UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	)	**Docket No. AK 1402606**
Kevin J. Seabeck,	)	**F/V Sierra Mar**
Kenneth O. Jackson, and	)	
Mechanics Services, Inc.,	)	**Dated: December 20, 2017**
Respondents.	)	

INITIAL DECISION AND ORDER

Before: M. Lisa Buschmann
Administrative Law Judge
United States Environmental Protection Agency[1]

Appearances:

For the National Oceanic and Atmospheric Administration:
Alisha Falberg, Esq.
Enforcement Attorney, Alaska Region
U.S. Department of Commerce
NOAA Office of General Counsel
709 West Ninth Street, Room 909A
P.O. Box 21109
Juneau, Alaska 99802-1109

Charles Green, Esq.
Deputy Chief, Enforcement Section
NOAA Office of General Counsel
1315 East-West Highway, Room 15828
Silver Spring, Maryland 20910

Respondent, *pro se*:
Kevin J. Seabeck
8555 30th Northwest
Seattle, Washington 98117

[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. Statement of the Case

On June 23, 2015, counsel for the National Oceanic and Atmospheric Administration ("NOAA" or "Agency") issued a Notice of Violation and Assessment of Administrative Penalty ("NOVA") alleging that Respondents Kevin J. Seabeck, George L. Yoder, Kenneth O. Jackson, and Mechanics Services, Inc., owners of the F/V Sierra Mar, and Respondent Kevin J. Seabeck, operator and permit holder of the Fishing Vessel ("F/V") Sierra Mar, violated the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act" or "Act"), 16 U.S.C. § 1857(1)(A) and (G), and its implementing regulation at 50 C.F.R. § 679.7(f)(4). Specifically, the NOVA alleges that in March 2014, in the Gulf of Alaska, the F/V Sierra Mar retained 7,506 pounds of Individual Fishing Quota ("IFQ") sablefish in excess of the amount of unharvested IFQ sablefish applicable to the regulatory area WY for which permits were held aboard the vessel, in which area it deployed fixed gear. The Agency proposed a total penalty of $39,002.32 for the violation.

Kevin J. Seabeck ("Respondent Seabeck") requested a hearing. On September 3, 2015, NOAA informed this Tribunal that it would be dismissing George L. Yoder from this proceeding after discovering that he is deceased and his estate does not retain an interest in the F/V Sierra Mar. Thereafter, Chief Administrative Law Judge Susan L. Biro was designated to preside over this matter. Pursuant to an Order to Submit Preliminary Positions on Issues and Procedures (PPIP) issued by Judge Biro, the Agency filed its PPIP on March 9, 2016 and Respondent Seabeck filed his PPIP on March 28, 2016.

Subsequently, Judge Biro issued orders scheduling a hearing in this matter to commence on November 15, 2016 in Juneau, Alaska, and later rescheduling it to commence on December 13, 2016 in Seattle, Washington. However, because the certificates of service for the latter hearing order and the Order to Submit Preliminary Positions on Issues and Procedures did not evidence service on Respondent Mechanics Services, Inc. ("Respondent MSI"), Judge Biro enclosed copies of those orders in a Supplemental Order to Submit Preliminary Positions on Issues and Procedures and Notification of Hearing, dated September 22, 2016. This Order was sent by regular mail to all of the parties, and via certified mail to Respondent MSI at 16415 15th Avenue, SW, Seattle, WA 98166. It was sent to Respondent Kenneth O. Jackson ("Respondent Jackson") by regular mail at P.O. Box 48, Wilton, CA and via certified mail at 12514 318th Ave., NE, Duvall, WA 98019 ("Duvall address")

On November 11, 2016, I was designated to preside over this case. On November 22, 2016, I issued a Notice of Hearing Location, informing the parties of a change in the hearing location. This Notice was sent to all the parties at the same addresses as the September 22, 2016 Order was sent, by regular mail and by certified mail to Respondents Jackson and MSI. None of the copies of this Notice or of the Order dated September 22, 2016 sent by regular mail were returned to this Tribunal as undeliverable, but the copies sent by certified mail to Respondent Jackson's Duvall address returned to this Office marked "not deliverable as addressed[;] unable to forward." The certified mail green card, or Domestic Return Receipt, for the copies sent to Respondent MSI were returned to this Tribunal signed by Marilyn Pritchard.

On November 23, 2016, the Agency issued an Amended NOVA to Respondents decreasing the proposed penalty for the alleged violation to $15,000. On December 1, 2016, the Agency submitted stipulations of fact and exhibits.

A hearing in this proceeding was held in the William Kenzo Nakamura U.S. Courthouse in Seattle, Washington on December 13, 2016. At the hearing, the parties' stipulations were marked as Court's Exhibit ("CX") 1 and entered into the record. At the hearing, the Agency offered 25 exhibits ("AX 1–25"), which were all admitted into evidence. Respondent Seabeck offered 9 exhibits ("RX 1–9"), all of which were entered into the record. The Agency called two witnesses at the hearing: Andrew Mathews, a Special Agent for the National Marine Fisheries Services ("NMFS"); and Mary Furuness, a supervisory resource management specialist for the in-season management branch of Sustainable Fisheries for NMFS. Respondent Seabeck testified on his behalf at the hearing. Respondents Jackson and MSI did not attend the hearing, and no representative appeared on their behalf. The evidentiary record was closed at the conclusion of the hearing.

Following the hearing, this Tribunal received copies of the hearing transcript, and on December 21, 2016, provided the parties with a copy of the transcript by electronic mail.[2] Subsequently, the Agency submitted a Motion to Conform the Transcript to Actual Testimony, which was granted, and the Agency and Respondent Seabeck timely submitted post-hearing briefs and reply briefs.

After the Agency filed its reply brief, Respondent Seabeck submitted a Motion to Admit Evidence to Record, dated March 6, 2017, requesting leave after the evidentiary record was closed to enter into the record two documents. The first is an IFQ Use Agreement between Sierra Mar Fisheries LLC and George Yoder, dated January 29, 2004, which is hereby designated as RX 10. The second is an IFQ Use Agreement between Respondent Seabeck and Larry R. Pritchard, president of Mechanics Services, Inc., dated March 1, 2017, which is hereby designated as RX 11. By Order dated April 5, 2017, I granted Respondent Seabeck's Motion, admitting into the evidentiary record the two IFQ Use Agreements.

II. Statutory and Regulatory Background

The Magnuson-Stevens Act was enacted in 1976, *inter alia*, "to conserve and manage the fishery resources found off the coasts of the United States" and "to promote domestic commercial and recreational fishing under sound conservation and management principles." 16 U.S.C. § 1801(b)(1), (b)(3). The Act makes it unlawful for any person "to violate any provision of this Act or any regulation or permit issued pursuant to this Act," and "to ship, transport, offer for sale, sell, purchase, import, export, or have custody, control, or possession of, any fish taken or retained in violation of this Act or any regulation, permit or agreement" issued pursuant to the Act. 16 U.S.C. § 1857(1)(A), (G). The Act defines a person as "any individual . . . any corporation, partnership, association, or other entity." 16 U.S.C. § 1802(32).

[2] Because an electronic mail address was never provided to this Tribunal by Respondents Jackson and MSI, a paper copy of the hearing transcript was mailed to them by both regular and certified mail.

In 1993, due to the various conservation and management concerns stemming from the "open access" policy then in effect for the fixed gear fisheries off the coast of Alaska, the North Pacific Fishery Management Council working with NMFS promulgated an IFQ program to limit the Pacific halibut and sablefish fisheries. Limited Access Management of Fisheries Off Alaska, 58 Fed. Reg. 59,375, 59,376 (Nov. 9, 1993). The IFQ program's regulatory requirements apply to any sablefish that are harvested with fixed gear in the Exclusive Economic Zone (EEZ) off the coast of Alaska. 50 C.F.R. § 679.1. To fish commercially for IFQ halibut or IFQ sablefish, a person must possess either an IFQ permit or an IFQ hired master permit, in addition to any other required permits. 50 C.F.R. §§ 679.4(d)(1), 679.4(d)(2), 679.42(c). An IFQ permit "authorizes the person identified on the permit to harvest IFQ halibut or IFQ sablefish from a specified IFQ regulatory area at any time during an open fishing season during the fishing year for which the IFQ permit is issued until the amount harvested is equal to the amount specified under the permit . . . ." 50 C.F.R. § 679.4(d)(1)(i). Similarly, "[a]n IFQ hired master permit authorizes the individual identified on the hired master permit to land IFQ halibut or IFQ sablefish for debit against the specified IFQ permit . . . ." 50 C.F.R. § 679.4(d)(2)(i). "Each assigned IFQ will be specific to an IFQ regulatory area and vessel category, and will represent the maximum amount of halibut or sablefish that may be harvested from the specific IFQ regulatory area and by the person to whom it is assigned during the specified fishing year . . . ." 50 C.F.R. § 679.40(b). "The IFQ specified for one IFQ regulatory area must not be used in a different IFQ regulatory area." 50 C.F.R. § 679.42(a)(1).

The Agency's regulations provide further that:

> . . . it is unlawful for any person to do any of the following:
> * * *
> (f) IFQ fisheries.
> * * *
> (4) . . . retain IFQ . . . halibut or IFQ . . . sablefish on a vessel in excess of the total amount of unharvested IFQ . . . , applicable to the vessel category and IFQ . . . regulatory area(s) in which the vessel is deploying fixed gear, and that is currently held by all IFQ . . . permit holders aboard the vessel, unless the vessel has an observer aboard . . . .

