UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:	)	**DOCKET NUMBER**
	)	
Tony DaSilva and AACH	)	PI1100830
Holding Co. No. 2, LLC	)	F/V Isabella
	)	
Respondents.	)	
	)	

INITIAL DECISION AND ORDER

Date: September 10, 2015

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

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

I. PROCEDURAL HISTORY

On June 28, 2011, the National Oceanic and Atmospheric Administration ("NOAA" or the "Agency") issued a one count Notice of Violation and Assessment of Administrative Penalty ("NOVA") to Tony DaSilva and AACH Holding Co. No. 2 LLC ("AACH") (collectively, "Respondents"). Respondents are, respectively, the operator and owner of F/V Isabella. The NOVA charges Captain DaSilva and AACH with one count of violating the Western and Central Pacific Fisheries Convention Implementation Act ("WCPFCIA" or "the Act"). This count alleges that on January 10, 2011, Respondents conducted two fishing sets within an area of the high seas that was closed to purse seine fishing in violation of 16 U.S.C. § 6901 *et seq.* and 50 C.F.R. § 300.222(x). The Agency proposes a penalty of $110,000 for which Respondents would be jointly and severally liable. The NOVA advised Respondents of their right to request a hearing before an Administrative Law Judge ("ALJ" or "Judge") within thirty days of receiving the NOVA.

By letter dated December 13, 2012, Respondent AACH, acting through Counsel James P. Walsh, Esq., requested a hearing.[2] NOAA notified this Tribunal of AACH's request by letter dated January 13, 2014.[3] The undersigned was designated to preside over this proceeding by an Order of Designation dated February 4, 2014. On February 12, 2014, I issued an Order to Submit Preliminary Positions on Issues and Procedures (PPIP) ("PPIP Order") setting forth various prehearing filing deadlines and procedures. The Agency filed its PPIP on March 14, 2014. Respondents' PPIP was filed March 26, 2014.

On April 17, 2014, a Hearing Order set forth deadlines for the filing of discovery motions, joint stipulations, and prehearing briefs, and scheduled the hearing to begin on June 12, 2014 in San Diego, California.

On May 27, 2014, the Agency amended its PPIP to change the description and designation of one of its witnesses, Raymond Clarke, who it intended to call as an expert on the Western and Central Pacific Fisheries Commission, the South Pacific Tuna Treaty, and management of the U.S. purse seine fishery and fleet in the western and central Pacific Ocean.

The Parties filed their Joint Stipulation of Facts ("Stipulations" and "Stip.") on May 27, 2014. The hearing was then twice rescheduled: By Order dated June 2, 2014, the date was changed to August 27, 2014 due to funding concerns. Then, at the Agency's request, the hearing was rescheduled for December 9, 2014 to coordinate with hearings in two companion cases to

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[2] Respondent Captain DaSilva has only minimally participated in this proceeding and did not attend the hearing. However, Mr. Walsh, initially only counsel for AACH, also entered an appearance on behalf of Mr. DaSilva by way of a notice filed February 27, 2014.

[3] As NOAA observed in its notification of AACH's hearing request, Respondents did not request a hearing within thirty days of the NOVA being issued. However, as the Agency also indicates, AACH had engaged in good faith settlement negotiations in the interim. Therefore, the Agency did not object to the timing of the hearing request, and any objection to its lateness is waived.

this one.[4] The Parties amended their Stipulations on November 25, 2014. Also, the Agency twice supplemented its PPIP, first on November 26, 2014 and again on December 5, 2014.

The hearing in this matter was held December 9, 2014, in San Diego, California.[5] At the hearing, the Agency offered the testimony of Kevin Sterling Painter, a special agent in NOAA's Office of Law Enforcement, and Mr. Clarke, a supervisory fishery biologist in NOAA's Pacific Islands Regional Office. One witness testified on behalf of Respondents: Antonio Gustavo Alvarez, Jr., the manager of the F/V Isabella. Five Joint Exhibits ("JX"), two Agency Exhibits ("AX"), two Respondents' Exhibits ("RX"), and one Court Exhibit ("CX") were admitted into the record.[6] Tr. at 7, 17, 26, 27, 28, 54, 95, 101, 105, 124-127.

This Tribunal received a copy of the hearing transcript on December 29, 2014. On January 7, 2015, electronic copies of the transcript were e-mailed to the Parties, and the next day the undersigned issued a Post-Hearing Scheduling Order that set deadlines for the filing of post-hearing briefs and motions to conform the transcript to the actual testimony.

On February 20, 2015, the Agency filed its post-hearing brief ("Agency's Brief" and "AB"). On March 6, 2015, Respondents filed their post-hearing brief ("Respondents' Brief" and "RB"). On March 20, 2015, the Agency filed its post-hearing reply brief ("Agency's Reply Brief" and "ARB"), and on April 3, 2015, Respondents filed their post-hearing reply brief ("Respondent's Reply Brief" and "RRB").

II. APPLICABLE LAWS AND REGULATIONS

A. Liability Under The Western and Central Pacific Fisheries Convention and its Implementing Laws and Regulations

Since September 5, 2000, the United States has been a signatory to the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean ("Convention"). The Convention aims to "to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean." Convention on the Conservation and Management of

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[4] *See Lawrence Wagner and AACH Holding Co. No. 2, LLC*, NOAA Docket No. PI1003559 and *Raymond L. Fournier, Alfred Canepa and AACH Holding Co. LLC*, NOAA Docket No. PI1100409.

[5] Citations to the hearing transcript are in the following format: "Tr. at [page]."

[6] Specifically, this included JX 1-5, AX 1, AX 5, CX 1, and what this decision will refer to as RX 1 and RX 2. RX 1 is the "AACH Holding Co. No. 2, LLC Financial Statement" for the year ended Dec. 31, 2010. Although not explicitly noted by the court reporter, it is clear from the hearing transcript that RX 1 was admitted to the record. *See* Tr. at 96, 101, 124. RX 2, which at times during the hearing was referred to as Respondents' "rebuttal" exhibit or "RER-2," is a document titled "Conservation and Management Measure for the Regional Observer Programme, Conservation and Management Measure 2007-01." Tr. at 61, 95, 124, 126.

Highly Migratory Fish Stocks in the Western and Central Pacific Ocean art. 2, Sept. 5, 2000, 2275 U.N.T.S. 43, 48, 2000 U.S.T. LEXIS 182.[7] The Convention established a governing body known as the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean ("Commission") to carry out various functions, including to:

> adopt measures to ensure long-term sustainability of highly migratory fish stocks in the Convention Area and promote the objective of their optimum utilization; [ ] ensure that such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors[;]...assess the impacts of fishing, other human activities and environmental factors on target stocks[;]...[and] take measures to prevent or eliminate over-fishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources.

Id. art. 5. The Commission currently includes 26 member nations, eight participating territories, and seven cooperating non-member nations. *See* About WCPFC, Western & Central Pacific Fisheries Commission, http://www.wcpfc.int/about-wcpfc. The U.S. Senate gave its advice and consent to the ratification of the Convention on November 18, 2005. President George W. Bush ratified it on May 15, 2007, and it acquired the force of law on July 27, 2007. S. Exec. Rep. No. 109-8 (2005); 2275 U.N.T.S. 43, 2000 U.S.T. LEXIS 182.

Domestically, the Convention is implemented through the Western and Central Pacific Fisheries Convention Implementation Act ("the Act"). Pub. L. No. 109-479, 120 Stat. 3635 (2007) (codified at 16 U.S.C. §§ 6901-6910). The Act directs the Department of Commerce to issue regulations "as may be necessary to carry out the United States international obligations under the [Convention] and this chapter, including recommendations and decisions adopted by the Commission." 16 U.S.C. § 6904(a). The Act further provides that it is "unlawful for any person: (1) to violate any provision of this title or any regulation or permit issued pursuant to this title." 16 U.S.C. § 6906(a)(1).

