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U.S. Department of Commerce
National Oceanic and Atmospheric Administration

IN THE MATTER OF: LARS AXELSSON AND H& L AXELSSON, INC. DAN AXELSSON AND H&L
AXELSSON, INC. RESPONDENTS

Docket No. NE0704313 F/V FLICKA, NE0704311 F/V DYRSTEN Consolidated

December 8, 2009

Appearances: For the National Oceanic and Atmospheric Administration

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INITIAL DECISION

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I. PRELIMINARY STATEMENT

*3 The National Oceanic and Atmospheric Administrative (NOAA or Agency) initiated this proceeding for assessment of civil penalties and imposition of permit sanctions against three (3) Respondents: Lars Axelsson; Dan Axelsson; and, H & L Axelsson, Incorporated (H & L Axelsson). NOAA issued two (2) Notices of Violation and Assessments (NOVA) and two (2) Notices of Permit Sanctions (NOPS) in this proceeding. One NOVA and NOPS was issued to Lars Axelsson and H & L Axelsson and the other NOVA and NOPS was issued to Dan Axelsson and H & L Axelsson. The same counsel represented all Respondents, the two (2) cases involved similar issues, and at the beginning of the hearing both of the parties requested that the two (2) cases be consolidated and heard at the same time. The matter proceeded as agreed by the parties and an order consolidating the cases was issued later.^[FN1]

In the issued NOVAs and NOPSs, Respondents were charged with violating twenty- seven (27) separate violations of the Magnuson-Stevens Fisheries Conservation Act (Magnuson- Stevens Act). All alleged violations concerned Respondents' failures to timely report information regarding herring fishing activities to the Agency. The Agency seeks to impose civil penalties totaling \$270,000 jointly and severally against Respondents. Additionally, the Agency seeks twenty-four (24) months in permit sanctions. Respondents' timely filed requests for hearings and these matters were transferred to the United States Coast Guard Administrative Law Judge (ALJ) Docketing Center for adjudication pursuant to the legal authority contained in [15 U.S.C. § 1541](#) and the interagency agreement between NOAA and the United States Coast Guard.

*4 On October 29, 2008, the cases were assigned to the undersigned judge. Following receipt of Preliminary Positions on Issues and Procedures (PIIP) from the parties and after holding scheduling conferences, the hearing in the above referenced proceedings was held on June 16, 2009 in Boston Massachusetts. At the hearing, attorney Charles Juliand appeared on behalf of NOAA. Counsel Stephen Ouellette appeared and represented all three (3) respondents in both matters.

In support of the allegations against Respondents, NOAA introduced the testimony of three (3) witnesses and offered forty-five (45) exhibits into evidence. No objections to NOAA's exhibits were made and all were admitted. (Tr. at 35). Counsel for Respondents introduced the testimony of two (2) witnesses and offered nine (9) exhibits into evidence. No objections to Respondents' exhibits were made and all were admitted.^[FN2]

On August 17, 2009, Respondents, through counsel, filed a post-hearing brief and on August 18, 2009, filed a separate document containing proposed Findings of Fact and Conclusions of Law. Likewise, on August 18, 2009, the Agency filed a post-hearing brief which included the Agency's proposed Findings of Fact. On September 1, 2009, Respondents filed a reply brief. On September 2, 2009, the Agency filed its reply brief. The record is now closed for decision. Rulings on the parties' proposed Findings of Fact and Conclusions of Law are included in Attachment II.

After careful review of the entire record in this matter, I find NOAA established by a preponderance of reliable and credible evidence that Respondents, Lars Axelsson; Dan Axelsson; and, H & L Axelsson, committed twenty-seven (27) separate violations of the Magnuson-Stevens Fisheries Conservation Act by failing to timely file herring catch and fishing trip reports.

II. FINDINGS OF FACT

*5 The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, the testimonies of witnesses, the exhibits admitted into evidence, and the entire record as a whole.