50 C.F.R. § 679.7(f)(4).

III. Findings of Fact

The following findings[3] are based on a thorough and careful analysis of the testimony of witnesses, the exhibits entered into evidence, and the entire record as a whole.

1. Respondent Seabeck purchased and wholly owned the F/V Sierra Mar, a 58-foot vessel, Official number 971950, in 1991. AX 1, 2.

[3] The Findings of Fact are referenced herein below as "FF."

2. In 1999, Respondent Seabeck conveyed 20 percent of his interest in the F/V Sierra Mar to Respondent MSI. AX 2 at 2.

3. Larry R. Pritchard is the president of Respondent MSI. RX 11.

4. In 2002, Respondent Seabeck conveyed 20 percent of his interest in the F/V Sierra Mar to Respondent Jackson. AX 2 at 3.

5. At all times relevant to this proceeding, Respondent Seabeck was the managing owner and maintained 60 percent ownership of the F/V Sierra Mar. AX 1, 2.

6. For an IFQ permit holder to allow a "hired master" of a vessel to harvest IFQ fish authorized on the permit, the IFQ permit holder must have an ownership interest in the vessel. Tr. 61.

7. Respondent Seabeck and Respondent Jackson, who are individuals, and Respondent MSI, a corporation, are "persons" as defined in the Magnuson-Stevens Act, 16 U.S.C. §1802(36). CX 1 ¶ 1; Transcript of Hearing ("Tr.") 60-61.

8. Respondent Seabeck is an experienced commercial fisherman with 35 years of owning and operating fishing vessels. Tr. 115, 118; AX 6. He participated in the IFQ program since its inception in 1995. AX 6. In the years he went longline fishing, he made 20 to 24 trips per year. Tr. 115.

9. Respondent Seabeck, as the captain and operator of the F/V Sierra Mar, made a commercial fishing trip targeting halibut and sablefish in the Gulf of Alaska beginning on or before March 25, 2014 and ending on March 31, 2014. CX 1 ¶ 2; AX 9, 11.

10. In addition to Respondent Seabeck the F/V Sierra Mar had a crew of four on board during the fishing trip. AX 11; Tr. 115. This fishing trip was the first time Respondent Seabeck worked with this crew. Tr. 119.

11. No observer was on board during the fishing trip, as the F/V Sierra Mar was not randomly selected by NOAA's National Marine Fisheries Service to have an observer aboard. Tr. 68, 82-83, 93.

12. Neither Respondent Jackson nor Larry R. Pritchard was aboard the F/V Sierra Mar on the fishing trip. Tr. 117.

13. Respondent Seabeck fished in Southeast ("SE") and West Yakutat ("WY") sablefish Regulatory Areas of the Gulf of Alaska during the fishing trip. CX 1 ¶ 4, AX 9, 11. The areas in which he fished are also within halibut Regulatory Area 3A established by the International Pacific Halibut Commission, which overlaps with SE and WY Regulatory Areas. Consequently these areas are referenced as SE/3A and WY/3A. CX 1 ¶ 4, AX 9, 11.

14. At the time of the March 2014 fishing trip, Respondent Seabeck held IFQ permit 6908 for the 2014 fishing season, authorizing him to harvest 5,042 pounds of sablefish in Regulatory Area WY. AX 3, 8; Tr. 59, 63.

15. At the time of the March 2014 fishing trip, Respondent Seabeck's Annual Fishing Permit permit 6908 authorized him to harvest 366 pounds of sablefish in Regulatory Area SE, and his IFQ permit 2896 authorized him to harvest an additional 13,342 pounds of sablefish in that area, which allowed him to harvest a total of 13,708 pounds of sablefish in Regulatory Area SE. AX 3, 4.

16. At the time of the March 2014 fishing trip, Respondent Jackson held Annual Fishing Permit 3873 for the 2014 season authorizing him to harvest, *inter alia*, 288 IFQ pounds of sablefish for Regulatory Area WY. AX 5, 7; Tr. 62.

17. During the March 2014 fishing trip, Respondent Seabeck was a hired skipper for Respondent Jackson's IFQ permit 3873, and had the permit onboard, allowing Respondent Seabeck to harvest the IFQ sablefish authorized on Respondent Jackson's IFQ permit without Respondent Jackson being onboard the vessel. Tr. 61-63, 65.

18. The sum of the 288 pounds from Respondent Jackson's permit and the 5,042 pounds from Respondent Seabeck's permit authorized Respondent Seabeck to harvest a total of 5,330 pounds of sablefish from Regulatory Area WY. Tr. 61-63, 65.

19. At the time of the March 2014 fishing trip, Respondent Seabeck did not hold any permit from Respondent MSI authorizing him to harvest IFQ sablefish. Tr. 120-121.

20. For an IFQ holder to allow a hired master harvest the IFQ for the holder, he must have an ownership interest in the vessel. Tr. 61.

21. Respondent Seabeck deployed longline gear, which is fixed gear, when fishing in areas SE/3A and WY/3A. CX 1 ¶ 5; AX 9, 11; Tr. 53-54. The gear included an automatic baiter. Tr. 81-82.

22. The F/V Sierra Mar fished in Regulatory Area SE/3A on March 25 and 26, 2014, targeting sablefish, also known as black cod, where the vessel caught and retained 12,836 pounds of sablefish and approximately 500 pounds of halibut. AX 9, 10, 11, 13; Tr. 45, 52.

23. Respondent Seabeck left Regulatory Area SE/3A and entered Regulatory Area WY/3A on the way to the port of Seward. AX 10; Tr. 45, 67-68.

24. The F/V Sierra Mar fished in Regulatory Area WY/3A on March 27 and 28, 2014, targeting halibut, where the vessel caught and retained approximately 18,500 pounds of halibut and no sablefish. AX 9, 10, 13; Tr. 52-53, 120, 126, 131.

25. Respondent Seabeck maintained an accurate International Pacific Halibut Commission logbook of his fishing activity during the fishing trip. CX 1 ¶ 6; Tr. 80.

26. Respondent Seabeck did not target or intend to catch sablefish in Regulatory Area WY. AX 9; Tr. 80.

27. On March 31, 2014, Respondent landed and sold 12,836 pounds of IFQ sablefish at the port of Seward, Alaska. AX 11.

28. Seward is the home port for the F/V Sierra Mar. Tr, 123.

29. At the time the F/V Sierra Mar deployed fixed gear in Regulatory Area WY/3A on March 27 and 28, 2014, it had approximately 7,506 pounds more sablefish onboard than the 5,330 pounds authorized to be harvested in Regulatory Area WY under the IFQ permits held by Respondent Seabeck. Tr. 66.

30. The excess of 7,506 more sablefish onboard than the 5,330 pounds authorized to be harvested under the permits was an overage of 140.83 percent. Tr. 66.

31. The Agency's IFQ Ledger Report for Respondent Jackson's permit 3873 shows that the 288 pounds of IFQ sablefish for Regulatory Area WY remained on the permit after the March 2014 fishing trip. AX 7; Tr. 62.

32. The Agency's IFQ Ledger Report for Respondent Seabeck's permit 6908 shows that the 5,042 pounds of IFQ sablefish for Regulatory Area WY remained on the permit after the March 2014 fishing trip. AX 8; Tr. 62-63.

33. Respondent Seabeck could have offloaded the sablefish caught in Regulatory Area SE before fishing in Regulatory Area WY. Tr. 67.

34. Respondent did not save time or fuel by offloading the sablefish at port in Seward rather than Yakutat. Tr. 132-133.

35. The regulatory prohibition of 50 C.F.R. § 679.7(f)(4) has been in place since 1995, when the IFQ program was implemented. Tr. 46-47, 101.

36. Respondent Seabeck was cooperative with the investigators during the investigation of this case. CX 1 ¶ 7; Tr. 80, 123.

37. On two previous occasions within the five years preceding the fishing trip at issue, Respondent Seabeck served as captain on vessels which exceeded the IFQ allowance for sablefish, resulting in summary settlements. AX 18; Tr. 72-73, 75-76. He had other IFQ and Maximum Retainable Amount ("MRA") violations also within the five years before the current 2014 violation. Tr. 72, 76; AX 18.

38. Since 1995, when the IFQ program was initiated, the sablefish fishery has not been overfished. Tr. 100.

39. For the Gulf of Alaska groundfish fishery, the amount of IFQ is assigned based on the Gulf of Alaska's annual catch limit for sablefish, which is then apportioned to each regulatory area as total allowable catch ("TAC"), for purposes of ensuring that the biological distribution and health of sablefish is maintained, avoiding localized depletion or overfishing. Tr. 96-99, 103.

40. Since 2011, the TAC for halibut and sablefish had been decreasing significantly, but then increased in 2016. Tr. 99-100, 121; RX 6.

41. NOAA depends on information as to the catch of sablefish from each regulatory area for its sablefish stock assessment, in order to determine catch limits. Tr. 101-102.

42. Catching more than the alloted IFQ from one regulatory area may cause localized depletion of the species, harming other fishermen who paid for or worked hard to get IFQ permits in that area. Tr. 102, 104.