The Department of Commerce has carried out the conservation management measures provided for in the Convention and the Act by promulgating regulations at 50 C.F.R. Part 300, subparts A and O. 50 C.F.R. §§ 300.1-.5, 300.210-.226. Among other prohibitions, these regulations make it unlawful for any person to "[u]se a fishing vessel equipped with purse seine gear to fish in an area closed under [50 C.F.R.] § 300.223(c)." 50 C.F.R. § 300.222(x). At the time of Respondents' alleged violation of this rule, section 300.223(c) specified geographic coordinates enclosing areas on the high seas within which purse seine fishing was forbidden:

> **(c)** Closed areas....[A] fishing vessel of the United States may not be used to fish with purse seine gear on the high seas within either

[7] The Convention text is publically available at https://www.wcpfc.int/system/files/text.pdf.

> Area A or Area B, the respective boundaries of which are the four lines connecting, in the most direct fashion, the coordinates specified as follows:
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> > **(i)** Area A: 7 [degrees] N. latitude and 134 [degrees] E. longitude; 7 [degrees] N. latitude and 153 [degrees] E. longitude; 0 [degrees] latitude and 153 [degrees] E. longitude; and 0 [degrees] latitude and 134 [degrees] E. longitude.
> >
> > **(ii)** Area B: 4 [degrees] N. latitude and 156 [degrees] E. longitude; 4 [degrees] N. latitude and 176 [degrees] E. longitude; 12 [degrees] S. latitude and 176 [degrees] E. longitude; and 12 [degrees] S. latitude and 156 [degrees] E. longitude.

50 C.F.R. § 300.223(c). These areas were closed by regulation beginning in January 2010 in response to Conservation and Management Measure 2008-01 that the Commission adopted to maintain maximum yields of tuna stocks and to mitigate the effects of overfishing. Fishing Restrictions in Purse Seine Fisheries for 2009-2011, 74 Fed. Reg. 38544, 38545, 38556 (Aug. 4, 2009) (Final Rule); JX 5 at 1-2. In particular, the Commission sought to achieve a 30 percent reduction in bigeye tuna fishing mortality and to avoid any irregular increase in fishing mortality for yellowfin tuna. JX 5 at 3. The area restrictions expired on December 31, 2012 and were subsequently removed from regulation. Fishing Restrictions in Purse Seine Fisheries for 2013-2014, 78 Fed. Reg. 30773, 30774, 30778, 30779 (May 23, 2013) (Final Rule).

Under these regulations, a "person" includes individuals, corporations, partnerships, associations, and other entities. 50 C.F.R. § 300.211. A "fishing vessel" is "any vessel used or intended for use for the purpose of fishing…and any other vessel directly involved in fishing." 50 C.F.R. § 300.211. Among other activities, fishing includes "searching for, catching, taking, or harvesting fish." 50 C.F.R. § 300.211. "Purse seine" fishing refers to the use of "a floated and weighted encircling net that is closed by means of a drawstring threaded through rings attached to the bottom of the net." 50 C.F.R. § 300.211. The "high seas" are the "waters beyond the territorial sea or exclusive economic zone…of any nation." 50 C.F.R. § 300.211.

B. Penalty

The Act incorporates by reference the civil penalty amounts and authorities of the Magnuson-Stevens Fishery Conservation and Management Act, Pub. L. No. 94-265, 90 Stat. 331 (codified at 16 U.S.C. § 1801 *et seq.*) ("Magnuson-Stevens Act"). 16 U.S.C. § 6905(c). The Magnuson-Stevens Act, in turn, provides for civil penalties of $100,000 per violation. 16 U.S.C. § 1858(a).

The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended by the Debt Collection and Improvement Act of 1996, Pub. L. 104-134, resulted in the Secretary in 2009 increasing the maximum civil penalties to $140,000 per violation under the

Act. *See* 15 C.F.R. § 6.4(f)(26). Additionally, when determining an appropriate penalty, regulations provide that certain factors should be taken into account, including "the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior violation, and ability to pay; and such other matters as justice may require." 15 C.F.R. § 904.108(a). This mirrors the Magnuson-Stevens Act factors:

> [T]he Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require. In assessing such penalty the Secretary may also consider any information provided by the violator relating to the ability of the violator to pay, *Provided,* That the information is served on the Secretary at least 30 days prior to an administrative hearing.

16 U.S.C. § 1858(a).

III. FACTUAL BACKGROUND

The following findings of fact include matters that have been stipulated by the parties or that have been deemed proven, material, and relevant based on the review of the evidentiary record and the assessment of the witnesses' credibility. Specific credibility findings and analysis of the evidence are presented in the Discussion section below.

The F/V Isabella is a large-scale purse seine fishing vessel that operates in the western Pacific Ocean, where it uses purse seine fishing gear to catch tuna species. Stip., ¶¶ 15-16. At more than 200 feet in length, the vessel weighs nearly 1,600 tons and can carry more than 1,000 tons of fish with a crew of 23. Stip., ¶ 16; AX 1 at 12. The F/V Isabella sails out of Pago Pago, American Samoa and is properly documented by the United States Coast Guard. Stip., ¶¶ 14, 16; AX 1 at 12.

On January 10, 2011, at 1734 UTC (Coordinated Universal Time), the F/V Isabella set its nets around a school of fish near the coordinates 07°39.080' S Latitude, 171°59.560' E Longitude. Stip., ¶ 18; AX 1 at 14. In that catch, the vessel landed nearly 95 tons of skipjack tuna and 5 tons of yellowfin tuna, with a gross ex-vessel value of at least $99,458. Stip., ¶ 21; AX 1 at 14. The F/V Isabella's log sheet suggests these fish were caught while gathered around a "fish aggregating device" ("FAD"). AX 1 at 14.[8] About six hours later, at 2343 UTC, the F/V Isabella made another set around a school of fish at the coordinates 07°35.181' S, 171°57.389' E. Stip., ¶ 19; AX 1 at 14. This netted 30 tons of skipjack with a gross ex-vessel value of at least $24,000. Stip., ¶ 22; AX 1 at 14. These fish were caught, the log sheet suggests, using baitfish.[9]

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[8] The school association code marked on the logsheet for this catch is "4." A code "4" represents a "DRIFTING RAFT, FAD OR PAYAO." AX 1 at 14.

[9] The school association marked for this catch is "2", which indicates "FEEDING ON BAITFISH." AX 1 at 14.

AX 1 at 14. Both of these sets occurred in the high seas in Area B, where purse seine fishing was at that time prohibited. Stip., ¶ 20; 50 C.F.R. §§ 300.222(x), 300.223(c). None of the fish that was caught was seized or forfeited by NOAA. Tr. at 24.

At the time of these incidents, the F/V Isabella was owned by Respondent AACH Holding Co. No. 2 LLC and captained by Respondent Tony DaSilva.[10] Stip., ¶¶ 2-3. Captain DaSilva has said he was unaware the area was closed to fishing. However, when he discovered that it was, he immediately reported the incident to AACH. Stip., ¶ 23. The company in turn informed NOAA, calling Raymond Clarke, a supervisory fishery biologist in NOAA's Pacific Islands Regional Office. Stip., ¶ 24; Tr. at 26, 56; AX 5. Mr. Clarke advised the company's representative, Itchy Sileu, to report the incident to NOAA's enforcement officials and "throw yourself on the mercy of the court and see how it comes out." Tr. at 57. At the time he received the call, the fish were already on board the vessel and there was no way to release them back into the ocean.[11] Tr. at 92. Mr. Clarke then notified NOAA enforcement officials about the report, including Kevin Sterling Painter, a special agent in NOAA's Office of Law Enforcement based in American Samoa. Tr. at 17, 57; AX 1 at 7.

Agent Painter opened an investigation and verified through various means that the F/V Isabella had fished in the closed area:

> I collected their daily log sheets that showed where they said they were fishing. And we had those plotted, and both sets were indeed inside that closed area. And then to make sure that they had reported an accurate position, I used the vessel monitoring system, which is a satellite tracking system that the purse seiners have on board, and it married up with where they said they were fishing. So I knew, you know, in fact that they did fish in [the closed area].

