UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

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

ORDER ON PETITIONS FOR RECONSIDERATION

I. BACKGROUND

On July 14, 2015, following a hearing in Boston, Massachusetts,[1] this Tribunal issued an Initial Decision and Order ("Decision") in this case and found that Respondents Jessie H. Drinkwater and Princess Elena, Inc. ("PEI"), violated Section 307(1)(A) of the Magnuson-Stevens Fishery Conservation Management Act, 16 U.S.C. § 1857(1)(A), and 50 C.F.R. § 648.14(k)(6)(i)(A). The Respondents were held jointly and severally liable for a civil penalty of $40,000. This represented a penalty of $20,000 for each of the two counts in the Notice of Violation and Assessment of Administrative Penalty ("NOVA") filed by the National Oceanic and Atmospheric Administration ("NOAA" or "the Agency") on April 2, 2013. *See Jesse H. Drinkwater*, NOAA Docket No. NE1202710, slip op. (ALJ, July 14, 2015) (Initial Decision and Order).

On July 31, 2015, both NOAA and Respondent Princess Elena, Inc., filed petitions for reconsideration based on two unrelated aspects of the Decision. The Agency seeks further information about how Respondents' fishing proceeds were incorporated into the assessed penalty and PEI challenges the Decision's discussion of the "law of the case" doctrine in regard to its *respondeat superior* defense. For the reasons stated below, both petitions are **DENIED**.

II. APPLICABLE STANDARD

The rules that apply to the parties' petitions are set forth at Part 904 of Title 15 of the Code of Federal Regulations. They 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

[1] The hearing was held May 15, 2014 and included testimony from four witnesses. A total of twenty exhibits were introduced into the record – five by the Agency, 14 by Respondents, and a joint exhibit of stipulated facts.

> 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. The petitions were timely filed. Although the exact relief each seeks is not entirely clear, they do imply that the matters they raise were erroneously decided. It is not necessary to wait 15 days for the parties to respond to each petition, as both are easily denied.

III. AGENCY'S PETITION FOR RECONSIDERATION

The Agency seeks clarity in the Initial Decision's penalty assessment, specifically "whether the Court included all or any of the $34,411 in 'gross proceeds'" that Respondent PEI received from its unlawful fishing. Agency Pet. at 2. NOAA questions whether the gross proceeds were included in the $40,000 penalty calculation in light of the recognition in prior cases of the need to deprive violators of the fruits of their violations. Agency Pet. at 2 (citing *Craig Bolton*, NOAA Docket No. AK1200300, 2015 NOAA LEXIS 2, at *124 (ALJ, Feb. 9, 2015); *Pacific Ranger*, LLC, NOAA Docket No. PI1101523, 2014 NOAA LEXIS 9, at *101-102 (ALJ, Nov. 25, 2014)).

However, the Decision's penalty assessment explicitly acknowledges considering the gross proceeds Respondents acquired in the course of their fishing with an illegal net liner in the penalty calculation. As noted in the final summary paragraph of the Decision, these proceeds were one of many requisite factors taken into consideration:

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

Drinkwater, NOAA Docket No. NE1202710, slip op. at 33 (emphasis added). Further, additional, earlier portions of the Decision advised how the gross proceeds factored into

consideration of the various penalty factors. For example, with regard to the gravity and extent of the violation, the Decision notes that only a small portion, 330 pounds, of the total of 22,000 pounds of fish sold to obtain the $34,411 in gross proceeds directly resulted from the violation. *Id.* at 28. Also under the penalty factor of "culpability," the Decision indicates its consideration of both the Agency's argument that the two Respondents intended to share in the (net) profits of the trip, and thus had a joint financial incentive to violate the law, and Respondents PEI's argument in opposition thereto, that it incurred more expenses on the trip than it recovered in proceeds. *Id.* at 28-29. Finally, the Decision obliquely considered the proceeds in its determination of Respondent PEI's ability to pay. *Id.* at 32 and n. 51. As such, it is clear that the $34,411 in gross proceeds from the trip were taken into account in considering the nature, circumstances, extent, and gravity of the violation; Respondents' degree of culpability and history of prior offenses; and other matters as required by justice, *i.e.,* the statutory penalty factors, to determine appropriate penalties for the violations.[2]

