UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	)	
	)	**Docket Nos. AK 1003466, AK 1101486**
Robert Becker	)	
	)	**(F/V CARLYNN)**
Respondent.	)	

INITIAL DECISION AND ORDER

Date Issued: April 6, 2015

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

Appearances: Susan Auer, Esq.
NOAA Office of General Counsel,
Enforcement Section, Alaska Region,
U.S. Department of Commerce
P.O. Box 21109
Juneau, Alaska 99802
For the National Oceanic and Atmospheric Administration

Julie L. Willoughby, Esq.
Law Office of Julie Willoughby, Esq.
227 Seventh Street
Juneau, Alaska 99801
For the Respondent

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

I. Statement of the Case

On January 10, 2012, the National Oceanic and Atmospheric Administration ("NOAA" or "Agency"), on behalf of the Secretary of Commerce, issued a Notice of Violation and Assessment of Administrative Penalty ("NOVA") to Robert Becker ("Respondent"). The NOVA alleges that on or about June 6, 2010, Respondent, "while fishing for sablefish . . . retained IFQ [Individual Fishing Quota] sablefish on the F/V Carlynn in Regulatory Area West Yakutat (WY) in excess of the total amount of unharvested IFQ applicable to that regulatory area held by all IFQ permit holders aboard," in violation of the Magnuson-Stevens Fishery Conservation and Management Act (the "Magnuson-Stevens Act" or "the Act"), 16 U.S.C. § 1801 et seq., specifically 16 U.S.C. § 1857(1)(A) and (G) and the implementing regulation at 50 C.F.R. § 679.7(f)(4) (2011). The NOVA proposed a penalty of $20,000 for the alleged violation.[2]

On March 27, 2012, Respondent submitted through counsel a request for hearing before an administrative law judge. The parties timely filed their respective Submit Preliminary Positions on Issues and Procedures (PPIPs). After several joint motions to postpone the hearing were granted and the parties attempted to settle this matter through Alternative Dispute Resolution, on August 27, 2013, the undersigned judge was designated to preside in this proceeding.

The hearing in this matter was held on September 18 and 19, 2013, in Juneau, Alaska. At the hearing, the Agency presented the testimony of three witnesses and offered twenty exhibits, all of which were admitted into evidence. Respondent Robert Becker testified as a witness and offered two exhibits, one of which was admitted into evidence. In addition, two Court's exhibits were admitted into evidence, one of which was joint stipulations of the parties. The parties each filed post-hearing briefs with proposed findings of fact and conclusions of law, and reply briefs.

After careful review of the entire record, it is concluded that NOAA established by a preponderance of credible and reliable evidence that on or about June 6, 2010, Respondent did fail to comply with the Individual Fishing Quota requirements specified in 50 C.F.R. § 679.7(f)(4), by deploying fixed gear while retaining IFQ sablefish on board the F/V Carlynn in Regulatory Area WY in excess of the total amount of unharvested IFQ applicable to that area held by all IFQ permit holders aboard said vessel, in violation of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A) and (G).

---

[2] The NOVA also alleged a second charge, i.e., that on or about September 26, 2010, Respondent violated the Magnuson-Stevens Act, 16 U.S.C. § 1801 et seq., specifically 16 U.S.C. § 1857(1)(A) and (G) and the implementing regulation at 50 C.F.R. § 679.22(a)(7)(i)(B), by directly fishing for Pacific Cod within the Bogoslof Steller Sea Lion Protection Area. The NOVA proposed a penalty of $20,000 for Count 2. The Agency subsequently withdrew Count 2 at the hearing on September 19, 2013.

II. Statutory and Regulatory Background

The Magnuson-Stevens Act was enacted, *inter alia,* "to conserve and manage the fishery resources found off the coasts of the United States" and "to promote domestic commercial and recreational fishing under sound conservation and management principles." 16 U.S.C. § 1801(b)(1) and (b)(3). The Act authorizes the Secretary of Commerce, in conjunction with the Regional Fisheries Management Councils, to adopt fishery management plans and implement such plans through regulation. *See* 16 U.S.C. §§ 1851–55. The Secretary may also take actions to protect and restore overfished fisheries. *See* 16 U.S.C. § 1854(e). The Act states that it is "unlawful for any person to violate any provision of this Act or any regulation or permit issued pursuant to this Act." 16 U.S.C. § 1857(1)(A). Further, it is "unlawful for any person to ship, transport, offer for sale, sell, purchase, import, export, or have custody, control or possession of any fish taken or retained in violation of this Act or any regulation, permit, or agreement" issued pursuant to the Act. 16 U.S.C. § 1857(1)(G).

In 1993, due to various conservation and management concerns stemming from the "open access" policy then in effect for the fixed gear fisheries off the coast of Alaska, the North Pacific Fishery Management Council ("Council"), working with NOAA's National Marine Fishery Service ("NMFS"), promulgated an Individual Fishing Quota ("IFQ," also known as "catch shares") program to limit the Pacific halibut and sablefish fisheries. Limited Access Management of Fisheries off Alaska, 58 Fed. Reg. 59,375, 59,376 (Nov. 9, 1993). In 1991, "the Council found that management problems in the fixed gear sablefish fishery also afflicted the halibut fishery" and decided that "a single IFQ program would be applied to both fisheries." *Id.* at 59,376. The Council also decided to include "halibut and sablefish in the same IFQ program because these species are interrelated." *Id.* at 59,378. The NMFS explained that the IFQ program would "enhance the achievement of [the optimum yield from fisheries] by reducing the risk of overfishing" and "decreasing rates of fishing mortality due to deadloss and discard waste." *Id.* at 59,380.

In 1996, NOAA's NMFS consolidated all its regulations governing Alaska's Exclusive Economic Zone ("EEZ") fisheries into 50 C.F.R. Part 679. Fisheries of the Exclusive Economic Zone Off Alaska, 61 Fed. Reg. 31,228 (June 19, 1996). IFQ permit requirements for sablefish and halibut are described in 50 C.F.R. § 679.4, related prohibitions are set out in 50 C.F.R. § 679.7, and the underlying IFQ management measures for sablefish and halibut were recodified in 50 C.F.R. Part 679, subpart D (§§ 679.40-679.45),

The IFQ program's regulatory requirements apply to any sablefish that are harvested with fixed gear in the EEZ off the coast of Alaska. 50 C.F.R. § 679.1 (2011); *see also* 58 Fed. Reg. 59,378. The NMFS Regional Administrator is responsible for the annual allocation of halibut and sablefish IFQs "to each person holding unrestricted [quota shares] for halibut or sablefish, respectively, up to the limits prescribed in § 679.42(e) and (f). 50 C.F.R. § 679.40(b). "Each assigned IFQ will be specific to an IFQ regulatory area and vessel category, and will represent the maximum amount of halibut or sablefish that may be harvested from the specified IFQ regulatory area and by the person to whom it is assigned during the specified fishing year . . . ." *Id.* The "IFQ specified for one IFQ regulatory area **must not** be used in a different IFQ regulatory area . . . ." 50 C.F.R. § 679.42(a)(1) (emphasis added).

