



## I. PROCEDURAL BACKGROUND

The National Oceanic and Atmospheric Administration (“NOAA” or “Agency”) issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”), dated February 10, 2017, to Brett A. Wilson (“Respondent Wilson”), charging him with two counts of violation of the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”) and implementing regulations. Subsequently, the Agency amended the NOVA (“Amended NOVA” or “Am. NOVA”) to include Hindsight Sportfishing LLC (“Respondent Hindsight”), as a respondent, upon discovering that this entity owned the fishing vessel associated with the alleged violations in this matter.

Count One of the Amended NOVA (“Count One”) alleges that Respondents Wilson and Hindsight (collectively, “Respondents”) violated the Magnuson-Stevens Act at 16 U.S.C. § 1857(l)(A), and implementing regulations within 50 C.F.R. §§ 635.30(a) and 635.71(a)(21), on or about August 12, 2016, by failing to maintain an Atlantic Highly Migratory Species in the form specified by regulations, namely by landing an Atlantic tuna “that was not maintained through offloading in round form or eviscerated with the head and fins removed, provided one pectoral fin and the tail remained attached.” Am. NOVA at 1. Count Two of the Amended NOVA, alleges that “on various dates between June 15, 2016 and September 17, 2016,” Respondents violated the Magnuson-Stevens Act at 16 U.S.C. § 1857(l)(A), and implementing regulations within 50 C.F.R. §§ 635.5(a)(4) and 635.71(b)(42), by “failing to report all discards or landings of Bluefin tuna through the [National Marine Fisheries Service’s] electronic catch reporting system within 24 hours of landing.” Am. NOVA at 1-2. For these alleged violations, the Agency assessed a penalty of \$5,000 for Count One, and \$4,000 for Count Two, for a total combined penalty of \$9,000. Am. NOVA at 2. Through counsel, Respondents timely requested a hearing,<sup>2</sup> and the Agency subsequently forwarded the case to this Tribunal.<sup>3</sup>

By order dated October 6, 2017, I was designated to preside over the litigation of this matter. On October 18, 2017, I issued an Order to Submit Preliminary Positions on Issues and Procedures (“PPIP Scheduling Order”) to the parties, setting forth various prehearing filing deadlines and procedures, including filing deadlines for each party to submit its Preliminary Position on Issues and Procedures (“PPIP”). In accordance with that order, the parties filed their respective PPIPs, and I scheduled the hearing in this matter by order dated February 28, 2018.

I conducted an evidentiary hearing in this matter on April 3, 2018, in Boston, Massachusetts.<sup>4</sup> At the hearing, the Agency presented Agency’s Exhibits (“AX”) 1-14, which

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<sup>2</sup> Pursuant to 15 C.F.R. § 904.107(b), “a hearing request by one joint and several respondent is considered a request by the other joint and several respondent(s).” In this matter, Respondent Wilson timely requested a hearing in response to the Agency’s NOVA, through his counsel, Stephen Ouellette. The Agency subsequently amended the NOVA to include Respondent Hindsight, also represented by Stephen Ouellette. The Amended NOVA charges Respondents jointly and severally for the alleged violations. Consequently, Respondent Wilson’s hearing request is also deemed a request on behalf of Respondent Hindsight.

<sup>3</sup> The record reflects that the parties were offered an invitation to participate in this Tribunal’s alternative dispute resolution process, but did not jointly accept this invitation.

<sup>4</sup> Citations to the transcript of this evidentiary hearing are made in the following format: “Tr. [page].”

were admitted into evidence without objection. The Agency also presented the testimony of two witnesses: Kevin Swiechowicz (“Officer Swiechowicz”), a law enforcement officer with NOAA’s National Marine Fisheries Service (“NMFS”), Office of Law Enforcement in the Northeast Region, and Bradley McHale (“Mr. McHale”), a Supervisory Fishery Management Specialist and the Northeast Branch Chief for the Highly Migratory Species Management Division of NMFS. Respondents offered Respondents’ Exhibits (“RX”) 1-10 into evidence, and RX 1-6 and 9-10 were admitted into evidence without objection.<sup>5</sup> However, RX 7 and 8 were excluded from evidence, upon objection by the Agency, with proffer made by Respondents’ counsel. Respondents also presented the testimony of Respondent Wilson. Additionally, the parties presented Joint Exhibit 1 (“JX 1”), a copy of the parties’ Joint Set of Stipulated Facts, Exhibits, and Testimony, which was admitted into evidence.

Following service of the certified transcript of the hearing to the parties on April 17, 2018, I issued an Order Scheduling Post-Hearing Submissions on the same date, establishing various post-hearing deadlines.<sup>6</sup> Consistent with such deadlines, the Agency timely filed a Motion to Conform Hearing Transcript to Testimony, which was granted by order dated May 25, 2018. Thereafter, the Agency timely filed its Initial Post-Hearing Brief (“Ag. In. Br.”), and Respondents filed their Post-Hearing Brief (“Resps. Br.”), in accordance with established post-hearing deadlines. Subsequently, the Agency timely filed its Reply Brief (“Ag. Rep. Br.”). Respondents did not file a Reply Brief.

## **II. STATEMENT OF THE ISSUES**

### **a. Liability**

In making a determination on liability regarding Count One of the Amended NOVA, I must determine if Respondents violated the Magnuson-Stevens Act at 16 U.S.C. § 1857(1)(A), and regulations at 50 C.F.R. §§ 635.30(a) and 635.71(a)(21), by failing to maintain an Atlantic HMS in proper form through offloading on or about August 12, 2016. With regard to the issue of liability for Count Two of the Amended NOVA, I must determine whether Respondents violated the Magnuson-Stevens Act at 16 U.S.C. § 1857(1)(A), and the regulations at 50 C.F.R. §§ 635.5(a)(4) and 635.71(b)(42), by failing to report all discards or landings of bluefin tuna to the NMFS electronic catch reporting system as required, on dates between June 15, 2016, and September 17, 2016.

### **b. Civil Penalty**

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

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<sup>5</sup> Notably, RX 1 contains confidential personal and financial information relating to Respondents, and has accordingly been maintained confidentially during this proceeding.

<sup>6</sup> These post-hearing filing deadlines were extended by order dated June 7, 2018, upon the request of Respondents.

### III. FACTUAL SUMMARY

Respondent Wilson is the owner and sole member of Respondent Hindsight, a limited liability company.<sup>7</sup> See JX 1 at ¶ 8; see also AX 4 at 2; Tr. 184, 194. At all times relevant to this proceeding, Respondent Hindsight was the owner of the fishing vessel Hindsight (“F/V Hindsight”),<sup>8</sup> JX 1 at ¶ 2; AX 4 at 2, and Respondent Wilson was the operator of the F/V Hindsight, JX 1 at ¶ 3.<sup>9</sup>

Respondent Wilson, at all relevant times, held an Atlantic Highly Migratory Species Charter/Headboat permit (“HMS Charter/Headboat permit”), Permit Number 10061281, which was registered to the F/V Hindsight. JX 1 at ¶ 5; AX 1 at 3, 17; Tr. 37. Respondent Wilson operates the F/V Hindsight as a charter fishing vessel from Cape Cod, Massachusetts. See JX 1 at ¶ 6; Tr. 153-55, 169. On charter fishing excursions, Respondent Wilson targets bluefin tuna, among other fish species. See JX 1 at ¶ 6; Tr. 151-52. In doing so, Respondent Wilson catches and lands bluefin tuna under the General category limits on some days, and under the Angling category limits on other days. JX 1 at ¶ 7. However, Respondent Wilson predominantly targets commercially-sized bluefin tuna on his charter excursions. See Tr. 154-55, 177-78. When a commercially-sized bluefin tuna is caught on a charter excursion operated by Respondent Wilson, he typically offers the charter excursion passengers either a discount on the cost of the excursion or a cut of the bluefin tuna. See Tr. 154-55.

On August 12, 2016, Respondent Wilson operated a charter excursion on the F/V Hindsight, which lasted approximately 12-hours and departed from Sesuit Harbor in Dennis, Massachusetts. JX 1 at ¶ 10; Tr. 156-57. There were six passengers on this charter excursion, and one mate assisting Respondent Wilson. Tr. 30; AX 1 at 3. On the trip, an 86-inch bluefin tuna was caught on the F/V Hindsight.<sup>10</sup> JX 1 at ¶ 10; Tr. 157. After catching the 86-inch bluefin tuna, the charter excursion caught a smaller bluefin tuna, which was 59-inches in size.<sup>11</sup> JX 1 at ¶ 10; Tr. 34-35, 157. During the course of the trip, while on board the F/V Hindsight at sea, Respondent Wilson cut the 59-inch bluefin tuna into fillets. JX 1 at ¶ 11; Tr. 157; see also Tr. 34-35.

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<sup>7</sup> In his testimony, Respondent Wilson indicated that Respondent Hindsight was registered with the Commonwealth of Massachusetts in 2014. Tr. 192.

<sup>8</sup> The record reflects that the F/V Hindsight is a 42-foot fishing boat. See Tr. 152; AX 4. At all relevant times, the F/V Hindsight was properly documented by the United States Coast Guard. JX 1 at ¶ 4; see also AX 4 (documentation from the United States Coast Guard).

<sup>9</sup> Although the parties stipulated that Respondent Hindsight has no employees, JX 1 at ¶ 9, Respondent Wilson testified that he employs one crew member, see Tr. 200-01.

<sup>10</sup> At times in the record, this 86-inch bluefin tuna is referred to as a 90-inch bluefin tuna. See, e.g., Tr. 34-35, 37, 41-46, 49; AX 1 at 4-9, 11 (referencing a 90-inch bluefin tuna caught on the August 12, 2016 charter excursion on the F/V Hindsight). However, the record reflects that the 86-inch measurement is the accurate measurement for this fish. See JX 1 at ¶ 18; Tr. 50. For purposes of accuracy and continuity, this fish is referred to in this document as the 86-inch bluefin tuna.

<sup>11</sup> Notably, the record reflects that after catching the 86-inch and 59-inch bluefin tuna on August 12, 2016, the F/V Hindsight hooked, but lost, a third bluefin tuna. JX ¶ 10; Tr. 33, 157; AX 1 at 4.

At the conclusion of the trip, the F/V Hindsight returned to Sesuit Harbor, where it refueled. *See* Tr. 29-32, 156, 158; AX 1 at 2-3. After refueling, the F/V Hindsight proceeded to dock at an offloading slip, Tr. 30-32, 158; AX 1 at 2-3, landing the 86-inch bluefin tuna which was caught on the trip, JX 1 at ¶ 18; *see also* AX 2 at 15 (reflecting the landing report for this tuna), as well as a cooler containing the 59-inch bluefin tuna filleted on the trip, *see* Tr. 32-34, 158; AX 1 at 3-4. The charter excursion passengers offboarded the F/V Hindsight at the offloading slip. *See* Tr. 32, 158; AX 1 at 3-4. Officer Swiechowicz observed the F/V Hindsight refuel and dock at the offloading slip at Sesuit Harbor from a position onshore. Tr. 29-32; AX 1 at 2-3. Additionally, Officer Swiechowicz observed the charter excursion passengers offload a cooler from the F/V Hindsight. Tr. 32-34; AX 1 at 3-4.

Officer Swiechowicz approached the charter excursion passengers on the dock following their departure from the F/V Hindsight, and asked them about the charter excursion. Tr. 33-34; AX 1 at 4. The charter excursion passengers told Officer Swiechowicz that they had caught two bluefin tuna on the trip, Tr. 33; AX 1 at 4, and they showed Officer Swiechowicz the contents of the cooler in their possession upon his request, Tr. 33-34; AX 1 at 4. Upon inspection, Officer Swiechowicz observed that the cooler contained cut tuna steaks enclosed in approximately 10 gallon-sized bags, as well as a cut tuna tail. Tr. 34, 36; AX 1 at 4; *see also* AX 1 at 21 (photograph of the cooler containing tuna meat taken by Officer Swiechowicz); Tr. 44, 49 (discussing photograph of the cooler). The charter excursion passengers further told Officer Swiechowicz that the tuna meat in the cooler came from the 59-inch bluefin tuna caught on the excursion, and that Respondent Wilson had filleted this fish at sea to provide them with meat to take home because the fish was too small for sale. Tr. 34-35; AX 1 at 4. Officer Swiechowicz took custody of the cooler, and boarded the F/V Hindsight to talk with Respondent Wilson. Tr. 36; AX 1 at 5.