Tr. at 18; AX 1 at 7, 13-16. In a March 10, 2011 e-mail to Agent Painter, Captain DaSilva indicated the vessel had set its nets "not knowing it was a closed area....There was some confusion on what is closed and what is not international water." Tr. at 17, 19; AX 1 at 19. Although experienced, Captain DaSilva had apparently not been fishing in two years, and "[t]he last time [I] was out fishing it was not [closed]." Tr. at 19, 24; AX 1 at 7, 19. Although Respondents confessed their violations to NOAA, according to Agent Painter, the Agency generally monitors the log books of purse seine ships and reviews the satellite tracking data "constantly." Tr. at 22. Additionally, there was an observer on board the F/V Isabella.[12] Tr. at 22, 79, 80, 87; AX 1 at 19. Thus, Agent Painter testified, it was "highly likely" that NOAA would have discovered the violation on its own, but he did acknowledge that it was "unusual" for

[10] Captain DaSilva is no longer an AACH employee. Tr. at 122.

[11] Had the fish still been in the water, and had Respondents realized their error in time, the fish could have been released. Tr. at 92, 93.

[12] Captain DaSilva claimed in his email to Agent Painter that the observer was also unaware of the closure. AX 1 at 19.

Respondents to self-report a violation. Tr. at 22. This represented a good degree of cooperation from the industry, he agreed. Tr. at 22. Aside from the charges in this proceeding, neither Respondent has had any violations under the Act in the past five years. Stip., ¶ 17. Agent Painter further testified that he was not aware of any other fishing violations in Closed Areas A and B other than the F/V Isabella's. Tr. at 25.

This Tribunal also heard expert testimony from Mr. Clarke about the Western and Central Pacific Fisheries Convention and Commission. Tr. at 26, 32. Mr. Clarke is the principal United States contact for the Commission. Tr. at 29-30. He said the Commission primarily focuses on the conservation of four tuna species in the Pacific as part of its overall objective to conserve and manage highly migratory marine life. Tr. at 33-34, 42. Of those species, two – skipjack tuna and yellowfin tuna – are principally caught by purse seiners. Tr. at 34. Neither has been designated as "overfished." Tr. at 34-35. However, a third species, bigeye tuna, is often caught inadvertently by purse seine fishers, sometimes in significant number.[13] Bigeye tuna are both overfished and subject to overfishing, as they continue to be caught at high rates.[14] Tr. at 35. According to Mr. Clarke, there are two basic metrics that biologists consider when describing the condition of a tuna species: "overfishing," or the rate at which fish are being pulled out of the ocean; and "overfished," or the actual state of the species population in aggregate. Tr. at 34.

Mr. Clarke further explained that the type of purse seine fishing in which a vessel engages may affect the number of bigeye tuna caught. The first method, "free school fishing," involves vessels transiting the ocean in search of schools of fish using electronic detection, visual sighting, helicopter searches, and other means. Tr. at 36. Because schools of tuna detected this way tend to be mostly skipjack and yellowfin varieties, there is "very little bycatch of the bigeye tuna." Tr. at 36. The second method involves the use of a FAD. Tr. at 36. FADs are floating objects set by fishermen around which tuna tend to congregate.[15] Tr. at 36-37. They attract not just yellowfin and skipjack, but bigeye tuna as well, so FAD fishing tends to produce a "significant bycatch of the bigeye." Tr. at 37. Juvenile bigeye are particularly susceptible to this method of purse seine fishing because their smaller size prompts them to congregate around FADs with other species to avoid the danger of the open ocean. Tr. at 35-36, 41.

For these reasons, Mr. Clarke made clear, conservation measures must be taken to reduce the catch. Tr. at 35. The Commission, which includes member nations plus additional cooperating non-member nations, seeks to accomplish this through the adoption of Conservation and Management Measures ("CMM"). Tr. at 42, 44. The tuna CMMs are typically adjusted every two to three years and are shaped by sometimes-competing multinational, political,

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[13] Bigeye tuna should "essentially be looked at as a bycatch." Tr. at 35.

[14] "Longlining," another type of fishing not involved in this case, specifically targets bigeye tuna and further contributes to its overfished status. Tr. at 35.

[15] The regulations define a FAD as "any artificial or natural floating object, whether anchored or not and whether situated at the water surface or not, that is capable of aggregating fish, as well as any object used for that purpose that is situated on board a vessel or otherwise out of the water." 50 C.F.R. § 300.211.

commercial, and scientific interests. Tr. at 46. "It's a huge negotiation. It's a multilateral negotiation at many levels....It's huge interests. It's the definition of the term 'negotiation,'" Mr. Clarke testified. Tr. at 46. He added:

> I think we all agree that without multilateral cooperation that no individual nation on its own can take measures by itself to ensure the long-term sustainability of the resources here we're talking about, and as a result it requires this cooperation, hopefully encompassed within the conservation and management measures.

Tr. at 47. By custom, CMMs are adopted through consensus agreement rather than a vote. Tr. at 47. The United States then generally, but not always, fulfills its obligation to implement the CMM.[16] Tr. at 60, 61. It does so by promulgating regulations unless the existing regulatory scheme is already consistent with the CMM. Tr. at 60, 64. Prior to the adoption of CMM 2008-01, the Commission's scientists advised "that significant action had to be taken to reverse" the decline in bigeye tuna stock. Tr. at 52, 91-92. Several options were considered, including the reduction or complete elimination of longlining and purse seine fishing, the ban of certain gear, the closure to fishing of certain geographic areas of the ocean, and seasonal periods in which fishing would not be allowed. Tr. at 52-53. Ultimately, CMM 2008-01 was adopted, and it included closure of Areas A and B. *See, e.g.*, International Fisheries, 76 Fed. Reg. 82180, 82181-82 (Dec. 30, 2011) (codified at 50 C.F.R. Part 300); JX 4 at 1-2.

It is up to each member nation to enforce their own obligations under a CMM, and Mr. Clarke was aware of other specific instances where Commission members had enforced measures against their own purse seine vessels. Tr. at 74-75, 89. Still, when a country does not enforce the measure, options are limited: "The best recourse at this time is what we call the name and shame, is basically to try to the best of our abilities to bring it to the attention of the other members around the table and the shame. There's no super national authority to provide some sort of . . . action against the country. . . ." Tr. at 90. The Commission has also implemented a "compliance monitoring scheme" that attempts to evaluate how particular members and cooperating nonmembers have honored their obligations. Tr. at 89-90, 94.

Respondents' only witness was Antonio Alvarez, Jr., the son of the owner of AACH and the manager of the F/V Isabella. Tr. at 105-107. According to Mr. Alvarez, his father Gabriel Antonio Alvarez Sr. is the owner of AACH and several other related fishing companies, including AACH Holding Company, AACH Management Corporation, AACH Realty, LLC, Cristina Fishing Company, Full Moon Fish Company, Dorez Investment, LLC, Gamma Seafood Corporation, Alpha International Seafood, and Software Solutions, LLC. Tr. at 115-118. Each of these companies has a limited number of members and these members are all relatives of the Alvarez family, including Mr. Alvarez's wife, mother, brothers, sister, and sister-in-law. Tr. at 106-107, 118. The family imports fresh and frozen fish from South America to distribute

[16] Under cross examination, for example, Mr. Clarke conceded the United States had not issued regulations to enforce portions of CMM 2007-01 requiring observers to timely share their reports with vessel captains. Tr. at 63-68, 83; RX 2. Consequently, captains often do not see the reports until an enforcement case is brought. Tr. at 69.

nationally, said Mr. Alvarez, who also manages the F/V Daniela in the Western Pacific and another vessel in Ecuador that fishes the Eastern Pacific region. Tr. at 106-107.

As manager of the F/V Isabella, Mr. Alvarez handles the company's operations from Samoa, negotiates prices with the canneries, and checks every time the boats come in. Tr. at 120. He is not involved in the accounting, bookkeeping, or legal aspects. Tr. at 120-121. Still, he testified about AACH's balance sheets reflecting the company's income and expenses at the end of 2010. Tr. at 108; RX 1. According to Mr. Alvarez, AACH had a net loss of $1.8 million in 2010. Tr. at 110; RX 1 at 4. He attributed this loss to a below-average number of fish caught: "A general number for boats in the Western Pacific is around 5-6,000 tons, the average. Some boats do very good and catch 10,000 tons. The Isabella catch 2,800 tons that year and the following year....It catch half of what the other boats catch." Tr. at 110-111. Mr. Alvarez further testified under cross examination that there is a wide variability in market prices for tuna that leads to cycles of profit and loss from year to year; the company lost money in 2010, 2011, and 2012, and made money in 2013. Tr. at 111-112. He further agreed that the value of the fish the F/V Isabella caught in closed Area B was nearly $124,000, as the Parties stipulated, and that that value exceeded the penalty sought by NOAA. Tr. at 113-114; JX 2, ¶¶ 20-22. Mr. Alvarez additionally indicated that assets were sometimes moved among AACH and the other fishing companies owned and operated by his family. Tr. at 115-119.

