UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	)	
	)	
Jesse H. Drinkwater and	)	Docket Number:
F/V Princess Elena, Inc.,	)	**NE1202710, F/V Capt Joe**
	)	
Respondents.	)	

INITIAL DECISION AND ORDER

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

Appearances:

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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. *See*, 5 U.S.C. § 3344 and 5 C.F.R. § 930.208.

I. PROCEDURAL HISTORY

On April 2, 2013, the National Oceanic and Atmospheric Administration ("NOAA" or "the Agency") initiated this proceeding by issuing a Notice of Violation and Assessment of Administrative Penalty ("NOVA") to Jesse H. Drinkwater and F/V Princess Elena, Inc. ("PEI") (collectively "Respondents") in regard to the fishing vessel ("F/V") Capt Joe.[2] The NOVA alleges in two counts that on August 14, 2012 and August 16, 2012, respectively, Mr. Drinkwater as "operator," and PEI as "owner," of the F/V Capt Joe, fished with trawl gear, effectively obstructing and constricting the vessel's nets as described in 50 C.F.R. § 648.80(g)(2). This violated Section 307(1)(A) of the Magnuson–Stevens Fishery Conservation Management Act ("the Magnuson Act"), as amended, 16 U.S.C. § 1857(1)(A), and 50 C.F.R. §648.14(k)(6)[i](A).[3] NOVA at 1–2. A total penalty of $74,411.00 is proposed, to be "imposed on the [R]espondents jointly and severally." NOVA at 2–3.

By letter dated April 24, 2013, acting through counsel, PEI requested a hearing on the NOVA.[4] After participating unsuccessfully in an Alternative Dispute Resolution process, on June 27, 2013, the undersigned was designated to preside over this matter for the purposes of hearing.

On July 2, 2013, an Order was issued directing each party to submit its Preliminary Position on Issues and Procedures ("PPIP"). NOAA filed its initial PPIP on July 26, 2013, a "First Amended PPIP" on July 29, 2013,[5] a Second Amended PPIP on August 22, 2013, a Third Amended PPIP on January 16, 2014, and a Fourth Amended PPIP on April 17, 2014. PEI filed its initial PPIP on August 9, 2013, an Amended PPIP on April 27, 2014, and submitted selected financial records on May 1, 2014. PEI also filed a Motion to Strike and a Request for Default in regard to the Agency's PPIP on August 5, 2013, which was denied by Order dated September 10, 2013. Mr. Drinkwater did not file any response to the PPIP Order.

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[2] This is one of two companion cases, the other of which is styled *Robert C. Roberge and Anthony & Enzo, Inc.*, NOAA Dkt. No. NE1300388, F/V Princess Laura (hereinafter cited as "AEI"). While the named parties in the cases differ, they are nevertheless associated because the corporate respondents in each case are both wholly owned by Giuseppe DiMaio, and the NOVAs allege violations of the same provisions of law. AEI Tr. 213, 321

[3] The NOVA erroneously omits the reference to subsection "i" from the regulatory citation for this provision.

[4] Mr. Drinkwater did not respond to the NOVA. However, the applicable procedural rules codified at 15 C.F.R. Part 904 provide that "[a] hearing request by one joint and several respondent is considered a request by the other joint and several respondent(s)." 15 C.F.R. § 904.107(b).

[5] The Agency's PPIP as initially filed on July 26, 2013 was unsigned. The signed copy of its initial PPIP was electronically filed on July 29 under the subject line "Amended Agency PPIP."

On August 20, 2013, PEI filed a motion for discovery, by way of interrogatories, request for production of documents and depositions. The motion was opposed and an Order was issued granting in part, and denying in part, the discovery motion on December 13, 2013. On January 10, 2014, the Agency responded to the order on discovery. In the interim, on November 21, 2013, the Agency filed its Penalty Assessment Worksheet for the charges issued.

On March 19, 2014, PEI filed a motion to dismiss/strike the NOVA on grounds that the sanctions the Agency seeks to impose against PEI are based solely on the common law tort theory of *respondeat superior*, and neither the Magnuson Act nor its regulations authorize the imposition of liability against a fishing vessel owner on such basis. The Agency filed its "answer" to this motion on April 7, 2014. By Order dated April 18, 2014, PEI's motion to dismiss/strike was denied.

On April 23, 2014, NOAA filed a motion requesting additional discovery in the form of an order compelling Respondent Drinkwater to respond to a written request for admissions arguing the need therefor based upon his failure to actively participate in the case. Although no response to the motion was filed, by Order issued on April 29, 2014, the motion was denied. On April 25, 2014, the Agency and PEI submitted their Joint Set of Stipulated Facts, Exhibits and Testimony ("Stipulations").

The hearing in this matter was held on May 15, 2014 in Boston, Massachusetts.[6] Five Agency Exhibits ("AE"), nos. 1–5, were offered and admitted into the record at hearing.[7] Tr. 7, 163. NOAA also presented the testimony of three witnesses: Curtis Bethea, Jay Scharff and Daniel D'Ambruoso. Tr. 13, 122, 146. Fourteen exhibits were offered and admitted into evidence on PEI's behalf ("RE"), nos. 1–14. Respondent presented the testimony of one witness, Giuseppe DiMaio.[8] Tr. 186, 188, 232, 243, 250. Further, the Stipulations were admitted into evidence as Joint Exhibit 1.[9] Tr. 8. In addition, with the agreement of the Agency and PEI, the whole of the testimonies of Douglas W. Christel and Mr. DiMaio given earlier in the week in the AEI companion case were admitted into evidence, as well as whatever portion of the testimony of Daniel D'Ambruoso PEI wished to rely upon in its post-hearing briefs.[10] Tr.

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[6] Citation to the transcript will be in the following form: "Tr. __."

[7] NOAA consecutively numbered the pages of all five of its exhibits from 000001–000370. The pages of these exhibits will be cited without the leading zeros.

[8] PEI consecutively numbered eight of its exhibits (nos. 3–10) from 001–0037. The pages of these exhibits will be cited without the leading zeros. PEI's Exhibits 12–14 were admitted under seal.

[9] Citations to the Stipulations, Joint Exhibit 1, will be as follows: "Stip. __."

[10] *See* note 2, *supra*. The testimony wholly incorporated from the AEI companion case appears at pages 109–129 (Mr. Christel) and 212–359 (Mr. DiMaio) of the transcript of the hearing in that case held May 13–15, 2014. Citation to the transcript of the hearing held in the AEI companion case will be in the following form: "AEI Tr. __."

11–12, 178–79. Respondent Jesse Drinkwater did not appear in person or through a representative at hearing. Tr. 14–15, 186.

A copy of the transcript of the hearing was provided to the parties by this Tribunal on June 9, 2014, along with a Post–Hearing Scheduling Order. After extension granted, the Agency's initial Post–Hearing Brief was submitted on August 8, 2014, and PEI's initial Post–Hearing Brief was filed on September 15, 2014. The Agency then filed a Reply to Respondent PEI's Post–Hearing Brief on September 29, 2014, followed by the submission on October 14, 2014, of the Reply Brief of PEI. With that last filing, the record in this matter closed.

II. APPLICABLE LAW

Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act ("the Act") in 1976 "to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States. . . ." Fishery Conservation and Management Act of 1976, Pub. L. No. 94–265, § 2(b)(1), 90 Stat. 331, 332.[11] The Act aims to "promote domestic commercial and recreational fishing under sound conservation and management principles . . . ." 16 U.S.C. § 1801(b)(3).

Consequently, it is unlawful "for any person[12]— to violate any provision of this Act or any regulation or permit issued pursuant to this Act." 16 U.S.C. § 1857(1)(A); AE 4. Regulations promulgated under the Act that were in effect at the time of the Respondents' alleged 2012 violations state, in regard to gear requirements while fishing for "Northeast (NE) multispecies,"[13] that "[i]t is unlawful for any person, including any owner or operator of a vessel issued a valid NE multispecies permit or letter under § 648.4(a)(1)(i)[14]...to...[o]bstruct or constrict a net as described in § 648.80(g)(1) or (2)." 50 C.F.R. § 648.14(k)(6)(i)(A); AE 5 at 366–368. Section 648.80(g) in turn details restrictions on impermissible gear and methods of fishing, including net obstruction and constriction: –

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[11] The Act and its amendments have been codified at 16 U.S.C. § 1801 *et seq.*

[12] "Person" is very broadly defined to include "any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government." 16 U.S.C. § 1802(36).

[13] The term "Northeast (NE) multispecies" is defined as including atlantic cod, atlantic halibut, pollock, and redfish. 50 C.F.R. § 648.2.

[14] Section 648.4(a)(1)(i) delineates the eligibility of vessels to apply for limited access NE multispecies permits based upon, among other things, their prior history of having and utilizing such permits. 50 C.F.R. § 648.4(a)(1)(i).

> (1)...[A] fishing vessel subject to minimum mesh size restrictions[15] shall not use any device or material, including, but not limited to, nets, net strengtheners, ropes, lines, or chafing gear, on the top of a trawl net . . . . "The top of the trawl net" means the 50 percent of the net that (in a hypothetical situation) would not be in contact with the ocean bottom during a tow if the net were laid flat on the ocean floor. . . .[16]
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> (2)...[A] fishing vessel may not use any mesh configuration, mesh construction, or other means on or in the top of the net subject to minimum mesh size restrictions, as defined in paragraph (g)(1) of this section, if it obstructs the meshes of the net in any manner.

50 C.F.R. § 648.80(g)(1), (g)(2); AE 5 at 369–70.[17]

To prevail on its claim that Respondents violated the Act and the regulations above, the Agency must prove facts constituting the violation by a preponderance of reliable, probative, substantial, and credible evidence. 5 U.S.C. § 556(d); *In re Cuong Vo*, NOAA Docket No. SE010091FM, 2001 NOAA LEXIS 11, *16–*17 (ALJ, Aug. 17, 2001) (citing *Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100–103 (1981)); *see also* 15 C.F.R. §§ 904.251(a)(2). This standard requires the Agency to demonstrate that the facts it seeks to establish are more likely true than not. *In re Fernandez*, NOAA Docket No. NE970052FM/V, 1999 NOAA LEXIS 9, at *8 (ALJ, Aug. 23, 1999). To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence. *Cuong Vo*, 2001 NOAA LEXIS 11, at *17.

However, violations of the Act are generally strict liability offenses. *Tommy Nguyen*, NOAA Docket No. SE0801361FM, 2012 NOAA LEXIS 2, at *17 (ALJ, Jan. 18, 2012) (quoting *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999)). As such, no proof of intent to commit the violation is required, and arguments as to Respondent's state of mind "are irrelevant." *Timothy A. Whitney*, NOAA Docket No. 015–300, 1991 NOAA LEXIS 33, at *10

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[15] Bottom trawl gear operated pursuant to a NE Multispecies permit in the defined "Gulf of Maine" area must have, among other characteristics, 6–inch diamond mesh or 6.5–inch square mesh "applied throughout the body and extension of the net" and a 6.5–inch diamond or square mesh applied to the codend of the net. 50 C.F.R. § 648.80(a)(3). For vessels greater than 45 feet in length, a diamond mesh codend is the first 50 meshes counting from the terminus of the net or for a square mesh the first 100 bars from the terminus. 50 C.F.R. § 648.80 (a)(3)(i)(A).

[16] Trawl nets can be towed by a vessel through the water at various water levels including on the ocean floor. 50 C.F.R. § 648.2 (defining "trawl," "bottom–tending mobile gear," "midwater trawl gear," etc.).

[17] The regulation provides an exception for nets with mesh sized less than 3 inches, which appears not to be relevant here. *See* 50 C.F.R. § 648.80(g)(1), (2), (5).

(ALJ, July 3, 1991) (quoting *Accursio Alba*, NOAA Docket No. 914–027, 1982 NOAA LEXIS 29, at *7 (NOAA App., March 15, 1982)).

III. FACTUAL BACKGROUND

Mr. Giuseppe DiMaio has been in the commercial fishing industry for decades and is the owner of a small fleet of commercial fishing vessels through a variety of closely held S corporations. Tr. 189, 208, 248, 283–85; AE 1 at 173. One of those corporations is Respondent PEI, of which Mr. DiMaio is President and sole shareholder.[18] Tr. 4, 189; AE 1 at 39. At all times relevant hereto, PEI was the owner of the Capt Joe,[19] a fishing trawler or dragger (U.S. Coast Guard Documentation No. 582912). Stip. 2; AE 1 at 37, 42; Tr. 208. At PEI's request, in 2012, NOAA issued the Capt Joe a permit to fish the Northeast multi–species fishery (Permit no. 410106). Stips. 3, 5; Tr. 10; AE 1 at 31–36.