On board the F/V Hindsight, Officer Swiechowicz identified himself and Respondent Wilson, and confirmed that Respondent Wilson held a HMS Charter/Headboat permit, issued to the F/V Hindsight. Tr. 36-37; AX 1 at 5. Respondent Wilson stated that he had been fishing for bluefin tuna, and he reported catching two bluefin tuna on the trip, including the 86-inch fish and the 59-inch fish. Tr. 37, 41-42; AX 1 at 5-6. Respondent Wilson agreed to show Officer Swiechowicz the 86-inch bluefin tuna in the hold of the F/V Hindsight, upon Officer Swiechowicz's request. Tr. 37-38; AX 1 at 5. Officer Swiechowicz observed that the 86-inch bluefin tuna in the hold was prepared for commercial sale, and he took a picture of this fish. Tr. 38; AX 1 at 5-6, 19. Respondent Wilson confirmed to Officer Swiechowicz that he intended to sell the 86-inch bluefin tuna, and reported that a fish dealer, North Atlantic Traders, was coming to receive this fish. AX 1 at 7.

During his conversation with Officer Swiechowicz, Respondent Wilson acknowledged that the tuna meat contained in the cooler was from the 59-inch bluefin tuna, and that he had filleted this fish while fishing at sea. Tr. 41-43; AX 1 at 6-8. Respondent Wilson told Officer Swiechowicz that he was familiar with the relevant landing form requirements, but explained that he didn't have enough ice on board the vessel for both fish retained on the excursion, so he filleted the smaller, 59-inch bluefin tuna at sea in order to allocate the limited ice on board to the

commercially-sized, 86-inch bluefin tuna in the hold, preserving the quality of this fish.<sup>12</sup> Tr. 42-43; AX 1 at 6-8. Additionally, Respondent indicated to Officer Swiechowicz that he had filleted the 59-inch bluefin tuna at sea to provide the charter excursion passengers tuna meat to take home. AX 1 at 7-8. Respondent Wilson also confirmed that the 86-inch bluefin tuna had been caught prior to the 59-inch bluefin tuna on the charter excursion. Tr. 41-42; AX 1 at 6-7. In response to questions from Officer Swiechowicz regarding size category limits on fishing bluefin tuna, Respondent Wilson reported that the size category limits had slipped his mind, and that he had not previously encountered a situation where he retained a recreationally-sized bluefin tuna after retaining a commercially-sized bluefin tuna on a charter excursion. Tr. 43-44; AX 1 at 7.

Officer Swiechowicz informed Respondent Wilson that his actions of filleting the 59-inch bluefin tuna at sea constituted two violations, one violation for landing a bluefin tuna in improper form, and another for retaining an undersized bluefin tuna after retaining a commercially-sized bluefin tuna.<sup>13</sup> AX 1 at 8. After consulting with a supervisor by telephone, Officer Swiechowicz informed Respondent Wilson that he would seize the tuna meat in the cooler due the violations, but would not seize the 86-inch bluefin tuna. *See* Tr. 46, 158; AX 1 at 9; *see also* AX 1 at 8 (discussing conversation between Officer Swiechowicz and his supervisor).

During Officer Swiechowicz's interaction with Respondent Wilson, a truck associated with North Atlantic Traders arrived and took possession of the 86-inch bluefin tuna. AX 1 at 9; Tr. 46; *see also* AX 1 at 23 (photograph of North Atlantic Traders taking possession of the 86-inch bluefin tuna). In the process of transferring the 86-inch bluefin tuna to North Atlantic Traders, Respondent Wilson and the driver operating the truck for North Atlantic Traders filled in forms relating to this transfer, including a Large Medium and Giant Atlantic Bluefin Tuna Landing Report. AX 1 at 9, 25; RX 5; *see also* Tr. 62-63, 160-61 (discussing Large Medium and Giant Atlantic Bluefin Tuna Landing Report). Officer Swiechowicz used a scale on the back of the North Atlantic Traders' truck to weigh the tuna meat from the filleted 59-inch bluefin tuna contained in the cooler, and determined that the tuna meat weighed 80 pounds. Tr. 46-47; AX 1 at 9-10. He subsequently completed a Notice of Seizure form for the 80 pounds of tuna meat, and Respondent Wilson voluntarily abandoned this tuna meat. AX 1 at 10, 29-30; Tr. 47-48, 50, 158.

Prior to departing, Officer Swiechowicz advised Respondent Wilson that he would be receiving an Enforcement Action Report in the mail, and he reminded Respondent Wilson of the landing form requirements and retention limits for bluefin tuna. AX 1 at 10; Tr. 51-52. He further reminded Respondent Wilson that all bluefin tuna landed or discarded dead must be reported within 24 hours to the website or telephone number reflected on his HMS

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<sup>12</sup> Notably, Officer Swiechowicz reported that it was approximately 90 degrees at the time of the boarding on August 12, 2016. AX 1 at 5-6; Tr. 43.

<sup>13</sup> Although Officer Swiechowicz identified a violation for retaining an undersized bluefin tuna after retaining a commercially-sized bluefin tuna during the boarding on August 12, 2016, AX 1 at 9, and included such a violation in the Enforcement Action Report, *see* AX 1 at 62, the Agency did not charge this as a violation in this proceeding.

Charter/Headboat permit.<sup>14</sup> AX 1 at 10; Tr. 52. After leaving the harbor, Officer Swiechowicz donated the seized 80 pounds of tuna meat to a charity organization in Hyannis, Massachusetts. AX 1 at 10-11, 32; Tr. 52.

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In addition to the 86-inch bluefin tuna and the 59-inch bluefin tuna landed by the F/V Hindsight on August 12, 2016, the F/V Hindsight landed 27 bluefin tuna, as reflected in the table below, during the period from June 15, 2016, through September 22, 2016. Notably, 20 of these bluefin tuna which were landed during the period of the charged violations in Count Two of the Amended NOVA, that is, between June 15, 2016 and September 17, 2016.<sup>15</sup>

<b>Date Landed<sup>16</sup></b>	<b>Fork Length<sup>17</sup></b>	<b>Dealer Tag Number</b>
June 15, 2016	93 inches	900045329 <sup>18</sup>
June 15, 2016	75 inches	900045328 <sup>19</sup>
June 20, 2016	81 inches	900047768 <sup>20</sup>
June 20, 2016	77 inches	900047769 <sup>21</sup>
July 29, 2016	85 inches	900047886 <sup>22</sup>
July 29, 2016	87 inches	900047887 <sup>23</sup>

<sup>14</sup> Upon further questioning at the hearing, Respondent Wilson did not challenge that the reporting requirements were conveyed to him by Officer Swiechowicz. *See* Tr. 203 (“So the officer probably did say something to me, but I just—I didn’t understand it the right way I guess.” Respondent Wilson confessed that he likely did not fully grasp or remember the information given to him by Officer Swiechowicz, in part because of the hectic scene at the time of the incident, Tr. 203-04, and in part because of his concern over having committed a violation, Tr. 204 (“I don’t have a guilty conscience, and when – you know, obviously I’d done something wrong that, you know, it was coming down on my shoulders, so maybe I misinterpreted that the officer had said.”). Considering this testimony, along with Officer Swiechowicz’s report and credible testimony of the conversation that took place, *see* AX 1 at 10; Tr. 51-52, I find as a fact that Officer Swiechowicz reminded Respondent Wilson of the bluefin tuna reporting requirements during their interaction on August 12, 2016.

<sup>15</sup> Citations are contained in footnotes at the end of each table entry.

<sup>16</sup> Notably, the dealer submitted reports regarding these fish reflect somewhat differing landing dates for the bluefin tuna landed on the F/V Hindsight on August 29, 2016; August 31, 2016; September 9, 2016; September 10, 2016; September 15, 2016; September 16, 2016; September 19, 2016; September 20, 2016; and September 22, 2016. *See* AX 1 at 59-60; AX 3 at 4-5.

<sup>17</sup> The reflected fork length is a head on measurement, except where the reported fork length is marked by an asterisk in the table, indicating the head was not included in the measurement. *See* AX 1 at 59-60; AX 2 at 15 (reflecting whether reported fork length was a snout/head on measurement).

<sup>18</sup> JX 1 at ¶ 12; AX 1 at 36, 59-60; AX 2 at 7, 15; AX 3 at 4-5.

<sup>19</sup> JX 1 at ¶ 13; AX1 at 59-60; AX 2 at 9,15; AX 3 at 4-5.

<sup>20</sup> JX 1 at ¶ 14; AX 1 at 36, 59-60; AX 2 at 11, 15; AX 3 at 4-5.

<sup>21</sup> The parties stipulated that on June 20, 2016, Respondents landed an 85-inch bluefin tuna (Tag No. 900047886), JX 1 at ¶ 16, and that on July 29, 2016, Respondents landed a 77-inch bluefin tuna (Tag No. 900047769), JX 1 at ¶ 15. However, the record otherwise reflects that the referenced 77-inch bluefin tuna was landed by Respondents on June 20, 2016, and the referenced 85-inch bluefin tuna was landed by Respondents on July 29, 2016. AX1 at 59-60; AX 2 at 9, 15; AX 3 at 4-5. Accordingly, it appears that the parties transposed the landing dates for these bluefin tuna in their stipulations.

<sup>22</sup> *Supra* at note 21, at 6; AX 1 at 59-60; AX 2 at 9,15; AX 3 at 4-5.

<sup>23</sup> JX 1 at ¶ 17; AX 2 at 15; AX 3 at 4-5.

August 13, 2016	84 inches	900048069 <sup>24</sup>
August 13, 2016	79 inches	900048068 <sup>25</sup>
August 19, 2016	81 inches	900048270 <sup>26</sup>
August 19, 2016	91 inches	900048269 <sup>27</sup>
August 29, 2016	95 inches	900048313 <sup>28</sup>
August 31, 2016	91 inches	900048314 <sup>29</sup>
September 9, 2016	81 inches	900048257 <sup>30</sup>
September 10, 2016	111 inches	900048258 <sup>31</sup>
September 13, 2016	81 inches	900048322 <sup>32</sup>
September 15, 2016	68 inches*	900048397 <sup>33</sup>
September 15, 2016	65 inches*	900048396 <sup>34</sup>
September 15, 2016	76 inches*	900044839 <sup>35</sup>
September 15, 2016	63 inches*	900048398 <sup>36</sup>
September 16, 2016	75 inches*	900048399 <sup>37</sup>
September 19, 2016	64 inches*	900048418 <sup>38</sup>
September 19, 2016	61 inches*	900048417 <sup>39</sup>
September 20, 2016	76 inches*	900048420 <sup>40</sup>
September 20, 2016	71 inches	900048418 <sup>41</sup>

<sup>24</sup> JX 1 at ¶ 19; AX 2 at 15; AX 3 at 4-5.

<sup>25</sup> JX 1 at ¶ 20; AX 2 at 15; AX 3 at 4-5.

<sup>26</sup> JX 1 at ¶ 21; AX 2 at 15; AX 3 at 4-5.

<sup>27</sup> JX 1 at ¶ 22; AX 2 at 15; AX 3 at 4-5.

<sup>28</sup> JX 1 at ¶ 23; AX 2 at 15.

<sup>29</sup> JX 1 at ¶ 24; AX 2 at 15.

<sup>30</sup> JX 1 at ¶ 25; AX 2 at 15.

<sup>31</sup> JX 1 at ¶ 26; AX 2 at 15.

<sup>32</sup> JX 1 at ¶ 27; AX 2 at 15.

<sup>33</sup> JX 1 at ¶ 28; AX 2 at 15; *see also* AX 1 at 58-59 (indicating that this fork length measurement is not a head on measurement).