IV. DISCUSSION AS TO LIABILITY

A. Burden of Proof

To prevail on its claims against Respondents, the Agency is required to prove facts supporting the alleged violations by a preponderance of "reliable, probative, and substantial evidence." *In re Creighton*, NOAA Docket No. SW030133, 2005 NOAA LEXIS 2, at *36 (ALJ, Apr. 20, 2005) (citing *Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 276 (1994); *Steadman v. S.E.C.*, 450 U.S. 91, 98 (1981)); *see also* 5 U.S.C. § 556(d); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). This standard requires the "trier of fact to believe the existence of a fact is more probable than its nonexistence." *Creighton*, 2005 NOAA LEXIS 2, at *36 (citing *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993)).

Facts constituting the violation of law may be established by either direct or circumstantial evidence. *Watson*, NOAA Docket No. PI0900579, 2010 NOAA LEXIS 8, at *10 (ALJ, July 21, 2010) (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764-765 (1984)). The Administrator has recognized that the ALJ is in the "best position to make credibility determinations when faced with conflicting testimony." *Black*, NOAA Docket No. PI0904340, 2013 NOAA LEXIS 6, at *6 (ALJ, Aug. 22, 2013) (citing *F/V Twister, Inc.*, NOAA Docket Nos. NE0602397FM/V, NE0601409FM/V, 2009 NOAA LEXIS 11, at *12 (NOAA Nov. 24, 2009)). The judge's responsibility is "to hear the testimony of the witnesses and determine credibility based on the facts and circumstances surrounding the proffered testimony as well as the witnesses' demeanor." *Barker*, NOAA Docket No. NE030107FM/V, 2004 NOAA LEXIS 11, at *10 (ALJ, Feb. 11, 2004) (quoting *Town Dock Fish*, 6 O.R.W. 580 (NOAA App. 1991)).

Inconsistent and unsubstantiated testimony from witnesses detracts from their credibility, and the judge determines the weight to be afforded such evidence. *Id.*

"Once the Agency has proven the allegations contained in the NOVA by a preponderance of the evidence, the burden of proof shifts to the respondents to produce evidence that rebuts or discredits the evidence presented by the Agency." *Pacific Ranger, LLC*, NOAA Docket No. PI1101523, 2014 NOAA LEXIS 9, at *46 (ALJ, Nov. 25, 2014).

B. Violation of the Act

To establish that Respondents violated the Act and 50 C.F.R. § 300.222(x) on January 10, 2011, as alleged in the NOVA, the Agency must show by a preponderance of the evidence that: (1) Respondents are "persons" under the Act; (2) that the F/V Isabella was in an area closed under 50 C.F.R. § 300.223(c); and (3) that Respondents used a fishing vessel equipped with purse seine gear to fish while inside that closed area.

Respondents have stipulated they are persons subject to the jurisdiction of the United States under the Act. Stip., ¶ 13. They have also stipulated that at the time of the violation, AACH was the owner of the F/V Isabella, a fishing vessel, and Captain DaSilva was its operator. Stip., ¶¶ 2-3, 14, 16. Moreover, the Parties have stipulated that the F/V Isabella was in an area closed under 50 C.F.R. § 300.223(c), Area B, and that Respondents twice used the vessel, which was equipped with purse seine gear, to fish while inside Area B. Stip., ¶¶ 14-16, 18-22. The Agency confirmed these facts through its investigation of the incident. Tr. at 18; AX 1 at 7, 13-16. Finally, in their post-hearing briefs, Respondents again stated that they "do not dispute that the [Isabella] operated in the high seas area subject to the ban on the day in question" and that the incident was self-reported "as soon [as] the captain determined that he had made an error." RB at 1.

Consequently, Respondents' liability in this proceeding is not in dispute. The Agency has demonstrated by a preponderance of the evidence that, on January 10, 2011, Respondents conducted two fishing sets within a high seas area that was closed to purse seine fishing in violation of 16 U.S.C. § 6901 *et seq.* and 50 C.F.R. § 300.222(x).

V. DISCUSSION AS TO PENALTY

The WCPFCIA incorporates by reference the civil penalty amounts and authorities of the Magnuson-Stevens Act. 16 U.S.C. § 6905(c). The Magnuson-Stevens Act provides for civil penalties of $100,000 per violation. 16 U.S.C. § 1858(a). The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, as amended by the Debt Collection and Improvement Act of 1996, Pub. L. No. 104-134, resulted in the Secretary increasing the maximum civil penalties to $140,000 per Magnuson-Stevens Act (and thus per WCPFCIA) violation. 15 C.F.R. §§ 6.4(f)(26). As to the presiding officer's penalty assessment, the Rules provide:

> Factors to be taken into account in assessing a civil penalty, depending upon the statute in question, may include the nature,

> circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior violations, and ability to pay; and such other matters as justice may require.

15 C.F.R. § 904.108(a).[17] Similarly, the Magnuson-Stevens Act (the penalty provisions of which are incorporated into the WCPFCIA) requires that the Agency

> 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. In assessing such penalty the Secretary may also consider any information provided by the violator relating to the ability of the violator to pay, *Provided,* That the information is served on the Secretary at least 30 days prior to an administrative hearing.

16 U.S.C. § 1858(a).

There is no presumption in favor of the penalty proposed by the Agency. 15 C.F.R. § 904.204(m); *see* Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631 (June 23, 2010). Nor is the Administrative Law Judge required to state good reasons for departing from the Agency's analysis. 75 Fed. Reg. at 35,631. Rather, the presiding ALJ may assess a civil penalty de novo, "taking into account all of the factors required by applicable law." 15 C.F.R. § 904.204(m); *Pauline Marie Frenier*, NOAA Docket No. SE1103883, 2012 NOAA LEXIS 11, at *11 (ALJ, Sept. 27, 2012).

The Agency seeks a total penalty of $110,000 against Respondents, jointly and severally, for the alleged violation.[18] NOVA at 2-3. In both the NOVA and its initial post-hearing brief, the Agency indicates that in assessing the proposed penalties it considered the relevant statutory and regulatory provisions as well as internal Agency guidance contained in NOAA's "Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions ("Penalty Policy").[19]

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[17] Agency regulations state that if a respondent asserts an inability to pay the penalty, "the respondent has the burden of proving such inability by providing verifiable, complete, and accurate financial information to NOAA." 15 C.F.R. § 904.108(c). No Respondent in this proceeding has asserted such a claim. *See, e.g.*, Tr. at 99.

[18] Although the NOVA alleges – and Respondents admit conducting – *two* purse seine fishing sets within the closed area on January 10, 2011, it only charges them with *one* violation of the WCPFCIA. Thus, the maximum penalty which may be imposed is $140,000. 15 C.F.R. § 6.4(f)(26).

[19] The Penalty Policy was not admitted into evidence, but it was incorporated into the Agency's NOVA, PPIP, and post hearing arguments. Consequently, this decision references but does not rely on the policy. Additionally, the Agency used its March 16, 2011 Penalty Policy, which until recently applied to all civil enforcement cases "charged on or after" that date. NOAA Office of the General Counsel, Policy for the Assessment of Civil Administrative Penalties and Permit

NOVA at Attach. 1; AB at 2. NOAA asserts that the Penalty Policy "improves consistency at a national level, provides greater predictability for the regulated community and the public, and promotes transparency in enforcement." AB at 2.

In following the Penalty Policy, the Agency calculated a base penalty of $12,500. This reflected a "Level V" violation of significant gravity. But this amount also recognized the Respondents' conduct was "unintentional" and thus of low culpability, and it was further adjusted downward for Respondents' cooperation. NOVA at Attach. 1; Penalty Policy at 7-9, 12, 25, 40. Indeed, the bulk of the penalty that NOAA seeks was calculated not on the "nature, circumstances, extent, and gravity" of the violation but on the economic value that Respondents derived from their unlawful activity. To that end, the Agency concluded that Respondents obtained $97,500[20] in proceeds from their unauthorized catch and added that to the base penalty to arrive at a total penalty of $110,000. NOVA at Attach. 1; Penalty Policy at 5, 12. *See also* 15 C.F.R. 904.108(b) ("NOAA may . . . increase . . . a civil penalty from an amount that would otherwise be warranted by the other relevant factors. A civil penalty may be increased . . . for commercial violators[ ] to make a civil penalty more than a cost of doing business.").