The regulatory areas for sablefish, also known as black cod, are distinct from the regulatory areas for Pacific halibut. *See,* 50 C.F.R. Part 679, figs. 3, 14 and 15. In the Gulf of Alaska ("GOA"), the sablefish regulatory areas relevant to this proceeding are the Central Gulf of Alaska Regulatory Area ("CG") and the West Yakutat District ("WY"), which is located east of the CG. More specifically, the CG Regulatory Area is between 159 and 147 degrees west longitude along the south side of Alaska and southward to the limits of the Exclusive Economic Zone ("EEZ"). Its eastern boundary forms the western boundary of the WY District, which between 147 and 140 degrees west longitude and southward to the limits of the EEZ, within the Eastern Gulf area. 50 C.F.R. Part 679, fig. 14. The WY Sablefish Regulatory Area is located within the International Pacific Halibut Commission ("IPHC") Regulatory Area 3A, and the CG Sablefish Regulatory Area is located within IPHC Regulatory Areas 3A and 3B. 50 C.F.R. § 679.2, 50 C.F.R. Part 679, figs. 3, 14 and 15. As to the Pacific Halibut fishery, IPHC Regulatory Area 3A is between Areas 3B to the west and Area 2C to the east. 50 C.F.R. Part 679, fig. 15.

To fish commercially for IFQ halibut or IFQ sablefish, a person must possess either an IFQ permit or an IFQ hired master permit, in addition to any other required permits. 50 C.F.R. §§ 679.4(d)(1)-(2), 679.42(c). The IFQ permit specifies the identity of the holder, the authorized fish species, the authorized harvest amount, the authorized regulatory area, and the size of the vessel, are valid from the date issued until the end of the specified fishing year. 50 C.F.R. §§ 679.4(a)(1), 679.4(d)(1)(i) and (ii). A copy of any IFQ permit or IFQ hired master permit "must be carried on board the vessel . . . at all times that such fish are retained on board." 50 C.F.R. §§ 679.4(d)(1)(ii) and (d)(2)(ii). The regulations state:

> [a]n IFQ permit authorizes the person identified on the permit to harvest IFQ halibut or IFQ sablefish from a specified IFQ regulatory area at any time during an open fishing season during the fishing year for which the IFQ permit is issued until the amount harvested is equal to the amount specified under the permit, or until the permit is revoked, suspended, surrendered . . . or modified . . . .

50 C.F.R. § 679.4(d)(1)(i). Similarly, "[a]n IFQ hired master permit authorizes the individual identified on the IFQ hired master permit to land IFQ halibut or IFQ sablefish for debit against the specified IFQ permit until the IFQ hired master permit "expires, or is revoked, suspended, surrendered . . . , or modified . . . , or cancelled . . . " 50 C.F.R. § 679.4(d)(2)(i). Thus, under the regulatory prohibitions, "it is unlawful for any person" to "[r]etain sablefish caught with fixed gear without a valid IFQ permit, and if using a hired master, without an IFQ hired master permit in the name of an individual aboard." 50 C.F.R. § 679.7(f)(3)(ii). The regulations provide further:

> . . . it is unlawful for any person to do any of the following:
> * * *
> (f) IFQ fisheries.
> * * *
> (4) Except as provided in § 679.40(d), retain IFQ or CDQ halibut or IFQ or CDQ sablefish on a vessel in excess of the total amount of unharvested IFQ or CDQ, applicable to the vessel category and IFQ or CDQ regulatory area(s) in which the vessel is

deploying fixed gear, and that is currently held by all IFQ or CDQ permit holders aboard the vessel, unless the vessel has an observer aboard . . . .

50 C.F.R. § 679.7(f)(4)(2011).[3] It is unlawful to "[p]ossess, buy, sell, or transport . . . IFQ sablefish harvested or landed" in violation of Part 679, or to "[h]arvest on any vessel more . . . IFQ sablefish than are authorized under § 679.42." 50 C.F.R. § 679.7(f)(5), (9).

"Fixed gear" is defined as "(i) For sablefish harvested from any [Gulf of Alaska] reporting area, all longline gear . . . (iii) For halibut harvested from any IFQ regulatory area, all fishing gear comprised of lines with hooks attached, including one of more stationary , buoyed, and anchored lines with hooks attached." 50 C.F.R. § 679.2 (within definition of "authorized fishing gear").

III. Findings of Fact

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

1. Respondent purchased the F/V Carlynn, a 55-foot vessel, Official Number 617246, in 2005 and was at least part owner or owner in fact since then. NOAA's Exhibit ("NOAA Ex.") 15-17; Transcript of Hearing ("Tr.") 232; Court's Exhibit ("Court Ex.") 2, Respondent's Responses to Requests for Admission ("R Admis.") ¶ 1.

2. At least from June 3 through June 9, 2010, Respondent was the captain and operator of the F/V Carlynn. Court Ex. 2, R Admis. ¶ 3; NOAA Ex. 3.

3. Respondent is an experienced commercial fisherman and is from a family of commercial fishermen. Tr. 231-232, 244-245. He has significant experience fishing in the sablefish CG and WY Regulatory Areas and in the halibut IPHC Regulatory Area 3A. Tr. 297-298; R Ex. 2; NOAA Ex. 18.

4. At all times relevant to this proceeding, the F/V Carlynn was a catcher vessel named on Federal Fisheries Permit Number 3717. NOAA Ex. 15; Court Ex. 2, R Admis. ¶ 14.

5. At least from June 3 through June 9, 2010, Respondent held hired master permits that authorized him to fish on behalf of Jeff Mulkey for IFQ halibut in IPHC Area 3A and for IFQ sablefish in the CG Regulatory Area. Court Ex. 1; NOAA Exs. 3, 4; Tr. 99-100, 107, 116, 237, 257, 261-262, 291-292. Respondent also had a permit authorizing him to fish for halibut in IPHC Area 2C. Tr. 52, 292.

---

[3] The exception of 50 C.F.R. § 679.40(d) is a policy for adjustment of an IFQ account, which is inapplicable to this proceeding. "CDQ" means community development quota" and is also inapplicable. 50 C.F.R. § 679.2.

6. On or about June 3, 2010,[4] Respondent, operating the F/V Carlynn, departed from Seward, Alaska and began fishing for sablefish in the CG Regulatory Area. NOAA Exs. 3, 5; Tr. 167-168, 233.