To the extent the Agency is requesting this Tribunal specify an exact dollar figure for the amount of the gross proceeds included in the total penalty assessed, it need not, and will not, provide one. Similarly, if the Agency is inquiring as to why the penalty assessed does not match the penalty amount proposed in the NOVA, it should recognize that "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). *See also Craig Bolton*, NOAA Docket No. AK1200300, 2015 NOAA LEXIS 10, at *15 (ALJ, April 15, 2015) (Order on Agency's Petition for Reconsideration). Rather, "the presiding Administrative Law Judge may assess a civil penalty *de novo*, 'taking into account all of the factors required by applicable law.'" *Pauline Marie Frenier,* 2012 NOAA LEXIS 11, at *11 (Sept. 27, 2012) (quoting 15 C.F.R. § 904.204(m)). The Judge is not required to state good reasons for departing from the Agency's penalty proposal. 75 Fed. Reg. at 35,631.

Insofar as the Agency is asking this Tribunal to establish the gross economic benefit of the fishing trip where a violation occurred as a baseline penalty in each and every administrative enforcement action, that would be inappropriate, as it is inconsistent with the statutorily mandated penalty factors and would limit the Tribunal's discretion in regard to determining the penalty. The facts of each case and the evidence presented by the parties in the case determine how and to what extent the proceeds from unlawful fishing factor into the penalty assessed. Likewise, the calculation and definition of "economic benefit" will change from case to case, depending on the evidence admitted to the record.

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[2] The Magnuson-Stevens Act provides that when assessing a civil penalty 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); *see also* 15 C.F.R. § 904.108(a). Economic benefit of the violation is *not* a penalty factor specifically identified in either the statute or regulation to be taken into account in assessing a civil penalty. Rather, upon discretion of the Tribunal, it can be and was, taken into consideration under other penalty factors identified in the statute.

In this case, as demonstrated by the extensive penalty analysis included in the Decision, this Tribunal did not find that the evidence supported a penalty that started with a $34,411 baseline representing the gross proceeds of the violation. Rather, it utilized an analysis of the statutory factors to arrive at the penalty amount to be assessed against Respondents, taking into consideration the proceeds of the violation therein where appropriate. Further clarification would require this Tribunal to "state good reasons for departing from the Agency's analysis," which it need not do. As it stands, the Initial Decision contains all of the necessary "[f]indings and conclusions, and the reasons or bases therefor, on all material issues of fact, law, or discretion presented on the record." 15 C.F.R. § 904.271. Consequently, the Agency's petition is **DENIED**.

IV. RESPONDENT PEI'S PETITION FOR RECONSIDERATION[3]

PEI contends the Initial Decision improperly invokes the "law of the case" doctrine when ruling against its *respondeat superior* defense. PEI's argument arises from this Tribunal's Order issued on April 18, 2014 denying its motion ("Motion") to dismiss the NOVA. Resp't's Pet. at 1-2; *Drinkwater*, NOAA Docket No. NE1202710 (ALJ, April 18, 2014) (Order on Respondent F/V Princess Elena, Inc.'s Motion to Dismiss/Strike the Notice of Violation and Assessment) (hereinafter "Order"). The Motion asserted the NOVA was based on the theory of *respondeat superior*, and that "neither the [Magnuson Act], nor the accompanying regulations, authorize the imposition of liability against the owner of a fishing vessel solely" on those grounds. Mot. at 1.