43. Respondent Jackson and Respondent MSI were properly served with the NOVA, Notification of Hearing and Notice of Hearing Location and were notified of their opportunity to participate in the hearing. AX 20, 21; 15 C.F.R. § 904.3; Supplemental Order to Submit Preliminary Positions on Issues and Procedures (PPIP) and Notification of Hearing, dated September 22, 2016..

44. Neither Respondent Jackson nor Respondent MSI appeared or filed any document in this proceeding. Tr. 12.

IV. Liability

A. Burden of Proof

To prevail on its claim that the Respondents violated the Magnuson-Stevens Act and its implementing regulations, the Agency must prove the facts constituting the violation by a preponderance of the evidence. 5 U.S.C. § 556(d); *Cuong Vo*, 2001 NOAA LEXIS 11, at *16–17 (NOAA Aug. 17, 2001) (citing *Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100–103 (1981)); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). To meet the preponderance of the evidence standard, the Agency must demonstrate that the facts it seeks to establish are more likely than not to be true. *John Fernandez III & Dean V. Strickler*, 1999 NOAA LEXIS 9, at *8–9 (NOAA Aug. 23, 1999) (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983)). To satisfy this standard of proof, the Agency may rely on direct and circumstantial evidence. 2001 NOAA LEXIS 11, at *17 (citing *Reuben Paris, Jr.*, 4 O.R.W. 1058 (NOAA 1987)).

B. Elements of Violation

To establish a violation of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A) and (G), by Respondents' alleged violation of 50 C.F.R. § 679.7(f)(4), NOAA must prove that Respondents are (1) "persons" under the Act, (2) who retained IFQ sablefish on their vessel, (3) in the WY Regulatory Area, (4) in an amount exceeding the total amount of unharvested IFQ currently held by all IFQ holders aboard the vessel for that area, (5) the vessel was deploying fixed gear in the WY Regulatory Area, and (5) the vessel did not have an observer on board.

There is no dispute that Respondents are "persons" under the Act, that the F/V Sierra Mar retained 12,836 pounds of sablefish on board, in Regulatory Area WY, which exceeded the total of 5,330 pounds of unharvested IFQ held by all IFQ holders aboard the vessel for Regulatory Area WY, that it was deploying fixed gear in that area, and that there was no observer on board. FF 7, 11, 21, 22, 27, 29.

Neither Respondent Jackson nor Respondent MSI disputed any of these facts. Respondent Seabeck does not dispute his liability for the alleged violation. However, he asserts that Respondent Jackson and Respondent MSI should not be held liable for the violation.

C. Joint and Several Liability

1. Parties' Arguments

The Agency's position is that along with Respondent Seabeck, the vessel operator who owned 60 percent of the F/V Sierra Mar, Respondent Jackson and Respondent MSI are liable for the violation under the theory of vicarious liability on the basis that they each owned 20 percent of the F/V Sierra Mar. Agency's Post Hearing Brief ("AB") at 7, 13. NOAA points out that it customarily charges vessel owners along with operators for violations of the Magnuson-Stevens Act, and that courts have regularly found vessel owners, including corporate vessel owners, vicariously liable for violations of the Magnuson-Stevens Act committed by their vessel operator, regardless of the knowledge, participation or awareness of the owner, and that this longstanding interpretation of the Act has been found to be "reasonably based in the statutory test and is also consistent with the policies underlying the statute." *Id.* at 3, 13 (citing *Jesse Drinkwater*, Docket No. NE1202710, 2014 NOAA LEXIS 23, 2015 WL 6395680 at *13 (ALJ, July 14, 2015), *aff'd*, 2015 NOAA LEXIS 20 (NOAA App. Nov. 18, 2015). In addition, NOAA asserts that Respondent Jackson had hired Respondent Seabeck as a "hired master" to land IFQ sablefish or halibut for debit against Respondent Jackson's IFQ permit, which included IFQ sablefish for area WY. *Id.* at 14. Furthermore, as neither Respondent Jackson nor Respondent MSI appeared in this proceeding, a default judgment should be entered against them. *Id.*

Respondent Seabeck's position is that Respondent Jackson and Respondent MSI should not be held liable for the violation because they are not owners of the F/V Sierra Mar in the full sense, but merely tenants in common, with no participation, control, decision-making or operation of the vessel in any way, as the tenancy contractually limits control, benefits and liability narrowly. Kevin Seabeck's Post-Hearing Brief ("RB") at 1. He asserts that they are

tenants "for the single purpose of harvesting their Quota," and "don't benefit in boat income, except a percentage of their Quota," which is a "minority percentage of the IFQ quota caught by a hired skipper." *Id.* He points out that in the IFQ fishery, most boat operations, like his, are small family owned. He asserts further that the F/V Sierra Mar is not a corporation, there is no employee involved, there is no "benefit stream," and neither Respondent Jackson nor Respondent MSI have ever been on the F/V Sierra Mar, so the case precedent cited by NOAA does not apply. *Id.* at 4-5. Citing another administrative penalty case, he points out that NOAA only charged the vessel operator in that case despite the fact that he held hired master permits. Holding the other Respondents liable is overly harsh, serves no purpose regarding compliance or management, and "goes against the very definitions and guidelines that NMFS uses." *Id.* at 1. He stipulated to taking full responsibility as sole operator, and he urges that the lack of participation at the hearing by the other Respondents should not be a basis to hold them liable on default.

In response, the Agency asserts that no evidence of a contract was presented in Respondent Seabeck's PPIP, and a contract was only briefly mentioned but not presented at the hearing, and therefore the argument as to a contract should not be considered. Agency's Reply to Respondent's Post-Hearing Brief ("ARB") at 1. It maintains that it holds both vessel owners and operators liable for violations committed by the operator, and therefore a penalty in this case should be assessed against the Respondents jointly and severally.

In his Response, Respondent Seabeck asserts that his contracts with Respondent Jackson and Respondent MSI indemnify them for regulatory infractions and holds them harmless for penalties resulting from overharvesting or any other regulatory violations. He states that they are "silent, limited owners in the strictest sense," and that NOAA has not explained how punishing IFQ "owners" of the 20 percent minimum vessel ownership required to share IFQ removes any incentive to violate the regulations. With the many types and degrees of vessel ownership that exist, the Agency should not use a "one-size-fits-all" approach, he concludes.

2. Discussion and Conclusions

The applicable procedural rules, at 15 C.F.R. Part 904 ("Rules"), provide as follows with respect to failure of a respondent to appear:

> (a) If, after proper service of notice, any party appears at the hearing and an opposing party fails to appear, the Judge is authorized to:
> * * *
> (2) Where the respondents have failed to appear, find the facts as alleged in the NOVA . . . and enter a default judgment against the respondents.
> * * *
> (d) The Judge may deem a failure of a party to appear after proper notice a waiver of any right to a hearing and consent to the making of a decision on the record.

15 C.F.R. § 904.211. The Rules provide further that "A final administrative decision by the Judge . . . after a hearing requested by one joint and several respondent is binding on all parties

including all other joint and several respondent(s), whether or not they entered an appearance unless they have otherwise resolved the matter through settlement with the Agency. 15 C.F.R. § 904.107(c).

Respondents Jackson and MSI were properly served with notice of the hearing in this matter, and have neither agreed to a settlement with the Agency nor appeared in this matter. FF 43, 44. Because one of the three Respondents in this matter has made an appearance and has presented a defense on behalf of the other two, a default judgment under 15 C.F.R. § 904.211(a)(2) is not imposed against Respondents MSI and Jackson. Instead, their failure to appear is deemed a waiver of their right to a hearing and consent to a decision being made without their participation, which decision is binding on them, under 15 C.F.R. §§ 904.107(c) and 904.211(d).

Consequently, the issue of the liability of Respondents Jackson and MSI for Respondent Seabeck's violation is addressed on the merits. The basis for applying the doctrine *of respondeat superior* to hold vessel owners jointly and severally liable under the Magnuson-Stevens Act is its definition of "person" as encompassing corporations and other business entities, by which vessels are often owned and which act vicariously through individuals. "[T]he purpose behind the statutory scheme is to remove all possible incentive for owners to employ vessel operators inclined to law-breaking, only to later disclaim responsibility while retaining the fruits of the unlawful activity – i.e., the proceeds from the catch." *Robert C. Roberge,* Docket No. NE1300388, 2015 NOAA LEXIS 22 *5-6 (NOAA App., Nov. 18, 2015). That is, the doctrine is applied to ensure that vessel owners do not gain the benefits of illegal fishing activities while avoiding the responsibility of preventing such activities. *David D. Stillwell*, NOAA Docket No. SE1200825FM, 2015 NOAA LEXIS 11, at *43 (ALJ, May 29, 2015).