7. Respondent had two types of fixed gear on board the F/V Carlynn. Both types of gear had a skate length of 600 feet. Type "A" had larger size 16 hooks spaced 9 feet apart with 67 hooks per skate. Type "B" had smaller size 14 hooks spaced 4.5 feet apart with 134 hooks per skate. NOAA Ex. 3; Tr. 53, 101-102, 234, 236.

8. Halibut are typically caught up to 250 fathoms deep on average, in shallower water than sablefish, which are typically caught in the 250 to 450 fathom range. Tr. 73, 242-243, 246.

9. Both the size 14 and size 16 hooks and both the type A gear and type B gear can potentially be used to catch both halibut and sablefish. Tr. 72, 266, 288-290, 316-317. However, Respondent's practice in recent years has been to fish for halibut using gear type A at shallower depths and to fish for sablefish using gear type B at deeper depths, based on his fishing experience and observations of the difference in size and feeding habits of the two species. Tr. 73, 234-236, 268, 298-316.

10. On or about June 3, 2010, Respondent deployed and pulled two sets of type B fixed gear at depths of 350 and 400 fathoms in the CG Regulatory Area and thereby caught and retained 1,781 pounds of sablefish, also known as black cod. NOAA Exs. 3, 5; Tr. 101-103, 233-235, 247-249, 251-252.

11. On June 6, 2010, on his way in to the port of Yakutat to offload the sablefish, Respondent deployed seven sets of type "A" fixed gear at a depth of approximately 80 to 85 fathoms, at a location in the IPHC Regulatory Area 3A which also was within the WY Regulatory Area. Court Ex. 2, R Admis. ¶ 9; NOAA Exs. 4, 6; Tr. 107-108, 252–253.

12. Respondent's target species for these sets was halibut. NOAA Ex. 4; Tr. 252-253.

13. At the time Respondent deployed the gear in the WY Regulatory Area, he had approximately 1,781 pounds of sablefish on board the F/V Carlynn. Court Ex. 1; NOAA Ex. 5.

14. On June 6, 2010, Respondent did not have a sablefish IFQ permit holder or permit on board the F/V Carlynn for the WY Regulatory Area. Court Ex. 1; Court Ex. 2, R Admis. ¶¶ 10–11; NOAA Ex. 1; Tr. 268.

---

[4] There is some discrepancy regarding this date. Tr. 106. Respondent's entry in the IPHC logbook lists the date as June 3, 2010. NOAA Ex. 3. The Alaska Department of Fish and Game Electronic Groundfish Ticket reports the start date as June 4, 2010. NOAA Ex. 5. The discrepancy does not affect the finding that the sablefish were harvested in the CG Regulatory Area as there is no evidence in the record that Respondent entered the WY Regulatory Area and caught sablefish there on June 4. See, NOAA Exs. 3, 4; R Ex. 2.

15. There was no observer on board the F/V Carlynn during the period from June 3 through 9, 2010. Tr. 123.

16. On June 7, 2010, Respondent landed the sablefish harvested from the CG Regulatory Area and sold it to Yakutat Seafoods, LLC, an IFQ dealer in Yakutat, Alaska, for $6,469.20.[5] NOAA Exs. 5, 7; Tr. 104-105, 238, 252.

17. Yakutat Bay is approximately 40 nautical miles, approximately 8 hours of travel on the F/V Carlynn, from the location Respondent set the gear on June 6, 2010, and approximately 12 hours of travel from the location Respondent was fishing for sablefish in the CG Regulatory Area. Tr. 241, 253-254.

18. After he sold the sablefish, Respondent hauled the gear he set on June 6, 2010 in the WY Regulatory Area and the IPHC Regulatory Area 3A, bringing on board over 5,000 pounds of halibut. Tr. 255-256.

19. On June 9, 2010, Respondent landed and sold to Alaska Glacier Seafoods in Auke Bay for over $25,000 approximately 6,612 pounds (round weight) of halibut and some rockfish from the gear he had set on June 6, 2010. NOAA Ex. 6; Tr. 108, 255-256.

20. The hired master receives 70 percent of the money received from selling the fish, and Respondent receives 30 percent, and from that he pays for bait, fuel and crew. Tr. 237-240.

21. By deploying the fixed gear in the WY Regulatory Area prior to offloading the sablefish, Respondent benefitted by saving time and fuel. Tr. 259-260, 262.

22. In 2008, Respondent was convicted in U.S. District Court for the District of Alaska (*United States v. Robert Becker*, Docket # 1:07-CR-0002 (D. Alaska)) of three criminal counts of unlawful fishery conduct that occurred in 2004, one of which involved IFQ shares, fishing in a closed area. Court Ex. 2, R Admis. ¶¶ 12–13; Tr. 249. In his signed plea agreement, Respondent admitted that he "knowingly made or aided and abetted the making of a false statement—here a false landing report for halibut—in a mater [sic] within the jurisdiction of the National Marine Fisheries Service." Court Ex. 2, R Admis. ¶¶ 12–13.

23. In June 2010, Respondent was on probation for his convictions in the district court. Court Ex. 2, R Admis. ¶ 13

IV. Liability

A. Burden of Proof

In an action to establish civil liability under the Magnuson-Stevens Act, the Agency has the burden of proving each alleged violation by a preponderance of the evidence. *Cuong Vo*,

[5] The ticket also shows that Respondent landed and sold a few rockfish, considered bycatch. NOAA Ex. 5; Tr. 238. .

NOAA Docket No. SE010091FM, 2001 NOAA LEXIS 11, at *16–17 (ALJ, Aug. 17, 2001) (citing 5 U.S.C. § 556(d); *Dept. of Labor v. Greenwich Colleries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100–03 (1981)). The Agency may rely on either direct or circumstantial evidence to establish a violation and satisfy the burden of proof. *Cuong Vo*, 2001 NOAA LEXIS at *17 (citing *Reuben Paris, Jr.*, 4 O.R.W. 1058, 1987 NOAA LEXIS 13 (ALJ Sept. 30, 1987) (finding liability on basis of circumstantial evidence)).

B. Elements of Violation

To establish a violation of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A) and (G) by Respondent's failure to comply with 50 C.F.R. § 679.7(f)(4) in regard to IFQ sablefish, NOAA must prove that: Respondent is a (1) person who retained IFQ sablefish on a vessel, (2) in the WY Regulatory Area, (3) there was no IFQ sablefish permit holder or permit on board the vessel for the WY Regulatory Area, or the amount of sablefish retained exceeds the total amount of unharvested IFQ currently held by all IFQ permit holders aboard the vessel for that area, (4) the vessel was deploying fixed gear in the WY Regulatory Area, and (5) the vessel did not have an observer aboard. 50 C.F.R. § 679.7(f)(4)(2011).