PART I: Lars Axelsson & F/V FLICKA (NE0704313)

1. H & L Axelsson owns the fishing vessel (F/V) FLICKA. (Agency Ex. 5, 28; Tr. at 167).
2. Lars Axelsson is a corporate shareholder for H & L Axelsson, he owns 33.3% of the corporation. (Agency Ex. 5; Tr. at 167).
3. Lars Axelsson served as the operator of the F/V FLICKA between January 14, 2007 and June 25, 2007. (Agency Ex. 27, 32-43; Tr. at 167).
4. The F/V FLICKA held an Atlantic herring permit number 410332 at the times relevant to the charged violations. (Agency Ex. 26).
5. *Count 1* - On January 14 and 19, 2007, the F/V FLICKA fished for herring. (Agency Ex. 30-33). The herring caught was not reported to the Agency's Interactive Voice Response (IVR) reporting system until October 18, 2007. (Agency Ex. 12, 13, 29, 30).
6. *Count 2* - On January 25, 2007, the F/V FLICKA fished for herring. (Agency Ex. 29-31, 34). The herring caught was not reported to the Agency's IVR reporting system until October 18, 2007. (Agency Ex. 12, 13, 29, 30).
7. *Count 3* - On February 1, 2007, the F/V FLICKA fished for herring. (Agency Ex. 29-31, 35). The herring caught was not reported to the Agency's IVR reporting system until October 18, 2007. (Agency Ex. 12, 13, 29, 30).
8. *Count 4* - On February 11, 2007, the F/V FLICKA fished for herring. (Agency Ex. 29-31, 36). The herring caught was not reported to the Agency's IVR reporting system until October 18, 2007. (Agency Ex. 12, 13, 29, 30).
9. *Count 5* - On February 22, 2007, the F/V FLICKA fished for herring. (Agency Ex. 29-31, 37). The herring caught was not reported to the Agency's IVR reporting system until October 18, 2007. (Agency Ex. 12, 13, 29, 30).
10. *Count 6* - On April 12, 2007, the F/V FLICKA fished for herring. (Agency Ex. 29-31, 41). The herring caught was not reported to the Agency's IVR reporting system until October 18, 2007. (Agency Ex. 12, 13, 29, 30).
- *6 11. *Count 7* - On January 14, 2007, the F/V FLICKA fished for and landed herring. (Agency Ex. 29, 30, 32). Lars Axelsson did not report the herring caught to the National Marine Fisheries Service (NMFS) via a Fishing Vessel Trip Report (FVTR) until May 29, 2007. (Agency Ex. 29, 30, 32; Tr. at 120-25).
12. *Count 8* - On January 19, 2007, the F/V FLICKA fished for and landed herring. (Agency Ex. 29, 30, 33). Lars Axelsson did not report the herring caught to NMFS via a FVTR until May 29, 2007. (Agency Ex. 12, 13, 29, 30; Tr. at 120-25).