<sup>34</sup> JX 1 at ¶ 29; AX 2 at 15; *see also* AX 1 at 58-59(indicating that this fork length measurement is not a head on measurement).

<sup>35</sup> JX 1 at ¶ 30; AX 2 at 15; *see also* AX 1 at 58-59(indicating that this fork length measurement is not a head on measurement).

<sup>36</sup> JX 1 at ¶ 31; AX 2 at 15; *see also* AX 1 at 58-59(indicating that this fork length measurement is not a head on measurement).

<sup>37</sup> JX 1 at ¶ 32; AX 2 at 15; *see also* AX 1 at 58-59(indicating that this fork length measurement is not a head on measurement).

<sup>38</sup> JX 1 at ¶ 33; AX 2 at 15.

<sup>39</sup> JX 1 at ¶ 34; AX 2 at 15.

<sup>40</sup> JX 1 at ¶ 35; AX 2 at 15.

<sup>41</sup> JX 1 at ¶ 36; AX 2 at 15.



September 22, 2016	61 inches	900048529 <sup>42</sup>
September 22, 2016	66 inches	900048528 <sup>43</sup>
September 22, 2016	72 inches*	900048527 <sup>44</sup>

These 27 bluefin tuna were sold to North Atlantic Traders, and this dealer reported these purchases to NMFS. AX 1 at 59-60; AX 3; JX 1 at ¶ 40; *see also* Tr. 64 (discussing dealer reports regarding these fish); AX 2 at 15 (reflecting dealer tag numbers for these purchased bluefin tuna). It is undisputed that Respondent Wilson did not timely report the 20 bluefin tuna, included in the above table, that were landed during the period of the charged violations in Count Two of the Amended NOVA (between June 15, 2016 and September 17, 2016), and which were sold to North Atlantic Traders, as he did not report such fish until September 26, 2016. *See* JX 1 at ¶¶ 12-17, 19, 32, 40.

Officer Swiechowicz continued his investigation regarding the F/V Hindsight following the boarding of the vessel on August 12, 2016. *See* Tr. 53-59; AX 1 at 11-15. As a part of his investigation, he obtained and reviewed NMFS records for reported landings and discards of bluefin tuna by the F/V Hindsight. *See* Tr. 53-59; AX 1 at 11-12, 34-36, 58-60. On September 20, 2016, Officer Swiechowicz discovered that the F/V Hindsight had not reported any landings or discards of bluefin tuna to NMFS since 2012 (including those bluefin tuna landed in 2016, identified above), but that dealer reports to NMFS reflected that 21 bluefin tuna had been landed by the F/V Hindsight and sold commercially. AX 1 at 11-12, 34-36, 58-60; Tr. 56-59. On the same date, Officer Swiechowicz completed an Enforcement Action Report, mailed to Respondent Wilson, which identified 21 counts for failure to report bluefin tuna as specified in 50 C.F.R. § 635.5(a)(4), in addition to the two violations he previously identified to Respondent Wilson (relating to the 59-inch filleted bluefin tuna) on August 12, 2016 (for which only one was charged, as reflected in Count One of the Amended NOVA). *See* AX 1 at 13, 62; Tr. 59-60.

On September 26, 2016, after receiving the Enforcement Action Report, Respondent Wilson reported landing the 86-inch bluefin tuna caught on August 12, 2016, as well as the 27 bluefin tuna landed during the period from June 15, 2016, through September 22, 2016, reflected in the table above, to NMFS by telephone. JX 1 at ¶ 40; AX 2 at 5, 15; Tr. 161, 167-68, 175-76. Respondent Wilson did not report landing the 59-inch bluefin tuna landed and filleted on August 12, 2016 to NMFS. *See* Tr. 176-77.

#### **IV. LIABILITY**

##### **a. Principles of Law Relevant to Liability**

##### *i. Standard of Proof*

To prevail on its claim that Respondents violated the Magnuson-Stevens Act and its implementing regulations, the Agency must prove facts constituting the violation by a

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<sup>42</sup> JX 1 at ¶ 37; AX 2 at 15.

<sup>43</sup> JX 1 at ¶ 38; AX 2 at 15.

<sup>44</sup> JX 1 at ¶ 39; AX 2 at 15.

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

ii. *Magnuson-Stevens Act and Implementing Regulations*

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

Section 307(1)(A) of the Magnuson-Stevens Act makes it unlawful “for any person—to violate any provision of this Act or any regulation or permit issued pursuant to this Act.” 16 U.S.C. § 1857(1)(A). “Person” is defined by the Magnuson-Stevens Act to include “any individual . . . , any corporation, partnership, association, or other entity . . . , and any Federal, State, local, or foreign government or any entity of any such government.” 16 U.S.C. § 1802(36). Conservation-related violations of the Magnuson-Stevens Act are strict liability offenses, and, therefore, state of mind is irrelevant in determining whether a violation occurred. *Alba*, 1982 NOAA LEXIS 29, at \*7 (NOAA App. 1982); *see also Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999) (holding that scienter is not required to impose civil penalties for violations of the Magnuson-Stevens Act and the implementing regulations); *Nguyen*, 2012 NOAA LEXIS 2, at \*11 (NOAA Jan. 18, 2012) (“The Magnuson-Stevens Act, and the regulations promulgated thereunder, do not set forth a scienter requirement. Accordingly, any violations are strict liability offenses.”) (internal citations omitted).

Pursuant to the Magnuson-Stevens Act, the Agency implemented regulations to govern the conservation and management of Atlantic Highly Migratory Species (“Atlantic HMS”). *See* 50 C.F.R. Part 635.<sup>45</sup> The regulations designate Atlantic tunas, including bluefin tuna,<sup>46</sup> as Atlantic HMS.<sup>47</sup> *See* 50 C.F.R. §§ 600.10, 635.2. With regard to Atlantic tunas, the regulations place restrictions on the form in which such fish may be maintained through offloading on a

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<sup>45</sup> Given the dates of the alleged violations in this matter, the 2015 edition of the Code of Federal Regulations is the edition applicable to the regulatory provisions under Title 50 of the Code of Federal Regulations relevant to the alleged violations in this case, and, therefore, is the edition to which citations to such regulatory provisions are made here, unless otherwise specified.

<sup>46</sup> The regulations define bluefin tuna as “the species *Thunnus thynnus*, or a part thereof.” 50 C.F.R. § 600.10.

<sup>47</sup> Notably, Atlantic tuna are managed under the authority of both the Magnuson-Stevens Act and the Atlantic Tunas Convention Act (“ATCA”). 50 C.F.R. § 635.1(a).

fishing vessel. *See* 50 C.F.R. §§ 635.30(a), 635.71(a)(21). Specifically, the regulations provide that:

Persons that own or operate a fishing vessel that possesses an Atlantic tuna in the Atlantic Ocean or that lands an Atlantic tuna in an Atlantic coastal port must maintain such Atlantic tuna through offloading either in round form or eviscerated with the head and fins removed, provided one pectoral fin and the tail remain attached. The upper and lower lobes of the tuna tail may be removed for storage purposes as long as the fork of the tail remains intact.

50 C.F.R. § 635.30(a). The regulations further specify that the term “round” means “a whole fish -- one that has not been gilled, gutted, beheaded, or definned.” 50 C.F.R. § 600.10. Additionally, the regulations otherwise specifically prohibit any person or vessel subject to the jurisdiction of the United States to fail to maintain an Atlantic HMS in the form specified by 50 C.F.R. § 635.30. 50 C.F.R. § 635.71(a)(21).

In addition to placing restrictions on the form in which Atlantic HMS may be maintained, the regulations pertaining to Atlantic HMS set forth permitting requirements for fishing Atlantic HMS, as well as retention limits for bluefin tuna. *See* 50 C.F.R. § 635.4 (establishing permitting requirements for Atlantic HMS); 50 C.F.R. § 635.23 (setting retention limits for bluefin tuna). Pertinent to this matter, the regulations require that “[t]he owner of a charter boat or headboat used to fish for, retain, possess, or land any Atlantic HMS must obtain an HMS Charter/Headboat permit.” 50 C.F.R. § 635.4(b)(1).

In relevant circumstances,<sup>48</sup> the regulations allow for a person aboard a vessel issued an HMS Charter/Headboat permit to fish under the retention limits for bluefin tuna set for either the General category or the Angling category. 50 C.F.R. § 635.23(c)(3). The retention limits for bluefin tuna in the General category prohibit possessing, retaining, landing, or selling a bluefin tuna “in the school, large school, or small medium class size.” 50 C.F.R. § 635.23(a)(1). In contrast, the retention limits for bluefin tuna in the Angling category allow for the retention, possession, and landing of only one large medium or giant bluefin tuna outside the Gulf of Mexico, and otherwise prohibit the sale or transfer of this fish for a commercial purpose.<sup>49</sup> 50 C.F.R. § 635.23(b)(1). To determine which fishing category is applicable when fishing bluefin tuna under an HMS Charter/Headboat permit under the relevant circumstances, the regulations provide that the size category of the first bluefin tuna retained “determine[s] the fishing category applicable to the vessel that day.” 50 C.F.R. § 635.23(c)(3). The regulations allow a person who owns or operates a vessel with a valid HMS Charter/Headboat permit with a commercial sale endorsement to sell Atlantic tuna, including bluefin tuna, but otherwise broadly prohibit the sale of a bluefin tuna “smaller than the large medium size class.” 50 C.F.R. § 635.31(a)(1).

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<sup>48</sup> The regulations provide that this is allowed “[w]hen fishing other than in the Gulf of Mexico and when the fishery under the General category has not been closed under [50 C.F.R.] § 635.28.” 50 C.F.R. § 635.23(c)(3).

<sup>49</sup> During the relevant period, the large medium size class for bluefin tuna encompassed fish with a curved fork length of 73 to less than 81 inches, or a pectoral fin curved fork length of 54 to less than 60 inches. RX 3 at 50. Likewise, the giant size class for bluefin tuna during the relevant period encompassed fish with a curved fork length of 81 inches or longer, or a pectoral fin curved fork length of 60 inches or longer. RX 3 at 50.

Consistent with the permitting requirements for fishing Atlantic HMS and retention limits for bluefin tuna, the regulations pertaining to Atlantic HMS establish requirements on owners of vessels permitted under the HMS Charter/Headboat category to report dead discards and landings of bluefin tuna to an electronic catch reporting system maintained by NMFS. *See* 50 C.F.R. §§ 635.5(a)(4), 635.71(b)(42) (reporting requirements under the General category); 50 C.F.R. § 635.59(c)(1) (reporting requirements under the Angling category). Relevant to the allegations in this matter, the Agency promulgated regulations establishing the reporting requirements for such vessel owners fishing under the General category limits on December 2, 2014, and these requirements took effect on January 1, 2015. *See Amendment 7 to the 2006 Consolidated HMS Fishery Management Plan*, 79 Fed. Reg. 71,510, 71,522, 71,588, 71,607 (Dec. 2, 2014). These regulations provide that the owner of a vessel that has been permitted under the HMS Charter/Headboat category, and which is fishing under the General category limits, “must report all discards and/or landings of bluefin tuna through the NMFS electronic catch reporting system within 24 hours of the landings or the end of trip.” 50 C.F.R. § 635.5(a)(4). The regulations provide that such electronic reporting can be accomplished either by calling a phone number designated by NMFS, or by submitting such information through a website designated by NMFS. *Id.* The regulations further prohibit any person or vessel subject to the jurisdiction of the United States to “[f]ail to report all dead discards or landings of bluefin through the NMFS electronic catch reporting system within 24 hours of landing or the end of the trip as specified at [50 C.F.R.] § 635.5(a)(4).” 50 C.F.R. § 635.71(b)(42). The regulations define a “trip” as “the time period that begins when a fishing vessel departs from a dock, berth, beach, seawall, ramp, or port to carry out fishing operations and that terminates with a return to a dock, berth, beach, seawall, ramp, or port.” 50 C.F.R. § 600.10.