C. Parties' Arguments

Respondent points out that the evidence does not support the allegation in the NOVA that "[o]n or about June 6, 2010, *while fishing for sablefish*, Robert Becker . . . retained IFQ sablefish" in the WY Regulatory Area. NOVA Count I (emphasis added). Instead, the evidence shows, and there is no dispute, that Respondent was fishing for *halibut* in that area while he had on board sablefish caught from the CG Regulatory Area. Respondent's Post Hearing Brief ("R Brief") at 1-2. Therefore, Respondent argues, "[s]trictly speaking . . . the government has not proven the allegation contained on the NOVA." *Id.* at 2.

In the post-hearing brief, Respondent concedes that the regulations require a permit for sablefish when a person is lawfully fishing for halibut but has on board sablefish caught in a different regulatory area. *Id.* at 2. However, Respondent argues that "[t]o a lay person, it is not intuitively apparent" why a sablefish permit is required when fishing for halibut. *Id.* at 2-3. Special Agent Andrew Mathews explained that if persons are actively fishing and have fish on board the vessel, without permits for the latter species of fish, it is "cause for concern for us, because we don't know where those fish were actually harvested from." *Id.* at 3 (citing Tr. 124). Respondent asserts that it is a *malum prohibitum* offense and is fundamentally distinct from the *malum in se* offenses of fishing in a closed area, fishing without a permit holder aboard, or fishing with no available IFQ, which directly harms and impacts management of the fishery. *Id* at 4.

In reply, NOAA contends that fishing violations and prohibitions are all *malum prohibitum*. Agency's Post-Hearing Reply Brief ("NOAA Reply") at 1. With respect to Respondent's alleged understanding that he could deploy fixed gear in the WY area since he was intending to catch only halibut, NOAA notes that the provision at 50 C.F.R. § 679.7(f)(4) "has been in place virtually unchanged since the inception of the IFQ halibut and sablefish program in

1996." *Id.* at 2. Respondent's explanation that deploying his gear and letting it soak while he went to Yakutat indicates Respondent's view that compliance need only occur when it is convenient, NOAA asserts. His intent to catch only halibut, and the fact of not catching any sablefish in the IFQ area, are irrelevant to the charged violation of 50 C.F.R. § 679.7(f)(4). *Id.* at 2-3.

Further, Complainant asserts that there is no credible evidence that Respondent did not catch sablefish when he retrieved his gear in the WY area. *Id.* at 3, 4. Respondent's denial that he caught any sablefish on the day in question, having used size 16 hooks to fish for halibut and size 14 hooks to fish for sablefish, is contradicted by evidence that he has used size 16 hooks for sablefish, and evidence that both species can be caught at the same depths and same areas. *Id.* at 3–4 (citing Tr. 73, 266, 288; NOAA Ex. 20 (Trip 22)). The Agency also points to Respondent's testimony admitting that he would have shaken off any sablefish caught and not recorded them in the logbook. *Id.* at 4 (citing Tr. 327-28).

In response, Respondent contends that his testimony at the hearing that he did not catch any sablefish in the IFQ area "is sufficient standing alone to establish the facts asserted." Respondent's Reply Brief ("R Reply") at 3.

Respondent asserts that he "has pointed to the very real distinction between a fisherman who deploys gear to fish for sablefish in an area where he does not have a permit or quota for sablefish and a fisherman who deploys gear for halibut where he does have a permit and quota for halibut." *Id.* at 1. He argues that the wording of 50 C.F.R. § 679.7(f)(4) is unclear. *Id.* at 2. Respondent explains that it is reasonable to interpret this rule as prohibiting deployment of fixed gear in a halibut IFQ area with halibut on board in excess of the total amount of halibut for which permits are held on the vessel, or as prohibiting deployment of fixed gear in a sablefish IFQ area with sablefish on board in excess of the total amount of sablefish for which permits are held on the vessel. *Id.* However, he asserts,

> [i]f the regulation means to prohibit a fisherman from deploying fixed gear for halibut in a halibut IFQ regulatory area while having sablefish aboard unless there is at least one IFQ permit holder aboard with unharvested IFQ sablefish, it could certainly have been written more clearly to so provide.

Id.

Earlier in this proceeding, in his prehearing brief (at 6), Respondent argued more boldly that the "Agency's interpretation of 50 C.F.R. § 679.7(f)(4) as prohibiting a permit holder from lawfully deploying gear for halibut because the permit holder could not lawfully deploy gear for sablefish is unreasonable and violates his due process rights." Respondent argued further that the public purpose served by NOAA's regulatory interpretation is not apparent, and that "[a] regulation that interferes with legitimate commercial activity without furthering any public purpose violates substantive due process and amounts to a taking without just compensation." Respondent's Prehearing Brief at 7.

D. Discussion and Conclusions as to Liability

NOAA has established all the elements of liability by a preponderance of the evidence. There is no question that Respondent, as the captain of the F/V Carlynn, is a person who retained IFQ sablefish on a vessel, the F/V Carlynn, from June 3, 2010, when he caught the sablefish in the CG Regulatory Area, until June 7, 2010, when he landed and sold it to Yakutat Seafoods LLC. Findings of Fact 2, 4, 6, 10, 13, 16. There is no dispute that on June 6, 2010, with the sablefish onboard, he was in the WY Regulatory Area, and that while he was in that area he deployed fixed gear from the vessel. Findings of Fact 11, 13. Respondent also does not contest that while he held a permit authorizing him to fish for IFQ sablefish in the CG Regulatory Area, there were no permits or permit holders onboard the F/V Carlynn for IFQ sablefish in the WY Regulatory Area. Findings of Fact 5, 14. It is undisputed that there was no observer onboard the vessel. Finding of Fact 15. As discussed below, none of the arguments raised by Respondent affect a finding of his liability for violating 50 C.F.R. § 679.7(f)(4) (2011).

As noted by Respondent, the Agency did not prove the allegation in the NOVA that Respondent was fishing for sablefish on June 6, and did not request amendment of the NOVA to remove that allegation although the evidence showed that Respondent was targeting halibut rather than sablefish when he set the type A gear on June 6 in the WY Regulatory Area. Looking to Federal Rules of Civil Procedure ("FRCP") for guidance, FRCP 15(b) provides that "[w]hen an issue not raised by the parties is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. . . but failure to amend does not affect the result of the trial of that issue." That is, pleadings may be amended to conform to proof at hearing. Where an issue is tried by implied consent of the parties and arose from the same scheme that was the focus of the pleadings, and there is no undue prejudice, failure of the party to request amendment will not affect the judgment. *Mead v. Reliastar Life Insur. Co.*, 768 F.3d 102 n. 4 (2nd Cir. 2014); *Jund v. Hempstead,* 941 F.2d 1271, 1287 (2nd Cir. 1991). Respondent did not suffer any undue prejudice stemming from his presentation of evidence that he was fishing for halibut, and thus the Agency's failure to amend the NOVA to delete the phrase "while fishing for sablefish" has no effect on Respondent's liability for the violation.