13. *Count 9* - On January 25, 2007, the F/V FLICKA fished for and landed herring. (Agency Ex. 29, 30, 34). Lars Axelsson did not report the herring caught to NMFS via a FVTR until May 29, 2007. (Agency Ex. 29, 30, 34; Tr. at 120-25).
14. *Count 10* - On February 1, 2007, the F/V FLICKA fished for and landed herring. (Agency Ex. 29, 30, 35). Lars Axelsson did not report the herring caught to NMFS via a FVTR until May 29, 2007. (Agency Ex. 29, 30, 35; Tr. at 120-25).
15. *Count 11* - On February 11, 2007, the F/V FLICKA fished for and landed herring. (Agency Ex. 29, 30, 36). Lars Axelsson did not report the herring caught to NMFS via a FVTR until May 29, 2007. (Agency Ex. 29, 30, 36; Tr. at 120-25).
16. *Count 12* - On February 22, 2007, the F/V FLICKA fished for and landed herring. (Agency Ex. 29, 30, 37). Lars Axelsson did not report the herring caught to NMFS via a FVTR until May 29, 2007. (Agency Ex. 29, 30, 37; Tr. at 120-25).
17. *Count 13* - On March 1, 2007, the F/V FLICKA fished for and landed herring. (Agency Ex. 29, 30, 38). Lars Axelsson did not report the herring caught to NMFS via a FVTR until May 29, 2007. (Agency Ex. 29, 30, 38; Tr. at 120-25).
18. *Count 14* - On March 16, 2007, the F/V FLICKA fished for and landed herring. (Agency Ex. 29, 30, 39). Lars Axelsson did not report the herring caught to NMFS via a FVTR until May 29, 2007. (Agency Ex. 29, 30, 39; Tr. at 120-25).
19. *Count 15* - On March 31, 2007, the F/V FLICKA fished for and landed herring. (Agency Ex. 29, 30, 40). Lars Axelsson did not report the herring caught to NMFS via a FVTR until May 29, 2007. (Agency Ex. 29, 30, 40; Tr. at 120-25).
20. *Count 16* - On April 12, 2007, the F/V FLICKA fished for and landed herring. (Agency Ex. 29, 30, 41). Lars Axelsson did not report the herring caught to NMFS via a FVTR until May 29, 2007. (Agency Ex. 29, 30, 41; Tr. at 120-25).
21. *Count 17* - On April 23, 2007, the F/V FLICKA fished for and landed herring. (Agency Ex. 29, 30, 42). Lars Axelsson did not report the herring caught to NMFS via a FVTR until May 29, 2007. (Agency Ex. 29, 30, 42; Tr. at 120-25).
- *7 22. *Count 18* - On June 23, 2007, the F/V FLICKA fished for and landed herring. (Agency Ex. 29, 30, 43). Lars Axelsson did not report the herring caught to NMFS via a FVTR until May 29, 2007. (Agency Ex. 29, 30, 43; Tr. at 120-25).

PART II: Dan Axelsson & F/V DYRSTEN (NE0704311)

23. H & L Axelsson owns the F/V DYRSTEN. (Agency Ex. 5, 6; Tr. at 167).
24. Dan Axelsson is a corporate shareholder for H & L Axelsson, he owns 33.3% of the corporation. (Agency Ex. 5; Tr. at 167).
25. Dan Axelsson served as the operator of the F/V DYRSTEN between January 14, 2007 and June 25, 2007. (Agency Ex. 27, 14-23; Tr. at 167).
26. The F/V DYRSTEN held an Atlantic herring permit number 330725 at the times relevant to the charged violations. (Agency Ex. 4).
27. *Count 1* - On January 5, 2007, the F/V DYRSTEN fished for herring. (Agency Ex. 11, 14, 24). The herring caught was not reported to the Agency's IVR reporting system until October 18, 2007. (Agency Ex. 9, 11, 12, 13).
28. *Count 2* - On January 12, 2007, the F/V DYRSTEN fished for herring. (Agency Ex. 11, 15, 24). The herring caught was not reported to the Agency's IVR reporting system until October 18, 2007. (Agency Ex. 9, 11, 12, 13).
29. *Count 3* - On January 15, 2007, the F/V DYRSTEN fished for herring. (Agency Ex. 11, 16, 17, 24). The herring caught was not reported to the Agency's IVR reporting system until October 18, 2007. (Agency Ex. 9, 11, 12, 13).
30. *Count 4* - On January 25, 2007, the F/V DYRSTEN fished for herring. (Agency Ex. 11, 18, 24). The herring caught was not report to the Agency's IVR reporting system until October 18, 2007. (Agency Ex. 9, 11, 12, 13).
31. *Count 5* - On February 10, 2007, the F/V DYRSTEN fished for herring. (Agency Ex. 11, 19, 24). The herring caught was not reported to the Agency's IVR reporting system until October 18, 2007. (Agency Ex. 9, 11, 12, 13).
32. *Count 6* - On February 14, 2007, the F/V DYRSTEN fished for herring. (Agency Ex. 11, 20, 24). The

herring caught was not reported to the Agency's IVR reporting system until October 18, 2007. (Agency Ex. 9, 11, 12, 13).

33. *Count 7* - On March 1, 2007, the F/V DYRSTEN fished for herring. (Agency Ex. 11, 21, 24). The herring caught was not reported to the Agency's IVR reporting system until October 18, 2007. (Agency Ex. 9, 11, 12, 13).

