UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	)	Docket Number: **SE 1201048**
Frank Alexis Prieto,	)	
Respondent.	)	

INITIAL DECISION AND ORDER

Date: March 1, 2017

Before: Christine Donelian Coughlin, Administrative Law Judge,
U.S. Environmental Protection Agency[1]

Appearances: For the Agency:

Meggan Engelke-Ros, Esq.
Office of the General Counsel, Enforcement Section
National Oceanic and Atmospheric Administration,
U.S. Department of Commerce
Silver Spring, MD

For Respondent:

Frank Alexis Prieto, Pro Se

[1] The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011. *See* 5 U.S.C. § 3344; 5 C.F.R. § 930.208.

I. PROCEDURAL BACKGROUND

The National Oceanic and Atmospheric Administration ("NOAA" or "Agency") issued a Notice of Violation and Assessment of Administrative Penalty ("NOVA"), dated October 1, 2014, to Gregory Westleigh Raymor ("Mr. Raymor") and Frank Alexis Prieto ("Respondent"). The NOVA charges Mr. Raymor and Respondent, jointly and severally, with two counts of violation of the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), specifically set forth as follows. Count 1 of the NOVA alleges that, "[o]n or about March 11, 2012, Respondents . . . violate[d] the Magnuson-Stevens Fishery Conservation and Management Act (16 USC §1801 *et seq.*) by catching, and then selling, Atlantic swordfish without a valid commercial permit." NOVA at 1. Count 1 of the NOVA specifically alleges that Mr. Raymor "sold 486 pounds of Atlantic swordfish with an invalid permit, in violation of applicable law." NOVA at 1. Count 2 of the NOVA alleges that, "[o]n or about March 23, 2012, Respondents . . . violate[d] the Magnuson-Stevens Fishery Conservation and Management Act (16 USC §1801 *et seq.*) by catching, and then selling, Atlantic swordfish without a valid commercial permit." NOVA at 1. This Count specifically alleges that Mr. Raymor "sold 86 pounds of Atlantic swordfish with an invalid permit, in violation of applicable law." NOVA at 1. The Agency assessed a penalty in the NOVA of $9,784 for Count 1, and $8,602 for Count 2, totaling $18,386. NOVA at 2-3. Respondent requested a hearing by letter dated April 17, 2015. On May 6, 2015, the Agency forwarded a copy of the NOVA and Respondent's hearing request to this Tribunal.

Thereafter, the parties accepted this Tribunal's invitation to participate in mediation for settlement of the case through an Alternative Dispute Resolution ("ADR") process. On July 22, 2015, following termination of the ADR process, I was designated to preside over the litigation of this matter. On July 31, 2015, I issued an Order to Submit Preliminary Positions on Issues and Procedures ("PPIP Scheduling Order") to the parties, setting forth various prehearing filing deadlines and procedures. Pursuant to the PPIP Scheduling Order, the parties were directed to participate in a settlement conference on or before August 14, 2015, with a status report regarding settlement to be filed by the Agency shortly thereafter. Additionally, the Agency was required to file its Preliminary Position on Issues and Procedures ("PPIP") on or before September 4, 2015, and Mr. Raymor and Respondent were required to file their PPIPs on or before September 18, 2015.

On August 24, 2015, the Agency filed its status report of settlement discussions between the parties and noted that Mr. Raymor had passed away on July 4, 2015. Thereafter the Agency and Respondent filed their respective PPIPs.[2] On December 21, 2015, I issued an order granting the Agency's motion to dismiss Mr. Raymor from this matter and its request for leave to amend the NOVA to remove Mr. Raymor. On January 6, 2016, the Agency filed an Amended NOVA ("Amended NOVA" or "Am. NOVA"), which provided the following:

[2] The Agency also filed supplements to its PPIP, namely a first supplement filed on January 29, 2016; a second supplement filed on February 8, 2016; and a third supplement filed on February 10, 2016.

> Count 1
> On or about March 11, 2012, Respondent Frank Alexis Prieto, owner of the FV Fish Sandwich (Official No. FL8760ND) and a person subject to the jurisdiction of the United States, did violate the Magnuson-Stevens Fishery Conservation and Management Act (16 USC § 1801 *et seq.)* by catching, and then selling, Atlantic swordfish without a valid commercial permit. Specifically, Mr. Prieto, through the operator of the FV Fish Sandwich, sold 486 pounds of Atlantic swordfish with an invalid permit, in violation of applicable law.
>
> Count 2
> On or about March 23, 2012, Respondent Frank Alexis Prieto, owner of the FV Fish Sandwich (Official No. FL8760ND) and persons subject to the jurisdiction of the United States, did violate the Magnuson-Stevens Fishery Conservation and Management Act (16 USC §1801 *et seq.)* by catching, and then selling, Atlantic swordfish without a valid commercial permit. Specifically, Mr. Prieto, through the operator of the FV Fish Sandwich, 86 pounds of Atlantic swordfish with an invalid permit, in violation of applicable law.

Am. NOVA at 1.

By order dated January 13, 2016, I rescheduled the evidentiary hearing in this matter to begin on February 17, 2016, and continue as necessary through February 18, 2016. I conducted the hearing in West Palm Beach, Florida, on February 17 and 18, 2016. At the hearing, the Agency presented Agency's Exhibits ("A") 2 through 7, 9-10, 12 through 15, 17, 21 through 24, and 27 through 31[3] , which were admitted into evidence. The Agency also presented the testimony of five witnesses: Omar Purcell ("Special Agent Purcell"), a law enforcement Special Agent with NOAA's National Marine Fisheries Service ("NMFS"); Mason Arnao ("Mr. Arnao"), a software developer business owner; Michele Arnao ("Mrs. Arnao"), the spouse of Mr. Arnao and a corporate officer within his company who handles the accounting needs of the business; Tanya Hawkins, a legal instruments examiner for NOAA; and Randy Blankinship, the Southeast Branch Chief for Atlantic Highly Migratory Species Management Division within NMFS. Respondent appeared for the hearing and represented himself. Respondent did not introduce any exhibits for admission into evidence and elected not to testify at the hearing, but did engage in extensive cross-examination of the Agency's witnesses and presented arguments on his own behalf.

The Hearing Clerk of this office received the certified transcript of the hearing on March 1, 2016. Electronic copies of the transcript were served on the parties by email on March 17, 2016, and an Order Scheduling Post-Hearing Submissions was issued on March 18, 2016. That

[3] A31, consisting of three pages, was admitted into evidence during the evidentiary hearing without objection, however, a paper copy of the digital version was not immediately available. As a consequence, upon agreement of the parties, this Tribunal subsequently printed a paper copy of the digital version and marked it as exhibit A31. Tr. 432-38, 441. I note that the transcript of proceedings makes a mistaken reference to this exhibit as "A83" when, as stated, the exhibit was identified, marked, and admitted into evidence as A31. *See* Tr. 438 (mistakenly referencing A31 as A83).

Order established various deadlines, including the following: April 1, 2016, as the deadline for any motions to conform the transcript to the actual testimony; April 15, 2016, as the deadline for the Agency's Initial Post-Hearing Brief; and April 29, 2016, as the deadline for Respondent's Initial Post-Hearing Brief. Although deadlines for Reply Post-Hearing Briefs were also established, the parties did not submit Reply briefs. While no motions to conform the transcript to the actual testimony were filed in this case, the Agency filed its Initial Post-Hearing Brief ("Ag. Br.") on April 15, 2016, and Respondent filed his Initial Post-Hearing Brief ("Resp. Br.") on April 26, 2016.

II. STATEMENT OF THE ISSUES

A. Liability

The issues presented are whether Respondent violated the Magnuson-Stevens Act and Agency regulations by "catching, and then selling Atlantic swordfish without a valid commercial permit" on or about March 11 and 23, 2012.[4] First, I must determine whether Respondent fished for, caught, possessed, retained, or landed an Atlantic Highly Migratory Species, namely Atlantic swordfish, without the appropriate vessel permit on or about March 11, 2012 (Count 1), and on or about March 23, 2012 (Count 2). Next, I must determine whether Respondent sold such swordfish without a valid commercial permit on or about March 11, 2012 (Count 1), and on or about March 23, 2012 (Count 2). In both counts, Respondent is charged as "owner of the FV Fish Sandwich (Official No. FL8760ND)," and the Amended NOVA alleges that he sold Atlantic swordfish "through the operator of the FV Fish Sandwich."[5] Am. NOVA at 1.

B. Civil Penalty

If liability for a charged violation is established, then I must determine the amount of any appropriate civil penalty to be imposed for the violation. To this end, I must evaluate certain factors, including the nature, circumstances, extent, and gravity of the violation; Respondent's degree of culpability and any history of prior violations; and such other matters as justice may require.[6] *See* 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(a) (enumerating factors to be taken into account in assessing a penalty).

III. FACTUAL SUMMARY

The following is a summary of the facts that I have found in this matter based on a careful and thorough review of the record and the credible evidence presented at hearing.

---

[4] *See* 16 U.S.C. § 1857(1)(A); 50 C.F.R. §§ 635.71(a)(2), 635.71 (e)(7), 635.31(d)(1).

[5] Notably, the Amended NOVA appears to have omitted the word "sold" with regard to the last sentence of Count 2 ("Specifically, Mr. Prieto, through the operator of the FV Fish Sandwich, 86 pounds of Atlantic swordfish with an invalid permit, in violation of applicable law."). However, I have interpreted this omission as merely a typographical error, given the preceding reference to "selling" in the first sentence of Count 2.

[6] While ability to pay is another factor that may be considered when determining penalty, Respondent did not raise such a claim in this case. Thus, this factor was not considered in rendering my decision. *See* 15 C.F.R. § 904.108.

