UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	)	**DOCKET NUMBER**
Craig Bolton and Pacific Dawn LLC,	)	**AK1200300, F/V Pacific Challenger**
Respondents.	)	

ORDER ON AGENCY'S PETITION FOR RECONSIDERATION

I. BACKGROUND

The hearing in this matter was held on November 19, 2013, in Seattle, Washington.[1] The Agency did not call any witnesses to testify. Respondents offered the testimony of two witnesses: Burton Charles Parker, Sr., and Christopher Daniel Peterson, Sr. Also admitted into the record were forty-two joint exhibits, one Court exhibit consisting of the parties' Joint Stipulations of Facts and Agreement on Admission of Evidence, and one exhibit offered by Respondents.

The Initial Decision was issued on February 9, 2015. Therein, the undersigned found that Respondents had violated the Magnuson-Stevens Fisheries Conservation and Management Act, 16 U.S.C. § 1857(1)(A), and the regulations at 50 C.F.R. §§ 679.4(k)(1)(i) and 679.7(i)(6), and imposed a civil penalty in the amount of $223,905, jointly and severally.

On March 2, 2015, NOAA filed a Petition for Reconsideration ("Petition" and "Pet.") arguing that the undersigned improperly calculated the civil penalty imposed. The Agency requests that the undersigned apply an ex-vessel value instead of a net-proceeds value of the fish harvested in order to calculate Respondents' economic benefit of noncompliance.

On March 16, 2015, Respondents filed an Answer in Opposition to Agency's Petition for Reconsideration ("Opposition" and "Opp."), arguing that there are no issues of law or policy that justify reconsideration.

For the reasons stated below, the Petition is **DENIED**.

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

II. ARGUMENTS OF THE PARTIES

A. Agency's Petition for Reconsideration

1. Ex-Vessel Valuation is Well-Settled in NOAA Administrative Decisions

The Agency argues that the undersigned's penalty calculation in an Initial Decision issued in November 2014 applied an "ex-vessel value" to calculate the economic benefit component, and that that analysis was "both correct and consistent with a line of NOAA administrative decisions stretching back 35 years."[2] Pet. 3; *Freitas, et al.*, 2014 NOAA LEXIS 9, at 101 (Nov. 25, 2014) ("*Pacific Ranger*"); also citing *Freitas, et al.*, 2013 NOAA LEXIS 4 (Aug. 23, 2013), *Dzung Ngoc Nguyen, et al.*, 1997 NOAA LEXIS 13 (Dec. 3, 1997); *Chincoteague Seafood, Co.*, 1986 NOAA LEXIS 44 (May 14, 1986); *Moceri*, 1980 NOAA LEXIS 20 (Feb. 20, 1980), *aff'd* 1981 NOAA LEXIS 33 (NOAA App., Jan. 13, 1981). Just as in the present matter, the respondents in *Pacific Ranger* were found to have no prior violations within the past 5 years. *Id.* However, no reductions for operating costs were made to the ex-vessel value of the fish caught in that case for purposes of determining the respondents' economic benefit. *Id.*

The Agency points out that in an order issued in April 2014 in another matter currently pending decision, the undersigned relied on NOAA administrative precedent to find that vicarious liability was available to find in Magnuson Act cases if appropriate. Pet. 3-4; *Drinkwater & F/V Princess Elena, Inc.*, Docket No. NE1202710, Order on Respondent F/V Princess Elena, Inc.'s Motion to Dismiss / Strike the Notice of Violation and Assessment, at 4, 9, 11-12 (Apr. 18, 2014) ("*Capt. Joe*"). Because I recognized in that Order that "a longstanding, consistent interpretation of an enforcement provision of the Magnuson-Stevens Act in Agency administrative proceedings is entitled to some deference," "the Court should not depart" here from Agency precedent that has used ex-vessel value to calculate economic benefit. *Id.*

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[2] The term "ex-vessel value" is not defined by NOAA regulations for the purposes of penalty calculations, but is defined for the purposes of NOAA's West coast groundfish trawl fishery cost recovery program as, "all compensation (based on an arm's length transaction between a buyer and seller) that a fish buyer pays to a fish seller in exchange for groundfish species . . . ." 50 C.F.R. § 660.111. *See also*, 50 C.F.R. § 679.2 ("IFQ actual ex-vessel value means the U.S. dollar amount of all compensation, monetary or non-monetary, including any IFQ retro-payments received by an IFQ permit holder for the purchase of IFQ halibut or IFQ sablefish landing(s) on his or her permit(s) described in terms of IFQ equivalent pounds."); 50 C.F.R. § 680.2 ("Ex-vessel value means: . . . The total U.S. dollar amount of all compensation, monetary and non-monetary, including any retroactive payments, received by a CR allocation holder for the purchase of any CR crab debited from the CR allocation described in terms of raw crab pounds."); *NOAA Fisheries Glossary of Catch Share Terms*, http://www.nmfs.noaa.gov/sfa/management/catch_shares/about/glossary.html ("ex-vessel value" is "a measure of the dollar value of commercial landings, usually calculated as the price per pound at first purchase of the commercial landings multiplied by the total pounds landed."). Here, in essence, the term means the gross value of the fish to the vessel.