As to the arguments that a violation of that provision is a *malum prohibitum* offense and that Respondent intended to catch halibut rather than sablefish when deploying his gear in the WY Area on June 6, intent to catch a certain species is not an element of liability for violation of 50 C.F.R. § 679.7(f)(4). Violations of the Magnuson-Stevens Act and implementing regulations are strict liability offenses, and arguments as to state of mind are irrelevant to liability. *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999).

The question of whether or not Respondent in fact *caught* any sablefish in the WY Regulatory Area is also not relevant to liability, as 50 C.F.R. § 679.7(f)(4) only prohibits *retaining* IFQ sablefish in excess of the unharvested IFQ for the area in which the vessel is deploying fixed gear.

To the extent that Respondent maintains arguments that the Agency's interpretation of this regulatory provision violates his due process rights and amounts to a taking without just compensation, or that he challenges the validity of 50 C.F.R. § 679.7(f)(4) on grounds that it is unclear, these arguments cannot be addressed in this proceeding. The applicable procedural regulations, 50 C.F.R. Part 904 ("Rules") provide at 15 C.F.R. § 904.200(b) that "[t]he Judge has

no authority to rule on constitutional issues or challenges to the validity of regulations promulgated by the Agency . . . ." An argument as to lack of fair notice -- such as a statute or regulation not being sufficiently clear to warn a party about what is expected of it -- is generally founded on the Fifth Amendment of the Constitution, that no person shall "be deprived of . . . property without due process of law." *General Electric Co. v. U.S. EPA*, 53 F.3d 1324, 1328-1329 (DC Cir. 1995); *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (DC Cir. 1987). Therefore, generally, such arguments are not ruled upon in administrative enforcement proceedings and are reserved for decision by the federal courts. *Lilo Maria Creighton*, 2005 NOAA LEXIS 2, 61 (NOAA Apr. 20, 2005) (administrative law judge does not have authority to rule on issue of whether statutory term is unconstitutionally vague and overbroad); *Norma J. Echevarria and Frank J. Echevarria, d/b/a Echeco Environmental Services,* 1994 EPA App. LEXIS 61, 5 E.A.D. 626, 634 (EAB 1994)("'As a general rule . . .challenges to rulemaking are rarely entertained in an administrative enforcement proceeding' . . . even when a party asserts that a rule is unconstitutionally vague.")(internal quotations omitted)

However, Respondent's argument that 50 C.F.R. § 679.7(f)(4) is unclear if interpreted to prohibit deployment of gear for halibut in a halibut IFQ area when sablefish are onboard, appears to challenge merely the Agency's interpretation of the regulation as applied to the particular facts of this case. Some administrative tribunals have ruled on the issue of whether due process was denied for lack of fair notice of the agency's interpretation of a regulation *as applied* to the particular facts of the case. *Howmet Corp.*, EPA Docket Nos. 02-2004-7102, 06-2003-0912, 2005 EPA ALJ LEXIS 21 (ALJ, April 25, 2005); *aff'd,* 2007 EPA App. LEXIS 19, *79, 13 E.A.D. 272, 303 (EAB 2007), *aff'd,* 656 F. Supp. 2d 167 (D. DC 2009), *aff'd*, 614 F.3d 544, 553-4 (D.C. Cir. 2010). And the fair notice argument has been viewed as not necessarily a constitutional issue. A judge on the U.S. Court of Appeals for the District of Columbia Circuit has stated, "one need never reach the constitutional question in deciding whether a regulated party has received notice sufficient to justify an enforcement action" and that "the due process clause is not in issue, nor is it critical to a resolution" of the issue of liability for a violation where challenged for lack of fair notice of the agency's construction of the regulation. *Rollins Environmental Services, Inc. v. U.S. EPA*, 937 F.2d 649, 656, 657 (D.C. Cir. 1991) (Edwards, J., dissenting in part and concurring in part); *see, Diamond Roofing Co., Inc. v. OSHRC*, 528 F.2d 645 (5th Cir. 1976)(without reference to due process or the Constitution, holding that statutes and regulations which impose monetary penalties for violations must give fair warning of the conduct they prohibit or require). At least one administrative law judge has addressed in a NOAA enforcement proceeding the argument of lack of fair warning and adequate notice of prohibited conduct, ascertaining the meaning of the term at issue using traditional tools of statutory construction. *Adak Fisheries, LLC,* Docket No. AK035039, 2007 NOAA LEXIS 2 *63-65 (ALJ, March 12, 2007), *aff'd in part, remanded in part,* 2009 NOAA LEXIS 4 (Under Secretary of Commerce, April 1, 2009).

If an argument of fair notice is to be addressed, the standard to apply is as follows:

> If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform, then the agency has fairly notified [the party] of the agency's interpretation.

General Electric Co. v. U.S. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995)), *citing Diamond Roofing Co. v. OSHRC*, 528 F.2d at 649. This standard has been applied also by administrative tribunals.[6] *E.g., Howmet Corp.*, 13 E.A.D. at 305.

Whether or not Respondent's argument raises a constitutional issue, it nevertheless does not affect liability for the violation. The pertinent regulatory language is

> . . . it is unlawful for any person to . . . retain . . . IFQ . . . sablefish on a vessel in excess of the total amount of unharvested IFQ . . ., applicable to the . . . IFQ . . . regulatory area(s) in which the vessel is deploying fixed gear, and that is currently held by all IFQ . . . permit holders aboard the vessel . . . .

50 C.F.R. § 679.7(f)(4)(2011). Although the general concept of an IFQ permit is to prohibit a person from fishing for IFQ species in a regulatory area for which the person has no permit, this is not exactly what Section 679.4(f)(4) prohibits. This provision clearly specifies the facts that constitute an enforceable violation, with regard to sablefish: deploying fixed gear in an IFQ regulatory area when more IFQ sablefish is retained onboard than the amount of unharvested IFQ for the area. The situation in this case is that the area in which Respondent deployed his gear was not only a sablefish regulatory area but also a halibut regulatory area, and he had halibut quota but not sablefish quota for that area, and had sufficient quota for sablefish in the other regulatory area where it was caught.

