UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	)	Docket Number:
Karen J. Belle, Inc., and Laramie J. Williams,	)	**SE1202106FM F/V KAREN J. BELLE**
Respondents.	)	

INITIAL DECISION AND ORDER

Date: March 23, 2015

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

Appearances: Agency Counsel:

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Respondents' Representative:

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

I. PROCEDURAL HISTORY

On April 29, 2013, counsel for the National Oceanic and Atmospheric Administration ("NOAA" or "Agency"), on behalf of the Secretary of Commerce, instituted this action by issuing a Notice of Violation and Assessment of Administrative Penalty ("NOVA") to Karen J. Belle, Inc. and Laramie J. Williams ("Respondents") in regard to the fishing vessel ("F/V") Karen J. Belle. The NOVA charges the Respondent corporation as the vessel owner, and the individual Respondent as the vessel operator, in a single count, with violating the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A), and Agency regulations at 50 C.F.R. Part 622, on May 20, 2012, June 21, 2012 and/or July 15, 2012, by failing to comply with requirements of the Gulf grouper and tilefish Individual Fishing Quota program set forth at 50 C.F.R. Part 622. NOVA at 1. The NOVA proposes the assessment of a $4,000 penalty for the violation against Respondents, jointly and severally. NOVA at 2.

By letter dated July 3, 2013, Karen L. Bell requested a hearing in response to the NOVA on behalf of the Respondent corporation here[2] and two other respondents in related actions.[3] On September 9, 2013, Ms. Bell submitted a letter to this Tribunal indicating that she accepted this Tribunal's offer to participate in its Alternative Dispute Resolution ("ADR") Process on behalf of both the Respondent corporation and Mr. Williams. The case was then assigned to ADR and remained in such process until it was terminated by Order of the ADR Neutral on December 12, 2013. On December 19, 2013, the undersigned was appointed to preside over this matter at hearing.

An Order to Submit Preliminary Positions on Issues and Procedures (PPIP) ("PPIP Order") was issued on January 24, 2014.[4] In the PPIP Order, the Agency and Respondents were each ordered to submit an initial PPIP in accordance with 15 C.F.R. § 904.240. The parties timely complied with the PPIP Order, and Respondents subsequently supplemented their initial PPIP with six additional documents. In the Agency's PPIP ("A's PPIP", filed on February 21, 2014, the Agency amended the regulatory citations set forth in the NOVA to conform to those in

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[2] In these proceedings, a non-attorney representative is permitted to appear on behalf of a party. 15 C.F.R. § 904.5(a) (party is permitted to "appear in person or by or with counsel or other representative.").

[3] This is one of three companion cases. The other two cases are: *Lisa M. Belle, Inc. and Peter D. Strebel*, NOAA Docket No. SE1101642FM, F/V Lisa M. Belle, and *A.P. Bell Fish Co., Inc., Kalije Belle, Inc., and Dwight L. Martin*, NOAA Docket No. SE1003701FM, F/V Kalije Belle. In her July 3, 2013 letter, Ms. Bell requested that the three actions "be heard together." In later correspondence to NOAA dated March 31, 2014, a copy of which was filed with this Tribunal, Ms. Bell indicated that she represented all Respondents in the three companion cases except for Peter Strebel, whom she had not been able to contact.

[4] The PPIP Order is mistakenly dated January 24, 2013, but the Certificate of Service correctly reflects its issuance and service on January 24, 2014.

effect at the time of the alleged violation in 2012, and removed language in the NOVA relating to the red snapper IFQ program.[5] A's PPIP at 4-5 n.2.

On April 2, 2014, the undersigned issued a Hearing Order setting forth additional prehearing filing deadlines and scheduling the hearing in this matter to begin at 9:00 a.m. on May 6, 2014, in Bradenton, Florida. Thereafter, the parties submitted a Joint Motion requesting that the hearing held in this case, and in two companion cases, be heard in seriatim, in a particular order. The Motion was granted by Order dated April 25, 2014.

The hearings in all three companion cases were held on May 6, 2014, at the Manatee County Judicial Center, Courtroom 8B, 1051 Manatee Avenue West, Bradenton, Florida 34205.[6] During the hearing in the instant matter, the Agency offered into evidence 21 exhibits and all were admitted.[7] Tr. 9. Additionally, the Agency presented the testimony of one witness, Special Agent Paige Casey of the NOAA Office of Law Enforcement. Tr. 10-32. Karen Bell appeared at hearing as the representative of both Respondents and also testified on their behalf. Tr. 8-9, 32-36. Respondent Laramie J. Williams did not personally appear at the hearing. Respondents offered 12 exhibits into evidence and all were admitted.[8] Tr. 51. The parties' Joint Set of Stipulated Facts, Exhibits and Testimony dated April 24, 2014, was admitted into evidence as Joint Exhibit 1.[9] Tr. 8-9.

On May 20, 2014, an electronic copy of the hearing transcript was received by this Tribunal and on May 27, 2014, was forwarded to the Agency and Respondents' representative, Ms. Bell. On May 28, 2014, the Hearing Clerk received the certified copy of the transcript and that day the undersigned issued a Post-Hearing Scheduling Order ("Post-Hearing Order"), establishing a briefing schedule. On June 27, 2014, the Agency's Initial Post-Hearing Brief was filed ("A's Brief"). Respondents did not file a post-hearing brief and as such, the record in this matter closed on June 27, 2014.

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[5] In the NOVA, NOAA erroneously cited to the applicable regulations as renumbered by an interim final rule published after the alleged violations, but before the NOVA was filed. 78 Fed. Reg. 22,950 (Apr. 17, 2013). The Rules of Procedure applicable to this proceeding, set forth in 15 C.F.R. Part 904, provide that "[a] party may amend its pleading as a matter of course at least 20 days prior to a hearing." 15 C.F.R. § 904.207(a). The correct citations for the regulatory provisions in effect the time of the violations at issue here are 50 C.F.R. §§ 622.20(b)(1)(i), (b)(3)(i) and 622.7(gg).

[6] Citations herein to the transcript are made as follows: "Tr. [page]."

[7] Citations herein to the Agency's exhibits are made as follows: "AE [number] at [page]."

[8] Citations herein to Respondents' exhibits are made as follows: "RE [number] at [page]."

[9] Although Mr. Williams did not personally sign the Stipulations, and Ms. Bell signed them only on the signature line for the corporate Respondent, at the hearing Ms. Bell represented that by her signature she intended to bind Mr. Williams to them as well. Tr. 9. Citations herein to the Joint Exhibit are made as follows: "JE 1, Stip. [number]."