2. Net-Proceeds Valuation is Contrary to Magnuson-Stevens Enforcement Scheme

The Agency asserts that the Act "provides no direct textual support for the net-proceeds methodology,"[3] while the term "ex-vessel value" is used repeatedly in the Magnuson-Stevens Act "as the standard value for determining certain fees required by the statute." Pet. 8, 8 n.4.

In civil forfeiture proceedings under 16 U.S.C. § 1860, "the Act mandates that the respondent surrender not a portion of the catch after allowances for their expenses, but the entire ex-vessel value of their catch" and "requires the same result regardless of the violator's degree of culpability of their history of prior violations." Pet. 4-5. It would be "illogical and unjust" and without support in the Act to treat violators in a civil penalty proceeding more generously than violators in a forfeiture proceeding by calculating their economic benefit differently. Pet. 5.

The holding in the *Pacific Ranger* decision (penalty must be large enough to deter, not simply factored in as a cost of doing business, and not put law-abiding fishermen at a competitive disadvantage) is "undercut by allowing Respondents to recoup $134,038 in costs from their unauthorized fishing trips." Pet. 5-6 (citing *Pacific Ranger* at 2014 NOAA Lexis 9 at 102, 48). Allowing Respondents to pay crew shares from profits for fish that "would otherwise have been available for catch by law-abiding fishermen indisputably awards a competitive advantage to law-breakers at the direct expense of those who followed the law." Pet. 6.

Recapturing the *entire* economic benefit derived from an unlawful act "must be the starting point of any penalty calculation under the Magnuson-Stevens Act." *Id.* Citing an EPA penalty policy document, NOAA argues that the economic benefit determination must be a "neutral calculation," that is, "determined independently from consideration of the other penalty factors such as a respondent's history of prior violations and degree of culpability, as well as the impact of the violations on the affected resource." Pet. 6-7 (citing *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties*, at 6 (Feb. 16, 1984)). While history of prior violations and culpability are "plainly relevant" to the gravity component of a penalty analysis, they are "entirely irrelevant to an accounting of the value of their unlawful catch (even if, as here, the size of the base penalty may be small compared to the value of the illegal economic benefit)." Pet. 7.

The Agency further argues that "surely" the penalty factor of "such other matters as justice may require" "cannot be so broad that it . . . would frustrate the enforcement scheme of the Act by creating a gross disparity . . . between those violators who catch was seized and those whose catch was not, and by granting a comparative advantage to violators over their law-abiding competitors by allowing law-breakers to recoup the operating costs of unlawful fishing trips from the proceeds of their illegal catch." Pet. 8-9.

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[3] "Net-proceeds" is not a term used or defined in NOAA's regulations but the parties use it here to mean the "ex-vessel value" less certain expenses, or the profit realized by the vessel after sale of the fish and overhead payments. Pet. 7-8; Opp. 1; *see* Initial Decision 49.

3. Applying Net-Proceeds Valuation will Complicate Agency Enforcement Proceedings

If the reduction to economic benefit here were to stand, the Agency posits, "would the benefit extend only to those 'with spotless compliance histories and merely negligent level of culpability,' or might it extend to reckless violators as well, or perhaps to violators with only minor prior violations?" Pet. 7. Permitting this analysis "will likewise necessitate routine discovery of bookkeeping an accounting records by the Agency whenever a respondent who may have derived an economic benefit from their violation requests a hearing." Pet. 7-8. The Agency continues, "of course, it will require further litigation as to whether additional categories of costs . . . should be allowed; litigation as to which costs should be allowable operating costs, which costs are direct costs or indirect costs, and what constitutes adequate substantiation of costs; as well as the testimony of many, many bookkeepers and accountants." Pet. 8. The Act does not compel these "consequences," the Agency argues. *Id.*

In sum, the Agency requests that I issue an Amended Initial Decision applying the gross ex-vessel value of the illegal catch in the case, $312,941, instead of the net-proceeds value used in the Initial Decision in calculating the economic benefit portion of the penalty imposed. Pet. 9.