While Section 679.4(f)(4) is rather wordy and lengthy, a commercial fisherman in southeast Alaska would certainly understand that it applies when either halibut or sablefish is retained and when fixed gear is deployed in an IFQ regulatory area, and that he must have sufficient unharvested IFQ for the area. Such a fisherman would know that the sablefish WY Regulatory Area is within the IPHC Regulatory Area 3A, and therefore that in the WY Regulatory Area, both species of fish may be harvested, IFQ requirements for both species are applicable, and sufficient IFQ for halibut and for sablefish may be required in that area. *See,* 57 Fed. Reg. 57130, 57139 (Proposed Rule, Dec. 3, 1992) (Fishing under the proposed program for halibut and sablefish is expected to result in an incidental catch, or bycatch, of other species and vice versa). Respondent had experience fishing in the WY area and IPHC Area 3A, and knew that the same fixed gear may be used to catch both halibut and sablefish. Findings of Fact 3, 9. Therefore there is no reason for Respondent or any other commercial fisherman operating a vessel in the WY Regulatory Area to doubt that sufficient IFQ for both halibut and sablefish may be required before setting fixed gear in that area. The text of Section 679.4(f)(4) is clear that when sablefish are retained onboard, to deploy gear in the WY area, sufficient unharvested IFQ for sablefish is required, because it is "applicable to the IFQ . . . regulatory area(s) in which the vessel is deploying fixed gear." Of course there is no reason to assume, when sablefish is

---

[6] Aside from liability, administrative tribunals also have taken fair notice issues into account in considering the amount of penalty to assess for a violation. *Howmet*, 13 E.A.D. n. 60; *see, Rollins*, 937 F.2d at 654 (ambiguity of regulation warranted rescinding penalty in taking into account statutory penalty assessment factors of extent and gravity of the violation, degree of culpability, and other matters as justice may require).

onboard, that the "amount of unharvested IFQ" refers only to halibut just because the location happens to be also within halibut area 3A.

Respondent's assumption that the "amount of unharvested IFQ" refers only to halibut when he is targeting halibut is a myopic perspective which ignores the fact that the area in which he was setting gear was also a sablefish regulatory area. It is also not consistent with the language of Section 679.4(f)(4), which does not in any way suggest that IFQ for one species is not required when deploying gear which is intended to target the other species.

Respondent's perspective is also unreasonable as a practical matter. It would assume that any inspector would simply accept a fisherman's word, despite having sablefish onboard, that he was not targeting sablefish, perhaps as evidenced by the type of gear he was setting, and that the sablefish were caught in another regulatory area. Special Agent Mathews explained at the hearing that when an observer is on board the vessel, he or she can observe the fish species at the time the fish is caught. Tr. 123. When an observer is not onboard, Section 679.7(f)(4) is triggered merely by those on the fishing vessel deploying fixed gear in the water, so "they are actively fishing [and] actively have fish on board the vessel," because inspectors who were not onboard the vessel when the fish were caught are generally unable to determine whether fish already on board a vessel were caught in the regulatory area in which the vessel was inspected or in another area the vessel was in previously. Tr. 124.

It is concluded that Respondent's arguments do not provide a defense to his liability for violating the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A) and (G) and 50 C.F.R. § 679.7(f)(4) by deploying fixed gear while retaining IFQ sablefish onboard the F/V Carlynn in Regulatory Area WY without having any unharvested sablefish IFQ applicable to that area.

V. Penalty

A. Statutory and Regulatory Provisions

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

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

respondent to prove "such inability by providing verifiable, complete, and accurate financial information to NOAA." 15 C.F.R. § 904.108(b), (c), (e), (g).

The Administrative Law Judge is responsible for "[a]ssess[ing] a civil penalty or impos[ing] a permit sanction, condition, revocation, or denial of permit application, taking into account all of the factors required by applicable law." 15 C.F.R. § 904.204(m) (2011); 75 Fed. Reg. 35,631, 35,632 (Final Rule, June 23, 2010). The current regulation "eliminates any presumption in favor of the civil penalty or permit sanction assessed by NOAA in its charging document," and "requires instead that NOAA justify at a hearing . . . that its proposed penalty or permit sanction is appropriate, taking into account all the factors required by applicable law." 75 Fed. Reg. at 35,631.

B. Penalty Policy

On March 16, 2011, NOAA issued a "Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions" ("Penalty Policy") which provides guidance for penalty assessments under multiple statutes enforced by NOAA. While it states that it "provides guidance for the NOAA Office of General Counsel" and refers to NOAA attorneys determining proposing penalties, it may be useful, yet is not binding, for Administrative Law Judges to use as an analytical framework for determining a penalty in an initial decision. *See Student Pub. Interest Research Grp. v. Hercules*, Civ. No. 83-3262, 1989 U.S. Dist. LEXIS 16901 (D. NJ April 6, 1989) (a penalty policy "provides a helpful analytical framework for [the court in] arriving at a civil penalty"). The Penalty Policy was not included as an exhibit by the Agency, but was referenced in the NOVA and attached Penalty Assessment Worksheet along with citations to its address on NOAA's public website. Further, Respondent acknowledged receiving a copy of the Penalty Policy. Court Ex. 2, R Admis. ¶ 18. Under the applicable procedural rules, official notice may be taken of "any reasonably available public document; provided that the parties will be advised of the matter noticed and given reasonable opportunity to show the contrary." 15 C.F.R. § 904.204(l); see also § 904.251(g). Official notice is hereby taken of the Penalty Policy.

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

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

and any additional economic benefit of noncompliance.

Penalty Policy at 4–5. The Magnuson-Stevens Act Schedule in Appendix 3 of the Penalty Policy helps determine the gravity component of the initial base penalty. The schedule assigns different "offense levels" to the most common types of violations charged by the Agency, which levels under the Magnuson-Stevens Act range from least significant ("I") to most significant ("VI") and are designed to reflect the nature, circumstances, and extent of the violations. *Id.* at 4–5, 7–8, 32 app. 3. Where no offense level has been assigned to a particular violation, the Penalty Policy directs use of the offense level of an analogous violation or, if no similar offense can be identified, by assessing the gravity based on criteria listed in the Penalty Policy. *Id.* at 5 n.4, 7, 8.

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

The gravity component and culpability component form the two axes of penalty matrices for each of the statutes, set out in Appendix 2 of the Penalty Policy. *Id.* at 25 app. 2. A range of penalties appears in each box on the matrix. A penalty range is thus determined by selecting the appropriate level for gravity and culpability on the axes. *Id.* The initial base penalty is the midpoint of the penalty range within that box. *Id.* at 5.

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

The final adjustment factor reflects the activity of the violator after the violation, in terms of good faith efforts to comply and cooperation or non-cooperation. The Penalty Policy lists the

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

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

C. Agency's Position

The Agency proposes assessment of a penalty in the amount of $20,000 for the violation, based on the statutory factors and the Penalty Policy.