*8 34. *Count 8* - On March 8, 2007, the F/V DYRSTEN fished for herring. (Agency Ex. 11, 22, 24). The herring caught was not reported to the Agency's IVR reporting system until October 18, 2007. (Agency Ex. 9, 11, 12, 13).

35. *Count 9* - On March 30, 2007, the F/V DYRSTEN fished for herring. (Agency Ex. 11, 23, 24). The herring caught was not reported to the Agency's IVR reporting system until October 18, 2007. (Agency Ex. 9, 11, 12, 13).

Financial Documentation

36. As of January 2, 2009, H & L Axelsson had \$478,013 in their checking and savings account. (Agency Ex. 25).

37. H & L Axelsson had net income losses in 2006, 2007, and 2008 totaling - \$378,348 in 2006; -\$574,131 in 2007; and, -\$258,293 in 2008. (Respondent Ex. D).

38. Lars Axelsson's income in 2006 was \$62,627; in 2007 was \$38,938; and, in 2008 was \$66,074. (Respondent Ex. C).

39. Lars Axelsson's net worth is approximately \$1,435,569. This net worth represents approximately \$1,200,000 equity in H & L Axelsson's boats and \$265,000 equity in a home owned by he and his wife. (Respondent Ex. C).

40. Dan Axelsson's income in 2007 was \$51,583 and in 2008 was \$33,376. (Respondent Ex. C).

41. Dan Axelsson's net worth is approximately \$921,000. This net worth represents approximately \$600,000 equity in H & L Axelsson's boats and \$295,000 equity in a home owned by he and his wife. (Respondent Ex. C).

42. H & L Axelsson's made several unsuccessful attempts to sell their vessels the F/V DYRSTEN and F/V FLICKA during the last five (5) years. (Tr. at 202-03).

III. DISCUSSION

A. AGENCY'S BURDEN OF PROOF

In this case, Respondents were charged with violating twenty-seven (27) separate violations of the Magnuson-Stevens Act. In order to prevail on the charges instituted against a respondent, NOAA must prove the violations alleged by a preponderance of the evidence. See 5 U.S.C. § 556Cd); see also [In the Matter of: Cuong Vo, 2001 WL 1085351 \(NOAA 2001\)](#). Preponderance of the evidence means the Agency must show it is more likely than not a *9 respondent committed the violation with which they are charged. See [In the Matter of: John Fernandez, III, 1999 WL 1417462 \(NOAA 1999\)](#). NOAA may rely on either direct or circumstantial evidence to establish the violation and satisfy the burden of proof. See [In the Matter of: Cuong Vo, supra](#). The burden of producing evidence to rebut or discredit the Agency's evidence will only shift to the respondent after NOAA proves the allegations contained in the NOVA by a preponderance of reliable, probative, substantial, and credible evidence. (*Id.*)

B. MOTION TO DISMISS

Respondents made a Motion to Dismiss during the hearing and in their post hearing brief. (Tr. at 23-24). In this Motion, Respondents asserted the Agency failed to comply with portions of the Paperwork Reduction Act, 5 U.S.C. § 1320 and are therefore barred from pursuing administrative action against Respondents. Respondents' Motion to Dismiss is denied for several reasons. First, Respondents' filing of this motion at the beginning of the hearing, as a

surprise legal issue, is in violation of the regulations. [15 C.F.R. § 904.240\(a\)\(3\)](#). A party has an ongoing affirmative duty to supplement its Preliminary Positions on Issues and Procedures (PIIP). *Id.* This includes legal issues in dispute. *Id.* On this basis alone, Respondents' Motion to Dismiss should be denied. Additionally, the undersigned does not have authority to rule on challenges to the validity of Agency regulations. [15 C.F.R. § 904.200\(b\)](#). Therefore, the regulations that provide for reporting requirements are deemed valid. Finally, Respondents' Motion also lacks merit. As noted in Attachment B of the Agency's Reply Brief, the Agency did obtain Paperwork Reduction Act clearance to collect all the information required to be submitted for both the FVTR and IVR reporting systems. Each of these reasons independently supports denial of the motion to dismiss, therefore, Respondents' Motion to Dismiss is denied.