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

The Agency contends the Respondents engaged in a "serious" fishing violation that "negatively affects both the stock and the regulatory regime agreed to by the United States as the result of international negotiations," resulting in "a deleterious effect on the moral authority of the United States in seeking to cooperatively conserve and manage [tuna] stocks." AB at 2; ARB at 1. NOAA points particularly to the F/V Isabella's capture of 130 metric tons of fish, and contends that some portion of that catch must have included the overfished bigeye tuna species that congregate near FADs and are susceptible to purse seine fishing. AB at 3; ARB at 2. This, after the United States and other members of the Commission had agreed to close certain areas of the high seas, "reflect[ing] the consensus that the nations involved had to take steps to reverse the alarming decline in the stock of Bigeye tuna and continue to manage the stock of Yellowfin tuna judiciously to prevent a similar decline." AB at 3. NOAA suggests Respondents cannot ignore these goals: "Enforcement of the Agency's regulations governing international fisheries implicates both domestic law enforcement concerns and the credibility and standing of the United States in the international community." AB at 2-4; ARB at 1-2. Thus, any argument the high seas closure was an ineffective conservation measure, and that its breach should therefore be excused, is misplaced because an evaluation of the effectiveness of CMM 2008-01 "is totally irrelevant to the evaluation of Respondents' offense." ARB at 2-3. Moreover, NOAA states, Respondents' actions meant 130 fewer tons of fish were available to lawfully operating fishing vessels. ARB at 2. To the extent Respondents suggest no harvest caps regulated the fishery and

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Sanctions, http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf. The 2011 policy has since been superseded by a revised penalty policy issued July 1, 2014. It does not apply here because this case was filed prior to the revision. *See* Penalty Policy, July 1, 2014, at 1: http://www.gc.noaa.gov/documents/Penalty%20Policy_FINAL_07012014_combo.pdf.

[20] It is not clear from the record how this number was calculated.

so no other fishers were harmed, "[t]he fact is that Respondents exceeded a harvest 'cap' by 130 metric tons when they captured those fish in an area where the 'cap' was set at zero." ARB at 2.

Respondents contend the regulation that closed Area B lacked "any true conservation impact" and that this is the reason it was repealed. RB at 5. They also argue NOAA "exaggerates the harm" caused by their violation in two ways: First, fishing in the closed areas was never widespread, they note; "[i]n fact, Respondents represent the only instance of fishing in the closed areas." RB at 5. Second, they point to Mr. Clarke's testimony that the risk of a large bigeye bycatch in purse seine fishing "is very low" (although they did not note his qualifier that the risk increases with the use of FADs). RB at 5; Tr. at 37, 41. The Agency has offered no evidence of harm to the environment or other fishers, they assert, and argument of such harm "is purely speculative." RB at 4; RRB at 4. "Indeed," they note, "Respondents caught ***no bigeye*** in either of the sets at issue." RB at 5. Additionally, Respondents maintain that NOAA cannot argue their violations harmed the environment while also arguing that the effectiveness of the high seas closure is not relevant. RRB at 5.

It is apparent to me that the nature, circumstances, extent, and gravity of Respondents' violation was "serious," even if not quite as serious as NOAA suggests. That is primarily because NOAA's attempt to quantify the Respondents' harm to the tuna stock, at least from a conservation viewpoint, is not very effective. The alleged harm rests largely on how Respondents' violations may have impacted the bigeye tuna species, the only tuna variety that was subject to both "overfishing" and being "overfished." Tr. at 35. The problem with this argument is its speculative nature. The Agency attempted to support its position through Mr. Clarke, who credibly testified that FAD fishing tends to produce a "significant bycatch of the bigeye," including juveniles. Tr. at 37. As he stated:

> [T]hese FADs aggregate typically a lot of juvenile fish, juvenile yellowfin tuna and juvenile bigeye tuna. And one of the theories is they provide some protection out in a very kind of dynamic ocean in which small tuna are essentially food for a lot of other species. So these small typically juvenile both yellowfin and bigeye tuna will aggregate. And when the fishers make their set and bring them aboard, there is sometimes a lot of juvenile bigeye tuna. And...that's part of the problem that's led to this overfishing issue.

Tr. at 41. But NOAA produced no evidence that Respondents actually caught any bigeye tuna during either of its net settings in closed Area B. Indeed, the Agency agreed that the 130 tons of fish caught were comprised entirely of yellowfin and skipjack tuna. Stip., ¶¶ 21-22; AX 1 at 14. Consequently, NOAA's argument rests on generalities associated with FAD fishing but is not supported by specific evidence in this case. The most that can be said is that Respondents engaged in FAD fishing, and that because bigeye tuna are attracted to FAD devices, this fishing *might* have involved some bigeye bycatch.

Still, simply because Respondents were fortuitous enough to not capture any bigeye does not mean the risk of a large bigeye bycatch was not real. And it is the risk of this harm for which regulations like CMM 2008-01 and 50 C.F.R. § 300.223(c) were written. To that extent, Respondents' lack of harm argument is somewhat mitigated. Thus, even if no bigeye were

caught, the seriousness of Respondents' violation is underscored by the need to deter other fishing vessels from engaging in illegal fishing practices in closed areas without regard to the risk of harm that exists. Fishing activities in closed areas have often been treated as serious violations. *See, e.g., Khiem Diep*, NOAA Docket No. PI1201802, 2015 NOAA LEXIS 12, at *70-72 (ALJ, June 5, 2015) (finding fishing inside closed areas "to be particularly grave infractions . . . . By establishing the [closed area] and restricting activities within its boundaries, the Federal government clearly recognized the significance of the region and found that it was worthy of protection."); *Josh W. Churchman*, NOAA Docket No. SW0703629, 2011 NOAA LEXIS 2, at *39-40 (ALJ, Feb. 18, 2011) ("Respondents' violations involve multiple acts of actual fishing within a closed area. Such actions represent serious violations . . . . Respondents were unlawfully taking advantage of a marine resource within an area that the Agency had lawfully determined should be closed to any such activity."); *Lobsters, Inc.*, NOAA Docket No. NE980310, 2001 NOAA LEXIS 8, at *33-34 (ALJ, Dec. 5, 2001) ("[E]ntry into a closed area to fish is by its very nature a most serious undermining of the efforts to protect these precious resources . . . . If [others] believe that insignificant cost of doing business penalties would be assessed then potential wholesale violations of the closed areas would abound."); *Brian M. Roche*, NOAA Docket No. NE990055, 2001 NOAA LEXIS 12, at *17-18 (ALJ, Aug. 15, 2001) ("There is no doubt that incursion into a closed area is a particularly serious violation.").

Also compelling is the Agency's argument that Respondents' conduct undermines efforts of the United States and other nations to enter into conservation agreements necessary to preserve the world's fish resources. Were Respondents' violation to be dismissed as merely a trivial misstep, it would suggest the United States does not or cannot enforce against its fishing vessels the international agreements to which it is a party. This in turn would give other nations a reason to not enforce the Commission's conservation measurements against its own fishers. The aggregate effect of non-enforcement, here and abroad, would render useless conservation measurements adopted by the Commission and ratified by the United States. Additionally, failure to fully recognize the nature, extent, and gravity of Respondents' violation in these circumstances would damage the United States' credibility in attempting to negotiate future conservation efforts with other nations. As Mr. Clarke testified, this effort involves a number of multilateral negotiations and the reconciling of complex and competing interests: "[N]o individual nation on its own can take measures by itself to ensure the long-term sustainability of the resources here we're talking about[.]" Tr. at 46-47. A lack of cooperation in this area could have a detrimental impact on fisheries and other resources that transcend international borders. To that extent, this Tribunal is not particularly persuaded that the nature, extent, and gravity of Respondent's violation in the circumstances of this case are merely "nominal," even accepting a lack of effectiveness of the high seas closures and limited duration of 50 C.F.R. § 300.223(c).