Mr. Arnao is a software developer who owns and operates a website that facilitates the purchase or sale of federal fishing permits between individuals. Tr. 168-69. On some occasions, Mr. Arnao purchases fishing permits either for his own use or to lease to others. Tr. 169. On April 11, 2011, Mr. Arnao was issued three federal limited access commercial fishing permits: a Swordfish Incidental Permit with permit number SFI-17, an Atlantic Tuna Longline Permit with permit number ATL-279, and a Shark Incidental Permit with permit number SKI-48. A4 at 8, 10, 12; *see also* Tr. 23, 353-544 (discussing limited access permits). Such types of permits are collectively referred to within the industry as a "tri-pack," as all of the aforementioned permit types are required for commercial harvesting of swordfish, and therefore form a package of permits. Tr. 19, 354-55; *see also* Tr. 85-87, 301 (referencing a tri-pack of permits). At the time Mr. Arnao was issued the aforementioned Swordfish Incidental Permit, Atlantic Tuna Longline Permit, and Shark Incidental Permit (collectively, "Tri-pack permits"), these permits were not attached to any vessel. A4 at 8, 10, 12. Consequently, the field on each permit for "Vessel Name" was left blank, and an abbreviated term, "NOVESID" (meaning, "no vessel identification"), was entered under the designation on each permit relating to an official vessel number.[7] A4 at 8, 10, 12; Tr. 87. This practice allows the permit holder to retain the permit by placing it in a "non-vessel status" until an appropriate vessel can be used with the permit. Tr. 298-99.

On October 1, 2011, Mr. Arnao posted an advertisement on his website in which he offered to lease the Tri-pack permits.[8] Tr. 169-71; A5. Mr. Raymor contacted Mr. Arnao in response to the advertisement, after which a meeting took place between Mr. Arnao, Mr. Raymor, and Respondent in October 2011. Tr. 171-72, 191-92. During this meeting, terms of a lease arrangement for the Tri-pack were established, culminating in a Permit Lease Agreement ("Permit Lease Agreement") that each individual signed on October 25, 2011. A6; Tr. 172-74, 191. The Permit Lease Agreement specified Mr. Arnao as the "permit owner" of the Tri-pack permits "ATL-229/SKI-48/SFI-17," identified Respondent "with" Mr. Raymor as the "vessel owner," and provided for a single payment of $3,000 to lease the Tri-pack permits from November 1, 2011 through November 1, 2012.[9] A6. The Permit Lease Agreement also contained a provision concerning "logbook requirements" that mandated the completion of logbooks "on every trip taken during the lease term," and submission of the same to NMFS. A6; Tr. 173. Logbook maintenance stems from the regulatory requirements related to commercial limited access permits that require the timely completion and submission of logbook information following a fishing trip, or the submission of "No Fishing Report Form[s]" ("No Fishing Reports" or "No Fishing Report") when no fishing has occurred. Tr. 356-60; *see also* A21 (reflecting relevant No Fishing Reports to this proceeding).

---

[8] Although the NMFS Southeast Regional Office website states that permits are not to be leased ("[a] specific person(s) or corporation owns the permit for use only on a specific vessel."), testimony offered at the hearing suggests that this stated prohibition stems from administrative processing limitations within the Agency. *See* http://sero.nmfs.noaa.gov/operations_management_information_services/constituency_services_branch/permits/permit_faq/ (as of the issuance of this decision); Tr. 394-400.

[9] The Permit Lease Agreement appears to mistakenly identify the permit number of the Atlantic Tuna Longline Permit at issue as ATL-229, rather than ATL-279. *See* A4 at 8 (reflecting ATL-279 as the proper permit number for the Atlantic Tuna Longline Permit); A6 (the Permit Lease Agreement identifying the permit number for the Atlantic Tuna Longline Permit as ATL-229).

In addition to the Permit Lease Agreement, Mr. Arnao, Mr. Raymor, and Respondent signed a Vessel Lease Agreement, which relates to a vessel with the registration number FL8760ND ("Vessel FL8760ND"), A4 at 36; Tr. 223-25, owned by Respondent, *see* Tr. 75; A29 (addressing ownership of Vessel FL8760ND). In the Vessel Lease Agreement, Mr. Arnao, Mr. Raymor, and Respondent each agree "to lease Vessel Reg#FL8760ND to Permit #s ATL-229/SKI-48/SFI-17" for a one-year lease beginning November 1, 2011, and ending November 1, 2012. A4 at 36; Tr. 223-26. The purpose of the Vessel Lease Agreement was to facilitate the transfer of the Tri-pack permits from Mr. Arnao to Mr. Raymor and Respondent for their use. *See* Tr. 225-31 (discussing the purpose of the Vessel Lease Agreement).

During their October 2011 meeting, Mr. Arnao, Mr. Raymor, and Respondent also completed and signed a Federal Permit Application for Vessels Fishing in the Exclusive Economic Zone ("October Permit Application"), in order to execute the transfer of the Tri-pack permits, held solely by Mr. Arnao with no associated vessel, to Vessel FL8760ND, for the use of Mr. Raymor and Respondent.[10] Tr. 192-93, 194-95, 235, 250-51; A4 at 29-36. The October Permit Application identifies Mr. Arnao as the mailing recipient and vessel lessee of Vessel FL8760ND, and Respondent and Mr. Raymor as vessel owners of Vessel FL8760ND.[11] A4 at 29-36. The October Permit Application additionally includes the Vessel Lease Agreement signed by Mr. Arnao, Mr. Raymor, and Respondent. A4 at 36; Tr. 223-24. The October Permit Application was sent to the NMFS by Mrs. Arnao, and was received on October 31, 2011.[12] Tr. 261; A4 at 29.

According to the Agency's permit procedures, a transfer, such as the type at issue in this matter, requires the submission of a permit application, the original permit that is the subject of the transfer,[13] the vessel documentation or state registration of the vessel to which the permit is to be associated, and payment of the application fee. Tr. 304, 337, 340-41. The Agency processed the transfer requested in the October Permit Application, and on November 15, 2011, NMFS issued the Tri-pack permits reflecting the transfer to Mr. Arnao. *See* A4 at 17-22, 24, 26, 28 (permit documentation depicting Agency processing of the transfer and issuance of the permits); Tr. 195 (testimony indicating that the permits were mailed to the Arnao's home). The

[10] The hearing testimony reflects that Mrs. Arnao filled out the October Permit Application. Tr. 193, 251, 261.

[11] Notably, the October Permit Application designates both Respondent and Mr. Raymor as vessel owners with the vessel ownership classification of "Individual or Sole Proprietorship," rather than vessel ownership classifications for "Joint Ownership" or "Partnership." A4 at 31-32.

[12] Mrs. Arnao testified only that she sent the October Permit Application to NOAA. Tr. 261. However, as the October Permit Application was received by the NMFS Permit Office in St. Petersburg, Florida, on October 31, 2011, A4 at 29, the record supports that Mrs. Arnao more specifically sent it to NMFS.

[13] If the original permit is misplaced or lost, then the permit holder must submit a notarized letter to this effect in order for NMFS to process the transfer using a duplicate permit rather than the original permit. Tr. 305, 332-35. NMFS distinguishes between transfers involving original permits, and transfers using duplicate permits, by identifying on the bottom of the file copy of the permit maintained in its office(s) either the word "transfer," to signify that the original permit was submitted, or the word "duplicate," to signify that a duplicate permit was used. Tr. 335.

Tri-pack permits issued on November 15, 2011, identify Mr. Arnao as a permit holder/vessel lessee, and Mr. Raymor and Respondent as vessel owners of Vessel FL8760ND, an unnamed vessel. A4 at 24, 26, 28. Notably, contrary to the ownership designation reflected on the Tri-pack permits issued on November 15, 2011, Respondent was the sole owner of Vessel FL8760ND. Tr. 73-75, 417; A29. It remains unknown to what extent, if at all, the Agency verified vessel ownership prior to issuing these permits, since Mr. Raymor was included as a vessel owner on the permits in spite of having no ownership interest in this vessel. Tr. 324-27, 340-41.

Mr. Arnao had no further contact with Respondent following their initial meeting in October 2011. Tr. 171-72, 191-92. However, Mr. Arnao continued to communicate with Mr. Raymor to finalize the lease arrangements insofar as coordinating the exchange of the transferred Tri-pack permits for the agreed upon payment. Tr. 171-75, 191-92. To that end, Mr. Arnao and Mr. Raymor arranged a subsequent meeting, during which Mr. Raymor was to pay Mr. Arnao in exchange for the Tri-pack permits for his and Respondent's use. Tr. 176. Upon meeting, however, Mr. Arnao learned that Mr. Raymor did not have the agreed-upon sum of $3,000 to give him in exchange for leasing the permits. Tr. 176-77; A9 at 3. As a consequence of Mr. Raymor's inability to pay the $3,000, Mr. Arnao and Mr. Raymor discussed alternative arrangements whereby Mr. Raymor would pay for the permits in two installments, namely, an initial payment of $1,500, and a subsequent payment of $1,500 once he started fishing with the permits. Tr. 176-77. When this too became problematic, Mr. Raymor offered to pay Mr. Arnao for leasing the permits "when he could," and Mr. Arnao "agreed to that." Tr. 177-78. At some point, presumably during an in-person meeting, Mr. Raymor came into possession of the transferred Swordfish Incidental Permit within the Tri-pack; however, the circumstances under which he obtained the permit, and whether he obtained the original permit or a copy, remains unclear.[14] Tr. 274-78; A9 at 3; *see also* A3 (a copy of the relevant Swordfish Incidental Permit as presented at a fish dealer in February 2012).

During the ensuing months, from November 2011 through January 2012, Mr. Raymor and Mr. Arnao continued to regularly communicate by means of text messaging. Tr. 186; A23; A27. While many of their communications were of a social nature and addressed the prospect of fishing together, some of the communications dealt with finalizing the permit lease arrangements, namely with regard to retrieving the permits. A23; A27. During this same span of time, Mrs. Arnao also communicated with Mr. Raymor through text messaging, the subject of which pertained almost exclusively to receiving payment in exchange for the permits. Tr. 257-60; A23; A28. In fact, by mid-January 2012, Mrs. Arnao asked Mr. Raymor when he wanted to "take possession of the permit[s]" and stated that she and Mr. Arnao "really need to get paid for the permit[s]." A23 at 8; A28 at 9. Although Mr. Raymor attempted to speak with Mrs. Arnao within days of that inquiry, she responded that she was eating lunch at that moment and would return his call shortly. A23 at 8; A28 at 10. She never did so. Tr. 259-60. A couple of days

[14] Mrs. Arnao testified that she realized she had neither the original nor a copy of this permit, and, as a result, she obtained a duplicate from NMFS in order to request that the Tri-pack permits be transferred out of the names of Mr. Raymor and Respondent and back to solely Mr. Arnao's name with no associated vessel. Tr. 265-69. However, Tanya Hawkins, a legal instruments examiner for the Agency who works in the permitting office that handled the permit transfers at issue in this matter, testified that based on the complete records in the Agency's possession, at A4, the original permits, not duplicates, were submitted with the Arnao's application to transfer them back into Mr. Arnao's name solely with no associated vessel. Tr. 328-36.

later, Mr. Arnao inquired of Mr. Raymor when they could meet, stating "I'm getting it from my wife bigtime." A23 at 8; A27 at 63. Although a meeting was arranged, it did not take place, and no further communication occurred between Mr. Raymor and Mr. or Mrs. Arnao until many weeks later, in March 2012. Tr. 184-85; A23 at 8; A27 at 64-65.