Notably, in addition to placing reporting requirements for bluefin tuna on owners of vessels permitted under the HMS Charter/Headboat category, the regulations pertaining to Atlantic HMS also place reporting requirements for bluefin tuna on fish dealers. *See* 50 C.F.R. § 635.5(b)(1). Effective July 28, 2016, the regulations changed the method of such dealer reporting from faxing handwritten landing reports to submitting such reports through an electronic reporting system. *See* 81 Fed. Reg. 42,290, 42,290-92 (June 29, 2016). However, the reporting requirements placed upon dealers are independent from those placed upon owners of vessels permitted under the HMS Charter/Headboat category. *See* 50 C.F.R. § 635.5 (separately addressing reporting requirements for such vessel owners and dealers). As a result, the regulations have created a dual reporting system for bluefin tuna, based upon reports from both vessel owners and dealers.

## **b. Parties’ Arguments as to Liability**

### *i. Parties’ Arguments as to Liability for Count One*

The issue of liability is undisputed for Count One, the alleged violation of 50 C.F.R. § 635.71(a)(21) and 50 C.F.R. § 635.30(a), on August 12, 2016. The parties have stipulated that while on board the F/V Hindsight at sea, “Respondent Wilson cut the 59 inch bluefin tuna into fillets, in violation of 50 C.F.R. §§ 635.71(a)(21) and 635.30(a).” JX 1 at ¶ 11. Further, in their arguments at the hearing and in their post-hearing briefs, the parties acknowledge that there is no

dispute with regard to Respondents' liability for Count One. *See* Tr. 18-20; Ag. In. Br. at 8-9; Resps. Br. at 4-5. In their Post-Hearing Brief, Respondents state that,

[Respondent Wilson] admits his error in filleting the [59-inch bluefin] tuna before landing it-and in retrospect whether he should have possessed it at all given his prior retention of a large fish, but stated it was an unusual catch for him and he [was] more concerned with keeping the fish from spoiling. There is also no dispute that [Respondent Wilson] and his wholly owned limited [liability company] are jointly and severally liable for any fines that result from this incident.

Resps. Br. at 5. Notably, Respondents' position in their Post-Hearing Brief is consistent with the testimony of Respondent Wilson, in which he acknowledged that his action in fileting the 59-inch bluefin tuna on board the F/V Hindsight at sea on August 12, 2016, was a violation. Tr. 157. Accordingly, the issue of Respondents' liability for Count One is not in dispute by the parties.

*ii. Parties' Arguments as to Liability for Count Two*

With regard to Count Two, the Agency argues that the facts established by stipulations in this matter demonstrate Respondents' liability, and that Respondents' joint and several liability for Count Two is otherwise established by the record. *See* Ag. In. Br. at 8-12. In support of its claim of liability against Respondent Hindsight, the Agency notes that Respondent Hindsight is the owner of the F/V Hindsight, a vessel which has been permitted in the HMS Charter/Headboat category, and asserts that the F/V Hindsight fishes most trips under the General fishing category. Ag. In. Br. at 9-10. The Agency otherwise indicates that the F/V Hindsight landed 28 bluefin tuna during the period from June 15, 2016 through September 22, 2016 (again, it should be noted that the period of violation charged in Count Two is the period between June 15, 2016 and September 17, 2016), and that these fish were purchased by a dealer who reported them. *See* Ag. In. Br. at 10. Further, the Agency asserts that Respondent Hindsight failed to report these bluefin tuna within 24 hours of their landings, as Respondent Wilson did not report landing these bluefin tuna until September 26, 2016. Ag. In. Br. at 9-10. Accordingly, the Agency concludes that with regard to Count Two, "Respondent Hindsight's liability is proven." Ag. In. Br. at 10.

The Agency additionally contends that the record establishes that Respondent Wilson is liable for Count Two, both on the basis that Respondent Hindsight is his alter ego, and on the basis that he is the responsible corporate officer for Respondent Hindsight. Ag. In. Br. at 10-11. With regard to its argument that Respondent Hindsight is Respondent Wilson's alter ego, the Agency argues that Respondent Wilson has control over the relevant practices of Respondent Hindsight, as he is the sole member and manager of Respondent Hindsight, and otherwise operates the charter excursions, applies for fishing permits, controls catch and disposition of catch, and makes reports regarding such catch. Ag. In Br. at 10-11. The Agency argues that these facts support the conclusion that Respondent Wilson controlled the business practices of Respondent Hindsight which caused the violations at issue in Count Two, and that he was the proximate cause of the injury at issue. Ag. In. Br. at 11. Further, the Agency asserts that it is

appropriate to find that Respondent Hindsight is the alter ego of Respondent Wilson, because the assets of Respondent Hindsight and Respondent Wilson are comingled, Respondent Hindsight is undercapitalized, and finding personal liability for Respondent Wilson serves the public interest in this matter. Ag. In. Br. at 11.

Additionally, the Agency argues that Respondent Wilson is also liable for the reporting violations in Count Two as the responsible corporate officer of Respondent Hindsight. See Ag. In. Br. at 11-12. The Agency asserts that Respondent Wilson is liable for Count Two under the responsible corporate officer doctrine, because Respondent Wilson is the only agent of Respondent Hindsight, and he exercises direct control over operations of Respondent Hindsight, including obtaining permits and reporting catch. Ag. In. Br. at 12. As a result, the Agency concludes that “Respondent Wilson was in the position to prevent the violation[s] [in Count Two], and he is therefore liable as the responsible corporate officer.” Ag. In. Br. at 12.

Although Respondents state in their Post-Hearing Brief that they “do not dispute the basic allegations of the violations nor their joint and several liability,” Resps. Br. at 5, Respondents do raise an argument with regard to their liability for the reporting violations alleged in Count Two under the Paperwork Reduction Act, see Resps. Br. at 2-3. Specifically, Respondents claim that the Agency is barred from recovering for the violations at issue in Count Two, because of their failure to comply with the Paperwork Reduction Act. Resps. Br. at 2-3. Respondents note that the provisions of 50 C.F.R. § 635.5(a)(4) place reporting requirements on Respondents to report landing bluefin tuna, and that these requirements therefore constitute a collection of information under the Paperwork Reduction Act. See Resps. Br. at 2. Further, Respondents argue that “instructions” produced by the Agency regarding submitting the required reports, reflected in a guide for vessel owners published by the Agency, and contained in AX 8, and HMS Commercial Compliance Guides produced by the Agency, and contained in RX 2 and RX 3, do not comply with the Paperwork Reduction Act, because they do not contain the control number from the Office of Management and Budget (“OMB control number”) for such information collection, as required by 5 U.S.C. § 1320. Resps. Br. at 2-3. As a result, Respondents conclude that the Agency’s “collection of information request document fails to satisfy the threshold requirements [of the Paperwork Reduction Act] and the Agency’s charges based on violations of the reporting requirements must be dismissed.” Resps. Br. at 3.

In response to Respondents’ argument against liability in Count Two pursuant to the Paperwork Reduction Act, the Agency asserts that it complied with the requirements of the Paperwork Reduction Act in establishing the reporting requirements in question. See Ag. Rep. Br. at 2-3. The Agency states that it obtained and published the OMB control number associated with the reporting requirements in the Federal Register, *Amendment 7 to the 2006 Consolidated HMS Fishery Management Plan*, 79 Fed. Reg. 71,510, 71,587 (Dec. 2, 2014); in the Code of Federal Regulations at 15 C.F.R. § 902.1; and on the HMS catch reporting website homepage, <https://hmspermits.noaa.gov/catchReports>, thereby satisfying the requirements of the Paperwork Reduction Act regarding the reporting requirements at issue in Count Two. Ag. Rep. Br. at 2-3. The Agency further notes that the Agency guidance materials referenced by Respondents in their argument regarding the Paperwork Reduction Act, in AX 8 and RX 2-3, merely provide information to the regulated public, and do not constitute “collections of information” under the Paperwork Reduction Act. Ag. Rep. Br. at 3.

**c. Discussion of Liability**

*i. Liability for Count One*

To establish the violation of the Magnuson-Stevens Act at 16 U.S.C. § 1857(1)(A), and regulations at 50 C.F.R. §§ 635.30(a) and 635.71(a)(21), alleged in Count One, the Agency must demonstrate, by a preponderance of the evidence, that (1) Respondents are persons subject to the jurisdiction of the United States, who (2) own or operate a fishing vessel that (3) possessed an Atlantic tuna in the Atlantic Ocean or that landed an Atlantic tuna in an Atlantic coastal port, and (4) they failed to maintain the Atlantic tuna through offloading either in round form or eviscerated with the head and fins removed, provided one pectoral fin and the tail remain attached. *See* 50 C.F.R. §§ 635.30(a), 635.71(a)(21). As previously noted, Respondents' joint and several liability for Count One is undisputed. *See* Ag. In. Br. at 8-9; Resps. Br. at 4-5. Further, Respondents' liability for Count One is otherwise established by the evidence of record.

The parties stipulated that Respondents "are both persons subject to the jurisdiction of the United States under the Magnuson Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1802(36)." JX 1 at ¶ 1. Additionally, the parties stipulated that at all relevant times, Respondent Hindsight was the owner of the F/V Hindsight, JX 1 at ¶ 2, and Respondent Wilson was the operator of the F/V Hindsight, JX 1 at ¶ 3. The parties also stipulated that a 59-inch bluefin tuna was caught on board the F/V Hindsight on August 12, 2016. JX 1 at ¶ 10; *see also* Tr. 34-35, 157. Further, the record reflects that on August 12, 2016, Respondents landed this 59-inch bluefin tuna to Sesuit Harbor, after it had been filleted at sea on board the F/V Hindsight by Respondent Wilson. *See* JX 1 at ¶ 11; Tr. 32-34, 158; AX 1 at 3-4. Specifically, the record reflects that this 59-inch bluefin tuna was not maintained in the form required by 50 C.F.R. § 635.30(a) through offloading, as it was not maintained in either the round form, or eviscerated with the head and fins removed, and one pectoral fin and the tail attached. *See* Tr. 34, 36; AX 1 at 4; *see also* AX 1 at 21 (photograph of the cooler containing filleted tuna meat); JX 1 at ¶ 11 (indicating that the manner in which Respondent Wilson cut this bluefin tuna was in violation of 50 C.F.R. § 635.30(a)). Accordingly, the evidence establishes Respondents violated 50 C.F.R. § 635.71(a)(21) and 50 C.F.R. § 635.30(a) on August 12, 2016, as alleged in the Amended NOVA.

*ii. Liability for Count Two*

As a preliminary matter regarding Respondents' argument that the Agency is barred from recovering for the violations at issue in Count Two under the Paperwork Reduction Act, I conclude that this argument is without merit. The Paperwork Reduction Act, at 44 U.S.C. § 3512, prohibits the imposition of a penalty for failure to comply with a collection of information, if the collection of information "does not display a valid control number." However, in the present matter, the Agency complied with the provisions of the Paperwork Reduction Act at 44 U.S.C. § 3512, for the information collection in the reporting requirements at issue in Count Two, by including the OMB control number in the publication of the appropriate Final Rule in the Federal Register, *Amendment 7 to the 2006 Consolidated HMS Fishery Management Plan*, 79 Fed. Reg. 71,510, 71,587 (Dec. 2, 2014), as well as the Code of Federal Regulations, at 15 C.F.R. § 902.1. Additionally, as the Agency referenced, the relevant OMB control number is

also included in the website where vessel owners may electronically submit the required bluefin tuna reports, <https://hmspermits.noaa.gov/catchReports>.<sup>50</sup> As noted by the Agency, the guidance materials regarding the relevant reporting requirements cited by Respondents, contained in AX 8 and RX 2-3, do not constitute requests for information pursuant to the Paperwork Reduction Act at 44 U.S.C. § 3512. Rather, these are simply informational materials produced by the Agency to assist the regulated community. *See generally* AX 8; RX 2; RX 3. As a result, the fact that such materials do not contain an OMB control number is immaterial. Accordingly, I deny Respondents' apparent request to dismiss Count Two on this basis, and do not otherwise find that the Paperwork Reduction Act precludes Respondents' liability for Count Two.