B. <u>Respondents' Opposition in Response</u>

First, Respondents argue that "the agency has failed to demonstrate any basis in law or policy that justifies reconsideration of the use of net-proceeds as a basis for the penalty calculation." Opp. 1. Generally speaking, in NOAA administrative enforcement proceedings, the ALJ determines the appropriate penalty *de novo* in accordance with the governing statutory and regulatory factors; there is no presumption in favor of NOAA's proposed penalty amount or analysis. Opp. 1-3. It is wholly within the ALJ's discretion to consider net-proceeds rather than ex-vessel value of the fish for purposes of determining the violators' "economic benefit" as part of the "such other factors as justice may require" penalty factor. Opp. 2. Plus, the arguments set forth in the Petition are the same advanced by the Agency in its post-hearing briefs and have already been dealt with by the undersigned in the Initial Decision. *Id.* Therefore, the Agency has failed to demonstrate a basis for reconsideration. *Id.*

1. Net-Proceeds Valuation is Available in NOAA Administrative Penalty Decisions

Specifically addressing the arguments in the Petition, Respondents first contend that the Agency "misstates the precedential value" of the four cases cited by the Agency in its Petition. Opp. 3; Pet. 3-4. Respondents assert that neither the *Dzung* nor *Chincoteague* cases cited by the Agency "actually state that they used ex-vessel value as part of their calculation of economic benefit." Opp. 3 (citing Pet. at 3). By taking "profit" into account in those two cases, Respondents suggest that the ALJs' analysis was actually consistent with a net-proceeds analysis, based on the common meaning of the term "profit." Opp. 4 (citing *Black's Law Dictionary,* 1404 (10th ed. 2014) (profit means "the excess of revenues over expenditures"). Respondents also argue that the Agency's reliance on *Freitas* is "misplaced" as that decision is on appeal and "lacks precedential value." *Id.* With regards to *Moceri*, Respondents note that the opinion offers no discussion as to why the ALJ chose to use ex-vessel value, and that in that case, conservation and resource concerns were a major focus of the penalty analysis. *Id.*

Because the cases and rules cited by the Agency neither "define economic benefit" nor "require that the calculation be based solely on ex-vessel value," Respondents argue that that a penalty determination that uses net proceeds, instead of ex-vessel value, is not inconsistent with prior case law. Opp. 3.

Further, Respondents argue that my finding in the *Capt. Joe* Order, that "a longstanding, consistent interpretation . . . in Agency administrative proceedings is entitled to some deference," is not applicable to the cases cited, as they are not consistent interpretations on this subject, nor does it change the fact that the presiding judge has "independent authority" to assess whatever penalty is appropriate in accordance with the Act and Rules. Opp. 4-5; Pet. 3-4; *Drinkwater & F/V Princess Elena, Inc.,* Docket No. NE1202710, Order on Respondent F/V Princess Elena, Inc.'s Motion to Dismiss / Strike the Notice of Violation and Assessment (Apr. 18, 2014).

2. Net-Proceeds Valuation is Not Contrary to Magnuson-Stevens Enforcement Scheme

Respondents argue that the Tribunal's use of a net-proceeds analysis does not frustrate the enforcement scheme of the Act. Opp. 5. The civil forfeiture provisions in the Act do not apply to the license violations in the immediate case. *Id.* ("Civil forfeiture provisions contemplate depriving violators of the fish themselves in cases involving illegally caught fish, which NOAA has not charged Respondents with in the present case."). Citing the Initial Decision, Respondents argue that even the Penalty Policy provides for alternative analyses than simply using gross profits. *Id.* (citing Initial Decision at 50, n.57).

In addition, Respondents insist that NOAA "overstates the risk that the deterrent effect of taking away any economic benefit will be undercut" by a net-proceeds valuation. *Id.* The decision did conclude that a penalty based in part on the net proceeds would appropriately deprive Respondents of the economic benefit of their noncompliance, and there's no evidence that Respondents were let "off the hook" or were able to maintain a competitive advantage. *Id.*

3. The Argument that Proceedings will be Made Unduly Complicated Must be Rejected

Finally, Respondents argue that a net-proceeds valuation will not necessarily complicate future agency enforcement proceedings, and that this argument has already been disposed of sufficiently in the Initial Decision. Opp. 6. Respondents downplay the Agency's concerns about additional discovery and litigation costs, asserting that the Agency's position does not comport with the adversarial process, the right of respondents to defend against the Agency's proposed penalty, and that the Agency overstates the risk of substantial costs being incurred to accommodate an examination of net proceeds. *Id.* Here, as explained in the Initial Decision, Respondents' evidence of net profits was found credible, the Agency had time to review that evidence, and the Agency did not object. Opp. 7.