In early August 2012, Mr. DiMaio hired Respondent Jesse H. Drinkwater to serve as the captain or master of the Capt Joe. AE 1 at 16, 144. According to Mr. DiMaio, at the time, Mr. Drinkwater was "a young boy" to whom he gave "an opportunity" to captain a commercial fishing vessel. Tr. 190, 251–54; AE 1 at 16, 144. Prior to allowing Mr. Drinkwater to take control of the vessel, Mr. DiMaio personally educated Mr. Drinkwater on the vessel and the applicable fishing regulations, including instructing him to abide by the law. Tr. 190, 199, 251–54.

On August 9, 2012, the Capt Joe, under the command of Respondent Drinkwater, departed the port of Gloucester, Massachusetts, declaring a Northeast multispecies trip via its vessel monitoring system. AE 1 at 1–2. Mr. DiMaio was not in attendance on the trip. Tr. 206, 208; AE 1 at 132; RX 3.

On August 14, 2012, the United States Coast Guard observed and boarded the Capt Joe, then fishing within federal waters in the U.S. Exclusive Economic Zone,[20] pursuant to its Northeast multi–species permit. Stips. 3, 5; Tr. 8–10; AE 1 at 1–2, 42, 49–51. After performing

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[18] At hearing in the companion case, Mr. DiMaio indicated that he was the sole shareholder of three other closely held corporations as well, each of which owns or owned a single commercial fishing vessel, respectively named the Princess Laura, the Orion, and the Tyler. AIE Tr. 305, 333–37, 339; Tr. 156–57, 278 ("There's only me, your honor.").

[19] While the record here is inconsistent, the Certificate of Documentation for the vessel identifies its name as "Capt Joe," with no period or full stop mark (".") after the first word ("Capt"). AE 1 at 37. This Initial Decision identifies the vessel consistent with that documentation.

[20] The "U.S. exclusive economic zone" is the area of water where the United States has sovereign rights and jurisdiction over the natural resources. Its "inner boundary . . . is a line coterminous with the seward boundary of each of the coastal States," and its *outer* limit is no more than 200 nautical miles from the territorial sea. 16 U.S.C. § 1802(11); Proclamation No. 5030, 48 Fed. Reg. 10605 (Mar. 10, 1983).

the standard greeting, initial safety inspection and introduction, the Coast Guard Boarding Officer in charge, Petty Officer Curtis Bethea, advised Respondent Drinkwater, that he needed him to "do a haul back" of the nets so they could be observed and measured for compliance with Federal regulations.[21] Tr. 15–16; AE 1 at 2, 42, 49, 51. Thereafter, according to Petty Officer Bethea, the situation "turn[ed] from a normal boarding into a little bit more interesting," in that Mr. Drinkwater became "more and more agitated." Tr. 16–17, 35; AE 1 at 3, 42, 51, 198. Advising Petty Officer Bethea that he had just put his nets in the water and that it would "cost him $3,000 if he hauls back now," Mr. Drinkwater suggested the officers measure the nets then on deck instead. Tr. 17; AE 1 at 2–3, 42, 49, 50. Eventually, however, after Petty Officer Bethea explained the legal requirement to measure the nets actually in use, Mr. Drinkwater capitulated and agreed to haul back. Tr. 17–18; AE at 49, 50.

Petty Officer Bethea, an eleven year veteran of the Coast Guard, and expert trained in trawl gear and fishing nets, found Mr. Drinkwater's haul back process of the nets unusual, as did the ship's crew. Tr. 13–14, 18–19, 40–41 (PO Bethea recalling crew expressed a "How are we going to do this? kind of look"), 82–83; AE 1 at 4, 43 (PO Bethea recalling crew "seemed confused [by] the unorthodox procedure" and describing the process as "unorthodox," different from normal, less effective, etc.). Specifically, instead of hooking around the middle of the cod end and raising the net straight up to let gravity draw the fish out as was usually done, they hooked the net "into a cross–deck winch" and pulled it towards the PO Bethea, so he "couldn't actually see the cod end very well," once it was out of the water. Tr. 18–19, 40–41, 94–95; AE 1 at 3, 42–43.

Nevertheless, once the catch–filled net was pulled in, Petty Officer Bethea had "a better sight of it," and "noticed the two nets on top of each other" or "a net outside of a net." Tr. 19, 51, 95. Specifically he saw "on the outside of the [normal] codend," made up of yellow diamond mesh, "there was another ["bluish"] net," made of square mesh, "around the cod end," covering the entire circumference of the cod end. Tr. 19, 20–23 (referring to photograph marked AE 1 at 62 and noting the "outside net is all the way around" the cod end), 31–32, 41, 48–51 (referring to

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[21] The nets on the trawler (of which there are several) are part of the extensive set of equipment used by the ship to drag through the water and catch fish. *See* Tr. 195–98. The nets together form a V or funnel shape, with the mouth of the V or funnel closest to the rear of the ship and the narrowest part the furthest away. The cod end (or "codend") is the narrow netting, tied shut, at the very end or bottom of the funnel where the caught fish are retained. 50 C.F.R. § 600.10. At hearing in this case, Mr. DiMaio described the Capt Joe's cod end as made of 4mm twine, 50 (6½") meshes long, and costing $3,000. Tr. 195. It is connected to a cod end extension which is also a net 50 (6") meshes long. Tr. 195. The extension is then is connected to the "belly," or "mouth of the net," which is 135 (6") meshes long, 255 meshes round, and made up of a top belly net to which (presumably buoyant) cans are attached and a bottom belly net where there are rollers. Tr. 195–96. The belly net is held open to a width of 175–200 feet by heavy (650 kilograms) trawl "doors" or steel plates attached by a 60–fathom ground cable mesh wire to winches on the ship. Tr. 196–97. It takes 15–20 minutes to haul in the nets. Tr. 193.

AE 1 at 151 and 161), 58 (referring to AE 1 at 62), 65–66 (referring to AE 1 at 68), 95; AE 1 at 3, 42–43, 49, 50–51, 62, 68, 151, 161. Further, Petty Officer Bethea saw a "daisy chain," "yellow line" or rope "holding the outside net to the inside net," which was the type of line "we usually see in training at Cape Cod; it's a quick release for a net liner." Tr. 19–20, 25; (referring to AE 1 at 62). *See also* Tr. 69 (noting the yellow line attached to the outer net was used to cinch the cod end shut), 78–79 (noting that the yellow line tied to outer net was "the line that was tying both nets shut"), 95–98 (noting he saw the crew open the cod end net with a quick pull "as if you released the drawstring on a dufflebag," and he was "[r]ight, up close"); AE 1 at 3–4, 42–43, 50, 62. This unusual net configuration at first "confused" the Petty Officer because it was not "what we usually see as a net liner," which are nets inside other nets; rather "it was a new technique," he had never seen before. Tr. 20–23, 82. It particularly sparked his interest, because he noted that "you can just untie this [big knot] here and pull that whole [zig–zag woven] [yellow] line out" "and then the [outer] net will just be able to fall off." Tr. 20–24, 96. He dubbed the configuration a "reverse net liner." Tr. 23

Later, as other Coast Guard officers were measuring the now emptied outside net, Mr. Drinkwater told Petty Officer Bethea that "[y]ou guys don't know what you're doing," asserting that the outside net was "chafing gear"[22] and the inner net the cod end. Tr. 24–25; AE 1 at 4, 43, 49. Further, he claimed that he had "called" "Tony, the Federal Fisheries guy," who told him that "this configuration's okay as long as I don't close the outside net, as long as just the inside net is cinched shut," and that was the way he had the net configured. Tr. 25, 27, 106–08 (referring to AE 1 at 45, 127); AE 1, 43, 45, 49, 50, 127. In retort, Petty Officer Bethea advised Mr. Drinkwater that he was not satisfied by this explanation, in large measure because he had personally observed that the ends of both nets had been cinched shut. Tr. 25, 31; AE 1 at 42, 44. In support of his observations, PO Bethea took a photograph of the yellow line used to cinched the net closed, reflecting that it was tied to the outer net. Tr. 25–26, 79. Further, while the mesh of each net itself measured 6.5 inches, the officers' measurements of the overlapping nets reflected a resultant mesh opening much smaller, only the size of a "credit card." AE 1 at 5, 7, 43, 49, 50. Mr. Drinkwater responded to the PO Bethea's comments by pacing back and forth, becoming "very abrasive," angry, "almost threatening," to the point where he was "taking his shirt off and cursing," and "throwing small objects on deck." Tr. 17, 35; AE 1 at 3, 5, 23, 43, 50, 181. For the Coast Guard, the situation turned into a "worst case scenario boarding where the captain is just abrasive and doesn't want to do anything you want to do." Tr. 17, 35; AE 1 at 3, 5. Petty Officer Bethea estimated that he spent half the time with Mr. Drinkwater just "trying to calm him down . . . to a reasonable level." Tr. 36.

Based upon the uniqueness of net configuration and Mr. Drinkwater's claims of legality in regard thereto, the Boarding Officer stated he was hesitant to unilaterally issue a notice of violation, so instead sought guidance from further up the chain of command, stating "I was requesting to write a violation for a net liner, but I didn't really know how to call it a net liner

[22] Chafing gear for trawl nets is not defined in the regulations pertaining to the Northeast fisheries. However, for the West Coast Ground Fisheries it is defined as "webbing or other material attached to the codend of a trawl net to protect the codend from wear." 50 C.F.R. § 660.11; Tr. 83–85.

because it wasn't . . . what I usually see or what I've been trained to see." Tr. 27–28. "But even with the outside net not shut, it was so easy to turn into what would act as a net liner," and Petty Officer Bethea thought "if there's not a law against this there needs to be because it's acting as a net liner." Tr. 28. However, Petty Officer Bethea was unable to send the contemporaneous photographs of the net along with his text request for guidance. AE 1 at 7, 44, 51, 58–68, 121–130. Eventually, instructions "came back down" to PO Bethea to "[w]rite 'no violation,'" on the 4100F Boarding Report form and "allow them to continue fishing" using their current configuration, and then to follow up with his superiors by personally communicating his findings to them for further deliberations. Tr. 28–29, 80–81, 108–109; AE 1 at 7–8, 44, 49–51, 132, 135; RX 3 at 2. Upon hearing that he was not to be cited for a violation, Mr. Drinkwater angrily told the officers to "get off my damn boat." AE 1 at 8, 44, 194 at 19:01–19:10 (audio recording of crewmember recalling Mr. Drinkwater yelling at the Coast Guard to "get the fuck off my boat" and that Mr. Drinkwater "seemed pretty confident that he got away with whatever it was at the time"), 198.

After disembarking, Petty Officer Bethea had further discussions with his superiors regarding his observations of the net, who upon further consideration concluded the configuration was a violation of law because the outer net went around the entire circumference of the cod end. Tr. 29–33, 99–100, 104–106; AE 1 at 8, 44, 135–38. As a result, the PO Bethea was given the option of locating and reboarding the vessel at sea and issuing a Federal fisheries violation notice for fishing with a liner obstructing the cod end or having NOAA issue the violation when the vessel returned to port. Tr. 33, 100–04; AE 1 at 8–9, 44. Petty Officer Bethea chose the first option, desiring to follow the matter "all the way through." Tr. 33.

On August 16, 2012, the Coast Guard again sighted the Capt Joe on the water in the process of fishing. AE 1 at 9, 45, 139–41. In the hope of catching the ship in the process of fishing with its nets in the same configuration as before to obtain better documentation thereof, the Coast Guard used clandestine efforts kept its intent to reboard from the Capt Joe until the last possible moment. Tr. 36–37, 56, 81. Moreover, in light of Mr. Drinkwater's belligerent attitude during their first boarding, the Coast Guard put together an unusually large boarding team in case the captain went "active." Tr. 35–36.