II. THE LAW AND REGULATIONS APPLICABLE TO LIABILITY

Finding that a "national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources," in 1976, Congress first enacted the Magnuson-Stevens Fishery Conservation and Management Act ("the Act").[10] Pub. L. No. 94-265, § 2(a)(6), 90 Stat. 331, 332 (1976) (codified at 16 U.S.C. § 1801 et seq.). The purpose of the Act is "to promote domestic commercial and recreational fishing under sound conservation and management principles" and "to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery."[11] *Id.* at § 2(b)(3)-(4), 90 Stat. at 332-33. The Act mandates the establishment of eight Regional Fishery Management Councils, including a Gulf of Mexico Fishery Management Council ("Gulf Council"),[12] and requires each council to design fishery management plans "for each fishery under its authority that requires conservation and management." 16 U.S.C. §§ 1852(a)(1)(E), (h)(1). Such management plans are required to "assess and specify" the "maximum sustainable yield" and "optimum yield" from the fishery as well as the "capacity and the extent" to which fishing vessels annually will harvest the optimum yield and fish processors will process that portion of such optimum yield harvested. 16 U.S.C. § 1853(a)(3)-(4).

In 1983, NOAA published its initial approval of the Gulf Council's first Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico ("Gulf FMP"), and also proposed initial regulations implementing the Gulf FMP. 48 Fed. Reg. 38,511 (Aug. 24, 1983) (later codified at 50 C.F.R. Part 622). Since then, numerous amendments and additions to the

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[10] The title of the Act was initially "Fishery Conservation and Management Act of 1976," but was changed four years later to the "Magnuson Fishery Conservation and Management Act," by the Salmon and Steelhead Conservation and Enhancement Act of 1980, Pub. L. No. 96-561, § 238, 94 Stat. 3275, 3300 (1980). After the Act was further amended by the Sustainable Fisheries Act, Pub. L. No. 104-297, 110 Stat. 3559-621 (1996), it was again renamed to the "Magnuson-Stevens Fishery Conservation and Management Act" by the Department of Commerce and Related Agencies Appropriations Act, 1997, Pub L. No. 104-208, Title II § 211, 110 Stat. 3009, 3009x40. The Act was reauthorized and amended in 2007. Pub. L. No. 109-479, 120 Stat. 3575-665 (2007).

[11] A "fishery" is a stock of fish that can be treated as a unit for purposes of conservation and management, based on geographical, scientific, technical, recreational, and economic characteristics. 16 U.S.C. § 1802(13)(A). "Optimum yield" means the amount of fish which provides the greatest overall benefit to the Nation with respect to food production, recreation, and protection of marine ecosystems; is prescribed on the basis of the maximum sustainable yield from a given fishery, as reduced by relevant social, economic, or ecological factors; and in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield of that fishery. 16 U.S.C. § 1802(33).

[12] The Gulf of Mexico Fishery Management Council consists of the States of Texas, Louisiana, Mississippi, Alabama, and Florida, and has authority over the fisheries in the Gulf of Mexico seaward of such States. 16 U.S.C. § 1852(a)(1)(E).

Gulf FMP and its regulations have been made. Most relevant here, in 2009, Amendment 29 to the Gulf FMP established the Gulf of Mexico Individual Fishing Quota ("IFQ") program for groupers and tilefishes. 74 Fed. Reg. 44,732 (Aug. 31, 2009) (to be codified at 15 C.F.R. Part 902, 50 C.F.R. Part 622); *see* AE 15, 16. In 2010 and 2011, NOAA published several rules supplementing, modifying, and reorganizing the program, e.g., 75 Fed. Reg. 9,116 (Mar. 1, 2010); 76 Fed. Reg. 68,339 (Nov. 4, 2011). The November 4, 2011 Final Rule, admitted into evidence as Agency's Exhibit 17, contains the version of 50 C.F.R. § 622.20 that is applicable to this matter, and therefore will be the version of the rule cited throughout this decision.[13]

Under the Gulf of Mexico IFQ program, fixed IFQ "shares," or percentages of the annual commercial quota for the fishery, were proportionally allotted in late 2009 (for fishing in 2010) to a closed set of eligible participants in that commercial fishery based upon their applicable historical landings. Tr. 15, 21-22, 24-25; AE 17 (76 Fed. Reg. at 68,345). Each year the variable annual quota of allowable commercial catch of Gulf groupers and tilefish (in pounds gutted weight), as established by NOAA and the Gulf Council, is divided among the shareholders according to their shares, thereby establishing the annual "allocation" or total poundage of each type of fish each "IFQ shareholder is authorized to possess, land, or sell during a given fishing year."[14] AE 17 (76 Fed. Reg. at 68,345, 68,349); 16 U.S.C. § 1802(23); Tr. 21-30.

The IFQ program is designed to be administered online, and as such, each participant is required to have a Gulf "IFQ Online Account" in NOAA's electronic share tracking system, accessible via a computer and the Internet.[15] AE 17 (76 Fed. Reg. at 68,345-49); Tr. 44-45. Furthermore, the regulations mandate that a vessel "have sufficient IFQ allocation in the *IFQ vessel account*, at least equal to the pounds in gutted weight of grouper . . . to be landed, *from the*

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[13] Updates to Title 50 of the Code of Federal Regulations are published every year to reflect revisions made as of October 1st. *See* GPO's Federal Digital System for the C.F.R., located at http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR. The alleged violations here took place in May, June and July 2012, in between the 2011 and 2012 updates. Because the text of the regulatory provision that Respondents are charged with violating, 50 C.F.R. § 622.20, was revised after the October 2011 update (76 Fed. Reg. 68,339 (Nov. 4, 2011), 76 Fed. Reg. 82,044 (Dec. 29, 2011)), before the alleged violations, and was also revised after the alleged violations (77 Fed. Reg. 45,270 (Jul. 31, 2012)), before the October 2012 update, the regulatory text applicable to this action can be found in neither the 2011 nor 2012 printed C.F.R. volumes. Therefore, citation herein is made to the regulation as published in the Federal Register in November 2011 at 76 Fed. Reg. 68,339, 68,345-49, as partially (and not substantially, for our purposes) modified in December 2011 at 76 Fed. Reg. 82,044, 82,052.

[14] To "land" means "to arrive at a dock, berth, beach, seawall, or ramp." AE 17 (76 Fed. Reg. at 68,347) (to be codified at 50 C.F.R. § 622.20(b)(3)(i)).

[15] At the beginning of each year, NOAA deposits each shareholder's allocation into its online account, from which the shareholder may draw down allocation as it utilizes it through its vessels harvesting fish, or by selling/transferring its allocation to another authorized shareholder. AE 17 (76 Fed. Reg. at 68,347-49); Tr. 20-21, 44-45.

time of advance notice of landing through landing . . . ."[16] 76 Fed. Reg. at 68,346 (emphasis added).