III. DISCUSSION

The procedural rules applicable to this proceeding, set forth at 15 C.F.R. Part 904 ("Rules of Practice"), provide as follows:

> 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.

15 C.F.R. § 904.272.

At the hearing, Respondents offered into evidence their Exhibit 1, entitled in part "2011 Cod Season Net Income," as a rebuttal exhibit during the testimony of Burton Charles Parker, Sr., a 50% owner of Respondent Pacific Dawn, LLC, and manager of the daily administrative business of the F/V Pacific Challenger. Tr. 21, 33-35. Mr. Parker stated that Respondent's other witness, Mr. Christopher Daniel Peterson, Sr., and their bookkeeper, Nancy Fortis, prepared the document for a "settlement out of court . . . to show that, you know, we didn't make $330,000." Tr. 33-34. When asked if this was a "true and reasonable estimate of what [the] profits had been for those three trips," Mr. Parker answered, "Yes." Tr. 34. Agency counsel stated that he had not seen the document before, however, after review, did not object to its admission to the record. Tr. 35.

The Rules that govern this proceeding provide that "[a]ll evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing." 15 C.F.R. § 904.251(a)(2). Also, "[o]nly objections made before the Judge may be raised on appeal." 15 C.F.R. § 904.251(b)(1). Each presiding judge in an administrative proceeding such as this has the duty to ultimately determine "any appropriate . . . relief," in accordance with the applicable statutory and regulatory factors, and based on the "exclusive record of decision." 15 C.F.R. §§ 904.108(a), 904.204(m)-(n), 904.270(a), 904.271(a)(1)-(2). Such record consists of the transcript, exhibits admitted into evidence, briefs, pleadings, other documents filed, etc. 15 C.F.R. § 904.270(a).

As both parties are fully aware, since 2010, there is no presumption in favor of the penalty proposed by the Agency. Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631 (June 23, 2010). Rather, "the presiding Administrative Law Judge may assess a

civil penalty *de novo*, 'taking into account all of the factors required by applicable law.'"[4] *Pauline Marie Frenier*, 2012 NOAA LEXIS 11, at *11 (Sept. 27, 2012) (quoting 15 C.F.R. § 904.204(m)). The ALJ is not required to state good reasons for departing from the Agency's analysis. 75 Fed. Reg. at 35,631.

Having admitted Respondents' Exhibit 1 without objection from the Agency, and finding Mr. Parker's testimony credible, I determined that it "must be found to contain a legitimate representation of Respondents' net profits" from the violations at issue. Initial Decision 49. In accordance with the factors set forth in the Act and regulations, and based on the evidence in the record, I determined the appropriate penalty to be assessed against Respondents in this proceeding. In my discussion, I disposed of several of the same arguments that the Agency now advances in its Petition. Initial Decision 46-51. Finding now that this economic benefit issue has been sufficiently argued, deliberated, and discussed in the Initial Decision, I will only briefly address some of the Agency's arguments again here.

The Agency argues that my decision to consider net profits or proceeds falls out of line with Agency precedent, however, first, no decision cited by the Agency would govern this Tribunal's decision-making, and even if they did, none explicitly address the economic benefit question sufficiently to persuade that it be resolved in favor of the Agency.

As to the four decisions the Agency cites as evidence of a consistent and longstanding use of ex-vessel value as the basis for assessing a violator's penalty – *Freitas, Dzung Ngoc Nguyen, Chincoteague Seafood, Co.*, and *Moceri* – these cases do not establish that ex-vessel valuation is worthy of deference. First, neither the opinion in *Dzung* nor in *Chincoteague Seafood* even mention "ex-vessel value." The ALJs in both decisions state their intention only to erase the "profit" that the respondents had acquired through their illegal actions. In *Moceri,* as Respondents point out, the ALJ did not provide any explanation as to why the ex-vessel value was used in the penalty calculation. Opp. 4. And while the Agency correctly observes that the ALJ in *Freitas* incorporated ex-vessel value into his penalty analysis, the opinion makes clear that the objective of the civil penalty is to recoup "the economic benefit a violator derives from their unlawful activity," and my objective was the same in the decision here.