B. Respondents' Culpability and History of Prior Violations

The Agency accepts "Respondents' assertions that the violations were inadvertent and the result of a mistake" by Captain DaSilva, who "was unfamiliar with the area closure[.]" AB at 4. However, NOAA also argues Respondents' actions "were still negligent" or "arguably reckless": Both had a duty to inform themselves of the closure, it says, and AACH had a duty to ensure Captain DaSilva knew about the closure, particularly because it knew "he had been away from the fishery 'for a while'." AB at 4; ARB at 3.

Respondents continue to describe their fishing violations as "inadvertent," chalking them up to Captain DaSilva's two-year absence from fishing and hastening to point out that they "immediately reported the error to NOAA." RB at 4; RRB at 2. They also note NOAA's "admission" that the violations were unintentional, and contend any argument for increased culpability is not supported by the record. RRB at 1-2; NOVA at Attach. 1. As evidence of the confusion, Respondents cite the email Captain DaSilva later sent to Agent Painter stating that "[t]here was some confusion on what is closed and what is not international waters." RRB at 2; AX 1 at 19.

As an initial matter, Respondents are correct that the Agency has been inconsistent in its description of their culpability. In the penalty worksheet attached to the NOVA, the Agency terms the acts "unintentional," meaning under the Penalty Policy they were "inadvertent, unplanned, and the result of an accident or mistake." NOVA at Attach. 1; Penalty Policy at 9. Then, in its post-hearing brief, NOAA again accepts that the violations were "inadvertent and the result of a mistake," i.e., unintentional. AB at 4. But in the same sentence, it also claims Respondents were "negligent," i.e., that they "fail[ed] to exercise the degree of care that a reasonably prudent person would exercise in like circumstances." AB at 4; Penalty Policy at 9. Finally, in its post-hearing reply brief, the Agency escalates Respondents' mindset to "reckless" which, under the Penalty Policy, "is a conscious disregard of a substantial risk of violating conservation measures that involves a gross deviation from the standard of conduct a law-abiding person would observe in a similar situation." ARB at 3; Penalty Policy at 9. There is no reason given for NOAA's shifting assessment of Respondents' culpability, and it is not entirely clear what the basis is for this upgrade. All NOAA says is that this Tribunal is "free to come to its own conclusions regarding culpability . . . ." ARB at 4.

In this instance, unlike the somewhat serious nature, circumstances, extent, and gravity of the Respondents' violation, their culpability is minimal. The evidence suggests that Captain DaSilva was unaware he was fishing in a closed area. Although he did not testify at hearing, preventing the Agency from testing his ignorance through cross examination, the fact that he immediately reported his violation to AACH supports this version of events. Stip., ¶ 23; AX 1 at 19 ("We [e]ntered the international water . . . . We set not knowing it was a closed area. Not fishing a while [I didn't] know it was closed. The last time I was out fishing it was not . . . . Informed Itchy that night we set in the closed area."). Accepting that Captain DaSilva had not been fishing in two years, and noting also the limited time in which Areas A and B of the high seas were closed to fishing, it is entirely plausible that he would make this mistake. Tr. at 17, 19 (Agent Painter testifying that Captain DaSilva "communicated to me in an email that, yes, he fished in there, and he made an honest mistake. He hadn't been fishing in quite some time and didn't know the area was closed."); AX 1 at 7, 19. Likewise, AACH's decision to self-report the fishing violations to NOAA also indicates its generally low degree of culpability. Stip., ¶ 24; Tr. at 26, 56 (Mr. Clarke testifying that "it was what we call an honest mistake. It was just a human mistake."); AX 5. While true that NOAA may ultimately have discovered the violation through its ability to monitor the F/V Isabella, Respondents would have been aware of this fact and so would have been unlikely to intentionally violate WCPFCIA closed areas. As Agent Painter testified, Respondents' decision to self-report "certainly" represented a good degree of cooperation that is unusual for the industry. Tr. at 22.

Based on these facts, the Respondents' actions reflect a minimum level of culpability, and for the most part, NOAA's initial indication that the violative acts were unintentional was a correct one. Nothing at hearing indicated a need to find increased culpability. There is arguably greater culpability on the part of AACH, which as a sophisticated commercial fishing company has a duty and the resources to stay abreast of any regulations governing its industry. Moreover, it has a duty to train its employees in those regulations and to ensure they understand them. And Captain DaSilva should, prior to going to sea, ensure he knows the regulations that govern his occupation. But even if Respondents' conduct was characterized as "negligent" rather than "unintentional," their good faith in self-reporting the incident minimizes any slight elevation in culpability.

Further working in Respondents' favor is the fact that they are not repeat offenders. As noted above, aside from the charges in this proceeding, neither Respondent has had any violations under the WCPFCIA in the past five years. Stip., ¶ 17. This also suggests a lack of intentionality in their actions.

C. Ability to Pay

Respondents make no claim that they are presently unable to pay the $110,000 penalty that NOAA seeks. A respondent who wants the initial decision of the judge to consider his inability to pay must, 30 days prior to hearing, submit to Agency counsel "verifiable, complete, and accurate financial information" such as "the value of respondent's cash and liquid assets; ability to borrow; net worth; liabilities; income tax returns; past, present, and future income; prior and anticipated profits; expected cash flow; and the respondent's ability to pay in installments over time." 15 C.F.R. § 904.108(d), (e). Respondents in this case submitted only a fraction of that information – in a form and amount inadequate to accurately measure inability to pay – and counsel for Respondents expressly stated at hearing that they were not arguing an inability to pay:

> Judge Biro: ... I think the argument here, and correct me if I'm wrong, Mr. Walsh. You're not arguing an inability to pay.
> Mr. Walsh: No, we are not.

Tr. at 99. *See also* Respondents' PPIP, at 8 (March 26, 2014) ("Respondents will not be asserting inability to pay any penalty that may be assessed as a result of this proceeding."). Indeed, Mr. Alvarez testified that in 2013, the most recent year for which financial testimony was offered, AACH was profitable. Tr. at 111-112 ("We made a profit in 2013."). Consequently, there is no basis for reducing the penalty based on Respondents' inability to pay.

D. Other Matters As Justice May Require

As indicated above, nearly $98,000 of the $110,000 penalty NOAA seeks is not based on the actual commission of the violation, but rather on the economic benefit Respondents derived from their misconduct. Federal regulations authorize a penalty on these grounds: "NOAA may . . . increase . . . a civil penalty from an amount that would otherwise be warranted by the other

relevant factors. A civil penalty may be increased . . . for commercial violators[ ] to make a civil penalty more than a cost of doing business." 15 C.F.R. § 904.108(b). Moreover, case law

> clearly make[s] the economic benefit a violator derives from their unlawful activity a necessary recoupment for any penalty assessed. A civil penalty must take into account the value of the catch obtained through unlawful means to alter the economic calculus that might lead a participant in a fishery to simply account for a potential fine as a cost that can be absorbed with the proceeds from such unlawful activity. Otherwise, enforcement would be severely compromised.

Anthony Black, NOAA Docket No. PI0904340, 2013 NOAA LEXIS 6, at *115-116 (ALJ, Aug. 22, 2013) (citations omitted). *See also Khiem Diep*, 2015 NOAA LEXIS 12, at *90 (Deterrence of fishing in closed areas "may only be achieved by imposing a penalty that includes the value of the fish unlawfully caught as well as an additional amount, such that the sanction . . . exceeds any economic benefit to be gained to a sufficient degree that it is not regarded merely as a 'cost of doing business.'"); *Pacific Ranger, LLC*, 2014 NOAA LEXIS 9, at *101 ("The appropriate penalty in this matter should not only remove or diminish Respondents' economic gain from violating the law, it should also act to deter future violations."); *Churchman*, 2011 NOAA LEXIS 2, at *60-61 ("The deterrent effect of a monetary sanction can thus be accomplished in these cases by imposing a significant sanction against each Respondent that encompasses not only the value of the unlawful catch but also an additional amount."); *Pesca Azteca, S.A. de C.V.*, NOAA Docket No. SW0702652, 2009 NOAA LEXIS 10, at *39 (ALJ, Oct. 1, 2009) ("The penalty in this case must be strong enough to alter the economic calculus that led Respondent to take its chances . . . and risk having to conduct illegal fishing operations"), *aff'd* 2010 NOAA LEXIS 3 (NOAA App. 2010); *Ernesto Silva*, NOAA Docket No. NE030119FM/V, 2005 NOAA LEXIS 1, at *17 (ALJ, March 17, 2005) ("Respondents' unlawful behavior here must invoke a civil penalty which is more tha[n] merely the cost of doing business.").