At "first light" on August 16, 2012, in "pouring," "bad," "monsoon" rain, the Coast Guard re-boarded the vessel as planned, catching the ship again with its nets in the water. Tr. 36–38; AE 1 at 45, 49. Mr. Drinkwater responded to the officers reappearing, by uttering to them an obscenity. Tr. 125–126. Petty Officer Bethea then advised Mr. Drinkwater that he was being issued a violation based upon his net configuration found on August 14, 2012. Tr. 38; AE 1 at 9, 45, 49, 234–36; RX 3 at 1; RX 4 at 3–4. In response, Mr. Drinkwater reiterated his claim that he had not fished with a net liner, that the outside net had not been tied shut, and that that the outer net had not covered the circumference of the cod end. AE 1 at 9, 45. Upon being queried if the vessel was currently fishing with the same nets, Mr. Drinkwater represented that it was not, in that the net in use on August 14 had been "ripped . . . to shreds on rocks." Tr. 39; AE 1 at 10–12. The net's fate was subsequently confirmed by another crewmember and Coast Guard observation. Tr. 39–40, 45, 46. Mr. Drinkwater was again requested to haulback, and again he became "understandably" upset, "very confrontational, and uncooperative," stating that he had

just put his nets in the water and was not intending to haul back for two to three hours. Tr. 38–39, 126; AE 1 at 10, 45, 49, 139–41. To accommodate him, the Coast Guard agreed to wait, remaining in the interim on the ship, but after an "uncomfortable" hour, during which time Mr. Drinkwater was "abrasive and verbally abusive," he ceded to the officers' request and hauled back the net. Tr. 39–40, 126; AE 1 at 10–11, 45, 139–41.

This time the crew hauled in the nets "quick and easy," using the "normal process." Tr. 40–41, 66; AE 1 at 91. Further, upon observing the nets from the deck, Petty Officer Bethea found a different configuration from before. Tr. 41. According to PO Bethea, the gear in use at the time of the second boarding consisted of a "normal cod end, with normal chafing gear," but there was also "a smaller [green] net inside of the [yellow] . . . cod end, acting as a net liner." Tr. 41–43, 110–11; AE 1 at 93. *See also* Tr. 128–129 (PO Scharff referring to AE 1 at 93). The green net was not at the bottom of the cod end but started at the top and went down past to the middle, covering about 60% of the cod end. Tr. 43–44, 129. At the point PO Bethea first observed it, the green "circular" net did not appear clearly affixed to the outer cod end, but was being held against it by the fish inside the nets. Tr. 111–15; AE 1 at 12, 46, 49, 93. Eventually, after the fish were unloaded, the crew "pull[ed] the whole net off the reel" and pulled the "tubular" or cylindrical–shaped green net from the cod end. Tr. 46–47, 112, 130–31; AE 1 at 12, 97.

In response to Petty Officer first observing the green net, Mr. Drinkwater responded that it was his "haddock separator [that] broke loose" and that his "haddock separator ripped out!" AE 1 at 12, 46, 49, 97; Tr. 44–45, 47, 111, 130, 136, 139. When the officers challenged this explanation, and told him that he could not use the net again because it appeared to them to contain a net liner, the Captain became "[v]ery agitated." AE 1 at 12. He subsequently represented to the Coast Guard that he had contacted his "his boss" by telephone who had instructed him "not to do anything else the Coast Guard tells [him] to do with the nets." Tr. 47; AE 1 at 13, 46.

Before disembarking on August 16, 2012, Petty Officer Bethea issued the vessel "a new 4100," backdated to August 14, 2012, reflecting the violation found on the first boarding, but did not issue a 4100 citing a violation for the net configuration found on the second boarding. Tr. 51–54; AE 1 at 14, 46. Instead, once again, he passed on the findings, with contemporaneous photographs, to superiors for guidance. AE 1 at 13, 46, 70–120; Tr. 127–29. In addition, he instructed the vessel to cease fishing and return to port. AE 1 at 14, 46, 49. On the trip back, "half way to coming home," Mr. Drinkwater telephoned Mr. DiMaio and advised him that the Coast Guard had instructed him to return to port. Tr. 200–201. In that conversation, Mr. Drinkwater told Mr. DiMaio "I didn't have net liner. Absolutely I didn't have net liner. I ha[d] a piece of twine, which they show up on top of the cod end . . . ." Tr. 201.

The Capt Joe returned to port in Gloucester on August 17, 2012, and unloaded its 22,060 pounds of fish at the Cape Ann Seafood Exchange. AE 1 at 15, 227–32. There it was met and boarded by NOAA Office of Legal Enforcement Special Agent Daniel D'Ambruoso along with two Coast Guard officers. Tr. 146–47, 176–77; AE 1 at 15. Once on board, Mr. Drinkwater

took Special Agent D'Ambruoso to the stern of the boat and presented him with a display of his gear laid out on deck as the vessel transited back to port. AE 1 at 143–44. To Special Agent D'Ambruoso, Mr. Drinkwater repeatedly "represented . . . that it was the same net and the same configuration" in use at the time of the first boarding on August 14, even when the Special Agent confronted him with the fact that it did not appear to match the image in the photographs taken of his net on that date.[23] Tr. 148–49, 152–53 (noting *e.g.,* the rope tying the material is orange in the display and yellow in the Coast Guard photographs), 176 (noting the Coast Guard did not remain on the vessel during transit); AE 1 at 15, 18–19, 143, 147, 151. In particular, Mr. Drinkwater directed the Special Agent's attention to the portion of his display demonstrating that the sides and bottom of the outer green net were not tied together, and that the outer top green net and inner yellow cod end net were not tied together. Tr. 149, 151–52; AE 1 at 156, 161. Mr. Drinkwater advised the Special Agent that this net configuration with the external net acting as chafing gear was something he used to prevent the filled cod end from splitting open as it rolls "when the vessel turns."[24] Tr. 153–54, AE 1 at 17, 145.

In response, Special Agent D'Ambruoso opined to Mr. Drinkwater that even in this configuration the net would still be in violation of the law based upon the fact that the top half of the net (the panel which faces upwards towards the sky, rather than the half which drags along the ocean floor) cannot be constricted to any extent. Tr. 150–54; AE 1 at 146. Upon being advised that he (and PEI) would be issued Enforcement Action Reports ("EARs"), Mr. Drinkwater became "most concerned" that he not be cited for fishing with a "net liner," opining to the Special Agent that "that's a dirty term," and "that's cheating," and arguing that his configuration did not constitute "a net within a net" and he was just trying to protect his gear. Tr. 154; AE 1 at 17–18, 146–47; RX 4. Eventually, Mr. Drinkwater "became [so] agitated" that he walked away from the Special Agent, refusing to answer any more questions. AE 1 at 19, 147–48, 200. Further, when the Agent attempted to speak with another crew member on board, Mr. Drinkwater instructed his crew over the loudhailer not to talk to Special Agent D'Ambruoso. Tr. 154, 183; AE 1 at 20, 148, 200.[25] Nevertheless, before he disembarked, the Agent was able

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[23] Petty Officer Bethea described the display memorialized in photographs taken by Special Agent D'Ambruoso as "a beautiful recreation," because it shows "the net going around the entire circumference of the cod end," but with the outside net sewn much further down from the cod end and the panels left open instead of "laced shut" to create "a net outside of a net." Tr. 48–51, 67–68, 115–18; AE 1 at 66, 127, 150–169. *See also* Tr. 260 (Mr. DiMaio noting the photographs taken by the Coast Guard and Special Agent D'Ambruoso show "two different scenarios").

[24] Mr. Drinkwater allegedly took photographs of the net display he laid out on the ship, but only the Special Agent's photographs appear in the record. AE 1 at 20, 148, 150–169.

[25] Furthermore, after Mr. Drinkwater complained to the Special Agent about not being initially cited for a violation and then being reboarded and cited two days later, the Special Agent then inquired of Mr. Drinkwater whether the Coast Guard had inspected his (starboard) net on the second boarding. AE 1 at 16–17, 144–45. In response, Mr. Drinkwater said "they did not," indicating his portside net was in use at the time. AE 1 at 16–17, 145–46.

to further and finally advise Mr. Drinkwater that while violations would be issued, neither the vessel's catch nor its nets would be seized by NOAA,[26] and doing so prompted Mr. Drinkwater to apologize to the Agent for getting upset earlier. AE 1 at 20, 149; Tr. 168, 175–76. Still, overall, the Agent believed Mr. Drinkwater had not been truthful in his conversations with him regarding the nets in use on the first boarding.[27] Tr. 172.

Mr. DiMaio fired Mr. Drinkwater right after he returned to port, not because of the alleged violations, since in Mr. DiMaio's opinion Mr. Drinkwater had been truthful and not violated any laws, but rather because he "doesn't respect the law," stating "I didn't like the attitude he had against the law," "[h]e had a bad attitude." Tr. 239, 254–55. He also did not pay him or the crew their shares of the 22,060 lbs of catch worth about $34,411. AE 1 at 22, 177, 229–30; Tr. 189–91, 238. He has not rehired Mr. Drinkwater since this voyage and testified that he would not in the future. Tr. 190, 255.

In December 2012, a few months after receiving the Coast Guard's investigative package relating to the two boardings, Special Agent D'Ambruoso twice interviewed a crewmember of the Capt Joe.[28] Tr. 155, 180, 184; AE 1 at 237–355. The crewmember's testimony was consistent during both interviews. Tr. 158. That crewmember advised Special Agent D'Ambruoso that at the time, he was fairly new to commercial fishing, with the trip at issue here being only his second such voyage, and his first being the immediately prior trip on the same ship. Tr. 155; AE 1 at 22, 180. *See generally* AE 1 at 180–202 (memorandum of interviews, handwritten notes, audio of interview, handwritten sworn statement). However, since that time, the crewmember told Special Agent D'Ambruoso he had made three to five more trips on the Orion, another of Mr. DiMaio's vessels. Tr. 156.

In regard to the gear in use on the Capt Joe at the time of the first boarding, the crewmember recalled that the vessel was flatfish fishing "with the cod end [of the starboard net] wrapped" and that the captain had set up the gear. Tr. 156; AE 1 at 23–25, 181, 185, 194 (audio recording at 23:14). Further, the crewmember indicated that that net had become torn and that Mr. Drinkwater "rebuilt that net on the way in" to port and that "he changed the net." AE 1 at

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[26] However, upon offload Massachusetts Environmental Protection authorities found that the catch contained 300–400 pounds of undersized fish (including dabs, redfish, sole, monktail, and haddock) valued at $500, which it seized and for which a state citation was issued to Mr. Drinkwater. AE 1 at 21, 171–76; Tr. 225–27.

[27] Special Agent D'Ambruoso did not inquire regarding the net liner found on the second boarding because he was unaware of what had been found on the second boarding at the time he boarded the vessel. Tr. 177, 182.

[28] The record reflects that two Coast Guard officers also briefly interviewed this crewmember when the vessel returned to port on August 16, 2012. AE 1 at 142. While the name of the crewmember is disclosed in the record it is being omitted in this decision for privacy reasons.

24, 142, 182; Tr. 156, 200. In regard to the gear in use on the Capt Joe at the time of the second boarding, the crewmember told Special Agent D'Ambruoso they were redfish fishing with the portside net, with "rock hopper gear," and that "he had seen the captain cut the tie–in for the net liner out of the net . . . when the Coast Guard was not looking." Tr. 156; AE 1 at 24–25, 182–83, 194,[29]. *See also* AE 1 at 199 (crewmember's written statement that "I do remember [Mr. Drinkwater] cutting a greed [sic] line that held the top of the liner in place. . . . [then] [h]e let the liner fall out of the bottom and started yelling about it being our belly that got ripped out. From there he kept that story . . . .") The crewmember recalled the net liner being in the net the whole time they were fishing and that about half the fish they caught had to be thrown back because they were too small. AE 1 at 25, 183, 194. Additionally, the crewmember reported to the Agent that he was not paid for either of his two voyages on the Capt Joe, because he was told there were "no fish or not enough fish" caught on the first voyage, and that the catch was seized and "something to do with lawyer fees and court costs," or "too many small fish" in regard to the second. AE 1 at 24, 182, 187. However, interestingly, after three months, he was paid $300 and told it came "out of [Mr. DiMaio's] pocket." Tr. 158, 228; AE 1 at 201. He also disclosed to the Agent that while a crewmember on four or five subsequent fishing trips with a different captain (Pasquale DiMaio) on the Orion, that that vessel also consistently employed net liners, even when an observer was aboard, and that that captain had told him Mr. DiMaio would fire them for using a net liner.[30] Tr. 156; AE 1 at 27, 185, 187, 194. Further, he said that he had never heard Mr. DiMaio tell anyone to use a net liner. AE 1 at 184.

Based upon the photographs, the crewmember's statement, and other information gathered for his report (AE 1), Special Agent D'Ambruoso determined the net configuration at the time of the second boarding to be a regulatory violation, and issued notices thereof to Respondents on February 6, 2013. Tr. 160–62, 173, 177–78; AE 1 at 28, 206–09, 217–220, 352–53; AE 2; AE 3; RX 5.