C. CHARGED VIOLATIONS PROVED

*10 The Agency alleges Respondent committed a total of twenty-seven (27) separate violations. Of these, the Agency alleged fifteen (15) violations occurred because Respondents failed to timely file information with the Agency's Interactive Voice Response (IVR) systems. In accordance with the regulations, all herring fishers holding federal permits must file weekly reports of all herring caught or not caught with the IVR reporting system. See [50 C.F.R. §§ 648.7\(b\)\(2\)\(i\), 648.14\(a\)\(4\)](#). The Agency alleges Respondent Dan Axelsson, while operating the F/V DYRSTEN, committed nine (9) counts of failing to properly file IVRs. The Agency alleges Respondent Lars Axelsson, while operating the F/V FLICKA, committed six (6) counts of failing to properly file IVRs.

Additionally, the Agency alleges Respondent Lars Axelsson, while operating the F/V FLICKA, committed twelve (12) violations for his failure timely file Fishing Vessel Trip Reports (FVTR). In accordance with the regulations, all herring fishers holding federal permits must file monthly FVTRs with the National Marine Fisheries Service (NMFS). See [50 C.F.R. §§ 648.7\(b\), 648.7\(f\), 648.14\(a\)\(4\)](#). The following is a list of all violations alleged:

IVR Reporting Violations - 50 C.F.R. §§ 648.7(b)(2), 648.14(a)(4)

DAN AXELSSON & F/V DYRSTEN NE0704311

- Count 1: fishing January 5, 2007 - IVR report due by Jan 9, 2007
- Count 2: fishing January 17, 2007 - IVR report due by January 16, 2007
- Count 3: fishing January 15 and 19, 2007 - IVR report due by January 23, 2007
- Count 4: fishing January 25, 2007 - IVR report due by Jan 30, 2007
- Count 5: fishing February 10, 2007 - IVR report due by February 13, 2007
- Count 6: fishing February 14, 2007 - IVR report due by February 20, 2007
- Count 7: fishing March 1, 2007 - IVR report due by March 7, 2007
- Count 8: fishing March 8, 2007 - IVR report due by March 13, 2007
- Count 9: fishing March 30, 2007 - IVR report due by April 3, 2007

LARS AXELSSON & F/V FLICKA NE0704313

- *11 Count 1: fishing January 14 & 19, 2006 - report due by January 23, 2007
- Count 2: fishing January 25, 2006 - report due by January 30, 2007
- Count 3: fishing February 1, 2006 - report due by February 6, 2007
- Count 4: fishing February 11 - report due by February 20, 2007
- Count 5: fishing February 22 - report due by February 27, 2007
- Count 6: fishing April 12 - report due by April 17, 2007

FVTR Reporting Violations - 50 C.F.R. §§ 648.7(b), (f)

Count 7: fishing January 14, 2007 - report due/postmarked by February 15, 2007
Count 8: fishing January 19, 2007 - report due/postmarked by February 15, 2007
Count 9: fishing January 25, 2007 - report due/postmarked by February 15, 2007
Count 10: fishing February 1, 2007 - report due/postmarked by March 15, 2007
Count 11: fishing February 11, 2007 - report due/postmarked by March 15, 2007
Count 12: fishing February 22, 2007 - report due/postmarked by March 15, 2007
Count 13: fishing March 1, 2007 - report due/postmarked by April 15, 2007
Count 14: fishing March 16, 2007 - report due/postmarked by April 15, 2007
Count 15: fishing March 31, 2007 - report due/postmarked by April 15, 2007
Count 16: fishing April 12, 2007 - report due/postmarked by May 15, 2007
Count 17: fishing April 23, 2007 - report due/postmarked by May 15, 2007
Count 18: fishing June 23, 2007 - report due/postmarked by July 15, 2007

The evidence shows that a key control used to manage the herring fishery is the Total Allowable Catch (TAC). The TAC is determined annually and once 95% of the TAC has been reached, NMFS will close the herring fishery. (Tr. at 38-42). NOAA regulations require the fishing industry to report accurate counts of herring caught to ensure proper estimation of the TAC. (Id.). The herring fishery is monitored via three (3) sources of data: IVR, FVTR, and dealer reports. (Id.). If reports are not timely filed, NMFS is unable able to properly determine when to close the fishery. (Id.).