Having established that the Agency is not barred from recovering for the violations at issue in Count Two under the Paperwork Reduction Act, I consider the elements required for the Agency to establish liability for the alleged violations of the Magnuson-Stevens Act at 16 U.S.C. § 1857(1)(A), and the regulations at 50 C.F.R. §§ 635.5(a)(4) and 635.71(b)(42), in Count Two. In order to establish liability for alleged violations in Count Two, the Agency must demonstrate, by a preponderance of the evidence, that (1) Respondents are persons subject to the jurisdiction of the United States, who (2) were owners of a vessel that had been permitted or was required to be permitted under the HMS Charter/Headboat category and was fishing under the General category quotas and daily limits, and who (3) discarded dead bluefin tuna or landed by a commercial vessel and sold bluefin tuna, and (4) failed to report all such discards or landings of bluefin tuna through the NMFS electronic catch reporting system within 24 hours of the landings or the end of the trip. *See* 50 C.F.R. §§ 635.5(a)(4), 635.71(b)(42). The evidence of record reflects that the Agency has demonstrated each of the required elements for establishing Respondent's liability for the violations alleged in Count Two.

Setting aside the issue of ownership of the F/V Hindsight, the Agency has established each of the other required elements for the violations alleged in Count Two. As previously noted, the parties have stipulated that Respondents are both persons subject to the jurisdiction of the United States under the Magnuson-Stevens Act. JX 1 at ¶ 1. Further, the record reflects that a HMS Charter/Headboat permit was registered to the F/V Hindsight at all relevant times. JX 1 at ¶ 5; AX 1 at 3, 17; Tr. 37. Additionally, the evidence demonstrates that during the period relevant to the allegations in Count Two of the Amended NOVA, from June 15, 2016 through September 17, 2016,<sup>51</sup> Respondents were fishing on the F/V Hindsight's HMS Charter/Headboat permit under the General category limits, given the size of bluefin tuna landed during this period, *see* JX 1 at ¶¶ 12-32; AX 1 at 59-60; AX 2 at 15; AX 3 at 4-5 (reflecting the reported size of bluefin tuna landed by the F/V Hindsight during this period); *see also* RX 3 at 55 (identifying the applicable size classes for bluefin tuna), and the commercial sale of these fish, *see* AX 1 at 59-60; AX 3; JX 1 at ¶ 40 (documenting the sale of these bluefin tuna). The record also establishes that Respondents landed at least 21 bluefin tuna during the period from June 15, 2016 through

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<sup>50</sup> Notably, this website also includes a link to the Paperwork Reduction Act statement provided by the Agency for such reporting requirements.

<sup>51</sup> As Count Two of the Amended NOVA alleges that Respondents failed to comply with the relevant reporting requirements "on various dates between June 15, 2016 and September 17, 2016," Am. NOVA at 1, this is the relevant period for determining liability for the alleged violations in Count Two. However, as addressed above, the record reflects that Respondents' noncompliance with the relevant reporting requirements continued through September 22, 2016. *See* JX 1 at ¶¶ 33-40; AX 2 at 5, 15; AX 3 at 3-5.



September 17, 2016,<sup>52</sup> see JX 1 at ¶¶ 12-32; AX 2 at 15, which were sold to a dealer, North Atlantic Traders, see AX 1 at 59-60; AX 3; JX 1 at ¶ 40. Likewise, as Respondent Wilson did not report these landings to NMFS until September 26, 2016, see JX 1 at ¶ 40; AX 2 at 5, 15; Tr. 161, 167-68, 175-76, the record establishes that Respondents failed to report all such landings of bluefin tuna through the NMFS electronic catch reporting system within 24 hours of the landings or the end of the trip, as required by 50 C.F.R. § 635.5(a)(4).

The remaining element necessary for establishing the violations alleged in Count Two is ownership of the F/V Hindsight. As the parties stipulated that Respondent Hindsight was the owner of the F/V Hindsight at all times relevant to this proceeding, see JX 1 at ¶ 2, Respondent Hindsight's ownership of the F/V Hindsight is established. Accordingly, the record establishes Respondent Hindsight's liability for the violations at issue in Count Two. However, as the record reflects that Respondent Hindsight is merely an alter ego for Respondent Wilson, it also establishes liability for Respondent Wilson for the violations alleged in Count Two on this basis.

With regard to piecing limited liability protection, “[t]he general rule adopted in the federal cases is that ‘a corporate entity may be disregarded in the interests of public convenience, fairness and equity.’” *Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981) (citing *Capital Telephone Co. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974)). Specifically, within the context of the Magnuson-Stevens Act, individuals have been found liable for violations committed by alter ego entities under this theory. See, e.g., *Atlantic Spray Corporation*, 1997 NOAA LEXIS 5 (NOAA April 4, 1997); *Albatross Corporation*, 1997 NOAA LEXIS 12 (NOAA Oct. 17, 1997); *Haggren*, 6 O.R.W. 123 (NOAA Sept. 11, 1990), *aff’d*, 6 O.R.W. 659 (NOAA App. 1992) (finding individuals liable for violations of alter ego entities under the Magnuson-Stevens Act). In making the determination as to whether to pierce limited liability protection in a federal case, it is appropriate to apply a two-pronged test, considering “(1) is there such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist?; and (2) if the acts are treated as those of the corporation alone, will an inequitable result follow?” *Labadie Coal Co. v. Black*, 672 F.2d 92, 96 (D.C. Cir. 1982); see also *United States ex rel. Siewick v. Jamieson Sci. and Eng’g, Inc.*, 191 F. Supp. 2d 17, 21 (D.D.C. 2002) (noting that this is the appropriate two-pronged test “to determine whether federal common law supports piercing the corporate veil.”). Applying this test to the present matter, the record supports piercing the veil of Respondent Hindsight's limited liability, and finding Respondent Wilson jointly and severally liable for the violations alleged in Count Two.

Addressing the first prong of the test, the record reflects that Respondent Wilson held such unity of interest and ownership with Respondent Hindsight as to nullify any separate identities between these Respondents. Notably, in such circumstances, “a corporate form may be ignored whenever an individual so dominates his organization ‘as in reality to negate its separate personality.’” *Labadie Coal Co.*, 672 F.2d at 97 (quoting *Quinn v. Butz*, 510 F.2d 743, 758 (D.C. Cir. 1975)). In the present case, Respondent Wilson is the owner and sole member of Respondent Hindsight. JX 1 at ¶ 8; see also AX 4 at 2; Tr. 184, 194. Additionally, Respondent Wilson held the HMS Charter/Headboat permit registered to the F/V Hindsight at issue in this matter. JX 1 at ¶ 5; AX 1 at 3, 17; Tr. 37. Likewise, at all times relevant to this proceeding,

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<sup>52</sup> Notably, this count of 21 bluefin tuna does not include the 59-inch bluefin tuna which was landed on August 12, 2016.

Respondent Wilson was the operator of the F/V Hindsight, JX 1 at ¶ 3, and he acknowledged being responsible for actions aboard the vessel, Tr. 169. Respondent Wilson further indicated that he performs certain management functions of Respondent Hindsight, including determining the amount to charge for charter excursions, *see* Tr. 154-55, 164; handling the business' finances, *see* Tr. 183-84, 193-94; making employment determinations and paying crew, *see* Tr. 164, 185, 201; and promoting the business, *see* Tr. 172-74. Also relevant to this analysis, Respondent Wilson initially held himself out as the owner of the F/V Hindsight to the Agency in this matter. *See* RX 1 at 6. Given these circumstances, it is clear that Respondent Hindsight does not have a separate identity, and is merely an alter ego for Respondent Wilson.

Furthermore, in evaluating the second prong of the test, the record reflects that treating the violations at issue in Count Two, regarding failure to report bluefin tuna, solely as the actions of Respondent Hindsight would lead to an inequitable result, given the extent to which the assets of Respondent Hindsight have been comingled with the assets of Respondent Wilson. [REDACTED]

[REDACTED] Respondent Wilson further indicated that he mortgaged the F/V Hindsight to purchase another boat which he registered to himself individually. Tr. 184. Given the extent to which Respondent Hindsight's assets have been comingled with those of Respondent Wilson, the Agency's ability to collect a penalty for the violations at issue in Count Two would be impaired absent piercing Respondent Hindsight's limited liability, resulting in inequity. Accordingly, it is appropriate to pierce Respondent Hindsight's limited liability under these circumstances, and find both Respondent Hindsight and Respondent Wilson jointly and severally liable for Count Two. Notably, this result is also consistent with Respondents' position regarding joint and several liability in this matter. *See* Resps. Br. at 2-3 (noting that Respondents do not contest joint and several liability). Having established Respondent Wilson's liability for Count Two under the aforementioned theory, I need not address whether Respondent Wilson would also be liable under the responsible corporate officer doctrine, as alleged by the Agency in its Post-Hearing Brief.

## V. CIVIL PENALTY

Having determined that Respondents are liable for the violations in Count One and Count Two of the Amended NOVA, I must next determine the appropriate civil penalty to impose for such violations, if any. I note that the Agency's penalty policy was neither introduced as an exhibit during the evidentiary hearing nor the subject of a motion requesting that I take official notice of it, which were the options outlined to the parties in advance of the hearing to effectuate my consideration of the penalty policy. As such, I have not considered the Agency's penalty policy in my evaluation. Rather, in assessing the penalty, I have considered only the factors set forth in the Magnuson-Stevens Act and in Agency regulations, as discussed below. *See* 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(a).

**a. Principles of Law Relevant to Civil Penalty**

As previously noted, the Magnuson-Stevens Act, provides that any person who violates any provision of the Act or implementing regulation may be assessed a civil penalty. 16 U.S.C. § 1858(a). The amount of the civil penalty cannot exceed \$184,767 for each violation. *See* 16 U.S.C. § 1858(a) (establishing the maximum statutory penalty amount); 15 C.F.R. § 6.3(f)(15) (adjusting the penalty amount in 16 U.S.C. § 1858(a) for inflation effective January 15, 2018); *see also* 15 C.F.R. § 6.4 (providing the effective date for inflation adjustments). No penalty assessment may be made unless the alleged violator is given notice and opportunity for a hearing conducted in accordance with Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554. 16 U.S.C. § 1858(a).

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

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

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

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

15 C.F.R. § 904.108(a).

There is no presumption in favor of the penalty proposed by the Agency, and an Administrative Law Judge ("ALJ") is not "required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document." *Nguyen*, 2012 NOAA LEXIS 2, at \*21 (NOAA Jan. 18, 2012); *see also* 15 C.F.R. § 904.204(m). The ALJ must independently determine an appropriate penalty "taking into account all of the factors required by applicable law." 15 C.F.R. § 904.204(m) (2018); *see also* 15 C.F.R. § 904.108 (enumerating factors to be taken into account in assessing a penalty).

With regard to considering a respondent's ability to pay in determining a penalty, a penalty may be increased or decreased in consideration of this factor. *See* 15 C.F.R. § 904.108(b) (discussing modification of penalty based on ability to pay). Relevant to the

arguments asserted in this matter, “[a] civil penalty may be decreased if the respondent establishes that he or she is unable to pay an otherwise appropriate civil penalty amount.” *Id.* In circumstances where a respondent asserts an inability to pay a penalty, “the respondent has the burden of proving such inability by providing verifiable, complete, and accurate financial information.” 15 C.F.R. § 904.108(c). Financial information relevant to a respondent’s ability to pay a penalty includes “the value of respondent’s cash and liquid assets; ability to borrow; net worth; liabilities; income tax returns; past, present, and future income; prior and anticipated profits; expected cash flow; and the respondent’s ability to pay in installments over time.” 15 C.F.R. § 904.108(d). Notably, consideration of a respondent’s ability to pay a penalty “does not preclude an assessment of a civil penalty in an amount that would cause or contribute to the bankruptcy or other discontinuation of the respondent’s business. *Id.* Further, “[a] respondent will be considered able to pay a civil penalty even if he or she must take such actions as pay in installments over time, borrow money, liquidate assets, or reorganize his or her business.” *Id.*

## **b. Parties’ Arguments as to Civil Penalty**

### *i. Agency’s Arguments Regarding Penalty*

The Agency argues that the record supports the proposed penalty of \$9,000 against Respondents, jointly and severally, for the violations in both counts of the Amended NOVA. *See* Ag. In. Br. at 13, 21. Addressing the calculation of this amount, the Agency clarifies this amount was calculated considering each count individually, stating that “[t]he penalty assessed for each count stands on its own.” Ag. Rep. Br. at 4. The Agency argues that the assessed penalty amount is supported by the nature, circumstances, extent, and gravity of the violations; the degree of Respondents’ culpability; Respondents’ history regarding prior violations; and Respondents’ ability to pay a penalty. *See* Ag. In. Br. at 13-21; Ag. Rep. Br. at 2-6.