IV. LIABILITY OF RESPONDENT DRINKWATER

The applicable Rules of Practice ("Rules") state:

> Service of a NOVA (§ 904.101) . . . may be made 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. Service of a notice under this subpart will be considered effective upon receipt.

15 C.F.R. § 904.3(a).

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[29] Audio recording at 21:58 ("Scrubby had waited for [the Coast Guard] to kind of turn their backs and then cut the liner for the liner; then he let that fall, and he started freaking out about it being the belly, trying to say it was the belly") and 24:30 (stating that net had a liner stitched in so it could be removed with a single pull).

[30] The Orion was never charged with a violation. Tr. 172–73, 229–30.

The record reflects that on May 20, 2013, NOAA/OLE Special Agent Anthony Forestiere personally served the NOVA on Respondent Jesse H. Drinkwater. *See* Forestiere Aff., July 25, 2013.[31] Mr. Drinkwater never responded to the NOVA.

The Rules further provide that the presiding officer in an administrative proceeding must "promptly serve on the parties notice of the time and place of hearing," which "will not be held less than 20 days after service of the notice of hearing . . . ." 15 C.F.R. § 904.250(a). Additionally, that "[i]f, after proper service of notice, any party appears at the hearing and an opposing party fails to appear, the Judge is authorized . . . [to] find the facts as alleged in the NOVA . . . and enter a default judgment . . . ." 15 C.F.R. § 904.211(a). Further, the Judge "may deem a failure of a party to appear after proper notice a waiver of any right to a hearing and consent to the making of a decision on the record." 15 C.F.R. § 904.211(d).

On February 6, 2014, an Order Rescheduling Hearing was issued by the undersigned rescheduling the hearing in this matter to begin at 9:00 a.m., May 15, 2014, in the John W. McCormack Post Office and Court House, 5 Post Office Square, Courtroom 5, Boston, Massachusetts.[32] The Order explicitly stated that "**RESPONDENTS ARE WARNED THAT FAILURE TO APPEAR AT THE HEARING, WITHOUT GOOD CAUSE BEING SHOWN, MAY RESULT IN DEFAULT JUDGEMENT BEING ENTERED AGAINST THEM.**"

Mr. Drinkwater was served with the Order Rescheduling Hearing by regular mail addressed to his address as shown in the NOVA.[33] Nevertheless, Mr. Drinkwater did not appear at hearing in person or otherwise. Tr. 14–15, 186–88. Having been properly served with the NOVA, duly notified of the time and place of the hearing, and served effectively throughout this proceeding, Respondent Jesse H. Drinkwater failed to appear and thereby waived his right to further contest the alleged violation. Therefore, the facts as alleged against him in the NOVA are found to be true and a default judgment is hereby entered against him in accordance with 15 C.F.R. § 904.211(a)(2).[34]

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[31] This document was filed by NOAA as an attachment to its initial PPIP on or about July 30, 2013.

[32] The hearing in this matter was originally scheduled to begin February 11, 2014, but was postponed due to pending matters.

[33] Concerned that Mr. Drinkwater had not been served by PEI with all the documents it filed in this matter, on April 30, 2014 the undersigned issued an Order to Compel Service of PEI's PPIP on Mr. Drinkwater, which counsel for PEI represented in correspondence dated May 6, 2014, occurred on May 2, 2014. In addition, on May 1, 2014, the staff of this Tribunal sent a letter to Mr. Drinkwater confirming the upcoming hearing date.

[34] Entry of default judgment against Mr. Drinkwater does not preclude PEI from contesting its vicarious liability in this matter. *See, e.g., Rogers v. J.B. Hunt Transp.*, 649 N.W.2d 23 (Mich. 2002); *Matza v. Grant,* 17 Mass. L. Rep. 565 (Mass. Super. Ct. 2004) (same); *W. Heritage Ins.*

V. PEI's DEFENSE BASED UPON *RESPONDEAT SUPERIOR*

Respondent PEI spends the bulk of its initial Post–Hearing Brief[35] arguing that NOAA is attempting to hold it, the vessel owner, responsible "solely on the theory of *respondeat superior*" when it simply cannot be liable on that basis.[36] AEI RIB at 5. PEI claims it was a "passive owner" that did not participate in or approve of the wrongdoing; that Mr. Drinkwater was an independent contractor, not an employee; that it did not stand to benefit economically from the wrongdoing; and that neither the Act nor any regulation authorizes liability on the basis of *respondeat superior*, and the extensive case law accumulated over decades holding otherwise is erroneous. AEI RIB at 5–8.

The Agency's pithy response to PEI's arguments proclaims that this Tribunal previously ruled on this issue in this case in its favor and that that ruling is now "law of the case." Agency's Post-Hearing Reply Brief ("ARB") at 3 (citing In re Jesse H. Drinkwater and F/V Princess Elena, Inc., NOAA Docket No. NE1202710 (ALJ, April 18, 2014) (Order on Respondent F/V Princess Elena, Inc.'s Motion to Dismiss/Strike the Notice of Violation and Assessment)).

PEI does not reply to the Agency's "law of the case" argument in its subsequently filed Post–Hearing Reply Brief ("RRB"). Instead, it merely reiterates many of its substantive arguments asserting that it cannot be held liable on a *respondeat superior* theory. RRB at 2–3.

Co. v. Superior Court, 132 Cal. Rptr. 3d 209, 221 (Ct. App. 2011) (same); *Dade Cnty. v. Lambert*, 334 So. 2d 844, 847 (Fla. Dist. Ct. App. 1976) (same); *United Salt Corp. v. McKee*, 628 P.2d 310, 313 (N.M. 1981); *Balanta v. Stanlaine Taxi Corp.*, 307 A.D.2d 1017 (N.Y. App. Div. 2003); *Leavitt v. Siems*, 2014 Nev. LEXIS 68, *22–*23 (Nev. 2014); *Dickerson v. Maione*, 1991 Pa. Dist. & Cnty. Dec. LEXIS 68 (Pa. C.P. 1991); *Stillwell v. City of Wheeling*, 2001 W. Va. LEXIS 109, 24–25 (W. Va. 2001).

[35] PEI appears to have mistakenly interchanged the first page of the initial Post-Hearing Briefs it filed in this case with that simultaneously filed in the companion case. As a result, pages 2–15 of PEI's initial Post-Hearing brief ("RIB") *filed in this matter* address the facts and arguments related to the AEI case, and pages 2–15 of the initial Post-Hearing Brief in the AEI case address the facts and arguments applicable to this case. As a courtesy to Respondent, this Tribunal has considered here the relevant arguments in its initial Post-Hearing Brief filed in the companion case, which will be cited herein as "AEI RIB at __."

[36] The Agency represented in this proceeding that it charged PEI in this case on the basis of *respondeat superior* as the owner of the vessel and employer of the vessel operator and not on grounds that it was "'aware of,' or in any way participated in, authorized or condoned" the alleged violations. *See* Agency's Response to the Motion of Respondent, Princess Elena, Inc., for Discovery by way of Interrogatories, Request for Production of Documents and Depositions, filed September 11, 2013, at 5–6.

Arguably, by failing to respond to the Agency's "law of the case" argument, PEI has implicitly acknowledged its validity and waived a challenge to it. *Global Tech. & Trading, Inc. v. Satyam Computer Servs.*, 2014 U.S. Dist. LEXIS 113045, at *5–*8 (N.D. Ill. Aug. 14, 2014) (failure to respond to argument is an implicit acknowledgment of defense and waiver); *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) (failure to respond to an argument results in waiver); *MCI WorldCom Network Servs., Inc. v. Atlas Excavating, Inc.*, No. 2 C 4394, 2006 U.S. Dist. LEXIS 88956, at *9–*10 (N.D. Ill. Dec. 6, 2006)(same); *Anderson v. McIntosh Constr., LLC,* 2014 U.S. Dist. LEXIS 72498, at *24 (M.D. Tenn. May 28, 2014) (same).

Even if not waived, the Agency's point is well made. The law-of-the-case doctrine is a long–established creature of common law jurisprudence by which courts generally refuse to "reopen what has been decided." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912); *see also Arizona v. California*, 460 U.S. 605, 619 (1983) ("a fundamental precept of common–law adjudication is that an issue once determined by a competent court is conclusive"); *Federated Rural Elec. Ins. Corp. v. Ark. Elec. Coops., Inc.,* 896 F. Supp. 912, 914 (E.D. Ark. 1995) (the "venerable" law-of-the-case doctrine is "a staple of our common law as old as the Republic.").

Under the doctrine, once a tribunal decides an issue of fact or law, either explicitly or by necessary implication, that court's decision on the issue will be treated as binding – i.e., as the "law of the case" –in subsequent proceedings in the same case. *Gander Mountain Co. v. Cabela's, Inc.*, 540 F.3d 827, 830 (8th Cir. 2008); *Crowe v. Smith*, 261 F.3d 558, 562 (5th Cir. 2001); *DiSimone v. Browner*, 121 F.3d 1262, 1266–67 (9th Cir. 1997). In choosing to adhere to decisions made in earlier proceedings, courts protect the settled expectations of parties, ensure uniformity of decisions, and promote judicial efficiency. *UniGroup, Inca v. Winokur*, 45 F.3d 1208, 1211 (8th Cir. 1995); *Little Earth of the United Tribes, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 807 F.2d 1433, 1441 (8th Cir. 1986). Only a handful of extraordinary circumstances provide possible bases for revisiting prior rulings, including: (1) an intervening change in controlling law; (2) new significant evidence; or (3) plain error in the prior disposition that works a manifest injustice.[37] *Hulsey v. Astrue*, 622 F.3d 917, 924–25 (8th Cir. 2010); *United Artists Theatre Cir., Inc. v. Township of Warrington*, 316 F.3d 392, 397 n.4 (3d Cir. 2003); *DiSimone*, 121 F.3d at 1266–67; *Hanover Ins. Co. v. Am. Eng'g Co.,* 105 F.3d 306, 312 (6th Cir. 1997); *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 817 (1988), *Arizona v. California,* 460 U.S. 605, 618 n. 8 (1983).

On April 18, 2014, this Tribunal issued its Order on Respondent F/V Princess Elena, Inc.'s Motion to Dismiss/Strike the Notice of Violation and Assessment ("Order"). In that Order it specifically analyzed PEI's arguments that neither the Magnuson Act, nor the accompanying regulations, authorizes the imposition of liability against the owner of a fishing vessel solely on the basis of *respondeat superior*. The Tribunal noted that the Respondent was making its arguments against the backdrop of "a formidable parade of administrative decisions" issued

[37] "Plain error" is defined as an error "so obvious and substantial that failure to correct it would infringe a party's due process rights and damage the integrity of the judicial process." Black's Law Dictionary 622 (9th ed. 2009).

since 1998 which have, with persistent regularity, found owners of vessels vicariously liable for operators' violations of the Magnuson Act. Order at 9–10 (citing 21 cases assigning vicarious liability to vessel owners for operators' Magnuson Act violations). Further, the Order noted that a United States District Court, in a heavily litigated case, recently upheld an administrative decision finding a corporate vessel owner vicariously liable for the actions of the vessel operator. Order at 10 (citing *Frontier Fishing Corp. v. Locke*, 2013 U.S. Dist. LEXIS 67704 (D. Mass, May 13, 2013)). Nevertheless, the Tribunal thoroughly analyzed the Respondent's legal arguments, and after doing so, held that "the Agency's longstanding interpretation of Section 307 of the Magnuson Act as authority for holding vessel owners vicariously liable for offenses committed by their vessels' operators appears to be reasonably based in the statutory text" and "is also consistent with the policies underlying the statute." Order at 11–12.