The "advance notice of landing" requirement in the regulations is a "[m]easure[] to enhance IFQ program enforceability." AE 17 (76 Fed. Reg. at 68,347). Under it, the owner or operator of a vessel landing IFQ groupers is required to provide the National Marine Fisheries Service (NMFS) with at least a 3-hour, but no more than a 12-hour, advance notice of the time and location of intended landing, estimated pounds gutted weight of grouper for each share category (gag grouper, red grouper, etc.) to be landed, vessel identification number, and name and address of the IFQ dealer set to receive the grouper at landing. *Id.* This notice provides law enforcement officials with the necessary information and time to meet the vessel at the landing location for inspection. 79 Fed. Reg. 15,287, 15,288 (Mar. 19, 2014). The regulation mandating advance notice reiterates the requirement that a "vessel landing groupers or tilefishes must have sufficient IFQ allocation in the IFQ vessel account, and in the appropriate share category or categories, at least equal to the pounds in gutted weight of all groupers and tilefishes on board (except for any overage up to the 10 percent allowed on the last fishing trip) from the time of the advance notice of landing through landing." AE 17 (76 Fed. Reg. at 68,347) (to be codified at 50 C.F.R. § 622.20(b)(4)) ("[A] valid commercial permit for Gulf reef fish, an IFQ vessel account for Gulf groupers and tilefishes, and IFQ allocation for Gulf groupers or tilefishes are required to possess (at and after the time of the advance notice of landing), land or sell Gulf groupers or tilefishes subject to this IFQ program.").

Transfer of IFQ shares and allocations by and among eligible participants is permissible under the regulations. AE 17 (76 Fed. Reg. at 68,347-48). Further, parent and subsidiary corporations may aggregate their shares and allocations. AE 17 (76 Fed. Reg. at 68,348) (to be codified at 50 C.F.R. § 622.20(b)(6)) ("A corporation's total IFQ share (or allocation) is determined by adding the applicable IFQ shares (or allocation) held by the corporation and any other IFQ shares (or allocation) held by a corporation(s) owned by the original corporation prorated based on the level of ownership."). NOAA has established an online IFQ Web site (http://ifq.sero.nmfs.noaa.gov) to facilitate, track and document such transfers from one IFQ account to another. AE 17 (76 Fed. Reg. at 68,348).

Finally, Section 307 of the Act makes it "unlawful . . . for any person . . . to violate any provision of [Chapter 38. Fishery Conservation and Management] or any regulation or permit issued pursuant to this chapter." 16 U.S.C. § 1857(1)(A). The Act defines "person" to include individuals and corporations. 16 U.S.C. § 1802(36). At all times relevant hereto, Agency regulations established that "it is unlawful for any person to . . . [f]ail to comply with any provision related to . . . the IFQ program for Gulf groupers and tilefishes as specified in § 622.20." 50 C.F.R. § 622.7(gg) (2011) (now restated and codified as 50 C.F.R. § 622.13(ii)) (78 Fed. Reg. 22,950 (Apr. 17, 2013); 78 Fed. Reg. 57,534 at 57,536 (Sept. 19, 2013)). Violators of that provision may be subject to penalties up to $140,000 for each violation. 16 U.S.C. § 1858(a); 73 Fed. Reg. 75,321 (Dec. 11, 2008) (Commerce Department Final Rule adjusting for inflation of civil monetary penalties) (codified at 15 C.F.R. § 6.4(e)(14)).

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[16] The regulation provides a single exception to this requirement allowing for vessels to exceed their allocation by 10% on the last fishing trip of the year. AE 17 (76 Fed. Reg. at 68,346) (to be codified at 50 C.F.R. §§ 622.20(b)(1)(i), (ii)).

III. FACTUAL BACKGROUND

The A.P. Bell Fish Company, Inc. ("A.P. Bell") is a "good-sized" family business that has been engaged in acquiring and selling seafood in Cortez, Florida, for over 90 years. Tr. 27, 33, 38, 40; AE 5; AE 10; AE 13; AE 19. A.P. Bell owns and controls at least 12 subsidiary corporations, each one of which owns a single commercial fishing vessel. Tr. 37, 40-42; AE 4. One of those subsidiary corporations is Respondent Karen J. Belle, Inc., which owns the fishing vessel Karen J Belle (U.S. documentation number 674845). AE 18; AE 19; AE 20; JE 1, Stip. 5. Respondents' representative in this proceeding, Karen Bell, is a director and shareholder of the corporation bearing her name (albeit with a slight deviation in spelling), and actively manages the day to day business operations of the various family corporations. Tr. 12, 34, 37, 45-46; AE 19; AE 20.

At all times relevant hereto, the corporation Karen J. Belle, Inc., held a Federal Fisheries Permit for F/V Karen J. Belle to commercially fish in the Gulf of Mexico Reef Fish Fishery (permit number RR-505). AE 20; JE 1, Stip. 6. Further, it, and the 11 other subsidiary corporations/vessels, are all shareholders in the IFQ Gulf program and maintain online IFQ shareholder as well as vessel accounts in the system.[17] Tr. 37-40, 44-46; AE 4; AE 9; AE 14.

A. May 20, 2012 Advance Notification and Landing

On Monday, May 14, 2012, the fishing vessel Karen J. Belle operated by Respondent Laramie Williams, set sail on an extended commercial fishing trip pursuant to its Gulf of Mexico Reef Fish Fishery Permit. AE 7 at 2; JE 1, Stip. 5. At 7:21 a.m. on Friday, May 18, 2012, Ms. Bell sent an e-mail to Captain Williams on the ship, stating: "Do not load up on fish. Demand is very Low. IFQ's are low, price is low. Don't want to waste them." AE 6 at 1. At 1:13 p.m. on Friday, Capt. Williams or another on board the vessel responded to Ms. Bell, stating: "wish u woood [sic] have told me that befor[e] i got all this bait we have 4000 all ready [sic] will b[e] in [M]onday probley [sic]." AE 6 at 4. The following day, on Saturday May 19, 2012, at 3:01 p.m., Ms. Bell received another e-mail advising her that "we will b[e] home late [S]unday night [with] close to 6000 [lbs] red and 50 [lbs] black [grouper]." AE 6 at 5. At 6:20 p.m. Eastern Daylight Time) (EDT) (22:20 Universal Time, Coordinated (UTC)) on Sunday, May 20, 2012, Captain Williams issued via e-mail through the Vessel Monitoring System ("VMS") the 3-hour advance notification of landing to NMFS. AE 1; AE 3; AE 7 at 2-3; AE 14 at 2. The notice advised that the vessel would be landing at approximately 8:00 p.m., at the A.P. Bell Fish House in Cortez, Florida, with an estimated 5,800 pounds of red grouper and 50 pounds of gag grouper. AE 1, 3; AE 14 at 2.[18] At the time the advance notification of landing was given, both the IFQ

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[17] In support of its case, NOAA offered into evidence a series of computer generated Allocation Ledgers and Allocation Ledger IFQ Activity reports for shareholder Karen J. Belle, Inc., from what appears to be NMFS' online IFQ system. AE 4, 9, 14.