Evidence was presented that up until late 2006, Respondents filed IVR reports through Ms. Kohl Kanwit, of the State of Maine Division of Marine Resources. (Tr. at 177,185,186). The record shows that prior to 2007 Lars Axelsson submitted his IVR reports to Ms. Kanwit of the State of Maine Department of Marine Resources. (Id.). Ms. Kanwit then apparently *12 forwarded the information on to NMFS. (Id.). The IVR reporting requirement was an obligation of the fishermen and the actions of Ms. Kanwit did not change the obligations of persons involved in the herring fishery. (H. Goodale testimony Tr. 62-64, 81-85). Ms. Kanwit changed jobs and ceased collecting the data near the end of 2006. (Id., Tr. 177, 185-186, Respondent Ex. I). In 2007 Respondents failed to make timely IVR reports to NMFS of their herring catch. (Id.). Respondent Lars Axelsson testified he failed to provide the reports because he was behind in his bookkeeping. (Tr. at 185-86).

Although Ms. Kohl Kanwit had been passing the IVR reports on to NMFS for some of the fishermen, the state of Maine was not obligated to do this. When Ms Kanwit changed jobs the practice of reporting herring catch to NMFS through her was no longer available. Ms. Kanwit sent an email informing fishermen that she was changing positions and for those fishermen that had been emailing or calling her with their IVR numbers, they would have to call them in to NMFS directly. (Respondent Ex. I). There is no dispute that the regulations require the reporting by the fishing vessel owner/operator to the federal government. (Tr. at 42-49, 81- 85,185). Whether or not Ms. Kanwit was collecting information for the State of Maine, and providing that information to NMFS prior to 2007, Respondents were required to provide weekly IVR reports with NMFS for herring fishing activity in 2007. Moreover, Respondents were on notice prior to 2007 that Ms. Kanwit would no longer be performing duties involving herring and they needed to make IVR reports directly. (Respondent Ex. 1).

As set forth in the above findings of facts, NOAA introduced sufficient evidence to establish Respondents failed to timely file IVR reports and FVTRs. As testified to during the hearing and as stated in their Post Hearing Brief and Reply Brief, Respondents do not dispute the elements of the charges. Respondents admit to the allegations, “that for a period of time they *13 failed to report their herring landings over the Interactive Voice Response System (‘IVR’) or that Lars Axelsson submitted a few months worth of Vessel Trip Reports late.” (Respondents' Reply Brief at 1). Instead of contesting the factual allegations, Respondent contest that the proposed penalty assessment and permit sanctions “are grossly disproportionate to the violations.” (Id.). While Respondents did eventually submit all

required reports, it is undisputed that Respondents did not make timely reports as required by the regulations. I find the charged violations are **PROVED**.

D. PENALTY ASSESSMENT AND PERMIT SANCTION

Once a violation has been established, NOAA's penalty schedule provides for the assessment of a civil penalty ranging from a written warning to a civil penalty in the amount of \$5,000 to \$80,000 per violation. (Agency Ex. 3). In determining the amount of penalty, the following factors must be considered: (1) the nature, circumstances, extent and gravity of the violation; (2) the degree of culpability; (3) any history of prior offenses; and (4) any other matters as justice requires. See [15 C.F.R. § 904.108\(a\)](#); [16 U.S.C. § 1858\(a\)](#). Moreover, with respect to assessment of a penalty, a respondent's ability to pay may be considered, provided that information concerning ability to pay is served at least thirty (30) days prior to an administrative hearing. See [15 C.F.R. §§ 904.108\(g\)](#) and [\(e\)](#). Ability to pay has been raised in keeping with the regulations in this case.