At some point during this break in communication that occurred between January and March 2012, Mr. Arnao drafted a letter addressed to Mr. Raymor and Respondent, the subject of which was "Re: Notice of lease agreement termination" ("Termination Letter").[15] Tr. 179, 220-21; A10. The Termination Letter states that it "constitute[s] written notice of lease cancellation" as the result of non-payment. A10. Additionally, in the Termination Letter, Mr. Arnao asserts that Mr. Raymor and Respondent "never took possession of [the] permits," and that they "at no point had the authority to sell fish" on the Tri-pack permits. *Id.* The Termination Letter bears the date of January 28, 2012, as well as the address and signature of Mr. Arnao. *Id.* However, the Termination Letter does not contain addressee information, like the name and mailing address of the intended recipient. *Id.* Initially at the hearing, Mr. Arnao stated that the intended recipient of Termination Letter was Mr. Raymor, but later expanded that to include Respondent. Tr. 209, 217. Mr. Arnao testified that he mailed the Termination Letter to "Justin at Key Largo," Tr. 179, and ultimately explained that he was given this address verbally by Mr. Raymor, and believed that it was a location where Mr. Raymor and Respondent kept a boat, Tr. 208-11. However, Mr. Arnao had considerable difficulty recalling this information in his testimony, as he was initially unable to recall why he chose to send the Termination Letter to Key Largo or how he obtained the Key Largo address. Tr. 179. Furthermore, despite Mr. Arnao's assertion that he mailed the Termination Letter to an address in Key Largo, no proof of mailing exists to corroborate his assertion, *see* Tr. 190, 212 (addressing the absence of corroborating proof of mailing the Termination Letter), and Mr. Arnao was unable to recall the address in Key Largo where he sent the letter, Tr. 208.[16]

Mr. Arnao's intention behind drafting the Termination Letter also remains unclear. Initially, Mr. Arnao testified that he prepared the Termination Letter simply to "have this on record for me" and to have paperwork in place to show that the lease was broken for lack of payment. Tr. 190. He further explained with regard to the Termination Letter that he had "no real thought process around making sure I had it certified," Tr. 190, since it was simply "a document for me to close the books on this and move on," Tr. 209, and to transfer the permit back into his name, Tr. 209, 218-19.[17] Mr. Arnao went on to explain that he did not think "there was any reason to have a return address, signature, anything like that" on the Termination Letter, Tr. 190, and that he did not even realize Mr. Raymor and Respondent were in possession of a

[15] At the hearing, the Agency specified that it did not offer the Termination Letter, in A10, as evidence that it was received by Mr. Raymor and Respondent, but rather as evidence that it was "written and sent by Mr. Arnao." Tr. 187.

[16] The Agency's investigative witness, Special Agent Purcell, testified that, from his perspective, this letter is merely a piece of paper that was typed-up, to which he focused little on due to the lack of confirmation that it was ever received. Tr. 138.

[17] Notably, the Tri-pack permits were transferred from Mr. Raymor and Respondent to Mr. Arnao, individually and with no associated vessel, on February 23, 2012. A4 at 49, 51, 53-57.

permit from the Tri-pack, Tr. 218.[18] Later, Mr. Arnao testified that he prepared the Termination Letter to provide notice and "verification" to Mr. Raymor and Respondent that he was terminating the lease, but he did not recognize it as a formal document such that the inclusion of addressee information was necessary. Tr. 216-19.

Around the time Mr. Arnao drafted the Termination Letter, Mrs. Arnao completed an undated permit application to transfer the Tri-pack permits from Vessel FL8760ND, with Mr. Raymor and Respondent listed as vessel owners, to a non-vessel status solely in Mr. Arnao's name. Tr. 179-80, 251; A4 at 54-57. This permit application, bearing a signature for Mr. Arnao, was received by NMFS on February 10, 2012, and reviewed on February 16, 2012.[19] A4 at 54, 57. Mr. Arnao was issued the transferred Tri-pack permits reflecting solely his name and no associated vessel on February 23, 2012. A4 at 42-43, 50-52. Prior to the Agency's receipt of the undated permit application, Mrs. Arnao completed and filed No Fishing Reports associated with Vessel FL8760ND for the months of November 2011, December 2011, and January 2012, in order to complete the logbook requirements associated with the Tri-pack permits and allow for transfer of these permits. *See* Tr. 251-55, 281-86 (testimony of Mrs. Arnao regarding the No Fishing Reports); A21 at 1-2, 4 (relevant No Fishing Reports from November 2011 through January 2012). Subsequently, on February 28, 2012, after the transfer of the Tri-pack permits to solely Mr. Arnao had been executed, Mrs. Arnao completed a No Fishing Report associated with Vessel FL8760ND for the Tri-pack permits for the month of February 2012, with the purpose of allowing for a subsequent transfer. *See* Tr. 283; A21 at 5.

Perplexingly, despite completing the transfer removing Mr. Raymor and Respondent from the Tri-pack permits in February 2012, Mr. Arnao failed to disclose to Mr. Raymor in text messages exchanged in March and April of 2012, that he had terminated the lease arrangement, sent a notice of termination to Mr. Raymor and Respondent, and transferred the Tri-pack permits back into solely his name with no associated vessel. Tr. 202-04. Instead, following a March 14, 2012 text message from Mr. Raymor requesting that they "link up" because Mr. Raymor was planning to "start using the permits" and wanted to be "squared up," Mr. Arnao belatedly responded, on April 12, 2012, stating "I don't know what u [sic] did but the government is on my ass. I better not have a problem man they are coming to see me right now." A23 at 9; A27 65-66; Tr. 204. A few days later, on April 16, 2012, Mr. Arnao stated "I can't believe you used the permit. Dude I might be in a shit ton of trouble." A23 at 9; Tr. 204-06. When confronted with questions at the hearing as to why no mention of lease termination was conveyed to Mr. Raymor during these communications, the subject of which pertained to the use and payment for the permits, Mr. Arnao testified "there isn't a reason for this" and "that was how this kind of rolled out." Tr. 205-06.

[18] The circumstances under which Mr. Raymor and Respondent came into possession of the Swordfish Incidental Permit remains unclear. It was suggested during the hearing that the permit, or a copy of the permit, was somehow taken from the Arnaos, presumably during an in-person meeting that took place at their home with Mr. Raymor, or that a copy of the permit was mistakenly given to Mr. Raymor by Mrs. Arnao. Tr. 195-98, 271-78.

[19] Notably, Mr. Arnao was unable to authenticate this signature with certainty at hearing. Tr. 236. He indicated that his signature has changed over time, and stated that the signature in the permit application on page 57 of A4 "may have been the way I signed back then." Tr. 236.

Not surprisingly, Respondent was not made aware of the transfer of the Tri-pack permits back to solely Mr. Arnao. A31 at 2. Under NMFS' permitting practices, permits (whether transferred or renewed) are sent only to the permit holder, in this case, Mr. Arnao. Tr. 307-08. Thus, absent Mr. Arnao disclosing the fact that he had transferred the Tri-pack permits out of their names, Mr. Raymor and Respondent would not otherwise have been definitively made aware of the transfer and the issuance of new permits in only Mr. Arnao's name. Tr. 308-09.

On March 10, 2012, Respondent participated in a fishing trip to catch swordfish with Mr. Raymor, presumably because Respondent believed he had valid authorization to do so by means of the Tri-pack permits that had previously been issued in his name and associated with his vessel. Tr. 57-66, 71-79, 441; A24; A25. The vessel used for this trip was Respondent's fishing vessel. Tr. 71-81; A29. The product of this fishing trip was a 600-pound Atlantic swordfish. Tr. 75-76; A24; A25. Portions of this fishing trip were filmed by multiple cameras, and the recorded video, depicting the landing of the 600-pound swordfish, was later edited and posted on the website YouTube by Respondent.[20] A24; A25; Tr. 76-78. In addition to video footage of the fishing trip on March 10, 2012, the posted video also includes photographs, including a photograph of Mr. Raymor and Respondent posing with a swordfish on the dock of a marina, A24 at 5:15-20; Tr. 72-73, and a photograph of a scale reflecting an identified "Core Weight" of 486.2 pounds, A24 at 5:23-5:26.

According to the Agency, the 600-pound swordfish landed by Mr. Raymor and Respondent on March 10, 2012, was later sold to a fish dealer; however, the documents submitted by the Agency to corroborate such a sale contain information inconsistent with the sale of the 600-pound swordfish landed on March 10, 2012, and otherwise do not identify Respondent in the alleged sale transaction. The fish dealer documentation submitted in support of the Agency's allegations regarding Respondent's participation in the sale of the 600-pound swordfish, reflecting the date "3/11," contains multiple recorded weights that do not correspond to a 600-pound swordfish. *See* A2 at 1; A17 at 1-2 (fish dealer weight sheet record and fish dealer report reflecting various weights and dressed weights). The Agency's law enforcement witness, Special Agent Purcell, associated a weight listed as "486" in a fish dealer weight sheet record as the "weight of the core fish" for the 600-pound swordfish after the unusable parts were removed at market, consistent with the "Core Weight" reflected in the video edited and posted by Respondent. Tr. 35; A2 at 1; A24.[21] However, the fish dealer weight sheet record and fish dealer report reflecting the date of "3/11" include multiple other weight amounts which do not correlate with a 600-pound swordfish.[22] *See* A2 at 1; A17 at 1-2. Notably, the fish dealer report reflecting transactions dated "3/11" records dressed weights of 223 pounds and 147 pounds, a significant discrepancy from the 600-pound swordfish for which Special Agent Purcell had no explanation. A17 at 1-2; Tr. 47.