[18] Exhibit 14 contains the 2012 Red Grouper and Gag Grouper Allocation Ledger IFQ Activity reports for Karen J Belle, Inc. The first column of each report appears to identify the time the vessel notified NMFS it anticipated landing in local time, and not the time the advance notice of landing was given. *Compare* AE 1 with AE 14 at 1.

accounts for the fishing vessel Karen J. Belle, and the shareholder Karen J Belle, Inc., had a zero (0) balance in their allocations for red grouper and gag grouper. Tr. 12; AE 4, 9 (same); AE 14 at 2, 6. The account balances were still zero when the vessel actually landed at the A.P. Bell fish docks at 9:57 p.m., with 6,053 pounds of red grouper and 72 pounds of gag grouper.[19] AE 2 at 1.

At 6:51 p.m. on Sunday, May 20, 2012, before the vessel landed, Officer Eric Sierra of the Florida Fish and Wildlife Conservation Commission notified NOAA Special Agent Paige Casey that the F/V Karen J Belle had landed with insufficient allocation in its IFQ account for the fish it had on board. AE 1; AE 2 at 1-2; AE 3; Tr. 11-12. Upon landing at "about 10:00," Officer Sierra made contact with Captain Williams who advised the officer that he had been "told to cut their trip short due to lack of allocation" and that he anticipated they would offload the fish the following day. AE 1; AE 7 at 1-3; *see* AE 6.

The next day, May 21st, NOAA Special Agents Paige Casey and Emanuel Antonaras met with Ms. Bell to discuss the missing IFQ allocations in the vessel's accounts both at the time of advance notification and landing. Tr. 12; AE 2 at 2. Ms. Bell advised the agents that she had intended to transfer the allocations into the vessel's account from another account before the vessel landed, but had forgotten, and as a result did not move the allocations into the vessel accounts until Sunday, May 20th, at 10:30 p.m., a short while after the vessel landed. Tr. 13; AE 2 at 2-3; AE 4 at 4; AE 14 at 2. Agent Casey interviewed Respondent Williams on Tuesday, May 22nd. AE 2 at 4-5; AE 7. Mr. Williams advised her that he had notified Ms. Bell of his expected return time on Sunday and the weight of his catch prior to giving NOAA the advance notification of landing. AE 2 at 5; AE 7.

NMFS IFQ Allocation Ledgers admitted into evidence confirm that on Sunday, May 20, 2012, at 10:39 p.m., transfers of 5,800 pounds of red grouper allocation and 50 pounds of gag grouper allocation were made from the account of "Jessie Belle Inc" into the account of "Karen J Belle." AE 2 at 5; AE 4 at 1, 4; AE 14 at 2, 6. Prior thereto, the account for Karen J Belle had a zero balance, and appears to have had a zero balance since May 2, 2012. *Id.* Further transfers of allocation were made on May 22, 2012, at 3:39 p.m., consisting of 278 pounds of red grouper and 22 pounds of gag grouper, from the Jesse Belle Inc account to the Karen J. Belle account. AE 4 at 2, 4; AE 14 at 2, 6.

B. June 21, 2012 Advance Notification

Pursuant to the vessel's Gulf of Mexico Reef Fish Fishery Permit, Respondent Laramie Williams operated the fishing vessel Karen J Belle on a similar subsequent fishing trip that ended on June 21, 2012. JE 1, Stip. 5-7; AE 2 at 5. Using the ship's on-board VMS, at 4:24 p.m. EDT that day (20:24 UTC), Captain Williams submitted to NMFS a 3-hour advance notification of landing, indicating his intent to land at 7:30 p.m. on June 21, 2012, at A.P. Bell Fish Company, Inc., with 700 pounds of red grouper.[20] AE 8 at 1; AE 14 at 2. At the time the advance notice was given, there was no (zero) allocation of red grouper shares in the vessel's online IFQ

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[19] The total value of the vessel's entire catch was approximately $17,500. AE 5 at 1, 3.

[20] Records indicate that the vessel issued a duplicate advance notification a few minutes later. AE 8 at 2; AE 14 at 2.

account. AE 2 at 5; AE 8; AE 14 at 2; Tr. 14. NMFS Allocation Ledgers for Karen Belle Inc. indicate that approximately two hours after the notice was given, at 6:29 p.m. on June 21, 2012, an online transfer of 700 pounds of red grouper allocation was made from the red grouper shareholder account of "Jessie Belle Inc" to the red grouper vessel account of the Karen J Belle.[21] AE 9 at 2; AE 14 at 2.

C. July 15, 2012 Advance Notification

Pursuant to the Vessel's Gulf of Mexico Reef Fish Fishery Permit, Respondent Laramie Williams operated the Karen J Belle on a third similar fishing trip which ended on July 15, 2012. JE 1, Stips. 5-7; AE 2 at 5. Using the ship's VMS, at 6:52 EDT (22:52 UTC) that day, Captain Williams gave NMFS advance notification of his intent to land the vessel at A.P. Bell Fish Company Inc. at 9:00 p.m. on July 15, 2012 with 3,500 pounds of red grouper on board.[22] AE 11. At the time the notice was given, 6:52 p.m. EDT, there was insufficient allocation of red grouper shares in the vessel's account. AE 2 at 5; AE 11; Tr. 14.

The IFQ Red Grouper Share Allocation Ledgers for Karen J Belle, Inc. indicate that, approximately four hours after the notification was given, at 11:19 p.m. EDT on July 15, 2012, a transfer of 3,500 pounds of red grouper allocation was made from the shareholder account of Lisa M Belle Inc to the vessel account of Karen J Belle. AE 12 at 2; AE 14 at 3. Two days later on July 17, 2012, at 8:30 p.m., a further transfer of 561 pounds of red grouper allocation was made to the vessel account of Karen J Belle from the shareholder account of Jessie Belle Inc. *Id.*

IV. DISCUSSION OF LIABILITY

A. Burden of Proof

To prevail on its claims that Respondents violated the Act and the Gulf IFQ regulations, the Agency must prove the violation by the preponderance of the evidence. *Vo*, 2001 NOAA LEXIS 11, at *16-17 (NOAA 2001) (citing 5 U.S.C. § 556(d); *Dept. of Labor v. Greenwich Colleries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100–03 (1981)). "Preponderance of the evidence means the Agency must show it is more likely than not a respondent committed the charged violation." *Nguyen*, 2012 NOAA LEXIS 2, at *10 (NOAA 2012) (citing *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 (1983)). A sanction may not be imposed "except on

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[21] An invoice on the letterhead of A.P. Bell indicates that the company actually received 741 pounds of red grouper from the vessel Karen J Belle when unloaded on June 22, 2012. AE 10 at 1. The total value of the grouper catch was $2,223. *Id.* at 1, 2.