With regard to the nature, circumstances, extent, and gravity of the violations, the Agency notes that both the landing form requirements at issue in Count One, and the reporting requirements at issue in Count Two, are necessary for the conservation and management of the Atlantic bluefin tuna stock, consistent with the United States’ obligations as a member to the International Commission for the Conservation of Atlantic Tunas (“ICCAT”). *See* Ag. In. Br. at 13-16; Ag. Rep. Br. at 6. The Agency notes that the landing form requirements at issue in Count One are necessary to allow fishery managers to readily determine the size and species of a landed fish for enforcement purposes. *See* Ag. In. Br. at 14. Likewise, the Agency asserts that the reporting requirements at issue in Count Two are necessary for managing the annual quota on bluefin tuna under ICCAT. Ag. In. Br. at 15-16. The Agency asserts that reporting by vessel owners, such as at issue in Count Two, is necessary to provide information on dead discards of bluefin tuna, which are not reported in dealer reports, and also to provide a method of confirming the accuracy of dealer reporting for bluefin tuna. *See* Ag. In. Br. at 15-16; Ag. Rep. Br. at 6.

Turning more specifically to the nature, circumstances, extent, and gravity of the violation at issue in Count One in this matter, the Agency asserts that such considerations warrant the penalty assessed in the Amended NOVA. *See* Ag. In. Br. at 14, 17; Ag. Rep. Br. at 2-4. The Agency notes that violations regarding form landing requirements are difficult to detect, and such violations were only discovered in this case as a result of being discovered by

chance by Officer Swiechowicz. *See* Ag. In. at 14, 17. Additionally, the Agency asserts that landing form requirements have been longstanding and are “widely understood in the fishing industry.” Ag. In. Br. at 14. The Agency further suggests that the Count One violation may have been surreptitious in nature, in that Respondents were motivated by an intention to conceal another violation for retaining a bluefin tuna that was undersized for the General category limits being fished by the F/V Hindsight on August 12, 2016. *See* Ag. In. at 14. The Agency notes that although the Respondents’ cite to NOAA’s National Summary Settlement and Fix-it Schedule (“Summary Settlement Schedule”) to suggest the penalty for the violation at issue in Count One should be a lower amount, the Summary Settlement Schedule is inapplicable to the circumstances in at issue in this matter, given related violations for retaining an undersized bluefin tuna under the General category limits, as well as numerous violations of the relevant reporting requirements. *See* Ag. Rep. Br. at 2-3. The Agency argues that as Respondents did not report the bluefin tuna which was filleted at sea, the reporting requirement violations directly relate to the violation of the form landing requirements in Count One. *See* Ag. Rep. Br. at 3.

Likewise, the Agency argues that the nature, circumstances, extent, and gravity of violative conduct at issue in Count Two also justify the penalty assessed by the Agency with regard to this count. *See* Ag. In. Br. at 15-16; Ag. Rep. Br. at 4-6. The Agency acknowledges that it is concerned by noncompliance with the reporting requirements at issue in Count Two, but notes that while Respondents cite such noncompliance in support of reducing a penalty for the violations in Count Two, this factor actually supports applying a significant penalty for noncompliance with these requirements for the purpose of deterrence. *See* Ag. Rep. Br. at 4. Additionally, the Agency asserts that the fact that the bluefin tuna at issue in Count Two were ultimately reported by a dealer does not render the violations in Count Two less grave, as the dealer reporting did not provide information regarding dead discards, and such failure to timely report impairs the Agency’s ability to maintain accurate information needed to monitor the Atlantic bluefin tuna stock. *See* Ag. In. Br. at 15-16; Ag. Rep. Br. at 6. Finally, the Agency argues Respondents’ repeated violations of the reporting requirements at issue in Count Two, and Respondents’ compliance with such requirements only following receipt of the Enforcement Action Report in this matter, support the assessed penalty. *See* Ag. In. Br. at 16, 18; Ag. Rep. Br. at 5.

Addressing the degree of Respondents’ culpability for the violations in this matter, the Agency argues that Respondents acted recklessly with regard to the violation at issue in Count One, and acted at least negligently with regard to the violations at issue in Count Two. *See* Ag. In. Br. 16-19. With respect to the violation at issue in Count One for failing to maintain a bluefin tuna in proper form, the Agency asserts that Respondent Wilson was aware of the applicable retention and landing requirements, but chose to disregard them. *See* Ag. In. Br. at 16-17. The Agency asserts that the explanations offered by Respondent Wilson for filleting the bluefin tuna at sea do not excuse this action, and it argues that such violative conduct “evinces a reckless disregard of the law in favor of customer satisfaction or convenience, well below the prudent and law-abiding captain’s standard of care.” Ag. In. Br. at 19.

With regard to the degree of culpability for the violations at issue in Count Two, pertaining to failure to timely report landed bluefin tuna, the Agency argues that Respondents’ violative conduct was at least negligent, as Respondents failed to educate themselves about the

reporting requirements applicable to their charter excursions targeting bluefin tuna. *See* Ag. In. Br. at 16-17; *see also* Ag. Rep. Br. at 5. While acknowledging that the reporting requirements at issue in Count Two, relating to fishing under the General category limits, became effective in 2015, the Agency notes that reporting requirements associated with fishing under the Angling category, for recreational fishing, have been longstanding, and it asserts that the evidence demonstrates that Respondents have engaged in such recreational fishing, and, therefore, should have been familiar with reporting requirements in that context. *See* Ag. Rep. Br. at 4-5. The Agency also asserts that Respondent Wilson was made aware of the applicable reporting requirements during his interaction with Officer Swiechowicz on August 12, 2016. Ag. In. Br. at 18. Further, the Agency notes that in addition to the regulations, information relating to the reporting requirements at issue in Count Two was available in a variety of materials, including the text of Respondent Wilson's HMS Charter/Headboat permit, as well as agency and trade publications. *See* Ag. In. Br. at 17 (citing AX 1 at 17; Tr. 67, 100-01, 105; AX 7; AX 8; AX 9; AX 10). Likewise, the Agency asserts that the reporting requirements were known by the dealer who purchased bluefin tuna from Respondents, as well as others in the regulated community complying with the requirements, and it suggests that Respondents could have obtained the information from these sources. *See* Ag. In. Br. at 18. As a result, the Agency concludes that Respondents either were aware of the applicable reporting requirements and chose to ignore them, or were "remarkably careless" in committing the violations at issue in Count Two. *See* Ag. In. Br. at 19.

In discussing any history of prior violations by Respondents, the Agency does not identify any documented violations committed by Respondents prior to the violations charged in the Amended NOVA. *See* Ag. In. Br. at 16-19. However, with regard to the violation at issue in Count One for failing to land a bluefin tuna in proper form, the Agency notes that such violations are difficult to detect, and that the violation in Count One was only discovered by chance. Ag. In. Br. at 17. Further, the Agency argues that with regard to the reporting violations at issue in Count Two, the record reflects that Respondents began violating these reporting requirements prior to 2016, before the violations at issue in this matter, based upon Respondent Wilson's testimony that he was not aware of the relevant reporting requirements before enforcement action in this matter. Ag. In. Br. at 16.

On the issue of Respondents' ability to pay, the Agency argues that Respondents have waived any inability to pay defense, because Respondents failed to provide complete financial information to the Agency, as required pursuant to 15 C.F.R. § 904.108(c). *See* Ag. In. Br. at 19-21. Specifically, the Agency notes that Respondent Wilson did not complete a credit report authorization form to allow the Agency to obtain his credit report, and also did not submit an account balance confirmation form from his bank. Ag. In. Br. at 19. Likewise, the Agency asserts that Respondent Hindsight did not supply any independent financial information to the Agency, and failed to submit either the credit report authorization form or the account balance confirmation form to the Agency. Ag. In. Br. at 20. The Agency further argues that the financial information supplied supports that Respondents have the ability to pay the assessed penalty. *See* Ag. In. Br. at 20. The Agency notes that Respondents charge ██████ per charter excursion, and net ██████ from each excursion. Ag. In. Br. at 19 (citing Tr. 164-65). Further, the Agency notes Respondent Wilson's income and property assets, and concludes that Respondent Wilson has the ability to pay the assessed penalty for the violations in this matter given his assets and borrowing

capacity. Ag. In. Br. at 20. Likewise, the Agency asserts that because Respondent Hindsight's income and assets reportedly "pass through" Respondent Wilson, and are attributed to Respondent Wilson personally, then Respondent Hindsight must have the ability to pay the assessed penalty, given that Respondent Wilson does. *See* Ag. In. Br. at 20 (citing Tr. 198-99).

*ii. Respondents' Arguments Regarding Penalty*

Respondents argue that the penalty proposed by the Agency for the violations in Count One and Count Two of the Amended NOVA is excessive and unwarranted. *See* Resps. Br. at 10. Respondents do, however, concede that some monetary penalty would be appropriate. Resps. Br. at 10. Instead of the penalty amount proposed by the Agency, Respondents argue that a penalty of \$750 would be appropriate for the violation at issue in Count One, and that if any penalty is warranted for the violations at issue in Count Two, that the penalty for this count not exceed \$1,000. Resps. Br. at 11. Respondents indicate that this penalty amount is warranted based upon the nature, circumstances, extent, and gravity of the violations; the degree of Respondents' culpability; the absence of prior violations by Respondents; Respondents' inability to pay a penalty; and other factors present in this matter.

Respondents argue that the nature, circumstances, extent, and gravity of violations in both Count One and Count Two do not warrant the penalty proposed by the Agency. *See* Resps. Br. at 4-9. Addressing the nature, circumstances, extent, and gravity of the violation in Count One, Respondents assert that this violation arose within the context of an "unusual occurrence for [Respondent Wilson], capture of a small tuna while targeting larger tuna." Resps. Br. at 6; *see also* Resps. Br. at 3, 5-6. Additionally, regarding the circumstances surrounding Count One, Respondents argue that Respondent Wilson was concerned about keeping the tuna retained cool and unspoiled, given 90-degree temperature outside and limitations with his ice production.<sup>53</sup> *See* Resps. Br. 3, 5-6. Notably, related to Count One, Respondents acknowledge that Respondent Wilson did not report the 59-inch bluefin tuna which was seized, and while questioning the need to report a seized fish, concede that "[Respondent] Wilson should have reported the seized fish." Resps. Br. at 7. Finally, Respondents assert that the amount of a penalty for a violation like the one at issue in Count One is \$750 under NOAA's National Summary Settlement and Fix-it Schedule ("Summary Settlement Schedule") in RX 6, Resps. Br. at 4, 6, and that Respondent Wilson believed that the penalty associated with the violation in Count One would be only \$750 after his interaction with Officer Swiechowicz, Resps. Br. at 6-7, 10; *see also* Tr. 21.