[20] The video depicting the March 10, 2012 fishing trip, was entitled "Huge Daytime Swordfish Over 600 lbs! 03/10/2012," when it was posted on YouTube by Respondent. *See* A25.

[21] The fish dealer weight sheet record in A2 does not specify a metric for the weight amounts recorded. *See* A2 at 1.

[22] Notably, the fish dealer weight sheet record dated "3/11" reflects weight amounts listed as "486," "94," "129," and "223." A2 at 1.

Moreover, the fish dealer documentation that the Agency relies upon as evidence that Respondent was involved in a sales transaction involving the 600-pound swordfish landed on March 10, 2012, contains inconsistent information regarding the fishing vessel related to the sale, and otherwise does not identify Respondent. *See* A2 at 1; A17 at 1-2. The fish dealer weight sheet record dated "3/11" reflects the vessel registration number of Vessel FL8760ND, Respondent's unnamed vessel, but otherwise identifies the boat associated with the recorded sales transaction as "Fish Sandwich." A2 at 1. The fish dealer report reflecting transactions dated "3/11" merely identifies an "Unnamed" vessel as related to the sales transaction associated with the investigation in this case, and provides no other identifying information. A17 at 1-2; *see also* Tr. 52-533 (identifying and discussing aforementioned record of the sales transaction in A17). Furthermore, while the fish dealer weight sheet record identifies "Greg Roy Raymor" with the recorded sales transaction, A2 at 1, none of the fish dealer records submitted by the Agency as evidence that Respondent was involved in a sales transaction relating to the 600-pound fish landed on March 10, 2012, identify Respondent, *see* A2 at 1; A17 at 1-2.

In addition to the allegations relating to the fishing trip on March 10, 2012, the Agency also alleges that Respondent participated in the catching and selling of Atlantic swordfish on March 26, 2012, in Count 2. As evidence in support of this allegation, the Agency provided records from a fish dealer dated March 26, 2012, including a fish dealer report, a fish dealer weight sheet record, and a trip ticket statement, which collectively reference the name of "Greg Raymor," a vessel named "Fish Sandwich," and the vessel number "FL8760ND." A12; A17 at 4-6. None of these records identify Respondent as catching or selling fish on March 26, 2012. Instead, these documents appear to only identify Mr. Raymor as involved in a sales transaction with a fish dealer on March 26, 2012. *See* A12; A17 at 4-6. The Agency did not supply any direct evidence of Respondent catching or selling fish on March 26, 2012. Notably, the Agency did not question Respondent during its investigation into the alleged violations, and did not focus its investigation specifically on Respondent's activities. Tr. 140-48. Rather, the Agency's investigation into the alleged violations focused on Mr. Raymor. Tr. 140-48; A22.

IV. PRINCIPLES OF LAW

A. Liability

In 1976, Congress enacted the Magnuson-Stevens Act, 16 U.S.C. §§ 1801-1883, "to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States." Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 401, 90 Stat. 331 (codified at 16 U.S.C. § 1801(b)(1)). The Magnuson-Stevens Act, as amended, aims to "promote domestic commercial and recreational fishing under sound conservation and management principles." 16 U.S.C. § 1801(b)(3)

Section 307(1)(A) of the Magnuson-Stevens Act makes it unlawful "for any person—to violate any provision of this Act or any regulation or permit issued pursuant to this Act." 16 U.S.C. § 1857(1)(A). "Person" is defined to include "any individual . . . , any corporation, partnership, association, or other entity . . . , and any Federal, State, local, or foreign government or any entity of any such government." 16 U.S.C. § 1802(36).

Pursuant to the Magnuson-Stevens Act, the Agency implemented regulations pertaining to Atlantic Highly Migratory Species ("Atlantic HMS"), including Atlantic swordfish. *See* 50 C.F.R. Part 635 (regulations addressing Atlantic HMS); 50 C.F.R. § 635.2 (defining Atlantic HMS to include Atlantic swordfish).[23] Such regulations "govern conservation and management of North and South Atlantic swordfish in the management unit." 50 C.F.R. § 635.1(a). To that end, the Agency regulations require an "appropriate valid vessel permit" to "fish for, catch, possess, retain, or land Atlantic HMS." 50 C.F.R. § 635.71(a)(2). Thus, in order to "fish for, take, retain, or possess" an Atlantic swordfish, an owner or operator of the vessel must have the appropriate valid permit on board the vessel when engaged in recreational or commercial fishing. *See* 50 C.F.R. § 635.4(a)(2). It is the vessel owner's is responsibility to "satisfy[] all of the requirements associated with obtaining, maintaining, and making available for inspection all required vessel permits." *Id.*

Aside from these requirements, Agency regulations impose additional requirements on the sale and purchase of Atlantic swordfish. *See* 50 C.F.R. § 635.71(e)(7). To sell such swordfish, the vessel on which the swordfish is possessed must have a "valid commercial permit for swordfish" issued under 50 C.F.R. Part 635. *See* 50 C.F.R. § 635.31(d). The only valid commercial vessel permits for swordfish are those issued under the limited access program. 50 C.F.R. § 635.4(f)(2). A commercial limited access permit for swordfish ("LAP") must be obtained by the owner of a vessel when that vessel is used "to fish for or take Atlantic swordfish," to retain or possess Atlantic swordfish with "an intention to sell,"[24] or sell Atlantic swordfish. 50 C.F.R. § 635.4(f)(1); *see also* 50 C.F.R. § 635.2 (defining LAP). Specifically, the three types of allowable LAPs are: a swordfish directed LAP, a swordfish incidental LAP, or a swordfish handgear LAP. 50 C.F.R. § 635.4(f)(1). Apart from a swordfish hand gear permit, a LAP for swordfish is valid only when the vessel has on board a valid LAP for shark and a valid Atlantic Tunas Longline category permit issued for such vessel.[25] 50 C.F.R. § 635.4(f)(4).

Subject to certain restrictions not at issue in this case, "an owner may transfer a shark or swordfish LAP or an Atlantic Tunas Longline category permit to another vessel that he or she owns or to another person." 50 C.F.R. § 635.4(l)(2)(i). For swordfish, shark, and tuna longline LAP transfers to a different person, the transferee must submit a request to NMFS to transfer the original LAPs. 50 C.F.R. § 635.4(l)(2)(v). In so doing, the completed application must include the original LAP(s), with the signatures of the parties to the transaction on the back of the

[23] Given the dates of alleged violations in this matter, the 2011 edition of the Code of Federal Regulations is the edition applicable to the regulatory provisions under Title 50 of the Code of Federal Regulations relevant to the alleged violations in this case, and, therefore, is the edition to which citations to such regulatory provisions are made here, unless otherwise specified.

[24] The Agency regulations provide that "[i]t is a rebuttable presumption that the owner or operator of a vessel on which swordfish are possessed in excess of the recreational retention limits intends to sell the swordfish." 50 C.F.R. § 635.4(f)(1). The recreational retention limits for vessels issued a HMS angling permit under 50 C.F.R. § 635.4(c) was, during the relevant period, no more than one North Atlantic swordfish per person and up to four North Atlantic swordfish per vessel per trip. *See* 50 C.F.R. § 635.22(f)(3).

[25] As previously noted, within the industry, this collection of vessel permits — a swordfish incidental LAP, a LAP for shark, and an Atlantic Tunas Longline category permit — is referred to as a "tri-pack." *See supra* p. 5; Tr. 85-87, 299-301.

permit(s), and the bill of sale for the permit(s). *Id.* For LAP transfers involving vessels, copies of U.S. Coast Guard documentation or state registration for both vessels must be included with the application. *Id.*

B. Standard of Proof

To prevail on its claims that Respondent violated the Magnuson-Stevens Act and the regulations, the Agency must prove facts constituting the violations by a preponderance of reliable, probative, substantial, and credible evidence. 5 U.S.C. § 556(d); *Vo*, 2001 NOAA LEXIS 11, at *17 (NOAA Aug. 17, 2001) (citing 5 U.S.C. § 556(d); *Dep't of Labor v. Greenwich Colleries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100-03 (1981)); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). This standard requires the Agency to demonstrate that the facts it seeks to establish are more likely than not to be true. *Fernandez*, 1999 NOAA LEXIS 9, at *8-9 (NOAA Aug. 23, 1999) (citing *Herman & MacClean v. Huddleston* (459 U.S. 375, 390 (1983)). To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence. *Vo*, 2001 NOAA LEXIS 11, at *17 (citing *Paris*, 4 O.R.W. 1058 (NOAA 1987)).

C. Civil Penalty

Section 308(a) of the Magnuson-Stevens Act provides that "[a]ny person who is found by the Secretary . . . to have committed an act prohibited by section 307 [of the Act] shall be liable to the United States for a civil penalty." 16 U.S.C. § 1858(a); *see also* 50 C.F.R. § 600.735 (incorporating statutory civil and criminal penalty provisions, and civil forfeiture provisions). The amount of the civil penalty cannot exceed $181,071 for each violation. *See* 16 U.S.C. § 1858(a) (establishing the maximum statutory penalty amount); 15 C.F.R. § 6.3(f)(15) (adjusting the penalty amount in 16 U.S.C. § 1858(a) for inflation effective January 15, 2017); *see also* 15 C.F.R. § 6.4 (providing the effective date for inflation adjustments). No penalty assessment may be made unless the alleged violator is given notice and opportunity for a hearing conducted in accordance with Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554. 16 U.S.C. § 1858(a).

To determine the appropriate amount of the civil penalty, the Magnuson-Stevens Act identifies certain factors to consider.

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

16 U.S.C. § 1858(a) (emphasis omitted). Similarly, the procedural rules governing this proceeding, set forth at 15 C.F.R. part 904 ("Rules of Practice"), provide, in pertinent part:

> Factors to be taken into account in assessing a civil penalty, depending upon the statute in question, may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior violations, and ability to pay; and such other matters as justice may require.