Regarding the gravity of the offense, the Agency asserts that the penalty should be based upon a level III offense because the offenses that most resemble Respondent's activity are level III "fishing in a closed area" and fishing for "limited entry or catch share species without holding a valid permit if ineligible for a permit." NOAA Brief at 8–9. The Agency notes that the IFQ program does not allow an overage of halibut or sablefish to be cured and Respondent was "ineligible for obtaining a permit authorizing him to fish halibut or sablefish in the WY portion of the IPHC 3A regulatory area until he landed his sablefish." *Id.* at 9.

In terms of culpability level, the Agency proposes that the penalty be assessed as reckless on the basis that he should have foreseen the possibility that it is a violation to set his gear in a regulatory area for which he neither had an IFQ permit nor a hired master permit on board, especially given his prior IFQ violation history. *Id.* at 10. The Agency states that he consciously took the risk, regardless of his testimony that he has been more cautious after his prior violations. *Id.* NOAA points to several inconsistent entries in his logbook and incorrect harvest reports as evidence rebutting his claimed exercise of caution. NOAA Reply at 4–5. Further, the Agency notes that the IFQ regulation has not changed substantially since its inception in 1996 and that Respondent was aware that the fixed gear he used in the WY sablefish area was capable of catching both sablefish and halibut. NOAA Brief at 10–11.

The Agency also asserts that Respondent changed his story, stating in the interview on April 11, 2011 that he was in a hurry to return to Juneau and get ready for seine fishing, and did not realize he was setting gear in an area where he had no sablefish IFQ available, but testifying at the hearing that he thought it was okay to set the gear in the WY area when he had sablefish from the CG Regulatory Area on board., but just could not haul the fish from the water. NOAA Brief at 6 (citing NOAA Exs. 1, 7; Tr. 254, 259).

The penalty matrix for a level III offense and reckless culpability level yields a base penalty range of $15,000 to $20,000. The Agency adjusted the penalty by $2,500 from the

midpoint to the highest point in the range because Respondent had been convicted of three prior counts related to unlawful fishery conduct. Although one of these prior offenses was specifically related to IFQ shares, the Agency chose to apply the increase based on an upward adjustment for "not similar" prior violations. *Id.* at 12. NOAA did not propose adjusting the penalty based on consideration of the economic benefit factor despite Respondent's testimony that his motivation for setting gear in the WY area was saving time and fuel.

As to the seriousness of the offense, NOAA points to Special Agent Mathews' testimony that his office is encountering an increasing number of cases of false reporting as to where the IFQ fish were actually harvested, and that Respondent's offense is significant because of the difficulty of determining where the fish on board were caught. NOAA Brief at 13, 14 (citing Tr. 120, 124). NOAA asserts that it is important to detect violations in a manner that will deter others from engaging in such violations. The Agency points to his testimony that other IFQ fishermen complain that competitors are stealing fish from an area where they have no permit, and that the perception that others are lying about where fish were harvested encourages others to cheat, potentially diminishes the fish available to lawful fishermen, and can result in localized depletion of fish, and flawed future annual allocation decisions by fishery managers. NOAA Brief at 14 (citing Tr. 125-127).

D. Respondent's Position

Respondent argues that he had a valid permit to fish for sablefish where he caught them and a valid permit to fish for halibut in Regulatory Area 3A, and was not fishing for and did not catch sablefish in the WY sablefish area. He proposes that the penalty be based upon a gravity level II rather than level III offense because his activity is closest to "entering a closed area or transiting a closed area with gear not properly stowed." R Brief at 5-6.

His position is that the penalty should be based on an unintentional level of culpability rather than reckless. He believed he had a clear idea of areas and quotas, he had the IFQ quota for halibut, and in setting his halibut gear at a depth suitable to catch halibut he did not catch any sablefish in the WY Regulatory Area. He argues that fishing in closed areas is usually a matter of negligence rather than recklessness. Furthermore, he argues that if the Agency treats the violation as an irrebuttable presumption that the sablefish onboard was harvested in the area in which he stops to deploy halibut gear, then the culpability level should be unintentional, because he in fact was not fishing for sablefish in the WY Regulatory Area. *Id.* at 6-9.

Next, he argues that the prior violations made him more conscientious about the laws, and that his action in this case, deploying halibut gear on the way to land his sablefish, does not relate to IFQ shares or fishing in a closed area. Fishing in closed waters is a much graver offense.

Finally, Respondent argues that the Agency proposed the penalty of $20,000 when it believed he was fishing for sablefish in the WY Regulatory Area, so the penalty should be substantially reduced given the undisputed fact that he was not doing so.

E. Discussion

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

The first set of factors that must be considered under the Magnuson-Stevens Act in determining the amount of a penalty is "the nature, circumstances, extent, and gravity of the prohibited acts committed." 16 U.S.C. § 1858(a). Looking to the Penalty Policy for a framework for considering these factors, the Penalty Policy does not assign any offense level to the particular violation in this case, and therefore it is appropriate to either apply the offense level of an analogous violation listed in Appendix 3 of the Penalty Policy, or assess the gravity based on criteria listed on page 8 of the Penalty Policy.

The violations that the Agency deemed analogous to Respondent's violation, level III violations of fishing in a closed area and "[f]ishing for . . . or possessing limited entry or catch share species without holding a valid permit if ineligible for a permit" do not reflect situations which are analogous to the facts of this case. Penalty Policy at 35, 36. These level III violations contemplate a straightforward offense of fishing for a species with no authority to do so. The evidence shows that Respondent was fishing for halibut and was authorized to do so under his permit for IFQ halibut in the IPHC Area 3A. Findings of Fact 5, 7-9, 11, 12, 18, 19. He also was authorized to fish for sablefish in the CG Regulatory Area and the evidence shows that he in fact caught the sablefish in that area. Findings of Fact 5, 10. The facts are not fully analogous to the level II violation of entering a closed area or transiting a closed area with gear not properly stowed, but the underlying presumption is similar – both violations suggest but do not prove that unauthorized fishing in that particular area may have been attempted or was contemplated. Penalty Policy at 36.

To analyze further, it is appropriate to consult the criteria on page 8 of the Penalty Policy. The first criterion, the nature and status of the resource at issue, includes consideration of whether the fishery is currently overfished, overfishing is continuing, the stock is particularly vulnerable because of slow reproduction rate, whether the violation affects measures designed to protect essential fish habitat, and whether endangered or threatened species are involved. These considerations do not suggest that the gravity of Respondent's violation should be a higher level. The second and third criteria, extent or potential of harm done to the resource or the regulatory scheme or program, suggest a somewhat higher gravity level, considering the testimony of Special Agent Mathews. Tr. 120, 125-127. Respondent's violation does not involve facts listed under the fourth criterion: fishing in closed areas, in excess of quotas, without a required permit or without authorized gear. As to the fifth criterion, his violation reflects only a slight competitive advantage, in saving some time and fuel, over those operating legally. Findings of Fact 17, 21. The nature of the regulatory program, the IFQ program, limiting the number of commercial fishermen who can fish for halibut and sablefish and the locations and amounts they can harvest, suggests a higher gravity level under the sixth criterion. Tr. 46-49; 50 C.F.R. Part 679 Subpart D. The fact that the violation is difficult to detect without an on-scene enforcement presence or an observer, suggests a higher gravity level with respect to the seventh criterion. Overall, the facts of this case suggest a gravity level II which is somewhat higher than the midpoint in the range.