Early in its analysis, the Order indicates that the Motion did not satisfy a procedural requirement that all parties agree to a summary decision, and it denies the Motion "on this basis." Order at 3; *see also* 15 C.F.R. § 904.210(a). PEI concludes this is the "unequivocal[ ]" holding of the Order. Resp't's Pet. at 2. Although the Order is 13 pages long, PEI claims in its Petition that the "actual Order…in its entirety" consists of this brief initial analysis and just two sentences under the heading "Order" on the final page that state, "Respondent F/V Princess Elena, Inc.'s Motion to Dismiss/Strike the Notice of Violation and Assessment does not satisfy the procedural requirements of 15 C.F.R. § 90[4].210. It is therefore **DENIED** as not properly before this Tribunal." Resp't's Pet. at 1; Order at 13. According to PEI, other than these two sentences, "all that followed the first paragraph of the Tribunal's analysis [on page 3 of the Order] is purely *dicta*[,]…is not binding authority and thus cannot be the law of the case." Resp't's Pet. at 2.

Based on this characterization of the Order, PEI argues the Tribunal denied its Motion on procedural rather than substantive grounds and that it would therefore be improper to rely on the "law of the case" doctrine in the Initial Decision to address its *respondeat superior* defense. Resp't's Pet. at 1–2. However, while the Motion was indeed denied on procedural grounds, it was not rejected for *only* this reason. PEI conveniently chooses to ignore additional language in

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[3] At the end of the Petition, Respondent states that the same corrections it requests here "should also be made in the related case of *In re Robert Roberge et al*, Docket No. NE 1300388." Resp't's Pet. at 5. This Order does not address that case. If PEI desires some particular action in that case, then it must file a motion in *that case*.

the Order that indicates an alternative basis for denial – that the substance of its *respondeat superior* argument was faulty. As the Order states immediately after recognizing PEI's procedural flaw, "the Motion *will nonetheless be addressed on its merits* because, even if the Motion was proper, [addressing the merits of the motion] would not in this matter result in a summary decision disposing of all or part of this proceeding." Order at 3 (emphasis added). The Order then goes on for nine additional pages addressing those merits. This was not an Order that offered an abbreviated ruling on a procedural matter and, in passing, expressed doubts as to the Motion's substance. The Order reflects a thoughtful consideration of the full range of PEI's arguments on *respondeat superior* and then explains in detailed fashion why they are erroneous. That the Order's concluding sentences did not expressly refer to PEI's meritless substantive arguments does not negate the broader implication of the Order: that setting aside the Motion's procedural defects, the legal arguments PEI asserted were insufficient to "dispos[e] of all or part of this proceeding." Notwithstanding this rejection of PEI's argument that the Tribunal's April 18, 2014 Order is not the "law of the case," the following discussion provides an additional basis for denying PEI's Petition.

First, the Initial Decision does not rely solely on the "law of the case" doctrine to reject the *respondeat superior* defense. The decision refers expressly to the Order and thereby incorporates its legal reasoning:

> On April 18, 2014, this Tribunal issued its Order on Respondent F/V Princess Elena, Inc.'s Motion to Dismiss/Strike the Notice of Violation and Assessment ("Order"). In that Order it specifically analyzed PEI's arguments that neither the Magnuson Act, nor the accompanying regulations, authorizes the imposition of liability against the owner of a fishing vessel solely on the basis of *respondeat superior.* The Tribunal noted that the Respondent was making its arguments against the backdrop of "a formidable parade of administrative decisions" issued since 1998 which have, with persistent regularity, found owners of vessels vicariously liable for operators' violations of the Magnuson Act. Order at 9–10 (citing 21 cases assigning vicarious liability to vessel owners for operators' Magnuson Act violations). Further, the Order noted that a United States District Court, in a heavily litigated case, recently upheld an administrative decision finding a corporate vessel owner vicariously liable for the actions of the vessel operator. Order at 10 (citing *Frontier Fishing Corp. v. Locke,* 2013 U.S. Dist. LEXIS 67704 (D. Mass, May 13, 2013)). Nevertheless, the Tribunal thoroughly analyzed the Respondent's legal arguments, and after doing so, held that "the Agency's longstanding interpretation of Section 307 of the Magnuson Act as authority for holding vessel owners vicariously liable for offenses committed by their vessels' operators appears to be reasonably based in the statutory text" and "is also consistent with the policies underlying the statute." Order at 11–12.