15 C.F.R. § 904.108(a).

There is no presumption in favor of the penalty proposed by the Agency, and an Administrative Law Judge ("ALJ") 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 (NOAA Jan. 18, 2012); *see also* 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631 (June 23, 2010). The ALJ must independently determine an appropriate penalty "taking into account all of the factors required by applicable law." 15 C.F.R. § 904.204(m); *see also* 15 C.F.R. § 904.108 (enumerating factors to be taken into account in assessing a penalty).

V. ANALYSIS

A. Parties' Arguments

In its post-hearing brief, the Agency argues that Respondent and Mr. Raymor were business partners in an "ongoing commercial enterprise" whereby together they used "Mr. Prieto's boat and Mr. Raymor's skills as a fisherman," for which evidentiary support can be found in Respondent's PPIP and closing argument. Ag. Br. at 6. As to Count 1, the Agency contends it presented "undisputed evidence and testimony" that Respondent directly "harvested and sold an Atlantic swordfish" on March 10 and 11, 2012. Ag. Br. at 6 (citing A2; A3; A4 at 54-65; A17; A22 at 7-8; A24). In support of its allegations regarding Respondent catching Atlantic swordfish in Count 1, the Agency relies on the YouTube video edited and posted by Respondent, which the Agency purports shows Respondent's "participation in the capture and landing of the fish." Ag. Br. at 6 (citing A24). With regard to the allegations in Count 1 relating to the sale of the swordfish, the Agency relies on documentation from a fish dealer reflecting use of the invalid Swordfish Incidental Permit (SFI-17), which identifies Respondent and Vessel FL8760ND, as well as the photograph of the scale included in the video edited and posted by Respondent, which it asserts reflects the "weigh-out" of the swordfish at a fish dealer. Ag. Br. at 6 (citing A2; A3; A4 at 54-65; A17; A22 at 7-8; A24).

As to Count 2, the Agency argues that "Respondent's partner, in furtherance of their joint business venture, sold a second fish to [a fish dealer] on March 26, 201[2] using the same permit, SFI-17, which was no longer valid."[26] Ag. Br. at 6 (citing A12; A17; A22 at 10). The Agency contends that "[w]hile there is no evidence before the Court proving the Respondent's direct involvement in the harvest or sale of this fish, it is appropriate for the Court to find vicarious liability because the activities of the Respondent and Mr. [Raymor] constitute a joint business venture and the sale of the fish was within the scope of that venture." Ag. Br. at 7 (citing *Peterson*, 1991 NOAA Lexis 34 (NOAA 1991)). In support, the Agency points to the lease

[26] The Agency appears to be referring to Mr. Raymor with its reference to "Respondent's partner." *See* Ag. Br. at 6.

agreement both individuals made with Mr. Arnao "to lease his permits for the purpose of catching and selling swordfish," and notes that Respondent and Mr. Raymor "had, in fact, caught and sold a fish together just over two weeks before." Ag. Br. at 7.

With regard to penalty, the Agency argues that "Respondent's recklessness in committing these violations of the law highlights the need to assess a penalty that will encourage future compliance." Ag. Br. at 8. The Agency explains that vessel permitting provides the "framework for a full suite of regulatory requirements" that ensure the sustainability of the United States. swordfish fishery, a fishery that has limited access, meaning that a new participant could not enter the fishery without obtaining the permit of a departing participant. Ag. Br. at 8. It discusses the value of logbook information submitted by permit vessel owners, that is used for, *inter alia*, stock assessments and establishment of quota limits. Ag. Br. at 8. The Agency notes that two incidents of violative conduct are at issue in this case. Ag. Br. at 9. It argues that, as a consequence of the violations, "false information (in the form of no-fishing reports) was reported to NOAA,"[27] which undermines the Agency's regulatory efforts to sustainably manage the United States Atlantic swordfish fishery. Ag. Br. at 9.

The Agency argues that, although Respondent did not testify at the evidentiary hearing, the representations he made in his PPIP (admitted into evidence as A31) suggest that Respondent and Mr. Raymor "believed they had a valid permit when the fish were caught and sold," and the Agency alleges that this position is inconsistent with Respondent's closing remarks. Ag. Br. at 10 (citing A31; Tr. 439-40). The Agency challenges the purported belief that the permit was valid, arguing that if such a belief was genuinely held, Respondent and Mr. Raymor "would have been submitting fishing reports to NOAA as per their agreement with Mason Arnao." Ag. Br. at 10. Moreover, the Agency argues that "the fact that [Respondent and Mr. Raymor] had not paid for the permit[s], and the content of the communications between Mr. Raymor and the Arnaos, should have led them to believe that the deal was off and to at least wonder about the validity of the permit[s]."[28] Ag. Br. at 10.

In contrast, Respondent in his post-hearing brief argues that the evidence presented by the Agency not only leaves many unanswered questions, but also fails to establish wrongdoing on his part. Resp. Br. at 1.[29] He contends that the Arnaos "have carefully fabricated their entire statement and testimony to ensure that they keep themselves out of the crosshairs of the [A]gency" and that the Agency's investigator, Special Agent Purcell, "failed to notice the inconsistencies in the concocted statement by the [Arnaos]" and "the inconsistencies in the evidence he was gathering." Resp. Br. at 1. Respondent argues that he is not responsible for the actions of Mr. Raymor, that he personally never engaged in the sale of fish or collected any money in connection with such sales, and that he at no time authorized Mr. Raymor to act on his

[27] As discussed, testimony at the hearing revealed that Mrs. Arnao submitted No Fishing Reports to NOAA indicating that no fishing was conducted with the Tri-pack permits associated with Respondent's vessel during the months of November 2011 through March 2012. Tr. 251-55, 281-86; A21.

[28] In support, the Agency refers to a text message communication from Mr. Raymor to Mr. Arnao on March 14, 2012, in which he expresses a desire to be "squared up." A27 at 65.

[29] Citations to Respondent's Initial Post-Hearing Brief are to the physical pages since each page is unnumbered.

behalf. Resp. Br. at 1-2. Respondent suggests that his only involvement in this matter stems from the fact that his name is on the Permit Lease Agreement. Resp. Br. at 1.

As to specific evidentiary challenges, with regard to the allegations relating to Count 1, Respondent notes that his name does not appear on the fish dealer documentation submitted by the Agency in A2 relating to the sale of a swordfish on March 11, 2012, and that no other evidence was presented to establish his presence at the fish dealer because, according to Respondent, he was never present. Resp. Br. at 1 (citing A2). Further, Respondent reiterates the points he made during the hearing with regard to the inconsistencies in the Agency's evidence concerning the alleged sale of the 600-pound swordfish, noting the recorded weight of the swordfish that was allegedly caught and sold (486 pounds) as compared to the weight of the swordfish claimed by the Agency to have been caught and sold (600 pounds).[30] Resp. Br. at 1; *see also* Tr. 47; A2 at 1; A17 at 1-2. He further cites to the fish dealer weight sheet record dated "3/11" in A2, and notes that this record lists four differing weight amounts. Resp. Br. at 2. He points out one of these recorded weight amounts, corresponding to a weight of 223 pounds, and suggests that it was this fish, not a much larger fish, that was actually sold on March 11, 2012, based on the calculation of the payment for the fish recorded in the fish dealer documentation at $8 per pound, totaling $1,784 (223 pounds x $8 = $1,784). Resp. Br. at 1-2 (referencing A2). Further support, Respondent contends, is contained in the fish dealer report submitted as evidence by the Agency in A17, in which, again, 223 pounds of swordfish is recorded as sold at $8 per pound in a transaction that occurred between March 1-15, 2012. Resp. Br. at 2 (referencing A17 at 1).

Respondent also challenges the Agency's evidence with regard to the allegations of Count 2, noting that within the fish dealer documents submitted by the Agency in A17, "there is a trip ticket with the weight of 86 [pounds of swordfish]" but "the 86 [pound] fish was NOT reported [on the fish dealer report for the relevant time period] and a check was never given to [Mr. Raymor]." Resp. Br. at 2 (emphasis in original). Furthermore, Respondent reiterates that he did not take part "in any illegal exchange of fish for money on this date or ever" and that Mr. Raymor's "actions do NOT reflect my own." Resp. Br. at 2 (emphasis in original).

In addition to challenging the Agency's evidence relating to the allegations of sale in Counts 1 and 2, Respondent also argues that the "dates in question fall between the dates of the permit[s] being valid" and the evidence reveals that the Arnaos never disclosed that they had transferred the permit[s] back solely into Mr. Arnao's name. Resp. Br. at 2. Instead, according to Respondent, the Arnaos "carefully concocted a fabricated story which . . . is full of inconsistencies and blatant lies." Resp. Br. at 2. In support of this assertion, Respondent points out that the Agency's permit specialist witness, who processed permits in this case, testified that the original permit (for the Swordfish Incidental Permit) was mailed with the Arnao's application to transfer the permit back into soley Mr. Arnao's name, yet Mrs. Arnao testified to the contrary that the original permit (for the Swordfish Incidental Permit) was missing, suggesting that Mr. Raymor had taken it, and that she had to request a duplicate permit to submit with the application in order to transfer the permit into her husband's sole name. Resp. Br. at 2 (referring to Tr. 264-78, 304-07, 328-36). Additionally, Respondent notes that the Arnaos "claim to have sent a

[30] Notably, in his pre-hearing brief, Respondent asserts that the 600-pound swordfish landed on March 10, 2012, was never sold, though he acknowledges that he did not present evidence of this assertion at hearing. Resp. Br. at 1-2.

termination letter to [Mr. Raymor] and or me but they can't show any proof whatsoever of when the letter was created or if it was ever mailed." Resp. Br. at 2 (referring to the Termination Letter in A10). Respondent suggests that "this letter was fabricated after the [Arnaos] were aware of an investigation," in an effort to shield themselves from any wrongdoing. Resp. Br. at 2-3. Further, Respondent points out that Mr. Arnao failed to mention to Mr. Raymor that the permit had been transferred (back to solely Mr. Arnao) when he was told that Mr. Raymor intended to begin using the permit to fish. Resp. Br. at 3.