NOAA argues that "[i]t is a matter of simple logic and Agency policy that . . . to achieve any appropriate deterrent effect, the first thing the Agency should do is [ ] remove any unjust enrichment Respondents'[sic] gained as a result of their illegal activity[.]"[21] AB at 4. Other purse seine fishing vessels – both foreign and domestic – were denied access to these fish by following the Convention or the law, NOAA contends, and allowing Respondents to benefit from their conduct would provide them a windfall at lawful fishers' expense. AB at 5; ARB at 2 ("Respondents' poaching left 130 metric tons fewer fish afterwards for the rest of the fishermen lawfully engaging in the fishery."). Thus, according to NOAA the proper remedy is to return Respondents to the status quo by penalizing them for no less than the stipulated ex-vessel value of the fish: $123,458. AB at 5. "As the high value of Respondents' illegal catch indicates," the Agency observes, "the potential economic benefit for breaking the law can be substantial." AB at 5. In support of assessing an economic-based penalty, the Agency cites this Tribunal's

[21] NOAA observes that the fish were subject to seizure and forfeiture by the United States under 16 U.S.C. §§ 6905(c) and 1860. For whatever reason, the fish were not seized at the time of landing. AB at 4-5.

decision in *Pacific Ranger*, and notes that "gross ex-vessel value"[22] is the most appropriate basis for calculating the amount by which Respondents were unjustly enriched.[23] ARB at 4-5. Also, it adds, this amount is "*the only evidence in the record of the value of the illegally caught fish to the company*." ARB at 5.

Respondents assert that regardless of what they received for selling the fish captured in Area B, "corresponding income was not produced" for AACH because the company had overall losses of $1.8 million in 2010 and $570,000 in 2011 "despite any value they received from the fish." RB at 4. The impact on competing fishers is irrelevant, they say, because it is purely speculative that others would have caught the fish if Respondents had not. RB at 4 ("There was no guarantee that any other vessels would have caught the fish if Respondent had not."). Respondents also question the deterrence effect of an economic penalty, which they deem "counterproductive" because it would prompt fishermen to hide violations: "The imposition of a significant penalty could have the opposite effect of what NOAA intends – that fishermen would stop reporting errors in the first place at the risk of incurring disproportionately high penalties." RB at 4.

In response, NOAA asserts that any money Respondents received for the fish produced corresponding income for AACH "and would have lessened any financial loss or contributed to any financial gain enjoyed by the company by an identical amount." ARB at 6. Otherwise, the Agency states, Respondents have agreed to the benefit received from the fish they caught and "presented no other evidence specifically relating to the value of the catch from [their] two unlawful sets in the closed area." ARB at 6. Plus, records of the company's overall financial performance are irrelevant, "of dubious accuracy and should be afforded no weight by the [Tribunal] when deciding on an appropriate penalty." ARB at 7, 8. NOAA adds that even if AACH's year-to-year profit and losses were considered, the documents admitted into evidence are incomplete because the other closely-held corporations owned and run by the Alvarez family share assets with AACH but the record does not reflect their revenues and expenses. ARB at 7-

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[22] The term "ex-vessel value" is not defined by NOAA, either here or in the regulations for the purposes of penalty calculations. But, this Tribunal has in a previous case accepted the following definition offered by the Agency: "Gross ex-vessel value is what the market believes is the value of the catch on the day it is sold." *Khiem Diep*, 2015 NOAA LEXIS 12, at *88 n.11. In essence, the term means the gross value of the fish to the vessel. *See Craig Bolton*, NOAA Docket No. AK1200300, 2015 NOAA LEXIS 10, at *3 n.2 (ALJ, April 15, 2015) (Order on Agency's Petition for Reconsideration).

[23] The Agency claims this proposition is "consistent with a line of NOAA administrative decisions stretching back 35 years," and cites several cases as examples. ARB at 5. However, this is not the first time the Agency has made this claim, and this Tribunal has previously noted that the decisions the Agency cites in this instance "do not establish that ex-vessel valuation is worthy of deference." *Craig Bolton*, 2015 NOAA LEXIS 10, at *17 (Order on Agency's Petition for Reconsideration). Thus, the Tribunal does not accept as a blanket proposition that there is a longstanding basis for assessing a violator's penalty under this standard without considering the impact of Respondents' evidence to the contrary.

8. Based on this "incomplete evidence," NOAA contends "it is impossible for the court to come to any supportable conclusions about [AACH]."[24] ARB at 8.

Finally, Respondents reply that "[t]here is no definition of what 'economic benefit' means or what the appropriate 'value' of any fish should be" when calculating the penalty. RRB at 2. According to them, the ex-vessel value of the fish does not represent their gain or reflect the actual profit they may have earned from the illegal net settings: "[J]ustice requires consideration of the benefit to Respondents in terms of the profitability rather than ex-vessel value." RRB at 2. Additionally, Respondents argue, the cases NOAA relies on for using ex-vessel value in penalty calculations do not apply here, and further refer to "profit" – a figure that takes into account costs and expenses – as a proper guideline. RRB at 3. AACH's financial statements are reliable because no evidence to the contrary was presented at hearing, Respondents add, and information regarding finances of the related companies is not relevant because those companies are not parties to this proceeding. RRB at 4.

It is clear in this case that justice demands the assessed penalty recapture at least some of the economic benefit that Respondents realized as a result of their illegal fishing. This is not for punitive reasons, but rather to reinforce the notion that the cost of violations cannot become a part of doing business. *See Ernesto Silva*, 2005 NOAA LEXIS 1, at *17. Those in the industry should simply not be able to benefit economically by violating the law. It is also important to demonstrate to other fishers that they will not be disadvantaged when they comply with regulations their competitors ignore. Here, Respondents extracted a quantifiable amount of fish from an area of the high seas that was closed to fishing. Had they obeyed the law, they would have acquired none of these fish in that area. Because the fish were not seized after their capture, the only way to restore Respondents to their original, lawful position is to require them to disgorge the value of the fish they took.

In calculating the appropriate value of Respondents' unlawfully-obtained fish, the record yields only one guiding figure: $123,458. Respondents as well as the Agency have agreed this is the total ex-vessel value of the fish captured in the two net settings. Stip., ¶¶ 21-22. Additionally, at hearing, Mr. Alvarez, the son of the owner of AACH and the manager of the F/V Isabella, offered testimony that further validates this amount:

> Q: In Paragraph 21, it says that "The vessel landed approximately 95 metric tons of skipjack and five metric tons of yellowfin, with a total ex-vessel value of not less than $99,458." Is that correct?
> A: Correct.
> Q: Okay. And in Paragraph 22, "Set two resulted in the vessel landing approximately 30 metric tons of skipjack, with a total ex-vessel value of not less than $24,000." Is that correct?
> A: That's correct.

[24] As the Agency further observes, there is no evidence in the record related to Captain DaSilva's financial resources. ARB at 8.

Q: So, with my math, that's like somewhere in the neighborhood of $124,000 worth of fish at least, *at least* that was landed from those two sets, correct?
A: That's correct.
Q: Okay. And that's *more than* the total penalty assessed, correct?
A: Yes.
Q: Now do you have any specific information beyond what's already in the record about the amount of fish that was caught on those two sets?
A: I'm sorry. Can you --
Q: Other than what's already been put into the record, do you have any information for the Court about the amount of fish that was caught on those two sets in the high seas closed area?
A: No, that's what I understand it was.
Q: Do you have any information about the species of fish that were caught in the closed area beyond what's in the record already?
A: No, I think that information is accurate.
Q: Do you have any information about the value of the fish beyond what's in the record already?
A: No.