PEI does not explicitly assert in its Post–Hearing Briefs that the prior ruling represents "plain error" nor does it offer up any alternative argument for disregarding the law of the case doctrine here. Rather, in large measure, it simply reiterates the arguments previously made in its motion on the same issue. This Tribunal sees no plain error in the prior ruling and, if anything, finds that the factual evidence in the record obtained at hearing supports the imposition of vicarious liability on PEI in this case. Such evidence includes the following: (1) that at the time PEI hired Mr. Drinkwater, he was a "young boy," inexperienced as a captain, "looking to get a steady job" with Mr. DiMaio (Tr. 190–91, 251–53); (2) PEI assumed the responsibility for training Mr. Drinkwater to properly perform his job as a vessel captain, including schooling him on the vessel, the regulatory requirements of fishing, and advising him regarding complying with the law (Tr. 190, 252); (3) PEI paid unemployment on Mr. Drinkwater's behalf (Tr. 235); (4) PEI provided the vessel, fuel, crew, supplies and permits necessary for Mr. Drinkwater to perform his work as a fishing vessel captain (Tr. 245, 272); (6) PEI and Mr. Drinkwater arranged to share the profits of their fishing venture (Tr. 245–46); (7) PEI "fired" Mr. Drinkwater based upon his poor attitude expressed to the Coast Guard officers and not for the alleged violations (Tr. 190, 254–55); and (8) based upon the long history of case law, PEI was on notice of its potential liability for the captains' obstruction of nets (AEI Tr. at 221–22). As such, this Tribunal finds no reason to reconsider its prior ruling that PEI may be held vicariously liable for the wrongdoing of Respondent Drinkwater.[38]

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[38] This Tribunal is cognizant of the understandable frustration Mr. DiMaio sincerely expressed at hearing to being held liable for violations as to which he sees himself free from fault. Nevertheless, it is noted that liability without fault is what "vicarious liability" means under the law. *See generally* 74 Am. Jur. 2d Torts § 60 ("[V]icarious liability assigns legal liability to a party who is blameless in fact based on the tortious acts of another;" "A vicariously liable party is liable for the entire share of the fault assigned to the active tortfeasor."). Legislatures and courts have imposed and upheld vicarious liability in an effort to provide incentives to reduce tortious conduct and fairly distribute the risk associated with activity characteristic of a business or other entity. *See* Dobbs, Torts, § 334, pp 908–910; W. Prosser, The Law of Torts, § 69 at p. 459 & § 75 at p. 494 (4th ed. 1971) (In most instances, vicarious liability has its source in a policy decision that the person held liable is in a position to spread the costs of injury over a large portion of the public.). Many others without personal fault have been held similarly liable, as the general lawfulness of vicarious liability has long been established and upheld against a variety of legal challenges, including those on the basis of "due process." *See e.g., A. & B. Auto*

VI. PEI's LIABILITY FOR THE VIOLATIONS

To establish liability for the violations alleged, NOAA must prove by a preponderance of the evidence that: (1) PEI is a "person," a term which includes "owners or operators of a vessel issued a valid NE [Northeast] multispecies permit;"[39] and (2) when fishing under that permit on the two dates at issue, its vessel did "obstruct or constrict a net," *i.e.* use a net with any "mesh configuration, mesh construction, or other means on or in the top of the net . . . if it obstructs the meshes of the net in any manner." 16 U.S.C. § 1857(1)(A); 50 C.F.R. § 648.14(k)(6)(i)(A); 50 C.F.R. § 648.80(g)(2); Agency's initial Post–Hearing Brief ("AIB") at 7.

PEI does not dispute that it is a corporation and the owner of the F/V Capt Joe, a vessel issued a valid NE multispecies permit. Tr. 10, 189; Stip. 2; AE 1 at 31, 37, 39. It has also stipulated that the Capt Joe fished under that permit in federal waters from August 10 to 17, 2012. Stip. 3; Tr. 10; AE 1 at 31.

Therefore, PEI is a "person" subject to NOAA's regulation of fisheries in the Northeastern United States. The only factual issues in dispute in regard to each Count is whether, when fishing on the pertinent days, the vessel "obstruct[ed] or constrict[ed] a net" within the meaning of 50 C.F.R. § 648.80(g)(2).

A. The Parties' Arguments on Count 1 Pertaining to Nets in Use on August 14, 2012

Based on the testimony of Petty Officer Bethea and Mr. Christal, the Agency contends the Capt Joe was fishing with what amounted to a "reverse net liner" because a square–meshed net had been completely wrapped around the outside of the cod end and cinched shut like a duffel bag with a single piece of yellow line. AIB at 9–10. Because the outer net constricted the mesh size of the inner net, this configuration violated 50 C.F.R. § 648.80(g)(2), the Agency asserts. AIB at 11. In response, PEI argues the outer net was permissible "chafing gear" arranged in a manner that Agent Forestierre had previously approved, that there was no evidence it had been used in a closed position, and no evidence that it restricted the cod end of the net or prevented juvenile fish from escaping. AEI RIB at 4. PEI points to Petty Officer Bethea's initial uncertainty as to the legality of the net configuration as an indication that it met regulatory requirements. RRB at 1–2.

Stores v. City of Newark, supra (municipality liable without fault to property owner for damages caused by rioting mob); *Adler's Quality Bakery, Inc. v. Gaseteria, Inc.*, 32 N.J. 55 (1960) (owner of aircraft liable without fault for ground damages caused by operation of aircraft); *New York Central R.R. Co. v. White,* 243 U.S. 188, (1917) (finding employer liable without fault for injuries to employee under worker's compensation law).

[39] Permits are issued to vessels upon applications submitted by the vessel owners. 50 C.F.R. § 648.4.

B. Finding and Discussion of Respondents' Liability on Count 1

This Tribunal finds that the Agency has met its burden of proof on Count 1 and the preponderance of the evidence establishes that on August 14, 2014, the fishing vessel Capt Joe "obstruct[ed] or constrict[ed] a net," *i.e.* used a net with a "mesh configuration, mesh construction, or other means on or in the top of the net . . . [that] obstruct[ed] the meshes of the net" as set out in 50 C.F.R. § 648.80(g)(2). The following discussion describes the substantial evidence in the record that supports this finding.

Petty Officer Bethea, an eleven year veteran of the Coast Guard, repeatedly, emphatically and very credibly testified, including during extensive cross–examination, that he *personally* witnessed various aspects of the net in use on the vessel on August 14, 2014. He stated that as the haulback process began he saw the net as it was "coming through the water." Tr. 13, 18–19, 58–59. "Everything looked normal," until the net was pulled on board using the cross winch, and at that point he "noticed the two nets on top of each other" or "another net around the cod end." Tr. 19. Specifically, he saw a "bluish net" made of square mesh "on the outside of the codend," which was made up of yellow diamond mesh; the blue square mesh net was wrapped "completely around the cod end," covering the entire circumference of the cod end. Tr. 19–23, 31–32, 43, 48–51, 58, 65–66, 95; *see also* AE 1 at 3, 42–43, 49, 50–51, 62, 68, 151, 161. Further, the Petty Officer testified that he saw a "yellow line" or rope on the top "holding the outside net to the inside net," which was the type of line "we usually see in training at Cape Cod; it's a quick release for a net liner." Tr. 19–20; AE 1 at 62. It particularly piqued his interest, because he noted that "you can just untie this [big knot] here and pull that whole [zig–zag woven] [yellow] line out . . . and then the [outer] net will just be able to fall off." Tr. 20–24, 81–82, 96.

Furthermore, Petty Officer Bethea credibly testified that he personally observed that the netting over the cod end was "cinched shut" at the bottom, with the terminus of the cod end "like a duffle bag." Tr. 25.[40]

The only evidence directly contradicting Petty Officer Bethea's testimony, and then only in part, is Mr. Drinkwater's claim as documented in the record that the outer net was "chafing gear," and its sides and bottom were not, in fact, "cinched shut." Significantly, he acknowledged in the re-creation he laid out and exhibited to Special Agent D'Ambruoso in port and thereafter that the outer net was on the *top of* the cod end net, as well as the bottom, *i.e.,* it went around the whole cod end. *See* AE 3 (Mr. Drinkwater's March 25, 2013 statement to Special Agent Forestiere that "it was chafing gear along the top, I'll admit that all day long, I'll take the fine for

[40] *See also* Tr. 69 (noting the yellow line attached to the outer net was used to close the cod end), Tr. 72 ("The normal way a cod end closes is how both nets were tied shut."), 78–79 (noting that the yellow line tied to the outer net was "the line that was tying both nets shut"), 95–96 (noting he saw the crew open the cod end net with a quick pull "as if you released the drawstring on a dufflebag," and he was "[r]ight, up close"), 97–99 (noting that the two nets filled with fish looked just like "one net" coming through the water because both were cinched shut); AE 1 at 3–4, 42–43, 50.

that . . . but you can't call it a net liner"); Tr. 256–57 (Mr. DiMaio noting from what he's seen and been told, Mr. Drinkwater "put another piece of twine [netting] on top of it, on top of the cod end").

In support of Petty Officer Bethea's testimony and in an effort to prove that the outer net obstructed the meshes of the top of the inner cod end, NOAA offered contemporaneous photographs taken by the Coast Guard of the actual net hauled back after it was emptied of fish. AE 1 at 62–68. The photographs clearly show a light blue/green square mesh net over a bright blue diamond mesh net, held together by a bright yellow rope. AE 1 at 62–68. The blue/green net appears to drape down from where it is secured on the bright blue netting by the yellow rope over the lighter diamond mesh yellow cod end. AE 1 at 62–68. Further, the photographs strongly suggest that the yellow rope and the blue/green netting go around the entire circumference of the circular net. AE 1 at 62–68. However, the photographs do not reflect whether the outer netting was open or cinched shut at the sides or at the terminus of the cod end.

Thus the issue of whether the net was open or closed comes down to credibility, and I simply find Petty Officer Bethea's sworn testimony at hearing more credible than that of Mr. Drinkwater's unsworn statement in the record, for myriad reasons. First, Petty Officer Bethea's testimony regarding seeing the outer net shut was clear and consistent.[41] In particular, he noted that "everything looked normal," and the net looked just like "one net" "coming through the water" until it was pulled on board; only at that point did he "notice[] the two nets on top of each other." Tr. 19, 97–99. Had the outer net been not cinched shut, but flayed open as chafing gear, Petty Officer Bethea would have seen the separate nets in the water and/or as the nets were being pulled out. Second, his recollections regarding the terminus of the two nets being tied shut together "like a duffle bag" were clear and specific, even against aggressive and extensive cross–examination. *See e.g.,* Tr. 25, 69, (noting the yellow line attached to the outer net was used to cinch the cod end shut), 78–79 (noting that the yellow line tied to outer net was "the line that was tying both nets shut").

On the other hand, Mr. Drinkwater did not appear at hearing and did not offer any testimony to contradict Petty Officer Bethea or subject himself to cross-examination. Even if he had, there is significant evidence to suggest Mr. Drinkwater is not a reliable and consistent truth-teller. For example, during the boarding, Mr. Drinkwater told the Coast Guard that he had called his "boss" who had instructed him not to cooperate. Tr. 47; AE 1 at 13, 46. However, Mr. DiMaio credibly testified that Mr. Drinkwater did not contact him until *after* the Coast Guard had disembarked the vessel. Tr. 200, 277–78. Mr. DiMaio's credibility on this point is supported by the fact that Mr. DiMaio subsequently fired Drinkwater for having a bad attitude towards the law enforcement officials. Tr. 254–55. Mr. Drinkwater's statement on this point is undermined by the fact that refusing to cooperate with the Coast Guard is consistent with his temperament as exhibited during the boardings.

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[41] Petty Officer Bethea explained that the net is made up of two flat sheets or panels of mesh sewn down the sides that open out to form a circle. Tr. 50.

Moreover, Mr. Drinkwater repeatedly represented to Special Agent D'Ambruoso that the net used in the display he exhibited to NOAA when the ship returned to port was the "same net" in the same configuration in use at the time of the first boarding. Tr. 148–49. However, this is inconsistent with what Mr. Drinkwater and other crewmembers told the Coast Guard regarding the net in use on August 14, 2012, having been destroyed by rocks, the crewmember's statement made to Special Agent D'Ambruoso that Drinkwater re-created the net on the way back to port, and the photographs of the net taken at the time of boarding on August 14, 2012. Tr. 39–40; AE 1 at 24, 45.

Contrary to PEI's claim, in the opinion of this Tribunal, the greater weight given to the testimony of Petty Officer Bethea is not undermined by the fact that he was at first "confused" by the unusual net configuration. Petty Officer Bethea credibly testified that the configuration in use on the vessel on August 14, 2012, was not "what we usually see as a net liner," which are nets inside other nets, but rather "a new technique" he had never seen before. Tr. 20–23, 82. Further, Mr. Drinkwater was stalwartly representing to Petty Officer Bethea that the outer net was NOAA approved "chafing gear" even though the Petty Officer testified that chafing gear is usually "furry," "ripped–up lines," "like a hula skirt," "cover[ing] the bottom portion of the net, to allow the net to skip over the rocks on the bottom and everything [else]," as it drags along the ocean.[42] Tr. 26; 42. And, in fact, that is the type of chafing gear the vessel had on board and used on its other net. Tr. 159. However, the outer net here was made up of square net mesh that would "snag up on the bottom just like the inside net." Tr. 26. Thus, his initial confusion is understandable, especially in light of the fact that Mr. DiMaio testified that he has never used this configuration in his more than 30 years of fishing. Tr. 191.