As stated broadly by a court many years ago, "The regulatory program is designed to punish the vessel and its owners for any transgressions, and it is apparent that for effective enforcement of the law this must be so." *United States v. Kaiyo Maru No. 53,* 503 F. Supp. 1075, 1090 (D. Alaska 1980), *aff'd,* 699 F.2d 989 (9th Cir. 1983). However, this statement must be read in the context of the case, where there was an employer-employee relationship between the vessel owners and captain. *Id.* (holding vessel owners liable for the captain's violations where they had employed and then fired him). The owner of a vessel may be held vicariously liable for the actions of its captain under the doctrine of *respondeat superior,* where there is an agency relationship between the owner and captain, such as that of employer-employee. In addition, vessel owners have been held liable for acts of the vessel operator where their relationship is in the nature of a joint venture, where they have an intention to carry out a single business undertaking, an inferred right of control by the owner, and a right to each share the profits. *Robert C. Roberge*, 2015 NOAA LEXIS 22 at *9; *Kenneth Shulterbrandt*, 7 O.R.W. 185, (ALJ 1993) 1993 NOAA LEXIS 26, at *6-7; *Charles P. Peterson,* Docket Nos. 016-057, 016-058, 1991 NOAA LEXIS 34, at *10-11 (ALJ, July 19, 1991); *see*, 46 Am. Jur. 2d Joint Venture § 7 (1969). Generally, the test used to determine whether to hold a vessel owner liable "is whether the vessel owner had, at the time of the violation, the right to control the actions of the wrongdoer." *Shulterbrandt*, 1993 NOAA LEXIS 26, at * 7.

Administrative tribunals consistently have held vessel owners liable, whether individuals or corporations, where there is evidence that they hired the captain and had authority to fire him. *E.g.*, *Ronnie and Charlotte Boggess*, 4 O.R.W. 319 (NOAA App., 1985), 1985 NOAA LEXIS 20 (denying discretionary review of ALJ finding that vessel owners were liable for Magnuson-Stevens Act violations where they had authority to hire and fire the captain, paid for fuel, and received 60 percent of catch);[4] *Jesse Drinkwater,* 2015 NOAA LEXIS 23, at *43-44 (holding corporate owner liable under Magnuson-Stevens Act where it provided vessel, crew, fuel, supplies and permits, hired and fired the captain, and shared profits with him); *Gonzales Fisheries, Inc.,* Docket No. SE050027FM, 2006 NOAA LEXIS 36, at 17-18 (ALJ, Dec. 5, 2006)(holding corporate vessel owner liable under Magnuson-Stevens Act where owner benefits financially from the illegal acts of the vessel's captain, whom it hired and whom it has the authority to fire.); *Rodney Rogers*, Docket No. SE980174FM, 2000 NOAA LEXIS 2, at * 21-22 (ALJ, July 7, 2000)(holding corporate vessel owner liable under Magnuson-Stevens Act where owner fired vessel's captain, indicating captain was agent of the owner under law of agency). As explained by an administrative law judge many years ago --

> It is sufficient that the owner of the vessel and the major beneficiary of its operations authorized the expedition which was illegally conducted. Since it acquires a share of the vessel's production, so it must bear a major responsibility, along with the captain, for the latter's unlawful acts. To hold otherwise would be to allow vessel owners to escape responsibility for the transgressions of the captains that they hire, authorize to operate their boats, and have the authority to fire.

Sam Millis, 4 O.R.W. 340 (ALJ, Sept. 27, 1985), 1985 NOAA LEXIS 17, at *13, *aff'd*, 1985 NOAA LEXIS 3 (NOAA App., Dec. 10, 1985)(holding corporate owner liable under the Act where it had authority to hire and fire captain, it owned the vessel and its equipment, provided fuel, and received 60 percent of the value of the catch). NOAA's appellate tribunal has held liable a vessel owner that had an employer-employee relationship with the captain even where the evidence did not establish a financial benefit to the owner from the fishing activities. *Jody Domingo*, Docket No SE960297ES, 2000 NOAA LEXIS 1, at *5-7 (NOAA App., Mar. 29, 2000)(modifying the ALJ's decision to clarify that individual vessel owner is liable along with the captain for violations of the Endangered Species Act where owner remained in control of the manner his boat was used and had an unequivocal right to hire and fire the captain, who was his brother, although record was not clear as to financial arrangement between them). Nevertheless, under certain circumstances an employer may be shielded from liability for the acts of its employee. *Khiem Diep,* Docket No. PI1201802, 2015 NOAA LEXIS 12 * 64 (ALJ, June 5, 2015)(addressing criteria to be met before vessel owner, who hired the captain, may be shielded from liability for the unlawful conduct of its vessel's captain and crew).

As to joint ventures, it has been broadly stated that "[i]t is well established that the owner of a fishing vessel is liable for that vessel's illegal fishing activity." *Tibor E. Kepecz*, 6 O.R.W. 556 (ALJ 1991), 1991 NOAA LEXIS 51, at *14. However, the vessel owners that have been held liable on the basis of a joint venture were found to have had ultimate control over the vessel. *Id.* (finding vessel owners did not establish they entered into bareboat charter with operator, and

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[4] In the interest of simplicity, earlier iterations of the Magnuson-Stevens Fishery Conservation and Management Act are referenced herein as the Act or Magnuson-Stevens Act.

holding them liable under Magnuson-Stevens Act where they authorized operator to be in charge of the fishing vessel and to engage in the fishing activities, they owned the fishing permits under which the vessel was operating, they shared in profits from fishing activities, and they refused to offload seized fish); *Joseph F. Raposa,* Docket No. 93-NOA-69, 1994 NOAA LEXIS 2, at *11-12 (ALJ, Nov. 16, 1994), *aff'd,* 1995 NOAA LEXIS 43, at *9 (NOAA App., Aug. 31, 1995)(holding vessel owner liable under Magnuson-Stevens Act where he fully owned one vessel involved in the illegal harvest of scallops, owned half of another vessel involved and controlled its activities and employees, and would benefit financially from sale of illegal scallops). Where a respondent wholly owned the vessel and held the federal fishing permit, it was inferred that he retained a right of control of the vessel. *Dowdy Joe Simmons,* Docket No. SE1104779, 2013 NOAA LEXIS 10, at *32-34 (ALJ, Aug. 30, 2013)(holding vessel owner liable for vessel operator's violations of Endangered Species Act where owner paid for vessel's equipment, held federal fishing permit, and shared in profits of fishing, and operator drove the vessel and purchased its shrimping nets).

In *Charles P. Peterson,* a vessel owner was held liable for the vessel operator's violations of Magnuson-Stevens Act where the owner supplied the fishing permit, received 30 percent of the gross proceeds of the fish harvested, and stood to benefit from the operator's illegal fishing whether the owner authorized it or not. 6 O.R.W. 486 (ALJ, July 19, 1991), 1991 NOAA LEXIS 34, at *10-12. The administrative law judge in *Peterson* noted that -

> this Tribunal has repeatedly found an owner charterer liable for statutory violations committed by the vessel because the owner charterer sets the fishing activity in motion and has the ultimate control over the selection of the operation and therefore the operation of the vessel.
>
> 1991 NOAA LEXIS 34, at *12.

The Agency has not cited to any case law that supports holding an IFQ permit holder liable for a vessel operator's violation on the basis of having authorized him as a hired master to harvest IFQ fish under the permit. The Agency also has not cited to any case law that supports holding a co-owner of a vessel liable for the co-owner captain's violation merely on the basis of that partial ownership. Indeed, there are not many cases addressing whether a person who owns a vessel in part is liable for a co-owner's violations of the Act on the vessel. In one case, a person was held jointly and severally liable for interference with an investigation, search or seizure in connection with the Magnuson-Stevens Act where he held one third ownership of the vessel and held a federal fisheries permit with the co-owner captain, but where he was involved in the investigation on board as a crew member). *Bruce Stiller,* Docket No. SE960319FM, 1998 NOAA LEXIS 6, at *15 (ALJ, Aug. 10, 1998). In *Shulterbrandt,* the vessel owner, a recreational fisherman, sold his vessel to the other respondent who operated it for commercial fishing. The owner relinquished possession and control of the vessel to him, but retained title to it to protect his security interest because the other respondent had not paid the full purchase price. The owner was held not liable for the other respondent's violation of the Endangered Species Act because he had no control over the actions of the other respondent, there was no agency or employer-employee relationship, and there was no evidence of a plan to generate profit through combined effort. *Shulterbrandt*, 1993 NOAA LEXIS 26, at *7-9.

These cases do not support the Agency's position. In the present case, it was not Respondent Jackson or Respondent MSI, but Respondent Seabeck who retained ultimate control over the vessel. Respondent Seabeck had wholly owned the vessel but sold a 20 percent share of ownership interest to each Respondent Jackson and Respondent MSI, resulting in Respondent Seabeck retaining 60 percent interest in the vessel. FF 1, 2, 4, 5. Respondent Seabeck is the managing owner. FF 5. He testified that neither of the other Respondents "have ever stepped on that boat." Tr. 117. They were not involved in any activities giving rise to the violation. Their 20 percent share of ownership interest does not support an inference that they had ultimate control over the F/V Sierra Mar, or that they had any right to control the actions of Respondent Seabeck. There is no evidence in the record that Respondent Jackson or Respondent MSI had "the right to control the actions of the wrongdoer" (*Shulterbrandt*, 1993 NOAA LEXIS 26, at * 7), or that they "set the fishing activity in motion and ha[d] the ultimate control over the selection of the operation and therefore the operation of the vessel." *Peterson,* 1991 NOAA LEXIS 34, at *12.

Furthermore, there was no employer-employee relationship, as neither Respondent MSI nor Respondent Jackson had authority to hire and fire Respondent Seabeck as captain of the vessel. Although Respondent Seabeck, holding Respondent Jackson's IFQ hired master permit, is referred to as a "hired master," he was not an employee of Respondent Jackson. Special Agent Mathews defined "hired master" or "hired skipper" simply as "somebody that fishes your quota or your permit for you." Tr. 61. The regulations provide:

> [a]n IFQ hired master permit authorizes the individual identified on the hired master permit to land IFQ halibut or IFQ sablefish for debit against the specified IFQ permit until the IFQ hired master permit expires, or is revoked, suspended, or surrendered [voluntarily],. . . , or modified…, or canceled on request of the IFQ permit holder.