Drinkwater, NOAA Docket No. NE1202710, slip op. at 16–17. Thus, if PEI prefers to view the Order as "an advisory opinion . . . binding on no one," Resp't's Pet. at 4, then it should view the Initial Decision as incorporating the Order's opinion into a ruling that is now binding on the parties to this proceeding. Additionally, while this Tribunal recognized the Order as in itself

rejecting *respondeat superior* as a viable defense for PEI, it also analyzed additional facts presented at the hearing in regard thereto. Upon doing so, it concluded in the Initial Decision that PEI *still* had not presented a winning argument:

> This Tribunal . . . finds that the factual evidence in the record obtained at hearing supports the imposition of vicarious liability on PEI in this case. Such evidence includes the following: (1) that at the time PEI hired Mr. Drinkwater, he was a "young boy," inexperienced as a captain, "looking to get a steady job" with Mr. DiMaio (Tr. 190–91, 251–53); (2) PEI assumed the responsibility for training Mr. Drinkwater to properly perform his job as a vessel captain, including schooling him on the vessel, the regulatory requirements of fishing, and advising him regarding complying with the law (Tr. 190, 252); (3) PEI paid unemployment on Mr. Drinkwater's behalf (Tr. 235); (4) PEI provided the vessel, fuel, crew, supplies and permits necessary for Mr. Drinkwater to perform his work as a fishing vessel captain (Tr. 245, 272); (6) PEI and Mr. Drinkwater arranged to share the profits of their fishing venture (Tr. 245–46); (7) PEI "fired" Mr. Drinkwater based upon his poor attitude expressed to the Coast Guard officers and not for the alleged violations (Tr. 190, 254–55); and (8) based upon the long history of case law, PEI was on notice of its potential liability for the captains' obstruction of nets (AEI Tr. at 221–22).

Drinkwater, NOAA Docket No. NE1202710, slip op. at 17. Consequently, the Initial Decision did not just apply the "law of the case" doctrine in a vacuum. It specifically made a part of its final ruling the rejection of PEI's *respondeat superior* defense by incorporating the reasons that were stated in the Order earlier in this proceeding, and then further analyzing new facts produced at hearing.

Second, PEI did not respond to the Agency's argument in its post-hearing reply brief that, under the law of the case theory, *respondeat superior* was an invalid defense. As this tribunal observed then, "by failing to respond to the Agency's 'law of the case' argument, PEI has implicitly acknowledged its validity and waived a challenge to it." *Drinkwater*, NOAA Docket No. NE1202710, slip op. at 16. *See also id.* (citing *Global Tech. & Trading, Inc. v. Satyam Computer Servs.*, 2014 U.S. Dist. LEXIS 113045, at *5–*8 (N.D. Ill. Aug. 14, 2014) (failure to respond to argument is an implicit acknowledgment of defense and waiver); *Bonte v. U.S. Bank, NA.*, 624 F.3d 461, 466 (7th Cir. 2010) (failure to respond to an argument results in waiver); *MCI WorldCom Network Servs., Inc. v. Atlas Excavating, Inc.*, No. 2 C 4394, 2006 U.S. Dist. LEXIS 88956, at *9–*10 (N.D. Ill. Dec. 6, 2006) (same); *Anderson v. Mcintosh Constr., LLC*, 2014 U.S. Dist. LEXIS 72498, at *24 (M.D. Tenn. May 28, 2014) (same)). The entry of the Initial Decision in this proceeding does not obviate PEI's waiver of this issue. Consequently, it is simply not appropriate for PEI to now argue, in its Petition for Reconsideration, that the Order's rejection of its *respondeat superior* defense was not the law of the case. It had the opportunity to raise this concern prior to the decision being issued and chose not to.

Third, this Tribunal makes the following finding: There is no merit to PEI's *respondeat superior* argument. This finding is based upon the reasons previously stated in the April 18, 2014 Order and Initial Decision and Order, which is incorporated herein by reference.

Consequently, based upon consideration of the all of PEI's arguments in its Petition for Reconsideration and as discussed above, PEI's Petition is **DENIED**.

SO ORDERED.

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

Dated: August 11, 2015
Washington, D.C.