benefit ($178,905) is appropriate in this case. The total penalty for these three negligent violations of $223,905, is adequate to "alter the economic calculus that led Respondent[s] to take [their] chances . . . and risk having to conduct illegal fishing operations" in the Western Gulf. *See In the Matter of Pesca Azteca, S.A. de C.V.*, Docket No. SW0702652, 2009 WL 371029, at *15 (ALJ, Oct. 1, 2009), *aff'd* 2010 WL 1676739 (NOAA, Mar. 1, 2010).

ORDER

IT IS HEREBY ORDERED that a civil penalty in the total amount of **$223,905,** is jointly and severally **IMPOSED** on Respondents Pacific Dawn, LLC, and Craig Bolton.

Once this Initial Decision becomes final under the provisions of 15 CFR § 904.271(d), you will be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein.

PLEASE TAKE NOTICE, that any petition for reconsideration of this Initial Decision must be filed with the undersigned within **20 days** after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. *Id.* Within **15 days** after a petition for reconsideration 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.

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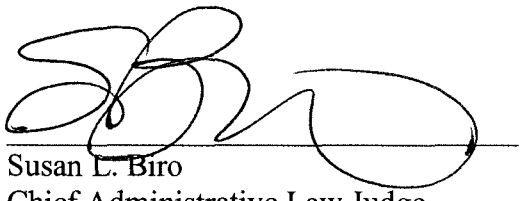
be served by measuring the "proceeds" as net income, rather than gross income. *Cf. United States v. Santos*, 553 U.S. 507, 512 (2008) (applying the rule of lenity to interpret the ambiguous word "proceeds" as net income rather than gross income).

PLEASE TAKE FURTHER NOTICE, that this Initial Decision becomes effective as the final Agency action **60 days** after service, 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 Agency within **30 days** from the date on which this decision becomes final Agency action, the Agency may request the U.S. Department of Justice to recover the amount assessed, plus interest and costs, in any appropriate district court of the United States or may commence any other lawful action. 15 C.F.R. § 904.105(b).

SO ORDERED.



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

Dated: February 9, 2015
Washington, D.C.

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.