50 C.F.R. § 679.4(d)(2)(i). While Respondent Jackson had authority cancel the IFQ hired master permit, there is no evidence that he had authority to fire Respondent Seabeck from operating the vessel.

Further weighing against imposing liability on Respondents Jackson and MSI is the lack of evidence that they stood to gain from Respondent Seabeck's violation. *See Bateman v. U.S. Dep't of Commerce,* 768 F. Supp. 805 (S.D. Fla. 1991)(vessel owners not liable where they stood to gain nothing from the seafood illegally caught that was for personal consumption by captain and crew, and where owners took sufficient measures in hiring, warning and informing the captain). The evidence does not demonstrate that Respondents Jackson or MSI shared generally in the profits of the F/V Sierra Mar, in terms of a percentage of the profits from the total catch. Respondent Seabeck asserted at the hearing that they receive no economic benefit other than from their own IFQ that he is authorized to harvest for them. Tr. 39. He explained in a post-hearing motion that the IFQ Use Agreements applicable to the other Respondents for the time period at issue were burned in a fire on the F/V Sierra Mar. See, Order Granting Respondent Seabeck's Motion to Admit Evidence to Record, dated April 5, 2017. He mentioned the fire in an interview with Special Agent Mathews and in testimony at the hearing, in reference to having new crew members on board in March 2014. Tr. 56, 119. Consequently, he submitted into

evidence an IFQ Use Agreement between himself and Larry Pritchard of Respondent MSI dated March 1, 2017, and an IFQ Use Agreement between Sierra Mar Fisheries LLC, owner of the F/V Sierra Mar, and George Yoder, dated January 29, 2004. RX 10, 11. The latter Agreement provides that George Yoder, the IFQ Holder, is a "20% unit holder in OWNER and the Vessel," and that "Except for the IFQ Fee set forth above, the balance of all gross fishing proceeds from the operation of the Vessel shall belong to the OWNER," and in turn provides that the "OWNER shall pay to IFQ Holder an IFQ Fee . . . consisting of fifty seven percent. . . of the Gross Proceeds from the sale of the IFQ Fish," defined as the annual IFQ owned by the IFQ Holder. RX 10 at 1-2. The IFQ Use Agreement with Larry Pritchard includes similar provisions, but states that the latter has a 20% tenancy in common. RX 11. These documents appear to be the best evidence of the agreements between the Respondents applicable at the time of the violation. There is no evidence contradicting Respondent Seabeck's assertion that the other Respondents receive no other benefit than the IFQ fee. In any event, he was not harvesting sablefish from any IFQ permit held by Respondent MSI, and there is no evidence that any of the Respondents potentially realized any gain by the offloading of the sablefish at Seward rather than at Yakutat, either as a result of the price paid for the fish or as a result of saving time and/or fuel. FF 19, 34. He was not harvesting sablefish from Respondent Jackson's permit for Regulatory Area WY, as the Agency's IFQ Ledger Report shows that Respondent Jackson's permit maintained the same amount of sablefish on the permits for WY after the fishing trip at issue. FF 31.

Not only is there no showing that Respondents Jackson and MSI gained any benefit of unlawful activity, but there also is no evidence that they could have taken actions to prevent the violation, as they were not on board the vessel, and did not hire Respondent Seabeck or have authority to fire or control him. Therefore, the policies behind holding vessel owners liable for captain's violations do not apply here.

Finally, there is no likelihood of a scheme here to avoid a high penalty for the violation by leaving a captain who is financially unable to pay the penalty as the sole party responsible for paying it. Respondent Seabeck has taken full responsibility for the violation, and has not asserted an inability to pay the penalty.

D. Conclusions on Liability

For the reasons discussed above, it is concluded that Respondent Jackson and Respondent MSI are not liable for the violation alleged in the NOVA.

The undisputed facts show that Respondent Seabeck is a person who was deploying fixed gear in the WY Regulatory Area on or about March 27 and 28, 2014 without an observer on board, while retaining IFQ sablefish on board in an amount of approximately 7,506 pounds in excess of the 5,330 pounds of unharvested IFQ held at that time for the WY Regulatory Area by all IFQ holders on board the vessel. It is concluded that Respondent Seabeck violated the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A) and (G) by violating the implementing regulation, 50 C.F.R. § 679.7(f)(4), as alleged in the NOVA.

V. Civil Penalty

A. Statutory and Regulatory Provisions

Any person found to have committed an act made unlawful by the Magnuson-Stevens Act "shall be liable to the United States for a civil penalty" not to exceed $178,156 per violation. 16 U.S.C. § 1858(a); 81 Fed. Reg. 36456 (June 7, 2016) (maximum penalty of $100,000 under Magnuson-Stevens Act increased to $178,156 effective July 7, 2016, as authorized by the Federal Civil Penalties Inflation Adjustment Act of 1990).[5] The Magnuson-Stevens Act states that, in determining penalty amount, "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" shall be taken into account. 16 U.S.C. § 1858(a); *see* 15 C.F.R. § 904.108.

The Act also allows consideration of a respondent's ability or inability to pay a penalty. 16 U.S.C. § 1858(a); *see also* 15 C.F.R. § 904.108(b)-(h). Under the Act, "any information provided by the violator relating to the ability of the violator to pay" may be considered, but only if "the information [was] served on the [Agency] at least 30 days prior to [the] administrative hearing." 16 U.S.C. § 1858(a); *see* 15 C.F.R. § 904.108(b)-(h). The burden is on the respondent to prove his inability to pay "by providing verifiable, complete, and accurate financial information to NOAA." 15 C.F.R. § 904.108(c).

The Administrative Law Judge is empowered to "[a]ssess a civil penalty or impose a permit sanction, condition, revocation, or denial of permit application, taking into account all of the factors required by applicable law." 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631-32 (June 23, 2010). The current regulations "eliminate[ ] any presumption in favor of the civil penalty or permit sanction assessed by NOAA in its charging document" and "require[ ] instead that NOAA justify at a hearing . . . that its proposed penalty or permit sanction is appropriate, taking into account all the factors required by applicable law." 75 Fed. Reg. at 35,631.

B. Penalty Policy

Guidance for penalty assessments under the multiple statutes NOAA enforces is set forth in the Agency's "Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions" ("Penalty Policy").[6] While the Penalty Policy "provides guidance for the NOAA

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[5] At the time the penalty was re-assessed by the Agency in the amended NOVA, dated November 23, 2016, the applicable adjustments for inflation published in 15 C.F.R. § 6.4 were those effective July 7, 2016, which apply to all penalties assessed thereafter by the Commerce department (until future adjustments are made), including penalties assessed for violations that predate the adjustment. 81 Fed. Reg. 36456, 36457; 15 C.F.R. § 6.5 (2016). Effective January 15, 2017, the maximum penalty is $181,071. 81 Fed. Reg. 95434, 15 C.F.R. § 6.4(f)(15) (2017).

[6] The current Penalty Policy became effective July 1, 2014.

Office of the General Counsel," it is not binding on Administrative Law Judges. Yet it may be useful as an analytical framework when assessing a penalty through an Initial Decision. *See Student Public Interest Research Group, Inc. v. Hercules, Inc.*, No. 83-3262, 1989 U.S. Dist. LEXIS 16901, at *5 (D.N.J. Apr. 6, 1989) (A penalty policy "provides a helpful analytical framework" for the court in arriving at a civil penalty.).

Under the Penalty Policy, a civil penalty is calculated as follows:

(1) A "base penalty," which represents the seriousness of the violation, calculated by:

(a) an initial base penalty amount reflecting;

(i) the gravity of the prohibited act committed, and
(ii) the degree of culpability of the violator, and

(b) adjustments upward or downward to reflect:

(i) history of non-compliance, and
(ii) other matters justice may require, including

(A) Conduct of the violator after the violation – whether the violator self-reports, promptly comes into compliance, cooperates with the investigation, attempts to avoid detection, or lies, obstructs, or interferes with the investigation; and

(B) History of compliance, economic impact of the penalty, or subsequently rescinded regulation

(2) plus an amount to recoup the proceeds of any unlawful activity and any additional economic benefit of noncompliance.

To determine the gravity component of an initial base penalty, a search is made for the particular violation on the schedules in Appendix 3 of the Penalty Policy. Penalty Policy at 30. The schedules assign an "offense level" to the most common violations charged by the Agency, which under the Magnuson-Stevens Act range from "I" (least significant) to "VI" (most significant) and are designed to reflect the nature, circumstances, and extent of the violations. *Id.* at 4-5, 7-8. Where no offense level has been assigned to a violation, the Penalty Policy directs that the offense level of a similar violation be used or, if no similar offense can be identified, by assessing the gravity based on criteria listed in Penalty Policy generally. *Id.* at 5 n.4. Such criteria include: nature and status of the resource at issue in the violation; extent of harm done or potential harm to the resource or regulatory scheme or program; whether the violation involves fishing in closed areas, in excess of quotas, without a required permit, or with unauthorized gear; whether the violation provides a significant competitive advantage over those operating legally; the nature of the regulatory program (e.g., limited versus open access fishery); and whether the violation is difficult to detect without on-scene enforcement presence or other compliance mechanisms. *Id.* at 8.