Respondent reiterates his position, that he "NEVER committed or even attempted to commit ANY violations whatsoever," and he asserts he "did NOT exchange ANY fish" and "did NOT collect ANY money." Resp. Br. at 3 (emphasis in original). He argues that he had no part of the charged allegations, and expresses that this matter has been a learning experience for him "to never again put my name on a piece of paper and then not follow through with where that paper goes." Resp. Br. at 3.

B. Liability

To establish liability for the charged violations, the Agency must prove, by a preponderance of the evidence, that Respondent engaged in the "catching and then selling Atlantic swordfish without a valid commercial permit" on or about March 11 and 23, 2012. It is well settled that "[i]n general, 'offenses under the [Magnuson-Stevens Act] are strict liability offenses.'" *Nguyen*, 2012 NOAA LEXIS 2, at *17 (NOAA Jan. 18, 2012) (quoting *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999)); *see also Whitney*, 1991 NOAA LEXIS 33, at *10 (NOAA July 3, 1991) (quoting *Alba*, 2 O.R.W. 670, 673 (NOAA App. 1982)) ("'[S]cienter is not an element of a civil offense under . . . 16 U.S.C. § 1857.'"); *Tart v. Massachusetts*, 949 F.2d 490, 502 (1st Cir. 1991) (discussing strict liability under "so-called 'public welfare' offenses"). Consequently, at this stage of the analysis, the intent of a respondent with regard to claimed violative conduct is immaterial.

As has been stated, the evidence upon which I may rely must be reliable, probative, substantial, and credible.[31] Here, the competent evidence presented by the Agency to establish the violations alleged against Respondent is limited, at best. Beginning with the first count of claimed violations — that Respondent caught and then sold Atlantic swordfish without a valid commercial permit on or about March 11, 2012 — the evidence presented establishes only part of the claim. Specifically, Agency regulations require the vessel owner to maintain an "appropriate valid vessel permit," such as a LAP, on board the vessel to "fish for, catch, possess, retain, or land" Atlantic swordfish. *See* 50 C.F.R. §§ 635.1(a), 635.2, 635.4, 635.71(a)(2). The violative conduct of fishing for and catching Atlantic swordfish without a valid permit has been established by the video that Respondent candidly authenticated in A24, depicting his acknowledged participation in the fishing for and catching of swordfish with his vessel on this date. Tr. 57-66, 71-81, 441; A24; A25; A29. The fact that Respondent, in all likelihood, was unaware that the Tri-pack permits relied upon to fish for and catch this swordfish were no longer valid is immaterial given that he is strictly liable for the offense.

[31] *See supra* p. 13; 5 U.S.C. § 556(d); *Vo*, 2001 NOAA LEXIS 11, at *17; 15 C.F.R. §§ 904.251(a)(2), 904.270(a).

As to the second part of this claimed violation in Count 1 — the sale of Atlantic swordfish without a valid commercial permit, for which additional Agency regulations apply— the evidence presented fails to establish Respondent's involvement in the alleged violative conduct.[32] The Agency predominantly relies upon fish dealer documentation, including a fish dealer report and a fish dealer weight sheet record, in an attempt to connect Respondent with the claimed sales transaction. However, this documentary evidence contains information inconsistent with the sale of the 600-pound swordfish landed on March 10, 2012, and otherwise does not identify Respondent in the alleged sale transaction. The fish dealer documentation upon which the Agency relies to establish the sale of such a rare 600-pound swordfish contains multiple recorded weights, including dressed weights, that do not actually correspond to a 600-pound swordfish.[33] *See supra* pp. 10-11; A2 at 1; A17 at 1-2. Notably, Special Agent Purcell, an investigator associated with this case and the Agency's law enforcement witness, was unable to explain the discrepancy between the weight of the 600-pound swordfish landed on March 10, 2012, and the substantially different dressed weights reflected in the fish dealer report purported to correspond with the alleged sales transaction. Tr. 47; *see also* A17 at 1-2 (the relevant fish dealer report).

Likewise, the fish dealer documentation relied upon by the Agency as evidence that Respondent was involved in a sales transaction involving the 600-pound swordfish landed on March 10, 2012, contains inconsistent information regarding the fishing vessel related to the alleged sale, and otherwise does not identify Respondent in the alleged sales transaction. *See* A2 at 1; A17 at 1-2. As previously noted, relevant fish dealer documentation contains differing and inconsistent references to the vessel associated with the sales transaction recorded. *See supra* p. 11; A2 at 1; A17 at 1-2. Additionally, while the fish dealer weight sheet record dated "3/11" identifies "Greg Roy Raymor" with a recorded sales transaction, A2 at 1, none of the records submitted by the Agency as evidence that Respondent was involved in a sales transaction relating to the 600-pound fish landed on March 10, 2012, identify Respondent as a participant in the alleged sales transaction, s*ee* A2 at 1; A17 at 1-2. Accordingly, the documentary evidence submitted by the Agency in support of the allegations in Count 1 relating to the sale of swordfish is insufficient to establish the alleged violative conduct.

Aside from the aforementioned documentary evidence, the Agency additionally relies upon the video Respondent edited and posted on YouTube related to the March 10, 2012 fishing excursion, for its assertion that Respondent was "directly involved" in the alleged sale of the 600-pound swordfish landed on March 10, 2012. *See* Ag. Br. at 6 (citing A24). The Agency asserts that the photograph of the scale included in the video edited and posted by Respondent reflects the "weigh-out" of the swordfish at a fish dealer, and argues that this is evidence of Respondent's involvement in the alleged sale of the 600-pound swordfish. *See* Ag. Br. at 6 (citing A24). However, the photograph in the video referenced by the Agency does not depict Respondent, *see* A24 at 5:23-5:26, and, while Respondent acknowledged editing and posting the video including this photograph, the evidence does not establish that he took the referenced

[32] *See supra* pp. 12-13 (discussing the additional regulations applicable to sale of Atlantic swordfish); *see also* 50 C.F.R. §§ 635.4(f)(1), 635.4(f)(4), 635.31(d), 635.71(e)(7) (relevant regulations).

[33] Special Agent Purcell characterized the 600-pound size of the swordfish as "rare," "very rare," and "extremely rare." *See* Tr. 60-61.

photograph, *see* Tr.76-78 (reflecting Respondent's testimony regarding the video in A24). As a result, this photographic evidence is also insufficient evidence to establish Respondent's participation in the alleged sale transaction of the 600-pound swordfish landed on March 10, 2012. Furthermore, as acknowledged by Special Agent Purcell, no eyewitness evidence was presented that Respondent was present at the alleged sale of the 600-pound swordfish. Tr. 117. Given the aforementioned inadequacy of the evidence presented by the Agency relating to Respondent's involvement in the alleged sale transaction relating to Count 1, I find that the Agency has failed to establish that it is more likely than not that Respondent engaged in the sale of Atlantic swordfish without a valid commercial permit on or about March 11, 2012.

As to the alleged violations in Count 2, namely the catching and then selling of Atlantic swordfish without a valid commercial permit on or about March 23, 2012, the evidence presented by the Agency is so attenuated with regard to any involvement by Respondent that I remain unconvinced of Respondent's liability. Specifically, in an attempt to establish the claimed violation, the Agency relies upon documentary evidence from a fish dealer, including a fish dealer report, a fish dealer weight sheet record, and trip ticket statement, which collectively identify the name of "Greg Raymor," a vessel named "Fish Sandwich," a vessel number "FL8760ND," and a date of "3/26/12." A12; A17 at 4-6. None of these records identify Respondent as catching or selling swordfish on March 26, 2012. While the state registration number "FL8760ND," reflected in the aforementioned documentary evidence, does correspond to Respondent's vessel, his vessel, as previously noted, does not bear the name of "Fish Sandwich," as it is actually an unnamed vessel. Tr. 73-75; A29. Moreover, the aforementioned documentary evidence reflects that it is Mr. Raymor, rather than Respondent, who is associated with the recorded sales transaction allegedly occurring on March 26, 2012, as such documentation only identifies Mr. Raymor and does not identify Respondent. *See* A12; A17 at 4-5. While the Agency concedes that "there is no evidence before the Court proving the Respondent's direct involvement in the harvest or sale of this fish" it argues nonetheless that "it is appropriate for the Court to find vicarious liability because the activities of the Respondent and Mr. [Raymor] constitute a joint business venture and the sale of the fish was within the scope of that venture." Ag. Br. at 7 (citing *Peterson*, 1991 NOAA Lexis 34 (NOAA 1991)). Thus, under such a theory the Agency seeks to hold Respondent accountable for the actions of Mr. Raymor that, in turn, gave rise to the charged violations in this matter.

In support of this argument, the Agency relies upon *Peterson*, 1991 NOAA Lexis 34 (NOAA 1991). *See* Ag. Br. at 7. In that case, the ALJ, in evaluating a defense raised by the respondents, examined the nature of the relationship between the respondents and determined that the relationship was "in the nature of a joint venture." *Id.* at *11. In reaching this determination, the ALJ found that the elements of a joint venture had been established since there was "an intent to carry out a single business undertaking; a contribution by each of the parties to the venture; an inferred right of control; and a right to participate in the profits." *Id.* (citing 46 AM. JUR. 2d Joint Venture § 7 (1969)). Noting that the evidence established a clear split in the proceeds between the respondents (of the gross proceeds, the registered owner of the vessel received 30 percent and the operator of the vessel received 70 percent), and noting that the registered owner of the vessel benefited by the operator's illegal fishing, the ALJ concluded that "since the owner [was] entitled to a share of the vessel's production, so must he bear responsibility for its unlawful use." *Id.* at *11-12. Additionally, the ALJ noted, "the fact that the

owner was the permit holder also ties him to, and makes him responsible for, fishing activities conducted under the permit." *Id.* at *12.