As to the *Pacific Ranger* decision, no evidence was offered at that hearing to rebut the Agency's economic benefit evaluation, as Respondents' Exhibit 1 was offered here exclusively

[4] When assessing a civil penalty under the Act, the presiding Judge "shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require." 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(a). Economic benefit of the violation determined based upon ex-vessel value or net-proceeds is not a penalty factor specifically identified in either the statute or regulation to be taken into account in assessing a civil penalty. Rather, it can be and was, taken into consideration under the penalty factor, "such other matters as justice may require."

for that purpose and supported by testimony.[5] The parties in *Pacific Ranger* stipulated as to the ex-vessel value of the fish, and while Respondents argued against the Agency's "back of the napkin" valuation of the profit from the fishing trips in their briefs, they presented no evidence in support of alternative figures for calculating economic benefit.

The Agency complains that my analysis conflated penalty factors, specifically that the economic benefit determination must be "determined independently from . . . a respondent's history of prior violations and degree of culpability, as well as the impact of the violations on the affected resource." Pet. 6-7 (citing *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties*, at 6 (Feb. 16, 1984)). However, this Tribunal is granted great flexibility in determining the appropriate penalty upon consideration of all the factors; whatever delineated process set forth in the Agency's internal guidance documents simply does not govern our analysis.

The Agency also argues that it would be "illogical and unjust," and without support in the Act to treat violators in a civil penalty proceeding more generously than violators in a forfeiture proceeding by calculating their economic benefit differently. Pet. 5. I find the Agency's comparison of one provision of law explicitly authorizing the U.S. government to obtain forfeited catch (16 U.S.C. § 1860)[6] in certain circumstances, to another provision directing the ALJ to consider certain penalty factors in an administrative enforcement proceeding (16 U.S.C. § 1858), completely inadequate to show that my decision to use net proceeds in this case will create an inequity among regulated parties in contravention of the Magnuson-Stevens Act.

Finally, the Agency complains that permitting a net-proceeds analysis "will likewise necessitate routine discovery of bookkeeping and accounting records . . . whenever a respondent . . . requests a hearing," and "further litigation" will arise as to what constitutes operating costs, which will necessitate "the testimony of many, many bookkeepers and accountants." Pet. 7-8. I do not foresee such a sea change in the way NOAA must bring its cases, and it is ultimately the Agency's prerogative to argue and prove its case, including its proposed penalty, as it sees fit, and is certainly within a respondent's rights to vigorously defend against and rebut the Agency's case on both liability and penalty with whatever relevant evidence it can muster. Plus, the Rules already require that "[i]n assessing a civil penalty, NOAA will take into account information

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[5] The respondents in *Pacific Ranger* had initially stated an intention to introduce the testimony of their chief financial officer about the value of the fish and the actual economic benefit they realized, but did not ultimately call that witness to testify at the hearing.

[6] This civil forfeiture provision states: "Any fishing vessel (including its fishing gear, furniture, appurtenances, stores, and cargo) used, and any fish (or the fair market value thereof) taken or retained, in any manner, in connection with or as a result of the commission of any act prohibited by section 307 [16 U.S.C. § 1857] (other than any act for which the issuance of a citation under section 311(c) [16 U.S.C. § 1861(c)] is sufficient sanction) shall be subject to forfeiture to the United States. All or part of such vessel may, and all such fish (or the fair market value thereof) shall be forfeited to the United States pursuant to a civil proceeding under this section." 16 U.S.C. § 1860(a). NOAA can and has seized forfeited fish *in addition to* seeking an administrative civil penalty under 16 U.S.C. § 1858. *See LT Seafood, LP*, 2013 NOAA LEXIS 5 (June 4, 2013).

available to the Agency concerning any factor to be considered under the applicable statute, and any other information that justice or the purposes of the statute require." 15 C.F.R. § 904.101(b). If the Agency's continued view is that the only such information relevant to calculating economic benefit (as an "other matter that justice may require") is the gross ex-vessel value, then it may support that view and argument in cases going forward. Respondents would, as here, be able to proffer evidence challenging the Agency's case in chief on the proposed penalty amount, and the Agency may respond to respondents' case with evidence, arguments, objections and/or other tools available in the Rules. It is simply not the responsibility of this Tribunal to worry about the Agency's litigation resources or strategy, just as it is not the responsibility of this Tribunal to consider the resources or strategy of the respondents with regard to refuting the Agency's proposed penalty.

IV. CONCLUSION

The Agency's Petition for Reconsideration is **DENIED**.

Pursuant to the Rules of Practice, the filing of the Agency's Petition stayed the effective date of the Initial Decision. 15 C.F.R. § 904.272. By this Order, the stay is lifted.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency[7]

Dated: April 15, 2015
Washington, D.C.

[7] 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.