Next, culpability of the alleged violator is assessed at one of four levels, in decreasing order of severity:

> An intentional violation generally exists when a violation is committed deliberately, voluntarily or willfully, i.e. the alleged violator intends to commit the act that constitutes the violation . . . .
>
> Recklessness is a conscious disregard of a substantial risk of violating conservation measures that involves a gross deviation from the standard of conduct a law-abiding person would observe in a similar situation. Recklessness occurs where someone does not intend a certain result, but nonetheless foresees the possibility that his or her actions will have that result and consciously takes that risk. Recklessness may also occur where someone does not care about the consequences of his or her actions. Recklessness involves a lesser degree of fault than intentional wrongdoing but a greater degree of fault than negligence.
>
> Negligence is the failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances. Negligence denotes a lack of diligence, a disregard of the consequences likely to result from one's actions, or carelessness. Negligence may arise where someone exercises as much care as he or she is capable of, yet still falls below the level of competence expected of him or her in the situation. The failure to know of applicable laws/regulations or to recognize when a violation has occurred may itself be evidence of negligence.
>
> Finally, an unintentional act is one that is inadvertent, unplanned, and the result of an accident or mistake. An unintentional act is one not aimed at or desired. This culpability level reflects the strict liability nature of regulatory violations, and the fact that the statutes NOAA enforces are designed to protect marine resources even where a violation is unintended.

Id. at 8-9. Factors to be considered when assigning culpability include whether the alleged violator took reasonable precautions against the events constituting the violation; the level of control the alleged violator had over these events; whether the alleged violator knew or should have known the potential harm associated with the conduct; and "other similar factors as appropriate." *Id.* at 9.

The gravity component and culpability component form the two axes of penalty matrices for each statute, set out in Appendix 2 of the Penalty Policy. *Id.* at 23. A range of penalties appears in each box of the matrix. A penalty range is thus determined by selecting the

appropriate gravity and culpability levels on the axes. An initial base penalty is the midpoint of the penalty range within the applicable matrix box. *Id.* at 5, 23.

The adjustment factors provide a basis to increase or decrease a penalty from the midpoint of the penalty range within a box or to select a different penalty box in the matrix. *Id.* at 9-10. The Penalty Policy states that prior violations of natural resource protection laws are evidence of intentional disregard for them, or reckless or negligent attitude toward compliance and may indicate that the prior enforcement response was insufficient to deter violations. *Id.* at 10. Therefore, the Penalty Policy provides that a penalty may be increased where a respondent had prior violations. *Id.*

Another adjustment factor reflects the activity of the violator after the violation, in terms of good faith efforts to comply and cooperation or non-cooperation. *Id.* at 12. The Penalty Policy lists the following examples of good faith factors to decrease a penalty: self-reporting, providing helpful information to investigators, and cooperating with investigators. The Penalty Policy states that no downward adjustments are made for efforts primarily consisting of coming into compliance, for exhibiting common courtesy to law enforcement that would be expected from members of the public, or for self-reporting when discovery of the violation is inevitable. The Penalty Policy describes bad faith factors leading to increased penalties as attempts to avoid detection, destroying evidence, intimidating or threatening witnesses, or lying. *Id.*

Added to the base penalty is any value of proceeds gained from unlawful activity and any economic benefit of noncompliance to the violator. *Id.* at 13. The Penalty Policy provides that these "are factored in to prevent violators from profiting from illicit behavior and engaging in improper behavior because the sanctions imposed are merely a 'cost of doing business' (i.e., because the economic benefit of their unlawful activity exceeds the cost of a potential penalty)." *Id.* Proceeds from fish caught in violation of statutory or regulatory requirements are assessed based on the gross ex-vessel value of the fish. *Id.*

C. Agency's Proposed Penalty

Utilizing the Penalty Policy, the agency calculated a recommended penalty assessment of $39,002.32 in the original NOVA issued in this case by adding a $15,000 base penalty to an amount of $24,002.32 representing the proceeds of the unlawful activity, the value of the sablefish in excess of Respondents' IFQ for Regulatory Area WY. AX 17. Subsequently, the Agency amended the NOVA to omit the amount representing proceeds of unlawful activity, thereby reducing the recommended penalty to $15,000. AX 25; Tr. 25; AB at 12.

The Agency calculated the $15,000 penalty by assessing the violation as Offense Level III, assessing Respondents' culpability as negligent (Level B), selecting $12,500, the midpoint of the range for the Offense Level III and Culpability Level B in the Penalty Policy matrix, and adding $2,500 to represent the history of prior offenses.

In support of its assessment of Offense Level III, the Agency refers to testimony of Ms. Furuness, supervisory resource management specialist at the National Marine Fisheries Service

("NMFS"). She explained that the IFQ regulations set the regulatory areas so that the catch is distributed throughout that area, to maintain the health of those stocks or avoid localized depletion or overfishing. AB at 10 (citing Tr. 96). She emphasized that it is important for NMFS to have correct and accurate fishery information – as to where the catch is coming from – because NMFS receives it primarily from fishermen's logbooks and catch landing reports. *Id.* (citing Tr. 90-92, 101-102). The Agency explains that 50 C.F.R. § 679.7(f)(4) was promulgated to ensure that NMFS knows where the fish retained on board were caught, not only for recordkeeping and reporting purposes, but also because having fish onboard that are not accounted for could be the result of more serious offenses, such as overfishing one's quota in an area or fishing in an area without having quota for that area and falsely reporting. AB at 10 (citing Tr. 48). The Agency asserts that its Office of Law Enforcement has "no way to know, when encountering a situation like this, which offense occurred or where the fish came from." *Id.* NOAA suggests that "Respondent Seabeck could have caught both sablefish and halibut in both regulatory areas -- SE and WY" as NMFS had no way to verify which area they came from. AB at 11. Nevertheless, conceding that his violation "may not seem as severe as a case of false reporting or fishing IFQ without an IFQ permit," it does have an impact on the fishery and its management, and cites to testimony of Ms. Furuness. *Id.*

As to culpability, NOAA asserts that Respondent Seabeck should have known about the prohibition in 50 C.F.R. § 679.7(f)(4), as it has been in place and he has been fishing IFQ since the inception of the program in 1995. Moreover, NOAA and OLE have been providing outreach, compliance assistance and website information on the IFQ program, including that prohibition.

NOAA proposes the addition of $2,500 to the penalty to reflect that Respondent Seabeck had seven prior violations since 2000 of the same regulatory provision (50 C.F.R. § 679.7(f)(4)) as charged in this matter, resulting in summary settlements, including two within the past five years. In addition, NOAA points out that he had "a few other" Maximum Retainable Amount overages for rockfish. NOAA concludes that the proposed penalty accounts for individual and general deterrence and the elimination of any economic incentive to violate the law, without increasing the penalty to offset any economic benefit. *Id.* at 12.

D. Respondent Seabeck's Arguments

Respondent Seabeck's position is that the gravity level should be I rather than III, because there was no harm to the resource, no overages, and no fish caught outside of an allowed regulatory area, in a closed area or out of season. He notes that the parties stipulated that no sablefish were caught in the Regulatory Area WY. He points out that the fish were correctly logged in the logbook and recorded, and that he sent his logbook immediately to the investigator when requested to do so. He asserts that he had no competitive advantage on the basis of the violation, and no impact on other fishermen, and the Agency has not alleged that he had any such advantage. He adds that he cooperated fully with the Agency.

He urges that the culpability level should be unintentional, or Level A, as there was no conscious disregard of the regulations, the parties stipulated that his logbook was accurate, and he did not know there was a violation until he was contacted by enforcement personnel. He states

that the violation occurred in circumstances in which he had a recent and devastating fire on his boat, new crew, poor weather, and a late start, and he had exhaustion and stress, and his father had recently passed away. He refers to the Penalty Policy guidance that in cases where there is no damage to the resource, a written warning may be sufficient.

As to the prior violations, he points to the discrepancy between the Agency's current position and its penalty assessment worksheet which mentions only four minor prior violations. He asserts that none of the seven prior violations were in any way similar to this situation, and very small rockfish bycatch overages, minor IFQ overages and an ungilled halibut are completely different. Rockfish bycatch results in violations regardless, in a catch-22 situation. He states that minor IFQ overages are deducted from next season's quota and/or the proceeds are surrendered to NMFS, which balances and protects the resource and removes any economic benefit of overfishing. Referencing his long career of longlining and difficulty of the fishery, to characterize his history as one of non-compliance, he argues, is a gross exaggeration. He testified that as to his fishing history, he "didn't catch one fish" that he didn't have IFQ for, or that was from an illegal area, and there were no overages in the statistical areas. Tr 122.

At the hearing, Respondent Seabeck testified that since 2008 the Total Allowable Catch ("TAC") for halibut has decreased by 72 percent, and in the past seven years the TAC for sablefish has decreased by about 30 percent, yet the penalties in the Penalty Policy matrix for the Magnuson-Stevens Act have remained the same, making penalties harsher in relation to the decreased income fishermen receive from lower harvests. Tr. 121-122. In support, he presents figures from the NMFS website for TAC of sablefish, approximately 29 million pounds in 2000 compared to approximately 20 million pounds in 2016. RX 6. He also presents commercial catch of halibut figures from the 1980s through 2014 from the website of the International Pacific Halibut Commission. RX 7. He adds that about five years ago, five percent of commercial IFQ were reallocated to the guided charter industry, resulting in a loss to him of five percent of quota he paid for. Tr. 130.