However, the facts of the instant case do not support such a determination and conclusion as the Agency has not established that Respondent and Mr. Raymor were engaged in a joint venture. The Agency argues that the lease agreement that Respondent and Mr. Raymor entered into to lease the Tri-pack permits owned by Mr. Arnao establishes their intention to catch and sell swordfish, and that this is further evidenced by an occasion of catching and selling a fish together "just over two weeks before" (presumably referring to the March 10, 2012 incident). Ag. Br. at 7. While I agree that the act of leasing the Tri-pack permits suggests a desire to fish for and catch certain species of fish, including Atlantic swordfish, this alone does not establish that Respondent and Mr. Raymor engaged in a joint business venture, nor does it demonstrate a clear intention to carry out a single business undertaking. Moreover, the quantity of fish at issue in this case — which the Agency acknowledges as "small" in number — casts doubt on the reality of a true commercial enterprise and business endeavor, in spite of the Agency's law enforcement witness' broad generalization that individuals identified on a commercial fishing permit are deemed to be in some sort of business enterprise.[34]

An analysis of this record does not reveal a business relationship between Respondent and Mr. Raymor. The fact that, by Respondent's own admission, he and Mr. Raymor fished together on a prior occasion (namely on March 10, 2012) aboard Respondent's vessel does not lend further support to such a conclusion. The evidence in this case does not reveal a clear contribution by Respondent and by Mr. Raymor to a joint business venture. In fact, the documentary evidence upon which the Agency relies is hardly consistent with the argument advanced by the Agency that Respondent contributed his vessel to the alleged joint business venture. *See* Ag. In. Br. at 6 (reflecting evidence relied upon by the Agency). Specifically, while the vessel registration for Vessel FL8760ND identifies Respondent as the sole owner, A29, the Vessel Lease Agreement that accompanied the October Permit Application curiously states that the vessel was being leased to the Tri-pack permits by Mr. Arnao, Respondent, and Mr. Raymor, collectively, A4 at 36; A29. Likewise, the October Permit Application designates both Respondent and Mr. Raymor as vessel owners of Vessel FL8760ND with the vessel ownership classification of "Individual or Sole Proprietorship," rather than vessel ownership classifications for "Joint Ownership" or "Partnership." A4 at 31-32. In response to the information submitted with the October Permit Application, the Agency processed the transfer of the Tri-pack permits to Respondent and Mr. Raymor, identifying both of them as owners of Vessel FL8760ND. A4 at 24, 26, 28. It remains unknown to what extent ownership of this vessel was ever verified by the Agency. To compound the conflicts presented regarding Vessel FL8760ND, the Agency has simultaneously argued that an altogether different vessel, namely a "Dusky" owned by Mr. Raymor, was used to fish for and catch Atlantic swordfish on March 10-11, 2012. Tr. 67-71, 407-09, 415-18; Ag. Br. at 11. Notably, this argument also is in conflict with the very charging

[34] *See* Tr. 157-58; *see also* Tr. 145-48, Ag. Br. at 8-9.
As an aside, since the following did not factor in my decision-making process, I note that agency regulatory provisions raise some question as to whether the quantity of fish claimed to have been caught in this case exceeds the recreational retention limits so as to create a rebuttable presumption of an intention to sell swordfish. *See* 50 C.F.R. §§ 635.4(f)(1), 635.4(c).

document initiating this proceeding, wherein both counts of the Amended NOVA specifically address the vessel connected to the alleged violative activity, namely "the FV Fish Sandwich (Official No. FL8760ND)."[35] Am. NOVA at 1. Given this myriad of inconsistencies, I cannot reasonably conclude that Respondent offered his vessel as his contribution to a business undertaking with Mr. Raymor.

Additionally, the evidence does not suggest any right of control by Respondent consistent with a joint venture. The Agency did not present any evidence demonstrative of Respondent having right of control over a joint venture with Mr. Raymor. On the contrary, the evidence tends to reflect that Respondent and Mr. Raymor acted independently from each other in their dealings with the Arnaos regarding the permit lease arrangements, as it reflects that Mr. Raymor continued to independently negotiate the lease terms with Mr. Arnao, while Respondent did not have contact with Mr. Arnao apart from the initial meeting in November. *See* Tr. 171-75, 191-92.

Further, and perhaps most compelling, is the absence in the record of any evidence establishing a right to participate in the profits. Unlike that which the ALJ relied upon in *Peterson*, there is no evidence of a clear split in the proceeds between Respondent and Mr. Raymor, or any reliable evidence showing that Respondent benefitted financially from the business venture the Agency claims existed in this case. I remain unconvinced that Respondent and Mr. Raymor engaged in a joint business venture and that Respondent is, thus, vicariously liable for the actions of Mr. Raymor. Accordingly, I conclude that the evidence is deficient in establishing liability for any violative conduct by Respondent, apart from his admitted activity of fishing for and catching an Atlantic swordfish on March 10, 2012, without a valid permit to do so.

C. Civil Penalty Assessment

Having determined that Respondent is liable for fishing for and catching an Atlantic swordfish without a valid permit on March 10, 2012, I must next determine the appropriate amount, if any, of a monetary penalty to impose for the violative conduct. As previously stated, there is no presumption in favor of the penalty proposed by the Agency, and as the ALJ presiding in this matter, I am 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; *see also* 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631 (June 23, 2010). Rather, I must independently determine an appropriate penalty, "taking into account all of the factors required by applicable law." 15 C.F.R. § 904.204(m); *see also* 15 C.F.R. § 904.108 (enumerating factors to be taken into account in assessing a penalty).

I note that the Agency's penalty policy was neither introduced as an exhibit during the evidentiary hearing nor the subject of a motion requesting that I take official notice of it, which

[35] It is notable that this allegation is also internally inconsistent, as again, Vessel FL8760ND is unnamed, and therefore, not the "FV Fish Sandwich," as identified. *See* Tr. 73; A29 (demonstrating that the Vessel FL8760ND is unnamed).

were the options outlined to Agency counsel in advance of the hearing to effectuate my consideration of the penalty policy.[36] *See* Tr. 424 (discussing these options as exercised in this case). As such, I have not considered the Agency's penalty policy in my evaluation. Rather, in assessing the penalty, I have considered only the factors set forth in the Magnuson-Stevens Act and in Agency regulations. *See* 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(a). These factors include the nature, circumstances, extent, and gravity of the violation(s); the respondent's degree of culpability, history of prior violations, and ability to pay; and such other matters as justice may require. 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(a).

i. Nature, Circumstances, Extent, Gravity of the Violation, and Respondent's Degree of Culpability

The Agency asserts that the permitting process relevant to this proceeding ensures the sustainability of the United States swordfish fishery and that the submission of logbook information to the Agency is a key component to such sustainability. Ag. Br. at 8-9. While the Agency acknowledges that "this case involves only a small number of fish," it asserts that the "false information (in the form of no-fishing reports) [that] was reported to NOAA"[37] undermined the Agency's regulatory efforts to meet its international obligations and to sustainably manage the fishery. Ag. Br. at 8-9. It also argues, as to the extent of the violation, that this case involved "two separate incidents in which the Respondent and his partner caught and sold Atlantic swordfish without a valid federal permit." Ag. Br. at 9.

With regard to the Respondent's degree of culpability, the Agency argues that Respondent acted recklessly and, as such, the amount of an assessed penalty must be sufficient to encourage future compliance. Ag. Br. at 8. The Agency asserts that "it is clear that the vessel that [Respondent] used to harvest and sell the [600-pound] swordfish on or about March 10-11, 2012 was not his vessel, so he could not have reasonably believed that he was fishing for, or selling, that fish under a valid permit." Ag. Br. at 11. Moreover, the Agency argues that had Respondent and Mr. Raymor believed they had a valid permit, "they would have been submitting fishing reports to NOAA as per their agreement with Mason Arnao." Ag. Br. at 10. Additionally, the Agency notes that "the fact that they had not paid for the permit[s], and the content of communications between Mr. Raymor and the Arnaos, should have led them to believe that the deal was off and at least wonder about the validity of the permit[s]." Ag. Br. at 10. Consequently, the Agency concludes that no penalty reduction attributable to reduced culpability is warranted. Ag. Br. at 11.

Respondent points out that it was the Arnaos who supplied inaccurate logbook reports to the Agency. Resp. Br. at 3. He asserts that he is not responsible for the actions of others and did not authorize "anyone to act or make decisions on [his] behalf." Resp. Br. at 1. He argues that he was not involved in all that transpired with regard to the permit lease arrangements, that he was "left in the dark" about "whatever [] mix up happened," and that he is "only being dragged

[36] The Agency submitted a copy of the penalty policy with its PPIP, but did not introduce it as an exhibit or move for official notice of it.

[37] As noted, Mrs. Arnao submitted No Fishing Reporting Forms to NOAA for November 2011 through March 2012, so that she would be able to transfer the Tri-pack permits. *See* Tr. 251-55, 281-86; A21.

into this because [his] name was on the lease agreement." Resp. Br. at 1; Tr. 439-40. He also notes that this process "has been a learning for me to never again put my name on a piece of paper and then not follow through with where that paper goes." Resp. Br. at 3 (presumably referring to the Permit Lease Agreement and October Permit Application).

My review of the evidence presented leads me to conclude that Respondent had little involvement with the claimed violative conduct and, as has been discussed previously, the evidence is deficient in establishing most of what has been alleged, save the establishment of Respondent's acknowledged activities on March 10, 2012 when he fished for and caught an Atlantic swordfish, as evidenced by the video he authenticated in A24, without a valid permit. While the Agency has attempted to hold Respondent accountable for the actions of Mr. Raymor, I have determined no legal basis for doing so. Further, the factual evidence presented in this case has not established that Respondent was made aware of the communications between Mr. Raymor and the Arnaos regarding the lease arrangements for the Tri-pack permits, including attempts by Mr. Raymor to finalize the lease arrangements subsequent to the initial meeting in October 2011. In fact, the factual evidence presented in this case has established very little with respect to Respondent's actions and knowledge in this matter, due, in no small part, to the fact that, apart from being named, he was not the focus of the investigation in this case. Respondent was not questioned or interviewed, or specifically investigated, about the claimed violative conduct. *See* Tr. 140-48; A22. Rather, the focus of the Agency's investigation was Mr. Raymor. *See* Tr. 140-48. Consequently, I find the Agency's arguments far from compelling.