2. Culpability

The Agency's view, in support of assessing a reckless degree of culpability, that Respondent should have foreseen the possibility of a violation, given his prior IFQ violation, and consciously took the risk of violating conservation measures, being aware that his gear could also catch sablefish, is not supported by the evidence. Instead, the evidence shows that Respondent did not foresee that merely having sablefish onboard while fishing for halibut may be a violation. He testified credibly that he "misunderstood the regulation," thought that he was in compliance because he was only setting and not hauling the gear, not pulling the fish out of the water. Tr. 254, 259. This testimony is consistent with his statement in the interview, that he "didn't even think about it being illegal to set gear in an area in which he had no IFQ sablefish quota, while he had sablefish onboard." NOAA Exs. 1, 7. His testimony suggests that he was not familiar with the exact text or meaning of Section 679.7(f)(4). Even if he understood the meaning of 679.7(f)(4), the likelihood that he would be aware of a possible violation may be reduced by the fact that he was legally fishing for halibut in a halibut regulatory area. The text of Section 679.7(f)(4) is wordy, and the Agency has not pointed to any guidance document which would assist the regulated community in understanding its application to the situation at hand.

While Respondent was perhaps shortsighted in his perspective, he does not appear to have had a "conscious disregard of a substantial risk" of violation involving a "gross deviation from the standard of conduct a law-abiding person would observe in a similar situation," which is the description of "recklessness" in the Penalty Policy. Penalty Policy at 9. Instead, he "fail[ed] to know of applicable laws/regulations or to recognize when a violation has occurred," which is a description in the Penalty Policy for a negligent level of culpability. *Id.* His violation does not exactly reflect an unintentional act, which is defined merely inadvertent, the result of an accident or mistake. *Id.* The Penalty Policy (at 9) lists factors to consider in assessing the level of culpability, including whether reasonable precautions were taken and whether the violator knew or should have known of the potential harm associated with the conduct. Respondent should have known that he was fishing in a sablefish area without having sablefish quota, with gear that may catch sablefish, and given that he had sablefish onboard, that would suggest that he was fishing for sablefish.

Considering the Penalty Policy descriptions and criteria, and the testimony and evidence of record as a whole, a low level of negligence is an appropriate assessment of Respondent's level of culpability.

3. Matrix Value

The Penalty Policy matrix for violations of the Magnuson-Stevens Act provides a penalty range of $4,000 to $6,000 for a gravity level II offense with a negligent degree of culpability. Penalty Policy at 25, Appendix 2. As discussed above, Respondent's violation reflects a somewhat higher level II offense and a low degree of negligence. A value of $4,500 is an appropriate assessment for the initial base penalty. *Id.*

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

The two adjustment factors in the Penalty Policy that are potentially relevant to this case are history of non-compliance, and activity after the violation in terms of good faith efforts to comply after the violation and cooperation or noncooperation during the investigation. Penalty Policy at 10–12.

As to history of noncompliance, in 2008, Respondent was convicted of three criminal offenses related to unlawful fishery conduct, including one count which involved IFQ shares. Finding of Fact 22. Under the Penalty Policy instructs that prior violations that are not similar to the newly alleged violation increase the penalty within the range of the initial base penalty box, and that age of the violation may be considered in determining the amount of upward adjustment. Penalty Policy at 11. Here, Respondent committed a similar IFQ violation in 2004 and was convicted in 2008. Finding of Fact 22. Considering that the previous violation was not similar to the present violation, and that it occurred in 2004, some increase in penalty within the initial base penalty box is appropriate. In the circumstances of this case, an increase from $4,500 to $4,800 is warranted.

As to activity after the violation, there is no evidence of any attempts to avoid detection of violations, destroying evidence or other interference with investigations. The evidence does not suggest any deceptive intent in the discrepancy in the June 3 date in Respondent's logbook and the June 4 date on the fishing tickets for when fishing began. Tr. 106; NOAA Exs. 4, 5. On the other hand, Respondent did cooperate with investigators in the on-going investigation, answering all of their questions. Tr. 175-176; NOAA Exs. 1, 7. Some downward adjustment of the penalty is warranted on that basis. Penalty Policy at 12.

Other matters to consider in assessing a penalty are any proceeds of unlawful activity and any additional economic benefit of noncompliance. Penalty Policy at 12–14. The sablefish offloaded from the F/V Carlynn on June 7, 2010 were sold to an IFQ dealer in Yakutat, Alaska, for $6,469.20. Finding of Fact 16. However, the record does not indicate that Respondent obtained any additional profit on the sale of sablefish due to setting gear in the WY Regulatory Area while retaining sablefish, except for the savings in time or fuel. *See* Tr. 237, 259. Given the fact that Respondent only receives 30 percent of the money received from selling the fish, from which he pays for fishing expenses, there is no compelling reason to increase the penalty for cost of fuel saved. Findings of Fact 20, 21.

5. Ability to Pay

The NOVA advised Respondent that he could seek to have the proposed penalty amount modified on the basis that he did not have the ability to pay, and that any such modification request would have to be made in accordance with 15 C.F.R. § 904.102 and be accompanied by supporting financial information. In this case, Respondent has not claimed inability to pay a penalty and has not provided any information concerning financial condition. Respondent is therefore "presumed to have the ability to pay the civil penalty." 15 C.F.R. § 904.108(c).

F. Conclusion

Taking into account the nature, circumstances, extent, and gravity of the violation, Respondent's degree of culpability and history of prior offenses, and other matters as justice may require, Respondent is assessed a civil penalty in the amount of $4,600.

ORDER

IT IS HEREBY ORDERED THAT a civil penalty in the total amount of $4,600 is assessed against Respondent Robert Becker. 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 any civil penalty imposed herein.

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

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

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

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

Lisa Busch

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

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

15 CFR 904.271-273

§ 904.271 Initial decision.

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

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

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

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

(4) A statement of further right to appeal.

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

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

the Administrator the record, including the original copy of the decision, as complete and accurate.

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

(1) Otherwise provided by statute or regulations;

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

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

§ 904.272 Petition for reconsideration.

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

§ 904.273 Administrative review of decision.

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

National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse, modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency

action for purposes of judicial review; except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

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

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

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

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

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