E. Discussion and Conclusions

1. Nature, Circumstances, Extent and Gravity of the Violation

Offense Level III in the category of Magnuson-Stevens Act violations "regarding size/condition/quantity of fish or landing/possession requirements," includes "[f]ishing for, . . . landing, or possessing fish in excess of what is allowed by regulations, permit, notice, or other means, where the overage exceeds the catch limit by 100% or more." Penalty Policy at 37-38. Respondent Seabeck's possession onboard while in Regulatory Area WY of IFQ sablefish 140.83 percent over the amount allowed by his sablefish IFQ permits for WY fits this description. FF 29, 30. However, the parties stipulated that his logbook was accurate for the fishing trip at issue, and the logbook shows that the sablefish were legally caught in Regulatory Area SE, where they were within the limits of his IFQ. FF 15, 22, 25. It therefore did not exceed the catch limit for the area the sablefish were caught, and would not have been a violation if an observer was onboard. 50 C.F.R. § 679.7(f)(4). Yet, descriptions of Offense Level III would include fishing for and catching double the amount of sablefish allowed by permit for the

area, fishing in a closed area, or fishing without a permit. Penalty Policy at 35, 37-38. These are significantly more serious violations than Respondent Seabeck's violation. Offense Level III is the highest possible offense level applicable to sablefish overages in the Penalty Policy's Offense Level Guidance for the Magnuson-Stevens Act. Penalty Policy at 38. Offense Level III would also include cases of false reporting, where the vessel catches some fish in one area, then catches a lot of fish in another area, and reports that most fish were caught in the area that actually not much fish were caught in, where the Agency does not have sufficient proof of falsified fish tickets, logbooks and landing reports to support a felony or misdemeanor criminal case. Tr. 78-79. As described in the Penalty Policy, a Level II violation also would include fishing for and catching significantly more sablefish than the amount allowed by a permit, or catching fish from a closed area. Penalty Policy at 36, 38. Further analysis is necessary to determine an appropriate offense level.

The Penalty Policy explains that the offense levels were based on several factors, including seven listed on page 8 of the Penalty Policy. I therefore consider the testimony and evidence of record as it relates to these factors. The first factor is the nature and status of the resource at issue, such as "whether the fishery is currently overfished, overfishing is continuing, or the stock is particularly vulnerable because of its slow reproduction rate; whether the violation affects measures designed to protect essential fish habitat, endangered/threatened species, or resources within a national marine sanctuary." Penalty Policy at 8. Ms. Furuness testified that "the sablefish fisheries have not been subject to overfishing" and "it's not approaching overfishing." Tr. 100; FF 38. There is no evidence supporting any of the other examples, or analogous situations, that would suggest a higher offense level to reflect the nature and status of the sablefish fishery.

The second and third factors are the extent of harm done, and the potential harm, respectively, to the resource or to the regulatory scheme or program. Penalty Policy at 8. Special Agent Mathews stated at the hearing that violations of Section 679.7(f)(4) are important to enforce for purposes of resource management. Tr. 49. Ms. Furuness explained that the regulatory prohibition of 50 C.F.R. § 679.7(f)(4) is "to prevent people from exceeding their . . . allowed catch in an area." Tr. 101. She testified that the prohibition is important because NMFS needs to know where the catch is coming from, to be able to do the stock assessments and to manage the fisheries, and because it "could hurt other fishermen that have an allocation in that area because somebody else is catching the fish that was set aside for their IFQ permit" that they worked hard for, or paid for. Tr. 101-102, 104; FF 39, 41, 42. She testified further that NMFS receives or estimates data as to other species based on where the target species was caught, so incorrect data as to target species could lead to overfishing or localized depletion of the non-target species. Tr. 103. In the present case, however, there was no evidence of incorrect data as to the origin of Respondent Seabeck's catch. The undisputed evidence indicates that the sablefish were caught in Regulatory Area SE, where he did not exceed his IFQ limit. FF 15, 22, 32. It was not simply happenstance that he failed to catch sablefish in WY; the evidence shows that he was targeting halibut. AX 9, FF 26. Using an auto-baiter, he likely was using the same gear fishing for halibut in Area WY as he was using fishing for sablefish in SE, but he testified that he set the gear at different depths for sablefish than for halibut, because in the springtime, sablefish are found 400 to 600 fathoms deep and halibut are found at 120 fathoms or less. Tr. 81-82, 131-132; FF 21. His logbook shows that he set gear for sablefish at 180 to 340 fathoms

deep on March 25 and 26, 2014, and at 135 and 150 fathoms deep when fishing for halibut on March 27 and 28, 2014. AX 9. He testified that he did not catch any sablefish in WY. Tr. 126. There is no evidence to suggest that he caught or intended to catch sablefish in WY. FF 26, 32. His violation would not harm other fishermen with sablefish allocation in WY, as he did not catch or try to catch sablefish there. A penalty in this case should reflect the harm or potential harm from the particular violation of Respondent Seabeck rather than from a violation of fishing within a particular Regulatory Area in excess of quota for that area.

The fourth factor is whether the violation involves fishing in closed areas, in excess of quotas, without a required permit, or with unauthorized gear. The violation at issue, involving retaining fish onboard in an amount excess of quota, is less serious than fishing in a closed area, fishing in excess of quota, or fishing for sablefish in an area where he had no quota.

The fifth factor is whether the violation provides a significant competitive advantage over those operating legally. Special Agent Mathews pointed out that Respondent Seabeck could have avoided the violation if, before fishing in WY, he had offloaded the fish in Yakutat, where he may or may not have received the same value for the fish. Tr. 67; FF 33. Respondent Seabeck testified that he would not have expended more fuel or time by offloading the sablefish at port in Yakutat rather than Seward. Tr. 132-133. This testimony was not challenged. The record indicates that after fishing in SE he headed toward Seward in part to avoid bad weather, and in addition, Seward is his home port. Tr. 67-68, FF 28. There is no evidence to support a finding that he gained any significant competitive advantage by offloading the sablefish in Seward rather than Yakutat. Moreover, Respondent Seabeck's conduct would not have been a violation if he had an observer onboard. Tr. 67. He could not have avoided the violation by requesting and paying for an observer onboard, as vessels are randomly chosen by the NMFS Observer Deployment and Declaration System to take an observer on a fishing trip. Tr. 82-84; 93.

The sixth factor, the nature of the pertinent regulatory program -- the limited sablefish fishery rather than an open access fishery -- weighs in favor of a higher offense level.

The last factor is whether the violation is difficult to detect without on-scene enforcement presence or compliance mechanisms such as Vessel Monitoring Systems or an observer. The violation was detected through review of IFQ landings ledgers, fish tickets, and Respondent Seabeck's logbook, and plotting the set information from the logbook onto a map. Tr. 44-45, 49-52; AX 9, 10. Determining which area he in fact caught the sablefish at issue would be difficult if there are doubts as to whether the logbook was accurate.

In sum, Offense Level III, the highest offense level for overages, does not fit Respondent Seabeck's violation. The Penalty Policy's description in the Offense Level Guidance of Offense Level III for overages does not adequately capture the facts of this case. On the other hand, Offense Level I describes overages of up to 50 percent or with a market value of $500 or less, which are relatively minor or small volume violations. Overall, the facts of this case are most appropriately assessed at Offense Level II, at a point somewhat lower than the average Offense Level II.

2. Culpability

Special Agent Mathews testified that he did not find that Respondent Seabeck made any attempt to be untruthful in his logbook. Tr. 80. Special Agent Mathews reported that during his investigation interview, Respondent Seabeck stated that after he fished for sablefish in SE, the weather report was poor so they headed toward Seward, but the weather did not turn bad so they stopped to fish for halibut in IPHC Area 3A. He stated further that he was not aware that he could not fish for halibut in area WY when he had sablefish onboard from another area, and didn't think about the sablefish onboard as an issue when just fishing for halibut. AX 14. He explained that in prior years he had crew members who had plenty of sablefish IFQ for Area WY, so this would not have been an issue. AX 14; Tr. 56.

Respondent Seabeck testified at the hearing that the violation was "a simple mistake, an inadvertent accident that was unplanned," and that he didn't realize there was any violation until the Special Agent contacted him. Tr. 120, 123. He testified further that the fishing trip at issue was the first in the season, and he had a new crew, his boat was "not completely fixed" after the fire, he was stressed and exhausted, without much sleep, and his father had passed away three or months before. Tr. 119. He testified that he knows the regulations, but that after he caught the fish in Regulatory Area SE, "it just slipped my mind that we'd moved into another area . . . . with everything else going on, running that boat, crew, different quotas, different permits, different areas, and it just got by me." Tr. 123-124, 126.