Second, this Tribunal is not persuaded that Mr. Drinkwater was ever advised by a NOAA official that the outer net configuration used on August 14, 2012, was lawful. At no point did Mr. Drinkwater suggest that Special Agent Forestiere authorized the use of an outer net cinched closed at the bottom. Further, neither Mr. Drinkwater nor Special Agent Forestiere testified at hearing. Thus, the record contains no particulars with regard to the timing, substance, or parameters of this alleged telephone conversation. Tr. 25. Plus, the only statement in the record from Mr. Forestiere suggests he held a contrary opinion. AE 3.

In any case, this Tribunal agrees with NOAA that what PEI is asserting here is essentially an equitable estoppel defense. The person raising the defense must demonstrate he reasonably relied upon the government's actions to his detriment and that the government engaged in some affirmative misconduct. *See United States v. Hemmen,* 51 F.3d 883, 892 (9th Cir. 1995). A party bears an especially heavy burden when raising this defense against the government, and "mere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct" sufficient to estop the government. *Bd. of Cnty. Comm'rs of the Cnty. of Adams v. Isaac,* 18 F.3d 1492, 1499 (10th Cir. 1994). Establishing the affirmative misconduct

[42] Although Special Agent D'Ambruoso noted an alternative to traditional hula–skirt chafing gear is the use of old netting (Tr. 171–172), there is no evidence that the vessel was using "old netting" for such purposes here. In particular the outer netting as shown in the photographs appears in quite new and good condition. AE 1 at 123.

element requires proof, at a minimum, that the government official "intentionally or recklessly mislead the estoppel claimant." *United States v. Marine Shale Processors,* 81 F.3d 1329, 1350 (5th Cir. 1996). "[T]he erroneous advice of a government agent does not reach the level of affirmative misconduct." *FDIC v. Hulsey,* 22 F.3d 1472, 1490 (10th Cir. 1994) (citing *Schweiker v. Hansen,* 450 U.S. 785, 787–90 (1981)). PEI has not proffered any evidence whatsoever of "affirmative misconduct" by a NOAA official. As such, PEI cannot meet the heavy burden imposed upon it to successfully raise an estoppel defense.

Third, PEI presents a weak argument that its alleged "chaffing gear" did not actually impair juvenile fish from escaping or that no evidence indicated an unusual amount of juvenile fish caught in the net. After all, Mr. Drinkwater *was* cited by the Massachusetts Environmental Police for possessing undersized fish upon unloading at port. AE 1 at 171–72, 174; Tr. 225–27. Further, the crewmember advised NOAA that before returning to port they threw back about half of the fish they caught because, as a result of fishing with a net liner, they were too small. AE 1 at 194 at 25:29 (audio recording). In any case, proof of a violation does not require evidence of actual impairment of juvenile fish, only that the net was constricted or its meshes obstructed "in any manner." 50 C.F.R. § 648.80(g)(2).

Fourth, while this Tribunal understands the explanation offered by Mr. Drinkwater and Mr. DiMaio as to why a captain might apply chafing gear to the top of the cod end as well as the bottom, it is not convinced that was the reason for the net configuration at issue. Specifically, Mr. DiMaio testified that to haul in the nets the boat initially must be traveling in a straight line, and then must turn "constantly" until the cod end is on board. Tr. 201–03. It requires skill to haul in the nets to avoid damaging them and risking injury to those on board, he opined. Tr. 202–03. As such, he suggested that the unusual net configuration used on his vessel, with "chaffing gear" affixed to the top of the cod end, was employed because Mr. Drinkwater did not want to haul in his nets before turning his boat. Tr. 192, 213. He explained that if Mr. Drinkwater left the cod end on the ocean floor while turning the boat around to avoid entering a closed area the cod end would close and "turn[ ] upside down," thereby subjecting it to damage unless there is protective netting surrounding the cod end. Tr. 191–93, 199, 256–57. However, Mr. DiMaio also admitted that it is "very tricky" to turn the boat around while the nets are out, and you do not catch fish in the process, but actually lose an hour of fishing time. Tr. 198–99. As such, he testified he has "never, never done it" and "I wouldn't do that. It's not necessary. I don't need to do that." Tr. 191–92. Instead, despite being a very experienced fisherman, he always hauls in his nets, and resets them, which takes 20 minutes in total, while turning around. Tr. 193, 198–99. Moreover, Mr. DiMaio testified he had "not really" heard of anyone using chafing gear on top of a net. Tr. 191. In this case, it is clear to the Tribunal that Mr. Drinkwater was a new captain trying to get a "steady job" with Mr. DiMaio, and it seems counterintuitive that he would engage in a unique, "very tricky" maneuver that would not necessarily result in the catching of more fish.

Thus, while I understand why Mr. DiMaio could conclude that there was no illegal "net liner" in the net, and respect his knowledge, training and experience, this Tribunal finds the net

was, in fact, obstructed.[43] Tr. 223, 276. Based upon the foregoing, this Tribunal finds that a preponderance of the evidence in the record establishes that on August 14, 2014, the fishing vessel Capt Joe did "obstruct or constrict a net," *i.e.* use a net with a "mesh configuration, mesh construction, or other means on or in the top of the net" that "obstruct[ed] the meshes of the net" as set out in 50 C.F.R. § 648.80(g)(2).

C. The Parties' Arguments on Count 2 Pertaining to August 16, 2012

With regard to Count 2, the Agency's foundation for its alleged violation again rests with Petty Officer Bethea's testimony that he and other Coast Guard officers saw a "circular" green mesh liner inside the yellow cod end that reduced the mesh opening from 6.5 inches to the "size of a credit card." AIB at 12–13. In further support, the Agency cites the testimony of Special Agent D'Ambruoso, including the statements made to him by the crewmember stating that he personally witnessed Mr. Drinkwater "cut the tie–ins [for the net liner] out while the Coast Guard was not looking," preventing them from seeing how the liner was tied into the net during its use on August 16, 2012. AIB at 13–14. NOAA relies on Special Agent D'Ambruoso's and Mr. Christel's opinions that the photographs in the record show the net liner obstructed the mesh of the net and that it was not a "haddock separator," as Mr. Drinkwater alleged. AIB at 14.

PEI's argument regarding this count consists solely of a two–sentence response in its Post–Hearing Reply Brief: "According to Drinkwater, the net found inside the cod end on the second day was part of a haddock separator according to Drinkwater and there is no evidence to the contrary. Mr. DiMaio, a seasoned fisherman, supported this proposition." RRB at 1.

D. Finding and Discussion of Respondents' Liability on Count 2

The Agency has met its burden of proof on Count 2, and a preponderance of the evidence establishes that on August 16, 2014, the fishing vessel Capt Joe "obstruct[ed] or constrict[ed] a net," *i.e.* use a net with a "mesh configuration, mesh construction, or other means on or in the top of the net" that "obstruct[ed] the meshes of the net" as set out in 50 C.F.R. § 648.80(g)(2).

First, Petty Officer Bethea credibly testified at hearing that while on deck of the Capt Joe on August 16, 2012, he observed the net in use being hauled back onto the vessel. Tr. 40–41, 111. He recalled seeing that the net had a "normal cod end, with normal chafing gear on it." Tr. 41. However, it also had what Petty Officer Bethea described as "[w]hat I'm more trained to see, which is a smaller net inside of the net that he's using as the cod end, acting as a net liner." Tr. 41. Specifically, there was "a smaller [green knotted] net inside of the [yellow cod end] net." Tr. 42–43, 110–11; AE 1 at 93. The inside net, he noted, "starts somewhere up in the top of the net, and it comes all the way down," to the middle of the cod end, but not to its terminus. Tr.

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[43] Paralleling Mr. Drinkwater's argument, Mr. DiMaio's testimony focused on whether the net covering the cod end was specifically a "net liner" rather than recognizing its effect in terms of obstructing the cod end of the net. *See, e.g.*, Tr. 262. ("Only way to break [the law is with] the liner inside, yes, but not on this one. I don't see anything what he did wrong. He shouldn't do it and I will agree. But Your Honor, it's not really it's liner.").

43–44, 114. Petty Officer Bethea noted the configuration was "interesting," because as the unimpeded cod end gets "clogged with normal catch, and then once it gets right up to where the net liner starts, it's going to start acting as a net liner." Tr. 43–44.

Second, Petty Officer Bethea's testimony was buttressed at hearing by that of Petty Officer Scharff, a 19 year veteran of the Coast Guard, who has participated in more than 150 ship boardings, 100 of which involved Northeast bottom trawlers like the Capt Joe. Tr. 122–24. Petty Officer Scharff was a member of the Seneca's boarding team on August 16, 2012, and observed and photographed the filled cod end of the net as it was being hauled on board. Tr. 124–26, 130. He credibly testified that he saw "another layer of net mesh inside the primary mesh with the net," and stated that the inner mesh was wrapped around inside the outer layer of mesh. Tr. 129, 139–40; AE 1 at 93. He further described the "tubular" or "cylindrical–shaped" "secondary mesh, that was inside the cod end," and estimated that it proceeded up approximately 60% of the cod end. Tr. 129–131; AE 1 at 93, 97.

Third, a contemporaneous photograph taken of the cod end of the net when filled with fish supports the Petty Officers' testimonies as it shows a bluish net inside the yellow cod end netting. AE 1 at 93. The internal net appears on the top side of the cod end net, whereas the blue chafing gear is attached to the bottom of the cod end. AE 1 at 93.

Fourth, the record contains evidence that a crewmember on board the vessel at the time of the boarding subsequently admitted to Special Agent D'Ambruoso that the vessel was fishing with a liner on August 16, 2012 and that Mr. Drinkwater cut the tie–in holding the liner in place to hide that fact from the Coast Guard. Tr. 156; AE 1 at 194, 199. Neither party called the crewmember to testify at hearing, but the record contains no basis for not giving weight to the crewmember's statement. There is no evidence suggesting he had any reason to fabricate the statement, and even though it was hearsay not subjected to cross–examination, the statement otherwise appears to be based upon personal knowledge and is credible. Moreover, based upon this statement, this Tribunal does not find it significant that Petty Officer Bethea did not see the inner net actually affixed to cod end. Tr. 111–13.

Fifth, Mr. Drinkwater's claim that the inner netting was a haddock separator that had broken loose is not credible. Tr. 44. At hearing, both Petty Officer Scharff and Mr. DiMaio described a haddock separator as generally consisting of a flat piece of mesh, sown in by 135 meshes, down the two opposite sides of the circular cod end of the primary net to "effectively cut that net in half or a little bit above half" and separate the bottom fish from the haddock, which enter the top portion of the net and can exit through a vent opening. Tr. 132, 282.[44] As

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[44] On cross examination, Petty Officer Scharff acknowledged that there were alternative designs for haddock separators designed to retain the fish, and that the inner piece of net mesh he saw at the time of the boarding "could be" the same size as a panel that was used in such a haddock separator configuration. Tr. 137–38. However, there is no testimony that such a haddock separator was in use that day.

suggested at hearing by Petty Officer Bethea, it is difficult to imagine how a net sewn in such a thorough manner could come completely loose while the external net remained intact. *See* Tr. 45–46. Furthermore, testimony at hearing suggested if it did come loose it would bunch up in the cod at some point. However, the contemporaneous photographs taken of the net show the inner bluish net was very large and it was evenly spread out across the codend and not gathered up at any point. AE 1 at 93, 97, 101, 103.

Sixth, there is no credible evidence that Mr. Drinkwater even had a haddock separator on board or that he was using a haddock separator in his net at the time. Although Mr. DiMaio supplied Mr. Drinkwater and the vessel for the trip and trained him, it is notable that Mr. DiMaio did not testify that he provided the vessel with a haddock separator for Mr. Drinkwater's use on this trip. To the contrary, Mr. DiMaio did testify that upon seeing the inner netting "[i]t *could be* the haddock separator *if* he had one on board at the time, *if* you had one on the net at the time, *if* it was a piece of regular twine." Tr. 262–63 (emphasis added). This may explain why Mr. DiMaio offered the alternative possibility that the inner net was "just regular twine, a piece of regular net" that got scooped up as the net was dragging on the bottom of the ocean. Tr. 207–08, 282–283. However, Mr. DiMaio undermined his own theory by admitting that scooped up derelict fishing gear would not likely lay evenly around the outer net, as reflected in the photographs. Tr. 295–296. *See also* AE 1 at 93. Further, this alternative hypothesis is undercut by the fact that the photographs reflect the inner net as being in very good condition and not like derelict gear that had been in the ocean for some period of time. AE 1 at 95, 97, 99, 101, 103. In addition, it is notable that the crew pointed out to the Coast Guard the place on the inner net allegedly representing the escape vent for the haddock separator, but it was sewn shut, suggesting that a haddock separator was not in use as such at the time. AE 1 at 95. Thus, there is no credible reason for this inner net to be in the cod end other than to serve as a net liner.