Likewise, Respondents assert that the nature, circumstances, extent, and gravity of violations in Count Two also do not warrant a penalty in the amount proposed by the Agency. *See* Resps. Br. at 4-9. Respondents argue that the reporting violations at issue in Count Two were widespread in the fishery "because of a fleetwide misunderstanding of the 2015 changes to reporting requirements." Resps. Br. at 6; *see also* Resps. Br. at 4-5, 8. In support of this position, Respondents cite the testimony of Mr. McHale, and Agency compliance rates regarding the reporting requirements at issue in Count Two, in RX 8. Resps. Br. at 4-5; *see also* Tr. 117; RX 8 at 11 (materials cited by Respondents). Further, Respondents assert that it can be difficult

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<sup>53</sup> Respondents note that bluefin tuna is a histamine producing fish, *see* Resps. Br. at 3, and this fact was confirmed at the hearing, *see* Tr. 132.

for vessel owners to comply with the reporting requirements at issue in Count Two, which require reporting either by telephone or website, and that this may be particularly difficult for Respondent Wilson, who they characterize as being “not computer literate.” Resps. Br. at 6, 8. Respondents additionally assert that the Agency did not adequately inform the regulated community as to the reporting requirements at issue in Count Two. *See* Resps. Br. at 6-8. Given these circumstances, Respondents argue that the violations at issue in Count Two “should have resulted in a warning with a direction to correct the deficiency or a small fine.” Resps. Br. at 11. Addressing the multiple incidents of reporting violations at issue in Count Two, Respondents assert that it would be inappropriate to increase the penalty on this basis because Count Two incorporates “the same error repeated over a period of time.” Resps. Br. at 9. Respondents further argue that there was no harm to the resource regarding the reporting violations in Count Two, because “all fish were reported through the dealer and charged [] against the available quota.” Resps. Br. at 7.

With regard to Respondents’ culpability for the violations, Respondents also diverge from the Agency’s assessment. *See* Resps. Br. at 8. Respondents concede that the level of culpability for Count One is “most likely negligent,” Resps. Br. at 8, noting that Respondent Wilson was generally aware of landing requirements, but had forgotten them in the instance at issue in Count One, *see* Resps. Br. at 3, 8. However, Respondents assert that the degree of Respondents’ culpability for the reporting violations at issue in Count Two is unintentional or inadvertent, at worst. Resps. Br. at 8. Respondents argue that they were unaware of the relevant reporting requirements during the period of time over which the reporting violations occurred, and believed any required reporting was completed by the dealer who purchased the bluefin tuna during this period. *See* Resps. Br. at 4-8. Respondents note that Respondent Wilson does not recall being informed of these reporting requirements during his interaction with Officer Swiechowicz. Resps. Br. at 4. Additionally, as previously discussed, Respondents assert that the reporting requirements at issue in Count Two were commonly misunderstood in the fishery, due to the change in the regulations. *See* Resps. Br. at 4-6, 8. Further, Respondents assert that upon discovering the reporting requirements at issue in Count Two, after receiving the Enforcement Action Report in this matter, Respondent Wilson reported the bluefin tuna landed and has since remained in compliance with the relevant reporting requirements. *See* Resps. Br. at 4-5, 7, 10.

Likewise, Respondents indicate that the absence of prior violations, their inability to pay a penalty, and the other factors present in this case, warrant a lower penalty than that proposed by the Agency for the violations in this matter. *See* Resps. Br. at 7, 9-10. Respondents note that they “have no history of past offenses through many years of fishing.” Resps. Br. at 10. They further suggest that this history indicates that they do not require any penalty to deter future violations. *See* Resps. Br. at 10. Additionally, regarding their ability to pay, Respondents assert that the penalty proposed by the Agency “is significant to a small boat fisherman.” Resps. Br. at 10. Respondents note that Respondent Wilson estimated making about [REDACTED] per day operating charter excursions, and that Respondent Wilson’s tax return from 2016 reflects an adjusted gross income of [REDACTED]. Resps. Br. at 10. Respondents conclude that the penalty assessed by the Agency is “a considerable sum to fine and cannot be easily paid off in after-tax dollars from [Respondent Wilson’s] income.” Resps. Br. at 10. Finally, Respondents’ suggest that any penalty assigned for the violations in this matter should consider that Respondent Wilson was cooperative during his interaction with Officer Swiechowicz, Respondents did not derive any



economic benefit from their violations, the violations were not associated with violence or injuries, and Respondents have been candid with the Agency and have accepted responsibility for the violations. *See* Resps. Br. at 7, 9-10.

**c. Discussion of Civil Penalty and Assessment**

*i. Nature, Circumstances, Extent, and Gravity of the Violations*

I have considered the substantial evidence of record regarding the nature, circumstances, extent, and gravity of the violations in this matter in making the penalty assessment. Relevant to these considerations, I note that the record establishes the importance of both the landing form requirements at issue in Count One, and the reporting requirements at issue in Count Two, to NOAA's management of the Atlantic bluefin tuna stock consistent with international obligations imposed on the United States as a member of ICCAT. *See* Tr. 85-87, 91-93, 96-97, 129. The evidence reflects that the landing form requirements at issue in Count One are necessary within this enforcement regime, as these requirements provide a means for identifying the species and size of fish at landing, and therefore allow NOAA to ensure compliance with quota and minimum size catch restrictions. *See* Tr. 85-87. Likewise, the record reflects that the reporting requirements for vessel owners at issue in Count Two assist NOAA in managing the allocated ICCAT quota for bluefin tuna by providing vessel level catch information, including information regarding dead discards, as well as providing a means of verifying and measuring the compliance of dealer reporting regarding bluefin tuna. *See* Tr. 91-93, 96-97, 129.

I further evaluated the specific nature, circumstances, extent, and gravity of the violations within the context of the facts established in this matter. Regarding the specific nature, circumstances, extent, and gravity of the violation at issue in Count One, it is relevant that the record indicates that this violation was only discovered upon inspection by Officer Swiechowicz, and otherwise would have gone undetected. *See* AX 1 at 3-5; Tr. 32-34 (reflecting that the violation at issue in Count One was detected upon Officer Swiechowicz's observation upon investigation). Further, it is notable that the record reflects that Respondents improperly retained the 59-inch bluefin tuna at issue in Count One while fishing under the General category limits on August 12, 2016, *see* Tr. 41-42; AX 1 at 6-7 (reflecting order of bluefin tuna retained by the F/V Hindsight on August 12, 2016) *see also* 50 C.F.R. § 635.23 (appropriate retention limits), and further failed to report this fish to NMFS, Tr. 176-77, *see also* 50 C.F.R. § 635.5(c)(1) (relevant reporting requirements reflecting that vessel owners must report all bluefin tuna retained or discarded dead). However, despite such improper conduct associated with the violation in Count One, I do not find that Respondents were motivated to violate the landing form requirements at issue in Count One to obscure their conduct, as suggested by the Agency. Notably, Respondent Wilson's candor with Officer Swiechowicz regarding such improper conduct during the enforcement contact on August 12, 2016, *see* AX 1 at 5-8; Tr. 41-44, would be contradictory to such a motive.

Additionally, contrary to Respondents' arguments, I do not find that the circumstances surrounding the violation at issue in Count One warrant a reduction in penalty for this violation. Notably, Respondent Wilson's reported concern regarding preserving the 86-inch bluefin with limited ice, *see* Tr. 42-43, 157; AX 1 at 6-8, does not provide justification for violating the

landing form requirements at issue. Likewise, the fact that Respondents could have received a smaller fine for the violation at issue in Count One under the NOAA's Summary Settlement Schedule is immaterial. The record reflects that enforcement officers determine whether to issue a summary settlement for a given violation, and are not required to issue a summary settlement for violations reflected in the schedule. *See* Tr. 69-70 (discussing NOAA's Summary Settlement Schedule). It is unclear, from the record, how Respondents could have gotten the impression that they would be issued a Summary Settlement Schedule fine for the violation at issue in Count One, as Officer Swiechowicz denied telling Respondents that they could expect the Summary Settlement Schedule fine for this violation during his enforcement contact on August 12, 2016, *see* Tr. 68. However, even if Respondents were under the impression that they would receive a Summary Settlement Schedule fine for this violation, this misconception also does not warrant a reduction in penalty for this violative conduct.

With regard to the specific nature, circumstances, extent, and gravity of the violations at issue in Count Two, I note that the violative conduct at issue in Count Two involves multiple instances of violation, including instances of violation occurring after enforcement contact. As previously discussed, the record establishes that Respondents failed to timely report 28 bluefin tuna landed during the period from June 15, 2016, through September 22, 2016. *See* JX 1 at ¶¶ 12-40; AX 2 at 15. This includes 21 bluefin tuna landed following August 12, 2016, *see* JX 1 at ¶¶ 19-40; AX 2 at 15, the date of Respondent Wilson's enforcement contact with Officer Swiechowicz, during which Respondent Wilson was alerted to the need to comply with the relevant reporting requirements, *see* AX 1 at 10; Tr. 52. These circumstances justify the imposition of a significant penalty for the violations at issue in Count Two, as they reflect that these violations were part of a course of conduct for Respondents, and that this course of conduct was not corrected upon initial enforcement contact. However, in calculating the penalty for the violations in Count Two, I also considered the fact that Respondent Wilson ultimately reported landing these bluefin tuna, albeit only after receipt of the Enforcement Action Report in this matter. *See* JX 1 at ¶ 40; AX 2 at 5, 15; Tr. 161, 167-68, 175-76.

Additionally, with respect to the nature, circumstances, extent, and gravity of the violations at issue in Count Two, I find that the sub-optimal compliance in the fleet with such reporting requirements demonstrates a need for deterrence, consistent with a significant penalty for these violations. The record reflects that the compliance rate for the vessel owners operating under the General category limits was 43.1 percent in 2016, the year of the reporting violations at issue in Count Two. RX 4 at 11; *see also* Tr. 117 (discussing this compliance rate). Notably, Mr. McHale, the Agency's programmatic witness, indicated that this level of compliance is sub-optimal. *See* Tr. 109-10. Particularly within the context of the Agency's substantial outreach efforts regarding the relevant reporting requirements, *see* Tr. 67, 100-08 (describing agency outreach efforts regarding these reporting requirements), these circumstances establish a need for deterring noncompliance with such reporting requirements. Contrary to the arguments of Respondents, I do not find that sub-optimal compliance with the relevant reporting requirements justifies a reduction in the penalty assessed for these violations.

It is further notable that the record does not support that compliance with the reporting requirements at issue in Count Two was burdensome for Respondents, as intimated by

Respondents.<sup>54</sup> Respondent Wilson testified that once he was aware of the reporting requirements following his receipt of the Enforcement Action Report in this matter, he was able to locate the appropriate phone number on his HMS Charter/Headboat permit to complete such reporting, *see* Tr. 175-76, and he acknowledged that complying with such reporting requirements is “not overly difficult,” Tr. 162.

*ii. Respondents’ Culpability*

With respect to the culpability of Respondents, the evidence is convincing that Respondents acted negligently in committing the violations in Count 1 and Count 2. Respondents are in the business of conducting charter excursions targeting bluefin tuna for profit. *See* JX 1 at ¶ 6; Tr. 151, 153-55, 165. Accordingly, Respondents are participants in a regulated industry and have a responsibility to remain apprised of the regulations which apply to their actions, including the landing form requirements at issue in Count One, and the reporting requirements at issue in Count Two. *See Alba*, 2 O.R.W. at 672 (“[A] participant in a regulated industry. . . has a responsibility to familiarize himself with the regulations which apply to him.”); *see also O’Neil*, 1995 NOAA LEXIS 20, at \*8 (NOAA June 14, 1995) (“[C]ommercial fishing is regulated and those engaged in it for profit activities are required to keep abreast of and abide by the laws and regulations that affect them.”); *Peterson*, 6 O.R.W. 486, 490 (NOAA July 19, 1991) (“When one engages in a highly regulated industry, that person bears the responsibility of knowing and interpreting the regulations governing that industry.”)