[22] An invoice from the A.P. Bell Fish Company pertaining to this landing indicates that a total of 4,061 pounds of red grouper, with a value of $12,306.70, were unloaded from the fishing vessel Karen Belle on July 16, 2012. AE 13 at 1. A report from NOAA's IFQ online system also in the record reflects a landing date for this trip of July 17th, and a catch value of $12,223.61. *Id.* at 2. The IFQ Red Grouper Share Allocation Ledgers reflect that the landing or unloading took place on the 17th. AE 12 at 2; AE 14 at 3. There are no explanations in the record regarding these discrepancies.

consideration of the whole record . . . and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also* 15 C.F.R. § 904.251 ("All evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing."); 15 C.F.R. § 904.270 (stating that the exclusive record of decision consists of the official transcript of testimony; exhibits admitted into evidence; briefs; pleadings; documents filed in the proceeding; and descriptions or copies of matters, facts, or documents officially noticed in the proceeding). Direct and circumstantial evidence may establish the facts constituting a violation of law. *Vo*, 2001 NOAA LEXIS 11, at *17.

B. Elements of Violation

To establish liability for the violation of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A), and 50 C.F.R. § 622.7(gg) (2011), for failing to comply with 50 C.F.R. § 622.20(b)(1)(i) and § 622.20(b)(3)(i) (as these sections appear in 76 Fed. Reg. 68,339 (Nov. 4, 2011)), as alleged in the NOVA as amended, NOAA must prove that: Respondents are "persons" and owners or operators of a vessel that has a Gulf grouper IFQ vessel account, who failed to have sufficient allocation for grouper in the vessel's IFQ account at the time the vessel gave its 3-hour advance notice of landing. 16 U.S.C. § 1857(1)(A), 50 C.F.R. §§ 622.7(gg) (2011), 622.20(b)(1)(i) (Nov. 4, 2011), 622.20(b)(3)(i) (Nov. 4, 2011); JE 1, Stips. 4-8.

C. Discussion and Conclusions

Respondents Karen J. Belle, Inc. and Laramie Williams have stipulated that they are "persons" within the meaning of the Act and were the owner and operator, respectively, of the fishing vessel Karen J Belle for the duration of the fishing trips surrounding May 20, 2012, June 21, 2012, and July 15, 2012, the dates of the alleged incidents supporting the violation. JE 1, Stips. 4-7. Further, the parties' Joint Stipulations state that "Respondent Karen J. Belle, Inc. admits that on or about May 20, 2012, June 21, 2012 and July 15, 2012, the vessel account for the F/V KAREN J BELLE had zero pounds of allocation at the time of each advance notice of landing through offloading, and it was only after the fish were weighed on those dates that allocation in an amount sufficient to cover the pounds landed was transferred to the vessel's account." JE 1, Stip. 8. Consistent therewith, at hearing, Respondents did not dispute the fact that on the dates at issue, the fishing vessel's IFQ accounts did not have the requisite grouper allocations in them at the time the advance notices of landing were given for the three trips. Tr. 33-52.

The Act imposes strict liability for these violations. *Northern Wind, Inc. v. Daley,* 200 F.3d 13, 19 (1st Cir. 1999) (quoting *Whitney,* 6 O.R.W. 479, 483 (NOAA 1991); *Alba,* 2 O.R.W. 670, 673 (NOAA App. 1982) ("Scienter is not an element of a civil offense under [the Act]. 16 U.S.C. § 1857. Because conservation-related offenses under the MFCMA are strict liability offenses, Respondent's protests as to his state of mind are irrelevant . . . .")); *Roche v. Evans,* 249 F. Supp. 2d 47, 59 (D. Mass. 2003).

NOAA asserts in the NOVA that Respondents Laramie J. Williams and Karen J. Belle, Inc., are jointly and severally liable for the violations alleged therein. However, at hearing, NOAA failed to show how Captain Williams' acts or omissions contributed at all to an insufficient amount of allocation in the vessel's IFQ accounts at the time of landing on the dates

in question, and Ms. Bell's testimony actually exculpated Respondent Williams.[23] In an effort to be more efficient, Ms. Bell explained, she consolidated all the yearly IFQ allocations of her family's business into one account – that for Jessie Belle Inc. – which she used essentially as a holding account and from which she distributed allocations to the IFQ accounts of the vessels as needed over the course of the year. Tr. 39-40, 46; AE 4; AE 14. Ms. Bell explained that she had sole access to and control over the system for transferring share allocations from one IFQ account to another, and described in detail how and why she did it this way. Tr. 13 (Ms. Bell told Agent Casey that "she had meant to put [the allocation] in the previous Friday, but didn't. And that it was in [ ] another one of the shareholder's account [sic] so she didn't see the difference."); Tr. 34 ("when you're managing 12 boats . . . it didn't make a difference, from my perspective to have it in the one holding account and then rather than move it in and out of all these boats constantly, it made more sense for me, as far as taking care of that operation, to move it as the fish – as I knew what was being landed. I would move that into that particular vessel account. [ ] I was trying to be efficient."); Tr. 39 ("what I was doing, for my simplicity, is putting them all – consolidating them and then I would distribute them based on [n]eed, because all the boats aren't always running. [ ] THE COURT: And do you put them into one like holding account? MS. BELL: That's how I was doing it."); Tr. 44 ("If that's all I'm doing, it only takes maybe five minutes."); Tr. 46 ("to me, it made more sense to just keep them all together and move it as they used it. And then I had it all in one place where I could look see, okay, this is what we have left."); Tr. 46-47 ("I literally have to lock everyone out of the office when I go to mess with this. . . . it's just a little time consuming to move things around when I have a billion other things that go on at work."); *see also* AE 2 at 3 (on May 21, 2012, Ms. Bell told Agent Casey that "she put allocation in the vessel account last night around 10:30 [pm].").

The record also shows that Mr. Williams was deliberately exempted from responsibility for ensuring sufficient allocation was in the appropriate vessel or shareholder account before he went to fish. AE 7 at 2 (Mr. Williams told Agent Casey that "he has never been told a limit to catch before leaving, it is usually unlimited/whatever they can catch"); Tr. 47 ("THE COURT: I mean, do they know before they go out, how much they can catch? MS. BELL: That's what I'm trying to do now.").