VII. PENALTY

Any person who commits an act made unlawful by the Magnuson–Stevens Act "shall be liable to the United States for a civil penalty" not to exceed $140,000 per violation. 16 U.S.C. § 1858(a); 15 C.F.R. § 6.4(f)(14). When assessing a civil penalty under the Act, the presiding officer must account for "the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require." 16 U.S.C. § 1858(a). There is no presumption in favor of the penalty proposed by the Agency. *See* 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631 (June 23, 2010) (Final Rule). Rather, "the presiding Administrative Law Judge may assess a civil penalty *de novo*, 'taking into account all of the factors required by applicable law.'" *In re Pauline Marie Frenier*, NOAA Docket No. SE1103883, 2012 NOAA LEXIS 11, at *11 (ALJ, Sept. 27, 2012) (quoting 15 C.F.R. § 904.204(m)).

The NOVA issued in this case proposed to assess a civil administrative penalty, jointly and severally against Respondents, in the amount of $54,411 for the violation of the Act alleged in Count 1 and $20,000 for the violation of the Act alleged in Count 2. NOVA at 2. In 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").[45] AIB at 15. 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." *Id.*

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

With regard to the "nature" of the violations, the Agency asserts that:

> The Fishery Management Plan for Northeast Multi–Species, including its numerous amendments, establishes the foundation of the current management scheme for the Northeast multi–species fishery. It represents a plan to evaluate rebuilding progress as necessary to continue rebuilding of various Northeast multi–species. The regulations prohibiting the obstruction or constriction of a net are intended to reduce fishing mortality and are part of the goal of the Northeast Multi–Species Fishery Management Plan to preserve a mix of species of groundfish at sufficient abundances "to assure that the regulated species maintain adequate spawning potential, so that the resource, as a whole, can recover from outside influences, such as the pressure imposed by fishing." 50 Fed. Reg. 49,582 (Dec. 3, 1985). These regulations prohibit fishermen from reducing the ability of juvenile fish to escape bottom trawl nets so that those fish can live long enough to spawn and replenish the stock. When nets are obstructed in the manner discovered aboard the F/V Capt. Joe on August 14 and 16, 2012, they preclude juvenile fish from being returned to the sea alive to spawn later, and this negatively impacts the stocks' ability to replenish itself in the long term.

AIB at 16 (citations omitted).

As to the circumstances surrounding the violation, the Agency relies upon the general facts of the case as set forth in its initial Post–Hearing Brief. AIB at 16.

Regarding extent, NOAA asserts the crewmember interviewed by Special Agent D'Ambruoso after the violations were found asserted that he had witnessed net liners in use on essentially all of his trips on Mr. DiMaio's vessels. AIB at 17; AE 1 at 25–26. As such, the

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[45] The March 16, 2011 edition of the Penalty Policy, utilized by NOAA in calculating the proposed penalty in this case, is available online at: http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf. Although Respondent refers to its admission in this case as "Exhibit 9," Respondent appears to be confusing the Penalty Policy's admission in the AEI companion case. AIB at 9; note 2, *supra*. In this case, RX 9 is a "Crew Member Release and Identification Agreement," and the Agency did not introduce an Exhibit 9. Regardless, this Tribunal will determine the penalty in this matter *de novo* using the statutory factors.

Agency argues that the extent of the violations was much greater than the particular incidents cited here. *Id.*[46]

As to gravity of the violations, the Agency again cites the New England Fishery Management Counsel's Fishery Management Plan as to the purpose of the gear controls, such as mesh size, to protect juvenile fish. AIB at 18.

PEI raises three points to undercut these factors. First, it notes that Mr. Drinkwater was fined a mere $100 by the Massachusetts Environmental Police for possession of 330 pounds of undersized fish; that PEI was not fined or held jointly and severally liable by the environmental police; and that there is no evidence as to whether the "alleged [state] violation [by Mr. Drinkwater] was contested, settled or otherwise resolved." AEI RIB at 10. Second, PEI contends that under the Penalty Policy NOAA treats "gear violations" as "relatively minor," with a penalty range from $2,000 to $20,000, depending upon culpability. *Id.* It suggests that "[i]nsomuch as NOAA only seeks to hold PEI responsible as owner of the vessel, and for no other reason, its culpability cannot get any lower," so the maximum penalty should be $2,000. *Id.* Third, PEI asserts that there is no evidence that the violation caused any harm to the resource, the regulatory scheme or program, or provided a competitive advantage over those operating legally. *Id.* at 10, 12. It notes the stocks of redfish are extremely healthy, so much so that NOAA has reduced both the permitted mesh size (from 6 ½ to 4 ½ inches) and the minimum fish size for redfish and haddock as well as increased the annual catch limit for redfish by 148%. AEI RIB at 12 (citing RX 4).[47] Further, PEI suggests that "it is entirely possible that any potential harm to the resource could have been prevented had the Agency informed Mr. DiMaio in the Spring of 2012 that NOAA had allegedly received several complaints concerning the use of illegal trawl nets' onboard the Capt. Joe." Instead, it suggests, Special Agent D'Ambruoso wanted to catch someone in the act in order to increase his own compensation. AEI RIB at 12 (citing Tr. at 68–69).

NOAA strongly challenges this last point in its Reply Brief, stating that obstructed or constricted nets "entirely frustrate" the purpose of regulations. ARB at 5. In support of this statement the Agency cites and quotes extensively from the Northeast Multi–Species Fishery Management Plan. ARB at 5. PEI vigorously objects in its Post–Hearing Reply Brief to the Agency's attempt to rely upon the Fishery Management Plan, which was not offered as a document in evidence, to bolster its penalty arguments. PEI notes that Special Agent

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[46] The Agency's arguments made in support of its "extent" claims are largely supported by the testimony of Petty Officer Bethea at the hearing in the companion case. *See* AIB at 17. As that testimony was not incorporated into *this* record, it will not be considered in reaching a decision in this case.

[47] The correct citation here is RX 6 or RX 10 at 32, which reflects, *inter alia*, that as of July 1, 2013, the new minimum size for redfish is 7", reduced from 9" and haddock is 16", reduced from 18". *See also* RX 10 regarding catch limits for 2013–2015. PEI also cites in support of these points a webpage which was not admitted into the record and so will not be considered here.

D'Ambruoso testified that the stocks of redfish and Pollack, i.e. those fish targeted by Mr. Drinkwater, were very healthy at the time and that neither were very valuable. RRB at 4; *see* AEI Tr. 74; see n.10, *supra*).

Upon consideration of the foregoing, this Tribunal finds that the nature, circumstances, extent, and gravity of both violations are modest. The vessel fished on two occasions with obstructed or constricted nets. As a result, it acquired approximately 22,000 pounds of fish, perhaps slightly more than it would have without violating the law, or it caught these fish more expediently than it would have otherwise. AE 1 at 230. However, the number of juvenile fish the vessel caught as a result of the violations, 330 pounds, represents a tiny percentage (1.5%) of the total fish caught. Moreover, the evidence suggests the juvenile fish that were caught were not endangered.

B. Culpability

NOAA paints the Respondents' culpability levels in a very harsh light. It notes that Mr. Drinkwater made no effort to rebut the allegations made in this case and that PEI "refuses to take responsibility for the actions that occurred on its vessel," despite the Tribunal's *respondeat superior* ruling. AIB at 19–20. Further, it again raises the fact that the crewmember interviewed by Special Agent D'Ambruoso after the violations were detected indicated that he had witnessed net liners in use on essentially all of his trips on Mr. DiMaio's vessels.[48] AIB at 17. NOAA suggests that in failing to investigate the use of net liners on his vessels, Mr. DiMaio was "reckless." AIB at 20.

In addition, the Agency characterizes Mr. DiMaio as having engaged in reckless hiring practices in regard to his captains, particularly by hiring and rehiring those suspected of fisheries violations. AIB at 21. It notes that Mr. DiMaio testified at hearing that he fired Mr. Drinkwater after the subject incident not because of the alleged violations, but because he did not like his attitude towards the Coast Guard when boarded. AIB at 21. Such practices, the Agency suggests, evidence his control over the vessel and its crew, noting that he promoted Mr. Drinkwater from a deckhand on his vessel the Orion to captain of the Capt Joe. AIB at 21. It cites this Tribunal's questioning of Mr. DiMaio at hearing, in response to his expressed frustration at being held liable for the acts of captains over which he claimed he had no control, whether the most effective way to prevent violations would be for vessel owners not to hire or rehire suspected violators. AIB at 22. Finally, citing the fact that PEI and the captain share in the profits of fishing trips, NOAA argues they both have a financial incentive to catch more fish, even by use of illegal fishing gear. AIB at 22.

PEI takes as strident a tone in its Brief decrying that it was "not reckless" and asserting "[t]he Agency concedes PEI played no role in the violation other than owning the vessel." AEI RIB at 11. Further, it makes two specific points. First it argues that it took reasonable precautions against the events constituting the violations. *Id.* It cites to Mr. DiMaio's testimony

[48] NOAA makes other arguments here citing in support from portions of the transcript in the companion case not incorporated herein. *See* AIB at 17, 19–20.

that he generally did all he could to keep his captains from violating the law, including verifying a prospective captain's permits, undertaking to teach new captains the law and regulations, and having them sign indemnity agreements. *Id.* In Mr. Drinkwater's case, PEI notes Mr. DiMaio's testimony that he researched Mr. Drinkwater's background even though he had been working as a deckhand already on one of Mr. DiMaio's other vessels; that he provided Mr. Drinkwater with training on the boat and regulations; that he fired Mr. Drinkwater after this incident because he did not like the attitude he displayed towards law enforcement; and that he made all his crewmembers aware that he would fire them if he caught them using a net liner. *Id.*

Second, PEI argues "a corporate owner of a vessel has no control over the vessel or captain once the vessel leaves the dock." *Id.* The owner cannot control when the boat leaves or returns, where it fishes, where it makes its fish tow, how long the vessel tows before hauling back its nets, or what type and configuration of gear the captain choses to use. *Id.* at 11–12. PEI notes that Mr. DiMaio has reported his own captains for violating the law, including his cousin. *Id.* at 12.

In addition, PEI argues that it has no financial incentive to use a net liner becauseit incurred more than $40,000 in expenses to land $30,000 worth of fish. *Id.* at 13. Further, it suggests that there is an incentive not to catch undersized fish as they count against the overall fish quota allocated to the company. *Id.* at 13. Additionally, the smaller the fish, the less valuable they are, according to PEI. *Id.*.

This Tribunal agrees with the Agency that Mr. Drinkwater's culpability for the violations is high. The evidence demonstrates that in each instance he knew what he was doing was illegal, despite his claims made to the Coast Guard and NOAA suggesting otherwise. In particular, with regard to the first violation, this Tribunal notes that Mr. Drinkwater hauled his nets on board during the first boarding in an unusual manner, seemingly in an effort to prevent the Coast Guard officers from immediately visualizing the net inside of a net configuration. Tr. 18–19, 40; AE 1 at 4, 43. Further, when he attempted to convince Special Agent D'Ambruoso that his net configuration was lawful he mislead the Special Agent, suggesting that the reconstructed nets were the actual nets he used on August 14, 2012. Tr. 148–49. As to the second boarding, the crewmember testified that Mr. Drinkwater cut the net liner out of the net when the Coast Guard was not looking. Tr. 156.

On the other hand, Mr. DiMaio's culpability or fault for the violations are far more minimal. This Tribunal found Mr. DiMaio's testimony credible to the extent he expressed frustration with his captain's actions. Nevertheless, it is hard to reconcile Mr. DiMaio's positive attitude towards compliance with the law and his asserted efforts to prevent illegality occurring on his ships with the evidence suggesting pervasive violations on his ships.[49] Further, although Mr. DiMaio may have had no ability to personally prevent violations on the vessel once it left

[49] It is noted that the indemnity agreements which PEI offered into evidence are all dated 2013, suggesting that they were not in use at the time of the violations here in August 2012. RX 9.

the dock, his absence from the ship does not mean he is without any culpability whatsoever. He hired the captain and the crew and supplied the ship with the intent of sharing its bounty. As such, he placed Mr. Drinkwater in a position where violations could be committed on his vessel.