Turning specifically to Respondents’ culpability for the violation at issue in Count One for failing to maintain a bluefin tuna in proper form, the record reflects that Respondents were aware of the relevant landing form requirements at the time of this violation, as Respondent Wilson informed Officer Swiechowicz that he was familiar with these requirements during their interaction closely following the violative conduct. *See* Tr. 42-43; AX 1 at 6-8. However, the record otherwise reflects that Respondent Wilson failed to consider these landing form requirements, because he was preoccupied with concern regarding preserving the commercially-sized, 86-inch bluefin tuna with limited ice on board, and was otherwise interested in providing the charter excursion passengers tuna meat to take home. *See* Tr. 42-43, 157; AX 1 at 6-8. These circumstances support a finding that Respondents acted negligently in committing the violation at issue in Count One. Notably, this is consistent with Respondents’ acknowledgement that the level of culpability for Count One is “most likely negligent.” *Resps. Br.* at 8. Although the Agency argues that Respondents’ degree of culpability for the violation at issue in Count One is reckless, *see Ag. In. Br.* at 16-17, I do not find this assertion supported. While the circumstances surrounding this violation support that Respondents acted carelessly and with a lack of diligence in failing to maintain the bluefin tuna at issue in proper form, the record does not reflect that Respondents acted with a reckless disregard for the landing form requirements, as suggested by the Agency. *See* JX 1 at ¶ 40; AX 2 at 5, 15; Tr. 161, 167-68, 175-76.

Likewise, the evidence presented is persuasive that Respondents’ degree of culpability for the reporting violations at issue in Count Two is negligent. Respondents have asserted that

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<sup>54</sup> Notably, although Respondents repeatedly characterized Respondent Wilson as “not computer literate,” *see Resp. Br.* at 6, 8, Respondent Wilson testified that he is able to operate social media accounts to advertise and to promote his charter excursions, *see* Tr. 172-74.

they were unaware of the relevant reporting requirements until Respondent Wilson received the Enforcement Action Report in this matter, and that they believed any required reporting was completed through their dealer. *See* Resps. Br. at 4-5, 10. Notably, the record reflects that Respondent Wilson completed or otherwise filled in information on landing forms maintained and submitted by a dealer for at least some of the bluefin tuna landed during the period at issue. *See* AX 1 at 9, 25; AX 2 at 2-3, 7, 9, 11, 13; RX 5; Tr. 62-63, 160-61. However, as previously discussed, Respondents, as participants in a regulated industry, have a responsibility to be aware of the regulations applicable to their actions, including the relevant reporting requirements for vessel owners. *See Alba*, 2 O.R.W. at 672. In light of this, I find Respondents' assertion that, at worst, their degree of culpability for the violations at issue in Count Two is unintentional or inadvertent, *see* Resps. Br. at 8, to be unconvincing. The relevant reporting requirements were promulgated in December 2014, and took effect on January 1, 2015, well over a year prior the period of reporting violations at issue in Count Two. *See Amendment 7 to the 2006 Consolidated HMS Fishery Management Plan*, 79 Fed. Reg. 71,510, 71,522, 71,588, 71,607 (Dec. 2, 2014). Furthermore, as noted by the Agency, the record reflects that there were abundant resources available to Respondents to inform them of such reporting requirements, including publications, notices, and communications from the Agency and trade organizations. *See* AX 7; AX 8; AX 9; AX 10; RX 3 (publications, notices, and communications addressing relevant reporting requirements). Notably, the HMS Charter/Headboat permit in this matter, issued to Respondent Wilson and registered to the F/V Hindsight, specifically references "Bluefin Tuna Catch Reporting," and cites the website and telephone number for completing such reporting. AX 1 at 17. Furthermore, the record reflects that Officer Swiechowicz reminded Respondent Wilson of these reporting requirements during their interaction on August 12, 2016. *See* AX 1 at 10; Tr. 52. Despite this, the record reflects that Respondents did not report the 28 bluefin tuna landed during the period from June 15, 2016, through September 22, 2016, until Respondent Wilson received the Enforcement Action Report in this matter and reported such fish on September 26, 2016. *See* JX 1 at ¶ 40; AX 2 at 5, 15; Tr. 161, 167-68, 175-76. Given these circumstances, I conclude that Respondents acted negligently in violating the reporting requirements at issue in Count Two.

### *iii. History of Violations*

The Agency argues that the record indicates that Respondents failed to comply with the relevant reporting requirements for bluefin tuna prior to the reporting violations established in Count Two, given Respondents' reported fishing activity and ignorance of reporting requirements until the enforcement action associated with this matter. *See* Ag. In. Br. at 16; Ag. Rep. Br. at 5. However, I note that the Agency's argument is based upon conjecture, and that the record does not establish any documented history of violations for Respondents prior to those at issue in this matter. *See* Tr. 159. Considering Respondent Wilson's testimony that he has been engaged in the charter and commercial bluefin tuna industry for over 20 years, Tr. 151, this absence of prior violations is noteworthy. In NOAA civil enforcement proceedings, the absence of prior violations has been found to be an appropriate mitigating factor in penalty calculations. *See, e.g., Straub*, 2012 NOAA LEXIS 1, at \*24 (NOAA Feb. 1, 2012) ("The absence of prior offenses . . . tends to favor a low civil monetary penalty."); *The Fishing Co. of Alaska*, 1996 NOAA LEXIS 11, at \*43-44 (NOAA Apr. 17, 1996) ("In an industry that is so heavily regulated, this absence of prior violations by any of the Respondents has been taken into consideration as a

mitigating factor in the penalty assessment.”). Accordingly, I considered Respondents’ absence of violations as a mitigating factor in calculating the penalty in this matter.

*iv. Respondents’ Ability to Pay*

As previously discussed, Respondents’ raised an inability to pay defense regarding the assessment of a penalty. However, in considering Respondents’ claim, I find that Respondents did not meet their burden to prove such an inability to pay through verifiable, complete, and accurate financial information. *See* 15 C.F.R. § 904.108(c) (establishing the burden for a respondent raising an inability to pay defense). Notably, the Agency has argued that Respondents’ failure to provide verifiable, complete, and accurate financial information, including financial reports specifically requested by the Agency, warrants a finding that Respondents have waived their inability to pay defense in this matter. *See* Ag. In Br. at 19-21. As Respondents supported their inability to pay claim with evidence, which was presented at the hearing, *see* Tr. 163-66; RX 1, I do not conclude that Respondents waived this defense. Nevertheless, after reviewing the evidence presented on this issue, I remain unconvinced that Respondents lack an ability to pay an assessed penalty.

While Respondents assert that the penalty proposed by the Agency is a “considerable sum,” which “cannot be easily paid off,” *Resps. Br.* at 10, such arguments do not support that a penalty is precluded under the appropriate standard for considering an ability to pay a penalty. As noted, under the appropriate standard, “[a] respondent will be considered able to pay a civil penalty even if he or she must take such actions as pay in installments over time, borrow money, liquidate assets, or reorganize his or her business.” 15 C.F.R. § 904.108(d). Applying this standard, Respondents have not established an inability to pay a penalty in this matter.

Respondents reported receiving net earnings of [REDACTED] per day for charter bluefin excursions operated on the F/V Hindsight, Tr. 165, and Respondent Wilson estimated that he operated approximately 25 of these charter excursions in 2017, Tr. 166. The record further reflects that Respondents generate income from selling bluefin tuna landed on such excursions, *see* AX 1 at 58-60; AX 3 at 3-5 (reflecting sales of bluefin tuna from the F/V Hindsight in 2016), *see also* Tr. 160-61; 177 (discussing sale of bluefin tuna in 2017), and Respondent Wilson also reported receiving income from participating in fishing tournaments, Tr. 194-97. The record reflects that Respondent Wilson reported a monthly income of [REDACTED] per month, RX 1 at 2; Tr. 180, and he also reported real property assets, *see* Tr.189-90; RX 1 at 3, 5, [REDACTED] [REDACTED] Tr.189-90.<sup>55</sup> Although Respondents did not provide separate financial information documenting the assets and liabilities of Respondent Hindsight, Respondent Wilson acknowledged that the bank account he uses to hold Respondent Hindsight’s income had [REDACTED] [REDACTED] [REDACTED] [REDACTED]. *See* Tr. 193-94; RX 1 at 4. Accordingly, the financial circumstances of Respondents, demonstrated by the evidence of record, do not support a finding that they are unable to pay an appropriate penalty in this matter. Notably, Respondents demonstrated their ability to make significant payments and their lending capacity upon purchasing [REDACTED] [REDACTED]. *See* Tr. 183-85. With regard to this purchase,

<sup>55</sup> Notably, the record does not reflect that Respondent Wilson included [REDACTED] [REDACTED]

Respondent Wilson testified that he provided a down payment of [REDACTED], and Respondent Hindsight obtained the remainder of the money [REDACTED].<sup>56</sup> Tr.183-85. Having considered all the evidence of record regarding Respondents' finances, I conclude that Respondents did not meet their burden to establish an inability to pay a penalty in this matter.

v. *Other Matters as Justice May Require*

In considering other matters as justice may require in determining the penalty amount, I do not find that any such factors warrant penalty adjustment in this matter. For example, while I considered that Respondents were cooperative during enforcement contact, I do not find that this warrants a reduction in the penalty in consideration of the circumstances of this case. Notably, the record reflects that Respondent Wilson was cooperative during his interaction with Officer Swiechowicz on August 12, 2016, *see* Tr. 62; AX 1 at 5-10, and voluntarily abandoned the tuna meat from the 59-inch bluefin tuna unlawfully filleted at sea, *see* AX 1 at 10, 29-30; Tr. 47-48, 50, 158. However, the record indicates that Respondents' enforcement contact was limited in this matter, *see* AX 1 at 2-10; Tr. 59, and further reflects that Respondents continued to engage in violative conduct by failing to timely report landed bluefin tuna under the relevant reporting requirements, following this enforcement contact, *see supra* at 25. Given these considerations, I do not find that Respondents' cooperation with law enforcement during the limited enforcement contact in this matter warrants a reduction in the penalty amount.

Upon consideration of all the forgoing, including the aforementioned consideration of the factors listed in 16 U.S.C. § 1858(a) and 15 C.F.R. § 904.108(a), I conclude that for Respondents' unlawful failure to maintain a bluefin tuna in proper form on August 12, 2016, and Respondents' unlawful failure to timely report bluefin tuna as required on dates between June 15, 2016, and September 17, 2016, a civil penalty in the amount of \$7,000 is appropriate.

## VI. DECISION AND ORDER

Respondents are liable for the charged violations in this case. A civil monetary penalty of \$7,000 is imposed for the charged violations. Once this Initial Decision becomes final under the provisions of 15 CFR § 904.271(d), Respondents will be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein.

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

**PLEASE TAKE FURTHER NOTICE**, that any petition to have this Initial Decision reviewed by the NOAA Administrator must be filed with the Administrator within 30 days after the date

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<sup>56</sup> Respondent Wilson testified that Respondent Hindsight is the owner of this vessel, but that it is registered to him as an individual. Tr. 184.

this Initial Decision is served and in accordance with the requirements set forth at 15 C.F.R. § 904.273. A copy of 15 C.F.R. §§ 904.271-273 is attached.

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

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

**SO ORDERED.**

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

Dated: August 9, 2018  
Washington, DC

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.

(1) 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.

In the NOAA Matter of *Brett A. Wilson and Hindsight Sportfishing LLC*, Respondents.  
Docket No. NE1604257, F/V Hindsight

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **INITIAL DECISION AND ORDER**, dated August 9, 2018, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following in the manner indicated below.



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Andrea Priest  
Attorney Advisor

Original and One Copy by Personal Delivery to:

U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
Ronald Reagan Building, Room M1200  
1300 Pennsylvania Ave., NW  
Washington, DC 20004

Copy and Redacted Copy by Electronic and Regular Mail to:

Loren Remsberg, Enforcement Attorney  
National Oceanic and Atmospheric Administration  
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262 13th Avenue South, Suite 177  
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*For the Agency*

Stephen M. Ouellette, Esq.  
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Gloucester, MA 01930  
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*For Respondents*

Copy and Redacted Copy by Certified Mail to:

Administrator  
National Oceanic and Atmospheric Administration  
1401 Constitution Ave., NW, Room 5128  
Washington, DC 20230  
Certified Mail No.: 7005-1160-0004-4342-4281

Assistant General Counsel for Enforcement and Litigation  
National Oceanic and Atmospheric Administration  
Enforcement Section  
1315 East West Highway, SSMC-3, Room 15405  
Silver Spring, MD 20910-6233  
Certified Mail No.: 7005-1160-0004-4342-4298

**Dated: August 9, 2018**  
**Washington, D.C.**