In NOAA administrative proceedings, there is a rebuttable presumption the Agency's proposed penalty is appropriate and serves as a reasonable starting point in determining the amount of the penalty in a particular case. See [In the Matter of: AGA Fishing Corp., 2001 WL 34683652 \(NOAA Mar. 17, 2001\)](#); [In the Matter of: Jody Domingo and Elden Domingo, 2000 WL 33174647 \(NOAA Mar. 29, 2000\)](#). While a judge is not bound by the proposed penalty, *14 both the regulations and the applicable case law make clear the judge may only depart upward or downward from the Agency's proposed assessment and impose a penalty *de novo* upon a showing of good cause. See [15 C.F.R. § 904.204](#); see also [In the Matter of Town Dock Fish, Inc., 1991 WL 432066 \(NOAA Oct 23, 1991\)](#); [In the Matter of: William J. Verna, 1985 WL 69210 \(NOAA Jan. 23, 1985\)](#). Further, the reason(s) justifying increase or decrease of the proposed penalty must be clearly stated. See [In the Matter of: Jody Domingo and Elden Domingo](#).

For the violations in this case NOAA proposed an overall civil penalty of \$270,000 and permit sanctions totaling twenty-four (24) months. The proposed sanctions are presumed appropriate, and should only be modified by the ALJ upon a showing of good cause. NOAA contends that these sanctions are appropriate to remove an incentive to commit further violations. In their post hearing brief, NOAA states that Respondents run a sophisticated fishing operation, were given multiple notification of how to comply with the regulations, but chose to ignore the notifications. NOAA contends Respondents are highly culpable. NOAA has argued that the proposed sanctions are needed to ensure Respondents will not continue to flout fisheries laws, which would result in short-term gains from Respondents, but could damage the overall health of the important herring stock.

Upon review of the factors in [15 C.F.R. § 904.108](#) that must be considered when determining the appropriate sanction, the undersigned finds good cause has been shown to take a downward departure from NOAA's proposed penalties. The factors to be considered are discussed below.

The nature, circumstances, extent and gravity of the violation:

*15 The Agency contends the suggested penalty range is appropriate considering the repetitive violations involving more than 3.25 million pounds of herring. They further contend that if fishermen do not report their catches, areas that should be closed to fishing will remain open and fishermen will obtain short-term economic gains at the expense of overall health of herring stock. This is certainly a valid concern and a key reason for implementing the reporting requirements. (Tr. 39-41, 51-53, 81-83). However, no over-fishing resulted as result of Respondents' failure to report. (Tr. at 147-48). Respondents were not fishing in a closed area and at no point was the TAC exceeded where Respondents were fishing. (Tr. at 139-48). Respondents did not obtain, nor is there any indication that they attempted to obtain, economic gain from their failure to file timely reports.

The degree of culpability:

During the hearing and in their post hearing briefs, Respondents contend that “fishermen in the Northeast are faced with a considerable number of complicated regulations.” (Respondents PHB 5).^[FN3] They argue the rules, while seemingly simple in nature, are numerous, create a regulatory burden on fishermen, and therefore make it difficult to comply with all the regulations. (*Id.*). However, this argument does not excuse Respondents of the requirement to follow the regulations. NOAA's asserts that even if the regulatory requirements are complex, individuals that engage in a highly regulated industry bear the responsibility of knowing and complying with the regulations is supported by the law. See *In re Peterson*, 6 O.R.W. 486, 490 (NOAA 1991). Confusion or ignorance of the fishing regulations are not an excuse to liability. See *In re Duong Vo*, 1998 WL1277937 (NOAA 1988).

*16 While confusion over regulations is not an excuse to liability, such confusion does not necessarily indicate an attempt to exceed fishing limits. The degree of culpability of Respondents is limited to the impact on NOAA/NMFS' need for timely information to properly manage the fishery. The Agency contends Respondents are highly culpable and flouted the fishery laws; however, the evidence does not suggest Respondents purposely ignored the fishery laws to gain an advantage in the fishery. The testimony of Respondents during the hearing was found credible and indicated, that while Respondents knew or should have known of the regulations requiring submission of timely IVR reports to NMFS, they negligently failed to make timely direct IVR reports after Ms. Kanwit of the State of Maine DMR changed jobs and negligently failed to timely comply with some of the FVTR reporting requirements. (Tr. at 177- 186). Prior to 2007, Respondents had accomplished compliance with their reporting of IVRs through Ms. Kanwit of the Maine Division of Marine Resources. (*Id.*). Once Respondents were made aware of their failures in timely reporting, Respondents cooperated in correcting all deficient filings.