Moreover, the record suggests that Mr. Williams routinely did what he could to comply with the allocation program, by notifying Ms. Bell of the catch prior to the time he gave NMFS the advance notice of his intended landing, as he was instructed to do. AE 2 at 3 (in late 2011, "BELL stated that captains are supposed to e-mail her before making their advance notice of landing so allocation can be moved into the vessel account."); AE 2 at 6 (on the June 2012 trip, "he called Karen [Bell] when he was in cell phone range to make sure that he has enough allocation."); AE 6 at 4-5 (e-mail sent to Karen Bell on May 19, 2012 at 3:01 p.m., notifying her of Captain Williams' intent to land the vessel the next evening with "close to 6000 red and 50 black"); AE 7 at 2 ("He normally sends an e-mail before he heads in [with amount of catch];

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[23] It is also noted that the particular regulation at issue does not explicitly assign the duty to comply with the allocation sufficiency to the owner and/or the operator of the vessel (although 50 C.F.R. § 622.7(gg) does generally say "person(s)" are liable for all program noncompliance). Instead, the rule states that the "*vessel* landing groupers . . . must have sufficient IFQ allocation in the IFQ vessel account . . . from the time of the advance notice of landing through landing." AE 17 (76 Fed. Reg. at 68,347) (to be codified at 50 C.F.R. § 622.20(b)(4)) (emphasis added).

sometimes he hears back, sometimes he doesn't"); AE 3; AE 8; AE 11; RE 1 at 1 (Ms. Bell states: "Initially we requested that the boats email in their estimated catch and we would deposit allocation into their account." It wasn't until later that the company required "the captains to pay attention to their balances."). Under these circumstances, holding Respondent Williams liable for the vessel's violation seems inappropriate and unjust.

Therefore, this Tribunal finds, by a preponderance of the evidence, that Respondent Karen J. Belle, Inc., violated the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A), and 50 C.F.R. § 622.7(gg), by failing to have sufficient grouper allocation in its online IFQ shareholder and vessel accounts at the time the F/V Karen J Belle provided advance notification of landing as required by 50 C.F.R. §§ 622.20(b)(1)(i) and (b)(3)(i), on the three dates in question. Respondent Laramie Williams is hereby held not liable for the violation alleged.[24]

V. CIVIL PENALTY ASSESSMENT

As indicated above, the Act provides, in pertinent part, that "[a]ny person who is found . . . to have committed an act prohibited by section 1857 of this title shall be liable to the United States for a civil penalty." 16 U.S.C. § 1858(a). The maximum civil penalty authorized by the statute $140,000 per violation. *Id.*; 15 C.F.R. § 6.4(e)(14) (2011) (providing for inflation adjustment). Further, the Act provides that in determining the amount of the penalty, the following factors "shall" be taken into account:

> the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require. In assessing such penalty the Secretary may also consider any information provided by the violator relating to the ability of the violator to pay, *Provided,* That the information is served on the Secretary at least 30 days prior to an administrative hearing.[25]

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[24] I note that while the record indicates Mr. Williams may have failed to consistently provide the advance notice of landing to NMFS on the fishing trips at issue, he was not charged here with a violation of that provision. The NOVA asserts only that Respondents "did fail to comply with any provision related to the Gulf IFQ grouper and tilefish program (i.e., have sufficient allocation in the IFQ vessel account . . . .").

[25] In her answer letter dated July 3, 2013, Ms. Bell indicated her intention to file separate financial statements for the each vessel and captain involved in the three related enforcement matters, alleging that Respondents "lack the ability to pay the assessed civil penalties." However, no evidence in support of an inability to pay claim was submitted by any Respondent before or at the hearing, and the parties stipulated that Respondent Karen J. Belle, Inc., did not submit all the financial information that the Agency requested. JE 1, Stip. 15. Therefore, all Respondents are "presumed to have the ability to pay the civil penalty." Respondent Karen J. Belle, Inc., is therefore "presumed to have the ability to pay the civil penalty." 15 C.F.R. § 904.108(c).

16 U.S.C. § 1858(a); *see also* 15 C.F.R. § 904.108(a).

The Agency has proposed a civil penalty in this action of $4,000. There is no presumption that the Agency's proposed penalty is appropriate, nor that the Agency's penalty analysis is accurate. *Nguyen*, 2012 NOAA LEXIS 2, at *21 (NOAA 2012); *see also* 15 C.F.R. § 904.204(m). An Administrative Law Judge is not required "to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document." *Nguyen*, 2012 NOAA LEXIS 2, at *21; Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631 (June 23, 2010) (to be codified at 15 C.F.R. § 904.204(m)).

NOAA utilized a penalty policy in determining its proposed penalty, entitled Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions (Mar. 16, 2011) ("Penalty Policy" and "PP").[26] A's PPIP at 10; A's Brief at 11 ("NOAA's Penalty Policy incorporates the relevant statutory provisions in determining the penalty assessed, and improves consistency at a national level, provides greater predictability for the regulated community and the public, and promotes transparency in enforcement."). The Penalty Policy categorizes "[f]ailing to comply in a timely fashion with log report, reporting, record retention, inspection, or other requirements, including failure to submit affidavits or other required forms in a quota fishery" as a Level I or Level II in "offense level," depending on whether the adverse impact to the regulatory program is significant and whether there is economic gain from the violation. PP at 35 n.20. In its PPIP, NOAA explained that it "was guided by the Agency's Penalty Policy to assess the penalty at the lowest offense level." A's PPIP at 6 (NOAA did not assert a specific category of violation from the Penalty Policy, however). Further, NOAA argued that "the warning given to Respondents for the identical violation prior to the repeated violations in the instant matter warrants increasing the culpability level from negligent to reckless." A's PPIP at 6-7; PP at 25. In its Brief, the Agency "suggests a monetary penalty is necessary to deter future misconduct." A's Brief at 10. In the Penalty Policy, the range of penalties suggested for Level I offenses when the respondent is "reckless" is $2,000 - $6,000. PP at 25.

Respondents indicate, by their submission of Respondents' Exhibit 5, a document entitled, "Southeast Region Fix-It Notice Violations," that the violation at issue here, if proven, is in the "Fail to submit information" category of violations, and therefore warrants a remedy of "Send[ing] in the information" within 30 days. RE 5 at 1-3. Respondents also submitted to the record Exhibit 6, a document described as an excerpt from the Penalty Policy (although it appears to be from a Southeast Region-specific document, not the Penalty Policy) entitled, "Southeast Region Magnuson-Stevens Act Penalty Schedule." RE 6. It's not clear what ranges of penalties included therein Respondents are arguing their type of IFQ violation falls within.

At hearing, Special Agent Casey testified credibly to the nature, circumstances, extent and gravity of the acts prohibited by the Gulf grouper IFQ regulations. Agent Casey has approximately seven years of experience working for NOAA in the State of Florida investigating violations of the Act and other related statutes. Tr. 10-11. As background, she testified that the IFQ Gulf grouper program began in January of 2010, and is "virtually the same" as the Gulf red snapper program that began three years before, in January of 2007. Tr. 15. When the IFQ Gulf

[26] The Penalty Policy is available to the public at: http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf.

grouper program began, the regulations were published in the Federal Register, there were "several rounds of public workshops," and NOAA issued fishery bulletins about the program to all permitted dealers and vessel owners. Tr. 17-18. The program, Agent Casey advised, was prompted by derby-style fishing, poor market conditions, and a need to preserve the species for long-term sustainability.[27] Tr. 15. At the time the IFQ went into effect, Gulf grouper had been harvested at too high a rate for sustainability, and as a result of this overfishing, the stocks had become depleted. Tr. 24, 31. Thus, the commercial fishing industry was anxious to ensure that the IFQ program was being enforced, and that law enforcement would be able to track all the fish that were caught through an accountable system. Tr. 15-16. To this end, a number of measures were put in place, including generally requiring that everyone participating in the program have a federal permit with an IFQ fishing or dealer endorsement as well as a vessel monitoring system. Tr. 16. In addition, the program requires vessels notify NOAA before they go out regarding where they intend to fish, what species they will be targeting, and what gear they will be using. *Id.* Then, before the vessels return to shore, they are required to provide advance notice to NOAA regarding when and where they are going to land, to whom they are going to sell their fish, and the approximate weight of the fish on-board. *Id.* Further, vessels are only permitted to off-load, that is remove the IFQ species fish from the boat, between 6:00 a.m. and 6:00 p.m. local time. Tr. 16-17.