Tr. at 113-114 (emphasis added). Consequently, the record demonstrates that the gross value of the fish to Respondents was more than $123,000. It was not until their post-hearing reply brief that Respondents fully articulated a desire to calculate economic benefit based on profitability of the catch rather than the gross ex-vessel value of the fish: "[T]he ex-vessel value of the fish does not represent the 'gain' to Respondents and penalizing them for this amount does not reflect the actual profit, if any, they may have earned as a result of the sets."[25] RRB at 2.

In a profitability accounting, the value of a catch would presumably be diminished by costs and expenses related to catching the fish, such as fuel, gear, or payments to the crew. Significantly, however, Respondents have offered no evidence of the particular costs or expenses they incurred in making their illegal net sets or in connection with that fishing voyage at all. While some costs no doubt existed, it is impossible to say what they were with any certainty. In fact, the amount Respondents earned from selling the fish could have exceeded the agreed upon ex-vessel value. The record is equally silent on both points.

More puzzling is Respondents' reliance on financial statements offered as evidence of the economic value of the fish. These statements are comprised of a balance sheet for AACH as of December 31, 2010, as well as related statements of income, expense, and changes in partners' capital and cash flows for the end of that year.[26] Tr. at 108-110; RX 1. According to Mr.

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[25] As discussed below, at hearing Respondents seemed to focus on the overall financial health of AACH and its year-to-year losses rather than costs incurred in catching the fish specifically at issue in this case.

[26] These unaudited statements compiled by the company's accountants contained the following passage: "Management has elected to omit substantially all of the disclosures required by U.S.

Alvarez and these documents, AACH had a net loss of $1.8 million in 2010 because it was a poor performer. Tr. at 110; RX 1 at 4. "A general number for boats in the Western Pacific is around 5,000 - 6,000 tons, the average. Some boats do very good and catch 10,000 tons. The Isabella catch 2,800 tons that year and the following year....It catch half of what the other boats catch," Mr. Alvarez testified. Tr. at 110-111. However, this general loss was prior to Respondents' violations at issue here and is therefore irrelevant to the value of the fish they captured. Mr. Alvarez did add that the company lost $570,000 in 2011. Tr. at 111. But he offered no documents to support this claim, and even if his testimony is accurate, Mr. Alvarez did not provide any explanation as to how the loss related to Respondents' unlawful catch. Thus, Respondents' argument that the fish acquired by virtue of the violation produced "no corresponding income" is completely unsubstantiated. RRB at 2. As the Agency correctly observes, "[a]ny money received for the fish did in fact produce corresponding income for the company and would have lessened any financial loss or contributed to any financial gain enjoyed by the company by an identical amount." ARB at 6. Whether that income contributed to the business's overall annual profit or merely lessened its overall annual loss, it is still income that inured to Respondents' benefit then, and has continued to accrue to its benefit until now, more than four years later.

Because of Respondents' Exhibit 1's dubious relevance to measuring the economic benefit Respondents gained by its violations, I accord it little weight as to this issue. Moreover, no other evidence in the record supports a valuation method other than ex-vessel value. Consequently, despite their late-in-the-game annual profitability argument, I have no choice but to use the stipulated ex-vessel value of the catch as the primary measurement of Respondents' unlawfully-acquired economic benefit. This does not mean gross ex-vessel value will be appropriate in all cases; respondents are always free to produce evidence of the actual value they received from an unlawful catch to "challeng[e] the Agency's case in chief on the proposed penalty amount." *Craig Bolton*, 2015 NOAA LEXIS 10, at *21 (Order on Agency's Petition for Reconsideration). Respondents in this case simply did not do so.

Consequently, beyond the penalty amount that would otherwise be warranted by factors such as the nature, circumstances, extent, and gravity of their violation, or their culpability, history of prior violations, and ability to pay, Respondents' capture of more than $123,000 worth of fish must, as a matter of justice, be considered. Indeed, in its post-hearing reply brief, NOAA requests a *minimum* penalty of $123,458 *plus* "some additional amount that appropriately reflects Respondents' level of culpability and the nature, circumstances, extent, and gravity of the Respondents' two prohibited sets in the closed area." ARB at 8. However, as discussed herein,

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generally accepted accounting principles. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the Company's financial position, results of operations, and cash flows." RX 1 at 2. Respondents dismiss this disclaimer as "standard statements that are regularly included" in such financial documents, and argue it is meaningless until challenged by evidence of inaccuracies. RRB at 4. NOAA did not produce any such evidence, Respondents note. RRB at 4. However, even without contrary evidence, a statement like this diminishes the credibility of this evidence.

other considerations counsel against a penalty that high.[27] Thus, while Respondents theoretically derived from their illegal fishing an economic benefit of $123,458, I do not find that to be the "floor" at which the penalty should be set in this case.

Of further note is a common thread throughout Respondents' argument that they should not be punished at all, because their violation was unintentional: "This case represents an example of a disproportionately heavy hammer being used to punish an admitted mistake that resulted in no proven harm. Any penalty assessment requires consideration of the level of culpability and any other factors as justice may require." RRB at 1. This leads to the inescapable conclusion, they contend, that only "a nominal penalty, if any," should be imposed. RRB at 1. They believe that to surrender the economic benefit of their catch would punish them for a level of blameworthiness the record does not support. RRB at 2. The Agency responds that "Respondents appear to have made no effort to comply with their duty to know what areas were closed or to ensure their employees were so aware . . . . Justice requires that those who break the law not be allowed to keep their ill-gotten gains." ARB at 4.

I have already discussed Respondents' culpability as an independent factor in penalty calculation and found it to work in their favor.[28] But under separate considerations of justice and economic benefit, Respondents' lack of blameworthiness may also play a role. The goal of deterring future violations by "alter[ing] the economic calculus" of violating the rules presumes some intentionality on a respondent's part. *See Anthony Black*, 2013 NOAA LEXIS 6, at *115-116. In a low-culpability case like this, there is less urgency in deterring a future violation because there is less concern the respondent will continue to engage in misconduct into which they incorporate the penalty as a business cost. Thus, based on their unintentional actions, justice may require that Respondents not be subjected to an economic benefit penalty based on the entire gross ex-vessel value of their catch. At the same time, however, the undersigned must still consider the need to deter others from committing similar violations. On that point, Respondents' state of mind is immaterial.

E. Penalty Amount

In light of the foregoing factors, the Respondents' penalty shall be set at the same amount requested by the Agency in its NOVA, **$110,000**. This accounts for a significant portion of the

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[27] It is further notable that the Agency asked for a total penalty of only $110,000 in the NOVA, and of that amount calculated Respondents' economic benefit at $97,500. There is no explanation given for the disparity between these numbers and the penalty amount the Agency now requests. I am not inclined to raise the penalty beyond what the Agency charged in its NOVA when there is no support for doing so beyond the stipulated gross ex-vessel value of the fish.

[28] Arguably, the Respondents' lack of culpability already was factored in by NOAA as the total penalty sought for the *two* incidences of illegal fishing is less than the $140,000 maximum penalty *per violation* permitted by the statute. That a possible penalty was significantly higher is also an answer to Respondents' argument that they are being unfairly penalized despite coming forward and disclosing the violation.

economic value of the fish Respondents caught but recognizes this value should be reduced based on the unintentional nature of the act and the likelihood that costs were incurred in capturing the fish. The remainder of the penalty is grounded in the nature, circumstances, extent and gravity of the violation, and takes into account Respondents' generally low level of culpability and lack of prior violations.

VI. CONCLUSION

After weighing the factors outlined in 15 C.F.R. § 904.108(a), (b), and 16 U.S.C. § 1858(a), it is hereby found that Respondents, as a result of violating the WCPFCIA as alleged in Count 1 of the NOVA, are liable for civil penalties as ordered below.

ORDER

For Count 1, a civil penalty of **$110,000** is assessed against Respondents Tony DaSilva and AACH Holding Co. No. 2, LLC, jointly and severally.

THEREFORE:

A total penalty of **$110,000** is hereby **IMPOSED** on Respondents Tony DaSilva and AACH Holding Co. No. 2, LLC, jointly and severally.

SO ORDERED.

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

Dated: September 10, 2015
Washington, D.C.

Once this Initial Decision becomes final under the provisions of 15 CFR § 904.271(d), Respondents 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.

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).

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.