C. History of Violations

The Agency does not allege any prior history of violations in this case by either of the Respondents.

D. Ability to Pay

As noted by the Agency in its Initial Brief, Mr. Drinkwater has made no inability to pay claim in this action and is presumed to be able to pay the proposed penalty. AIB at 24; 15 C.F.R. § 904.108(c).

However, PEI has raised such a claim in this action and asserts that "[t]he company is insolvent and has absolutely no ability to pay." AEI RIB at 13. In support, they offer as evidence the company's tax returns, suggesting they demonstrate a "bleak financial status with liabilities exceeding assets" and noting that a related corporation had to sell its boat, the F/V Princess Laura, due to losses incurred from regulatory changes that decreased fishing quotas in the Gulf of Maine by 70 percent. *Id.* at 14. Moreover, PEI asserts Mr. DiMaio testified he does not have the personal resources to provide financial support for the corporation. *Id.*

Additionally, PEI advises that another closely held fishing company owned by Mr. DiMaio was recently forced to sell the vessel it owned (F/V Princess Laura) for its mortgage value "to stop the losses it was incurring brought about by recent changes to the regulations [decreasing quota in the Gulf of Maine by 70%]." *Id.* at 13. Further, it alleges that Mr. DiMaio has no money to loan the company and no sources of credit available to him and that even if he obtained a loan, the company could not repay it. *Id.* at 14. PEI represents that Mr. DiMaio is the financial source of support for his elderly mother as well as his recently divorced daughter and her two children. *Id.*

The Agency claims PEI has not met its burden of proof on its ability to pay because Mr. DiMao is the true source of funds for the company, and he has provided incomplete evidence of his personal financial resources, such as his personal tax returns. AIB at 23–25. In particular it pronounces that the evidence offered by PEI as incomplete as Mr. DiMaio never provided any information regarding his personal financial status as required by the regulations. AIB at 23–24 (citing 15 C.F.R. 904.108(d)). The Agency notes Mr. DiMaio testified that he has periodically used his own money to pay PEI's bills. AIB at 23 (citing AEI Tr. 273, 323–24). As such, it suggests he is a source of funds for the company. AIB at 23. Further, it notes after Mr. DiMaio sold the Princess Laura, he bought another dragger, the F/V Tyler, with money provided to him by the Zeus Seafood Company, a fish processer who had lost its own vessel and needed a supply of product. AIB at 24. NOAA suggests this as another source of funds for the company. AIB at 24.

In Reply, PEI contends that as a corporation it is not required to provide its shareholders' financial records because they are not liable for the corporation's debts. RRB at 5. Further, PEI attaches to its Reply Brief certain correspondence (not admitted into evidence here) between the parties' counsel offering to provide further documentation if requested by the Agency in connection with its inability to pay claim.

In its Reply Brief, the Agency also cites exhibits from the companion case which were not admitted here, to support its assertion that it provided PEI forms for completion by Mr. DiMaio to obtain the requisite information on its ability to pay, which the company never completed. ARB at 8 (citing *inter alia* Tr. 310). In addition, the Agency asserts that it needed Mr. DiMaio's personal tax returns to determine inability to pay because PEI is "a subchapter S corporation, its net losses flow through to the individual tax return" of Mr. DiMaio, "providing a significant reduction." *Id.* (citing RX 13). In any case, the Agency claims PEI's 2011 and 2012 federal income tax returns show that its net assets have increased by more than $40,000 from 2011 to 2012. *Id.* at 9 (citing RX 13 at 16 and 27). Further, PEI's 2010 federal income tax return shows that the company disposed of a major asset in 2010 and acquired another major asset with the assumption of new debt in 2011. *Id.* at 10. (citing RX 13 at 16). The Agency states these changes indicate that PEI "has the ability to qualify for debt, despite growing losses from operations." *Id.* Furthermore, it suggests that "when Respondent's non–cash expenses such as depreciation are added back, Respondent apparently had a positive cash flow of over $30,000 per year." *Id.* (citing RX 13 at 2, 13, and 24). "Consequently, even though Respondent's equity position has declined by over $51,000 over three years, Respondent is generating significant cash above its operating needs. This indicates that Respondent has the means from ongoing operations to satisfy the civil monetary penalty assessed in this case." *Id.*

A Respondent who raises an inability to pay claim carries the burden of proof thereof. 15 C.F.R. § 904.108(c); *Darren J. Plaisance*, 6 O.R.W. 654, 656–57 (NOAA 1992). While the Rules require that, in support of such claim, a respondent produce "verifiable, complete, and accurate financial information," it limits such information to what "Agency counsel determines is adequate to evaluate the respondent's financial condition." 15 C.F.R. § 904.108(c). Here, it appears that on July 15, 2013, PEI produced its tax returns for the previous three years plus a request that "[i]f NOAA's financial analysts require any additional information to determine that my client has absolutely no ability to pay this proposed penalty, please let me know as soon as possible and if such material exists, I will endeavor to do my best to obtain it for them. Otherwise, I will assume these materials are adequate." RX 13 at 1. A week later, Mr. DiMaio provided the Agency with a completed "Financial Verification Request and Authorization" form allowing it to "inquire and request information from any person, corporation as to [the accounts of PEI] and credit standing with regard to any transaction as far as any person shall know." RX 12 at 1. There is no evidence showing that after these submissions were made the Agency requested additional documentation from PEI regarding its inability to pay.[50] As such, this

[50] Neither party requested that the record be reopened after hearing to move additional documents into evidence, including those attached to the parties' post-hearing briefs. RRB at 5. As such, those documents are not considered in rending the decision here.

Tribunal finds no merit in the Agency's assertion that the claim not be considered based upon Respondent's alleged failure to produce sufficient documentation.

PEI's tax returns for 2010–2012 shows the company had a total average yearly income (gross receipts minus cost of goods sold) of nearly $150,000. RX 13. For tax purposes, PEI then took deductions for intangible reductions in asset values such as depreciation, depletion, and amortization in each of those years amounting to half to two–thirds of its total income, along with deductions for actual yearly expenditures made in support of operations, resulting in reportable small losses or gains in ordinary income. *Id.* Along with NOAA's other points regarding PEI's tax returns and company operations, this suggests PEI is not "insolvent" as it alleges or completely without the ability to pay. Furthermore, while Mr. DiMaio testified that he, and the fishing industry generally, has had a hard time the past few years, he acknowledged he was successful for many years and that "[e]ven today, good fishermen, the captain can make 120, 140 thousand dollars today." Tr. 241, 244–45, 284. This suggests that PEI as the owner of a commercial fishing vessel should be able to generate a profit sufficient to pay the penalty imposed here.[51]

E. Such Other Matters as Justice May Require

The Agency does not raise any issues to be considered under this penalty factor. On the other hand, Respondent puts forth a number of facts to mitigate the penalty. AEI RIB at 14. Those facts include that (1) Mr. DiMaio is disabled and unable to go to sea; (2) he was previously an industry leader and the first in the Northeast Region to install surveillance equipment on his vessel; (3) he previously invited the Coast Guard on his vessel for cross–training; (4) his vessel the Italian Princess was the first in the country to participate in the Coast Guard's voluntary safety inspection program; (5) he was very cooperative when interviewed in connection with this matter. AEI RIB at 14; RRB at 8. In addition, Respondent cites a decision in which an ALJ penalized the individual captain but not the corporate owner because "it would be unjust to pursue such an approach[.]" AEI RIB at 15 (citing *James A. Green*, NOAA Docket Nos. 235–156, 235–157, 1993 NOAA LEXIS 48 at *8 (ALJ, Aug. 27, 1993)).

The Tribunal agrees that all those facts present a generally favorable portrait of PEI and, standing alone, would be a basis for significant mitigation of the penalty were it not for Mr. Drinkwater's extremely negative interactions with government officials. In particular, the testimony at hearing and documentary evidence of record establish that Mr. Drinkwater was uncooperative and extremely unprofessional in his interactions with the Coast Guard and NOAA officials who investigated these violations. In particular, Petty Officer Bethea testified that he was uncooperative and threatening, which was confirmed by the crewmember on board at the time. Special Agent D'Ambruoso found him to be not fully cooperative and a liar. Tr. 172. In these respects he was an extremely poor representative of the profession and not a positive participant in the industry or the government's on–going cooperative efforts to protect the

[51] It is noted that PEI did not offer into evidence a completed settlement sheet for the subject trip showing owner expenses paid out of the proceeds of the voyage. *See, e.g.*, RX 8 at 15; Tr. 236–37, 267–70.

country's critical fishing resources. *See* Tr. 224 (Mr. DiMaio referring to the professionals in the fishing industry).

CONCLUSION

It is difficult to determine an appropriate penalty in this case to be assessed "jointly and severally" against the Respondents. Mr. Drinkwater is significantly and most directly culpable for the violations, claims no inability to pay, and interacted in an inappropriately negative way with government officials. That on its own would warrant a very high penalty. But when evaluated solely in regard to PEI, the penalty factors play out more favorably and suggest a low penalty. Consequently, a mid–range penalty is most appropriate. If PEI had not hired Mr. Drinkwater, then he would not have been in a position to commit the violations. The Respondents agreed to pursue a common objective and each expended their labor and resources on a common plan they hoped would result in their mutual financial benefit. As such, the positives and negatives of each are attributable to the other.

Upon considering the nature, circumstances, extent, and gravity of the violation; Respondents' degree of culpability and history of prior offenses; and other matters as required by justice, this Tribunal imposes on the Respondents jointly and severally a civil penalty of $20,000 for each violation set forth in Counts 1 and 2 of the NOVA. Only 1.5 percent of the total fish caught were undersized, and the fish were not endangered. Mr. Drinkwater appears to have intentionally committed the violations, but PEI undertook efforts to avoid them even though it was not successful. Ultimately, the nature, circumstances, extent and gravity of the violations were similar and modest. PEI has evidenced a limited ability to pay, although Mr. Drinkwater has not. However, PEI recovered the full gross proceeds of the fishing venture, $34,411, and Mr. Drinkwater did not receive any portion of those funds. Finally, Mr. Drinkwater negatively interacted with Coast Guard and NOAA officials, while in this instance and generally, PEI's interactions have been positive.

ORDER

A total civil penalty in the total amount of **$40,000** hereby **ASSESSED** against Respondents Jessie H. Drinkwater and Princess Elena, Inc, jointly and severally, on Respondents for violating Section 307(1)(A) of the Magnuson–Stevens Fishery Conservation Management Act, 16 U.S.C. § 1857(1)(A), and 50 C.F.R. §648.14(k)(6)(i)(A).

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

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

filed, any other party to this proceeding may file an answer in support or in opposition. The undersigned will rule on any petition for reconsideration.

PLEASE TAKE FURTHER NOTICE, that any petition to have this Initial Decision reviewed by the NOAA Administrator must be filed with the Administrator within **30 days** after the date this Initial Decision is served and in accordance with the requirements set forth at 15 C.F.R. § 904.273. A copy of 15 C.F.R. §§ 904.271–273 is attached.

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 a failure to pay the civil penalty to the Department of Commerce/NOAA within **30 days** from the date on which this decision becomes final Agency action will result in the total penalty becoming due and payable, and interest being charged at the rate specified by the U.S. Treasury regulations and an assessment of charges to cover the cost of processing and handling of the delinquent penalty. Further, in the event the penalty, or any portion thereof, becomes more than 90 days past due, Respondents may also be assessed an additional penalty charge not to exceed 6 percent per annum.

SO ORDERED.

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

Dated: July 14, 2015
Washington, D.C.

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

15 CFR 904.271-273

§ 904.271 Initial decision.

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

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

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

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

(4) A statement of further right to appeal.

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

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

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

(1) Otherwise provided by statute or regulations;

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

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

§ 904.272 Petition for reconsideration.

Unless an order or initial decision of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or initial decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. Petitions must be filed within 20

days after the service of such order or initial decision. The filing of a petition for reconsideration shall operate as a stay of an order or initial decision or its effectiveness date unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the administrative proceeding may file an answer in support or in opposition.

§ 904.273 Administrative review of decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the

Judge's initial decision has become the final agency decision under paragraph (h) of this section.

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

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