Additionally, to prevent the catch limits from being violated, the IFQ program requirement at issue here provides that a vessel have "sufficient allocation" in its vessel account at the time of the advance notice. Tr. 16-17. Agent Casey explained that the aggregate total catch limit for the fishery is established yearly based upon biological data indicating the level of harvesting that can occur while avoiding overfishing. Tr. 22-23. Without a strictly enforced catch limit, she opined, Gulf grouper would be depleted, effectively ending commercial fishing for them, which has occurred with other species. Tr. 24. The requirement to have the allocation in the vessel account at the time of notice through landing, assures that a vessel does not go out and fish twice for the same allocation of fish, which helps ensure that the overall catch limit is not exceeded, Agent Casey claimed.[28] Tr. 28-29.

In terms of culpability, Respondent's history of prior violations, and such other matters as justice may require, Agent Casey testified at hearing that on November 7, 2011, approximately six months prior to the earliest date of violation at issue here, she had discussed with Ms. Bell the Agency's requirement to have sufficient allocation in the proper shareholder or vessel account at the time of advance notification in connection with a fishing trip taken by another of her company's vessels, the Savannah Belle. Tr. 13, 19-20; AE 2 at 3. At that time, however, she

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[27] "Derby style" fishing or harvesting, also termed "the race for fish," "consists of a short duration of increased effort where harvest is maximized prior to reaching" an annual catch limit. 77 Fed. Reg. 16,991, 16,992 (Mar. 23, 2012). The vessels "would go out pretty much in whatever weather conditions they had to go out in to catch those fish as quickly as they could so they could meet that limit . . . before NOAA shut down the fishery and said, we've reached out limit. No more fishing." Tr. 27-28.

[28] Further, each shareholder may operate several vessels, each with its own account, and the shareholder may maintain control over these vessel accounts as well. Tr. 28-29. It is up to the shareholder to divide its allocated pounds of catch among its vessel accounts. Tr. 21.

gave Ms. Bell and the vessel operator only a verbal warning. *Id.* Agent Casey described both Ms. Bell and Mr. Williams as polite and cooperative when she spoke to them about compliance issues. Tr. 30-31; AE 2 at 6.

In the Agency's Post-Hearing Brief, NOAA offers as additional evidence in support of the gravity of the violation and proposed penalty the fact that in regard to the May 20, 2012 incident, Capt. Williams gave Respondent Karen J. Belle, Inc., notice "well in advance" of landing of his estimated catch. AE 6; A's Brief at 4-5. Specifically, on May 18, 2012, he e-mailed Ms. Belle notifying her that the vessel had already caught 4,000 pounds of fish and put her on notice of the need to transfer that much allocation to be in compliance with the law. *Id.* Nevertheless, NOAA notes, Ms. Bell failed to make such a transfer of allocation until after the vessel landed on May 20, 2012. A's Brief at 4-5. The Agency further asserts that the two subsequent incidents are similar. *Id.* at 6-7. It also suggests the fact that Ms. Bell was well aware of the legal IFQ requirements as she was part of the Gulf Council during the time the IFQ program was amended, and "was quite concerned that the quota not be exceeded." *Id.* at 7 (citing Tr. 33, 36-37).

In defense of Respondent Karen J. Belle, Inc., Ms. Bell characterized this case as "frustrating" and the proposed penalty as "excessive," raising an array of points in support of these claims. Tr. 35, 48.

First, Ms. Bell asserted that the violation was unintentional and an oversight, stating "[w]e're not out to break any laws. . . . I was trying to be efficient." Tr. 34. As background, she explained that it was a family tradition to "sell[] nothing," including its permits and boats. Tr. 38. As a result, she is burdened with managing 12 boats and their related corporations, each of which has its own IFQ shareholder or IFQ vessel account. Tr. 39. Thus, for the sake of "simplicity," Ms. Bell stated, it has been her practice to initially consolidate all the government-issued shares, and concomitant yearly catch allocation for her family's shareholders, into one shareholder account, that for Jessie Belle, Inc., and then as each fishing trip over the year occurs, she transfers the necessary allocation into the particular vessel's IFQ account to cover the fish harvested. Tr. 38-40, 46. The process of allocation transfer through the IFQ system is multi-stepped, and each participant has its own password, she explained. Tr. 44-45. Ms. Bell opined "if that's all I'm doing [one transfer of allocation], it only takes maybe five minutes," but with "all the different boats . . . I literally have to lock everyone out of the office when I go to mess with this," and "[i]t's a little time consuming to move things around when I have a billion other things that goes [sic] on at work." Tr. 44-47. Ms. Bell explained that she chose this operating method, rather than putting a certain amount of allocation in each vessel's account at the beginning of year, "because we didn't have enough to sustain all of our boats; therefore if I put 40 there, then I might not have 20 over here," "all the boats aren't always running," and "[o]ne may not have a captain or different captains have different abilities," "[s]o some boats need more than others." Tr. 39-40, 46; RE 1 at 1. Further, although admitting that the events constituting the violation occurred two years after the IFQ program began, Ms. Bell argued that at that point the company was still "learning ways to make it more efficient." Tr. 34-35, 39.

Second, Ms. Bell stated, the company never exceeded its yearly allocation limit and thus the violation caused no "overharvesting" nor "harm to the resource." Tr. 34, 50. As such, she

decried that "it doesn't make sense to me," that the company is being "fined for something that's truly just a means to make enforcement easier," rather than a violation with a substantive impact on the fishery. Tr. 48.