He did not specifically address at the hearing whether at the time of the violation he was aware of the regulatory prohibition as applied to fishing for one IFQ species while having another species onboard in an area where he has insufficient IFQ for that species. He apparently did not previously consider this application of the regulation as it was not an issue for him, given his prior crew members' IFQ. His testimony is consistent with his statement in the interview, that he had new crew members aboard without sablefish IFQ for WY. AX 14; Tr. 123-124; FF 10. I find credible his testimony that he was stressed and exhausted during the fishing trip, albeit there is no mention of this in the memorandum of Special Agent Mathews' interview. Nevertheless, given the relatively large volume of IFQ fishing that Respondent Seabeck engages in, and the fact that the regulatory program has been in place since 1995, he should have been aware of the regulatory requirement as applied to the circumstances at issue here. FF 35.

His level of culpability fits descriptions of negligence in the Penalty Policy, "the failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances," "lack of diligence," "carelessness," and the "failure to know of applicable laws/regulations or to recognize when a violation has occurred." Penalty Policy at 9. It also meets some of the description of unintentional in that it appears to have been inadvertent, and perhaps unplanned to the extent of an unforeseen event of bad weather being forecasted that did not come to fruition, which led to his decision to fish for halibut in Area 3A/WY. His conduct would rate low on the scale of "whether the alleged violator knew or should have known the potential harm associated with the conduct," a factor for determining the level of culpability. Penalty Policy at 9. The potential harm from this violation may not be very obvious to a fisherman who is fishing only for halibut. Therefore, his culpability is assessed at a low level of negligence.

Special Agent Mathews testified that he was involved in outreach regarding the IFQ program by putting on a public program in Sitka, Alaska in 1995, during boardings, in responding to questions from fishermen, which sometimes involved 50 C.F.R § 679.7(f)(4), and in including information regarding that provision in field training for new employees. Tr. 46-47. However, increasing the degree of culpability on the basis of Agency outreach does not seem warranted here, as any explanation of the application of 50 C.F.R § 679.7(f)(4) does not seem likely to have reached Respondent Seabeck.

3. Matrix Value

The penalty range in the Penalty Policy for a Magnuson Stevens Act violation with Offense Level II and low level of negligence is $4,000 to $6,000. For reasons stated above, I find that the appropriate penalty within this range is $4,000.

4. History of Prior Offenses

The Penalty Policy provides that a penalty may be increased for prior offenses that have been finally adjudicated – including summary settlements or written warnings - within five years of the violation at issue. Penalty Policy at 10. The amount of increase depends on how similar it is to the violation at issue. *Id.*

Special Agent Mathews testified that Respondent Seabeck had two violations - in 2011 and 2013 - which occurred in the five years prior to the violation at issue. Tr. 76; FF 37. His report of prior violations shows that in October 2013, Respondent Seabeck had a summary settlement for "exceeding available quota for sablefish" in violation of 50 C.F.R. §679.7(f)(4). AX 18 p. 14. The report also shows that in August 2011, he had a summary settlement for "exceed[ing] available IFQ sablefish available" in violation of the same provision. AX 18 p. 11. He had other types of violations also within the five years before the current 2014 violation. Tr. 76; AX 18. Some of them were IFQ and others were Maximum Retainable Amount ("MRA") violations which involve exceeding the quota of rockfish or other groundfish bycatch species, which the vessel is required to retain up to a specific percent for overages. Tr. 72, 76. The IFQ violations are typically resolved by seizure of the fish or the value of the fish, and the MRA violations are resolved by a summary settlement to pay the value of the overage. Tr. 77. Special Agent Mathews agreed with Respondent Seabeck that that with over 20 trips per year, "you're going to have a few" IFQ overages. Tr. 73.

The Penalty Policy advises the NOAA attorney to move the initial base penalty one box to the right in the penalty matrix for each prior violation that is similar to the one at issue. Penalty Policy at 10. For two prior violations, two boxes to the right of the Offense Level II with negligent culpability would be the box for Offense Level II with intentional level of culpability, assigned a penalty range of between $10,000 and $20,000. *Id.* at 23. This would effectively add $6,000 to $16,000 to a $4,000 base penalty. The evidence does not demonstrate that the prior violations put Respondent Seabeck on notice of the specific violation in this case – that he could

not have more sablefish onboard that was legally caught in one area than the sablefish IFQ limit he had for another regulatory area in which he was fishing for halibut. The evidence also does not demonstrate that his violation was tantamount to an intentional one. Therefore, I do not consider the prior violations as evidence of intentional disregard for the regulations, or such a negligent attitude toward compliance that a large increase in the penalty is warranted. All of his prior violations would have served as reminders generally not to exceed quota, so some increase is warranted. The Agency, calculating the proposed penalty in the NOVA, in its discretion only increased the proposed initial base penalty by $2,500 for "four minor violations," from the midpoint to the top of the range within the penalty box. AX 17. It did not adjust this value when it amended the NOVA, or after reviewing the report of his prior violations. AX 18, 25. Similarly, I find that it is appropriate to adjust the penalty within the matrix box to reflect the prior violations. In the circumstances of this case, I find it appropriate to adjust the base penalty upward from the lowest limit of the range to just under the midpoint, $4,900.

5. Activity after Violation

In this case there is no evidence of any attempts to avoid detection of violations, of destroying evidence or other interference with the investigation. The parties stipulated to the accuracy of his logbook for the dates of the violation. FF 25. Special Agent Mathews testified that Respondent Seabeck was cooperative during the investigation, that he had been "helpful in providing the information," and provided his logbook upon request. Tr. 50, 57, 80; FF 36. His level of cooperation with the investigation went beyond mere common courtesy. Since the outset of the investigation, he has taken responsibility for his violation, and he appears very respectful of the enforcement process. Tr. 38-39, 117, 119-120. While his cooperation does not rise to the level of self-reporting, a downward adjustment is warranted for his level of cooperation.

6. Other Matters as Justice May Require

The Penalty Policy provides that a penalty may be mitigated for factors including a "long history of compliance" and "the economic impact of an assessed penalty on a business." Penalty Policy at 12. It is undisputed that Respondent Seabeck has a 35-year history in the commercial fishing business, owning and operating fishing vessels, participating in the IFQ program since its inception in 1995, and making 20 to 24 trips of longline fishing per year in the years he went longline fishing. FF 8. Acknowledging that he has some past violations, Respondent Seabeck points out that his compliance history includes only minor infractions that are not out of the ordinary given the frequency and duration of his fishing history. Tr. 115, 118, 124.

The Agency did not challenge Respondent's argument that the Total Allowable Catch is much lower than in previous years, resulting in less income for IFQ fishermen so that penalties have a correspondingly greater impact. FF 40. However, the penalty ranges in the Penalty Policy matrix for Magnuson-Stevens Act violations have remained the same since the Penalty Policy dated March 16, 2011. Yet, the maximum penalties under the Act have increased significantly, from $100,000 originally, to $140,000 as adjusted since 2011, to $178,156

effective July 7, 2016, as authorized by the Federal Civil Penalties Inflation Adjustment Act of 1990. Civil Monetary Penalty Adjustments for Inflation, 81 Fed. Reg. 36456, 36457. NOAA has chosen not to exercise its right to modify the penalty range in the matrix to reflect such increases. Penalty Policy at 6 n. 6. Therefore, any harsher impact of penalties due to less income from IFQ fishing is offset by the fact that the relevant penalty matrix values have remained the same despite the significant increases in the statutory maximum penalty.

7. Ability to Pay

The NOVA advised Respondent Seabeck that he could seek to have the proposed penalty amount modified based on an inability to pay, and that any such modification request would have to be made in accordance with 15 C.F.R. § 904.102 and be accompanied by supporting financial information. In this case, Respondent Seabeck has not claimed inability to pay a penalty and has not provided information concerning his financial condition. Respondent Seabeck is therefore presumed to have the ability to pay the civil penalty. 15 C.F.R. § 904.108(c).

8. Conclusion

Taking into account the nature, circumstances, extent, and gravity of the violations, Respondent Seabeck's degree of culpability and history of prior offenses, and other matters as justice may require, Respondent Seabeck is assessed a civil penalty in the amount of $4,600.

ORDER

IT IS HEREBY ORDERED THAT Respondent KENNETH O. JACKSON and Respondent MECHANICS SERVICES, INC. are DISMISSED from this matter.

IT IS FURTHER ORDERED THAT a civil penalty in the total amount of **$4,600** is assessed against Respondent KEVIN J. SEABECK.

As provided by 15 C.F.R. § 904.105(a), payment of this penalty in full shall be made within **30 days** of the date this decision becomes final Agency action, by check or money order made payable to the Department of Commerce/NOAA, or by credit card information and authorization provided to:

NOAA
Office of General Counsel
U.S. Department of Commerce
P.O. Box 21109
Juneau, AK 99802

PLEASE TAKE NOTICE, that this Initial Decision becomes effective as the final Agency action, sixty (60) days after the date this Initial Decision is served, 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 Department of Commerce/NOAA within thirty (30) days from the date on which this decision becomes effective as the final Agency action, "NOAA 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).

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

PLEASE TAKE FURTHER NOTICE, that any petition for review of this decision by the Administrator of NOAA must be filed within thirty (30) days after the date this Initial Decision is served and in accordance with the requirements of 15 C.F.R. § 904.273. If neither party seeks administrative review within thirty (30) days after issuance of this order, this initial decision shall become the final administrative decision of the Agency. A copy of 15 C.F.R. §§ 904.271-904.273 is attached.

Lisa Buschmann

M. Lisa Buschmann
Administrative Law Judge
U.S. Environmental Protection Agency

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.