Nevertheless, it has been clearly established that Respondent engaged in fishing for and catching an Atlantic swordfish on March 10, 2012, without a valid permit to do so, and that he failed to submit reports associated with this fishing activity as he would otherwise have been required to do. The record further reflects that the failure to submit such reports compromises the Agency's ability to sustainably manage the United States swordfish fishery. *See* Tr. 367-70 (describing the detrimental impact of such inaccurate reporting on the United States swordfish fishery). As to the submission of fishing reports, I note that regardless of Mrs. Arnao's actions of submitting inaccurate No Fishing Reports during this time, Respondent, along with Mr. Raymor, had agreed to satisfy the logbook requirements based on the terms of the Permit Lease Agreement. *See* A6. Yet, based on the evidence, they did not do so and no explanation for that failure was presented. Thus, the impact that such inaccurate reporting of fishing activity had on the sustainability of the United States swordfish fishery and on the Agency's ability to meet its international obligations has been considered in my assessment of the penalty.

As to the legal requirement to have a valid permit to fish for and catch Atlantic swordfish, I note that the regulatory requirements impose such burdens on the vessel owner, namely Respondent, as it was his vessel that was depicted in the video of fishing activity on March 10, 2012. *See* 50 C.F.R. §§ 635.2, 635.4(a)(2), 635.71(a)(2) (referenced regulatory provisions); *see also* Tr. 71-81; A29 (evidence identifying Respondent as the relevant vessel owner). I recognize that the Agency has argued that the vessel used to catch Atlantic swordfish on March 10, 2012, was not Respondent's vessel but rather a "Dusky" owned by Mr. Raymor. *See* Ag. Br. at 5, 11 (citing A22 at 13; A24 at 5:17); Tr. 66-70, 81, 408-09. However, those arguments are unpersuasive as they are based upon the conjecture of the Agency's law enforcement witness and based upon a photograph of a portion of a vessel tied to a marina dock

on which the swordfish is being displayed for a photograph. *See* A24 at 5:15-5:20; Tr. 66-70, 408-09. More convincing were Respondent's sworn statements, candidly authenticating the video in A24 and acknowledging the use of his vessel to engage in the violative conduct of fishing for and catching an Atlantic swordfish on March 10, 2012, in spite of not having a valid permit to do so. *See* Tr. 71-81; A24.

Although Respondent did not testify on his own behalf at the evidentiary hearing,[38] he presumably believed he had valid permits for fishing swordfish. In his closing remarks and PPIP submission, Respondent indicated that he was unware the Tri-pack permits had been transferred back to solely Mr. Arnao. Tr. 439-40; A31 at 2. He noted that the permit was obtained, was to be leased for one year, and that he had no reason to revisit the issue, arguing that he was "left in the dark" as to the cause for the mix-up and never made aware that the permit was transferred back to solely Mr. Arnao.[39] Tr. 439-40. While Respondent's knowledge of the validity of the Tri-pack permits is inconsequential for liability purposes, it is appropriate to consider such knowledge and intent for penalty assessment purposes.

Here, the evidence indicates that Respondent was never informed that the Tri-pack permits had been transferred back to solely Mr. Arnao in February 2012, thereby rendering the same invalid for use by Respondent in March 2012. Indeed, the evidence shows that the only way Respondent could have been informed of such a change in the status of the permits he believed were valid was by Mr. Arnao directly informing Respondent, or potentially through notice from Mr. Raymor, neither of which appear to have occurred. It is questionable whether or not Mr. Arnao ever actually sent the Termination Letter. His account of what transpired, and his reported actions throughout the events relating to the lease of the Tri-pack permits appear suspect, and, at times, his testimony was vague and not entirely consistent. *See supra* pp. 8-10; A10 (Termination Letter, lacking identification of a mailing recipient and address); Tr. 179-81, 208-09, 217 (inconsistent and vague testimony from Mr. Arnao at hearing). Worse still, when Mr. Raymor text messaged Mr. Arnao on March 14, 2012, communicating an intention to begin using the permits, Mr. Arnao failed respond with any mention whatsoever of having mailed the Termination Letter or of having transferred the permits out of Mr. Raymor and Respondent's names, in spite of it having been an opportune time to communicate such information. *See* Tr. 204-06; A23 at 9; A27 at 65-66.

Given such circumstances, Respondent's actions can hardly be considered reckless, as the Agency urges. Rather, I am persuaded that Respondent's actions were unintentional. The evidence does not establish that Respondent would have had any way of knowing that the Tri-pack permits were no longer valid since neither he, nor apparently Mr. Raymor, was ever informed of a change in the status of the permits. While the Agency has argued that the lack of payment should have put Respondent on notice of the invalidity of the permits, the facts of this case do not lead to such a conclusion. First, as Respondent stated, he was left in the dark about much of what transpired with regard to the lease permit arrangements, see Tr. 439-40, which is

[38] I note that Respondent was sworn, during the Agency's presentation of its case, for purposes of authenticating the video he edited and posted on YouTube, in A24, Tr. 71, and as such, statements he made thereafter were under oath and considered, as appropriate, in rendering this decision.

[39] Respondent's references to "the permit" in these documents appear to be referencing with the Swordfish Incidental Permit at issue. *See* Tr. 439-40; A31.

reflected in the evidence regarding communications pertaining to the lease of the Tri-pack permits, that almost exclusively pertains to Mr. Raymor, s*ee, e.g.*, A23; A27; A28 (text message communications regarding the lease of the Tri-pack permits). Secondly, that evidence of communications between Mr. Raymor and the Arnaos, does not establish that the delays in making payment for the leased permits resulted in a clear nullification of the lease agreement. Rather, it would appear from the evidence, that the terms of the lease were renegotiated when, as Mr. Arnao testified, it was established that Mr. Raymor was unable to pay for the permits in installment, and he agreed to allow Mr. Raymor to pay for the permits "when he could." *See* Tr. 176-78. Accordingly, the unintentional nature of Respondent's conduct was appropriately considered in my assessment of the penalty in this case.

ii. Ability to Pay, History of Prior Violations, and Such Other Matters as Justice May Require

As to the factor of ability to pay, the Rules of Practice state that if the respondent wants the presiding judge to consider his inability to pay the penalty, he must submit "verifiable, complete, and accurate financial information" to the Agency in advance of the hearing. 15 C.F.R. § 904.108(e). No evidence of Respondent's inability to pay a penalty was submitted at any time in this proceeding. As such, this factor did not impact my assessment of any penalty.

With regard to a history of prior violations, the Agency asserts "Respondent has no history of prior violations, and the assessed penalty reflects no increase on the basis of one." *See* Ag. Br. at 11. While a history of non-compliance may serve as a basis to increase a penalty, a number of administrative tribunals have found, conversely, that the absence of prior offenses may support the assessment of a lower penalty. *See, e.g.*, *Frenier*, 2012 NOAA LEXIS 11, at *39-40 (NOAA Sept. 27, 2012) ("[T]he absence of any prior or subsequent offenses can serve as a mitigating factor and support the assessment of a lower civil penalty under certain circumstances."); *Straub*, 2012 NOAA LEXIS 1, at *24 (NOAA Feb. 1, 2012) ("The absence of prior offenses . . . tends to favor a low civil monetary penalty."); *Fishing Co. of Alaska*, 1996 NOAA LEXIS 11, at *43-44 (NOAA Apr. 17, 1996) ("In an industry that is so heavily regulated, this absence of prior violations by any of the Respondents has been taken into consideration as a mitigating factor in the penalty assessment."). However, the evidence presented in this case does not establish the length of time in which Respondent has participated in the fishing industry so as to provide any context for the lack of prior violations. Consequently, this factor was given limited consideration in my assessment of a penalty.

Regarding such other matters as justice may require, such as, for example, a respondent's degree of cooperation with law enforcement, or lack thereof, it is noteworthy that Respondent was not put in the position to cooperate, or not cooperate, with law enforcement, since he was never questioned or specifically investigated by law enforcement concerning the events that gave rise to this action. Tr. 140-48. As it was stated by Special Agent Purcell, the Agency's investigator and law enforcement witness, it was Mr. Raymor, not Respondent, who was the primary focus of the Agency's investigation. *See, e.g.*, Tr. 141-43 ("my focus was heavily on Mr. Raymor because it's Raymor's name that appears everywhere. I didn't realize that [Respondent] was on the boat that day until recently reviewing the video once again."), 151 ("I figured out that [Respondent] was on the boat [filmed in the video in A24] last night. So, it

wasn't during the course of the investigation."), 142 ("everything was focused on [Raymor] and [Raymor's] communications, I only had [Raymor] to look into because I didn't see any communications from [Respondent] at all."). Consequently, there has been very limited evidence presented regarding this consideration as it relates to Respondent.

Upon consideration of all the foregoing and the penalty factors listed in 16 U.S.C. § 1858(a) and 15 C.F.R. § 904.108(a), it is hereby determined that for Respondent's actions of fishing for and catching an Atlantic swordfish on March 10, 2012, while aboard his vessel, Vessel FL8760ND, and without a valid commercial permit, a civil penalty in the amount of $200 is appropriate.

VII. DECISION AND ORDER

A total penalty of **$200** is hereby **IMPOSED** on Respondent Frank Alexis Prieto for the violation upon which he was found liable herein, namely fishing for and catching Atlantic swordfish on March 10, 2012 without a valid commercial permit.

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

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

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

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

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

SO ORDERED.

Christine Donelian Coughlin
Administrative Law Judge
U.S. Environmental Protection Agency

Dated: March 1, 2017
Washington, D.C.

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

15 CFR 904.271-273

§ 904.271 Initial decision.

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

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

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

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

(4) A statement of further right to appeal.

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

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

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

(1) Otherwise provided by statute or regulations;

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

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

§ 904.272 Petition for reconsideration.

Unless an order or initial decision of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or initial decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of such order or initial decision. The filing of a petition for reconsideration shall operate as a stay of an order or initial decision or its effectiveness date unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the administrative proceeding may file an answer in support or in opposition.

§ 904.273 Administrative review of decision.

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

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

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

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

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

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

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

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

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

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

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

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content

requirements in paragraph (d) of this section without further review.

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

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

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

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

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

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an

Administrator's decision to remand the initial decision to the Judge is not final agency action.

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

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

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section.

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

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