Third, while acknowledging that during the first year or two of the program, enforcement officers were "there all the time," and that Agent Casey spoke with her on numerous occasions in general, Ms. Bell could not recall the specific occasion of prior violation in November mentioned by Agent Casey, nor did she recall being told by Agent Casey that further incidents could be referred to NOAA law enforcement. Tr. 35, 49. Further, Ms. Bell explained that "[p]art of my concern with this particular case, too, is that the violation was issued 353 days after the actual incident, which, to me, doesn't seem like a very reasonable time." Tr. 34-35. "I just think that seems like an awfully long time, to me, to notify somebody that's something's wrong." Tr. 49. Ms. Bell suggested that if the notice of violation was issued earlier "we could have remedied it earlier, if I realized it was such a serious issue."[29] Tr. 49. However, when asked for further elucidation on this point by the undersigned, Ms. Bell acknowledged that "in this particular case [the delay] probably doesn't make that much difference . . . ." *Id.*

Fourth, Ms. Bell asserted her belief that at the time of the hearing, NOAA was reviewing the IFQ regulations, looking for ways to make compliance "less cumbersome and improve the system." Tr. 50. In support, she offered documentation showing that in March 2014, NMFS sought comment on proposed rule changes to provide additional flexibility, including, among other things, that the time window for advance notices of landing would be expanded, and that allocations could be held in either the vessel's account or the vessel's linked shareholder account at the time the landing notification is submitted.[30] RE 10 at 1-2; RE 11; 79 Fed. Reg. 15,287 (Mar. 19, 2014).

In conclusion, Ms. Bell proclaimed, "I'm very proud of what our boats do and what our company does," and suggested that a warning letter or some form of mitigated sanction would be more appropriate than the penalty sought. Tr. 36, 48.

Upon consideration of all the foregoing, it is noted as follows:

First, the evidence admitted into the record indicates that the violation was not quite a singular unintentional oversight during a hectic work day (or even, days), as was at times suggested by Respondents. Ms. Bell acknowledged at hearing that she had access to her vessels' VMS tracking systems through the Lockpoint program, which allows her to monitor each vessel's location as reported hourly and have e-mail exchanges with the captains and crew. Tr. 42-43. As such, she had the ability to easily access contemporaneous information regarding the vessel's catch and activities, including when the vessel was heading into port. Further, Capt.

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[29] In support of this argument, Respondents offered into evidence a list of cases initiated by NOAA reflecting months rather than years between the date of violation and the date the NOVA was issued. RE 8-9.

[30] The proposed rule would still require that sufficient allocation be transferred into the vessel account before the dealer would be permitted to complete the landing transaction. RE 10 at 1.

Williams asserted, and the record supports, that he routinely notified her of the catch so that she could place sufficient allocation in the vessel's account. AE 6; AE 7 at 2. As to the May 2012 incident, at 3:01 p.m. on Saturday, May 19, 2012, Mr. Williams e-mailed Ms. Bell advising her that the vessel would be "home late sunday night [with] close to 6000 [lbs] red and 50 black [grouper]." AE 6 at 5. Capt. Williams did not provide NMFS with the three hour notice of landing until 6:20 p.m. the next night, May 20, 2012. AE 2 at 2. As such, Ms. Bell had over *27 hours* to expend the requisite five or ten minutes to transfer sufficient allocation to cover the catch before the three hour notification was given, and was sufficiently on notice of its pending arrival. Nevertheless, she did not make the transfer prior to the notice, and in fact, did not make the transfer until at 10:39 p.m. on May 20, 2012, almost an hour after the vessel landed. *Id.*

Second, regardless of whether Ms. Bell received notice in November 2011 before the May 2012 violation occurred and what was said, if anything, in regard thereto, the record clearly indicates that Agent Casey spoke to Ms. Bell *after* the May 2012 incident regarding the need for the allocation to be in the vessel's account at the time the advance notice was given. AE 2 at 3. Nevertheless, in a relatively short period of time, two other similar incidents occurred in the following months.[31] This demonstrates that, at the very best, Ms. Bell was on notice of the fact that her "efficient" method of maintaining and transferring allocation was not technically sufficient to assure compliance with IFQ requirements, yet continued the practice. At worst, it suggests a conscious indifference to compliance. The latter conclusion is specifically buttressed by Ms. Bell's admission at the hearing that "[j]ust this past Sunday" before the hearing, another incident occurred where allocation was not in the appropriate account when one of the company's vessels "came in," and "it was my fault." Tr. 47. The record supports, therefore, the Agency's assignment of "reckless" culpability as opposed to mere "negligence." PP at 25.

Third, while there is no evidence that Respondent Karen J. Belle, Inc., ever exceeded its allocation for the year 2012, it certainly utilized it to its full extent, indicating that if there were any unintentionally missed transfers of allocation, or similar oversights by Ms. Bell when using the system for managing balances between the multiple company accounts, they may have gone over their maximum allocations before the end of the year without careful accounting. Ms. Bell testified that they ran out of catch allocation in November 2012 and "had to tie the boats up" at that point. Tr. 40. Further, even though no fish were forfeited or seized from the company or vessel for this violation, the total value of fish caught and landed when the requisite allocation was not in the vessel's IFQ account at the time the notice was given, was in excess of $32,000, representing not an insubstantial value to the company. AE 5; AE 10; AE 13; 16 U.S.C. § 1860(a). Additionally, Agent Casey's testimony as to the importance of shareholders' compliance with the IFQ allocation monitoring system, and the importance generally of the quota system to the Gulf grouper fishery and industry in that region, support the Agency's analysis in terms of the nature, circumstances, and extent of the prohibited acts committed.

On the other hand, it appears from the NMFS' proposed rule changes that the Agency has recognized that requiring transfer of sufficient allocation from the shareholder account into the vessel account before the three hour advance notice of landing is given may not be necessary for the "enforcement, administration, and monitoring of the program." RE 10 at 1. This, together

[31] It should be noted that there is no evidence that the corporate Respondent has any prior history of similar violations for which penalties were imposed, however. RE 1 at 2; AE 2.

with the lack of damage to the fishery or any fishing in excess of allocation, suggests that while Respondent is liable for a technical violation, the gravity thereof was nominal. RE 1; PP at 25.

Upon consideration of the foregoing, the penalty factors in the Act and the Rules, it is hereby determined that it is appropriate to impose upon Respondent Karen J. Belle, Inc., a civil penalty in the amount of $3,000, for failing to have sufficient grouper IFQ allocation in the appropriate account at the time of the fishing vessel Karen J Belle's advance notices of landing on the dates in question.[32]

[32] NOAA has charged Respondents with one violation, even though the charging documents assert, and the evidence proffered shows, that there was insufficient allocation in the appropriate vessel IFQ account on three different dates.

ORDER

A civil penalty in the amount of **$3,000,** is appropriate and assessed upon Respondent Karen J. Belle, Inc.

Once this Initial Decision becomes final under the provisions of 15 C.F.R. § 904.271(d), you will be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein. The Rules concerning the finality of this Initial Decision and how to challenge this Initial Decision can be found at 15 C.F.R. §§ 904.271-273, a copy of which is pasted below.

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

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

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

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

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency[33]

Dated: March 23, 2015
Washington, DC

[33] As stated above, the Administrative Law Judges of the U.S. EPA are authorized to hear cases pending before the Agency pursuant to an agreement effective September 8, 2011.

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.