No evidence was introduced indicating Respondents avoided filing reports to gain a fishing advantage or that they attempted to evade reporting their catches. Respondents' presented evidence that they reported all their catches on dealer reports. (Tr. 148). While negligence in complying with multiple reports is not an excuse to liability, the failure to timely comply with the regulations in the limited facts of this case does not support a penalty greater than what is needed to ensure future compliance. The record indicates that Respondents have no prior history of violations. The evidence did not establish that Respondents purposely attempted to circumvent the fishery regulations in order to catch more fish or gain a greater profit from the fishery. However, their conduct is of significant concern because a failure of fishermen to *17 provide timely IVR reports could harm the resource by giving NMFS insufficient information regarding the point where the fishery had reached the total allowable catch. Therefore a significant penalty is appropriate in this matter.

History of prior offenses:

Lars Axelsson has been fishing commercially fulltime since 1973. (Tr. at 166). Likewise, Dan Axelsson has been a commercial fisherman since 1980. (Tr. at 227). Neither Lars nor Dan Axelsson have been cited for past fisheries violations. The corporation that both are shareholders for, H & L Axelsson, has also never been cited for a prior fisheries violation.

Ability to pay & any other matters as justice requires:

Throughout these proceedings, Respondents have raised concerns over their ability to pay NOAA's suggested penalty. Penalties may be decreased in consideration of a respondent's inability to pay. 15 C.F.R. § 904.108(b). In their post hearing brief, Respondents stated “[n]either the individuals nor the business have the ability to pay the proposed fines ...” (Respondents PHB at 13). Respondents contend that any more debt or structured payments may bankrupt both Dan and Lars Axelsson and result in H & L Axelsson becoming unviable. (Respondents PHB at 9-11). The Agency argues Respondents do have the ability to pay and the suggested penalty should not be decreased.

I agree with the Agency that while the financial materials show some significant debt and limitations of Respondent Corporation and individuals in regard to their assets, the evidence in this case indicates that Respondents would have ability to pay the suggested penalty even if it required selling some of their assets. A review of H & L Axelsson's checking and saving accounts reveal that at the initiation of these proceedings, the corporation had in excess of \$400,000 in on-hand cash. (Agency Ex. 25). While neither Lars nor Dan Axelsson have *18 sufficient cash reserves on-hand to pay the penalty, the penalties were assessed jointly and severally and H & L Axelsson could pay the entire fine. (Tr. at 207-10). Even if the paying of this penalty may result in the bankruptcy of Respondents, consideration of a respondent's ability to pay does not preclude an assessment of a penalty in an amount that would cause or contribute to the bankruptcy or other discontinuation of the respondent's business. 15 C.F.R. § 904.108(d).

In these civil proceedings the function of fines and penalties is to protect the entire fishery, not just Respondent's participation in it. Congress has made clear that the appropriate consideration in the imposition of penalties in this highly regulated industry, in which Respondent voluntarily participates, is not just the economic hardship to the individual, but significantly the effect upon the fishery that would result if predatory behavior were condoned. In the Matter of: Tony Tan Nguyen, 7 O.R.W. 60, 64 (NOAA 1993).

The Agency is correct that per the regulations, a penalty that bankrupts a respondent does not necessarily preclude the imposition of such a penalty. As the above quote states, Congress has little sympathy for respondent's that engage in "predatory behavior." (Id.). However, this does not mean penalties that bankrupt respondents should not be considered, especially if the respondents did not engage in "predatory behavior."

NOAA's assertion that Respondents run a multimillion dollar fishing operation appears to overstate the Respondents financial condition. (Agency Reply Brief at 7). Depending on the time of the year, H & L Axelsson employs between seven (7) and twenty (20) people. (Tr. at 199-201). Its total assets equate to \$7,485,338. (Agency Ex. 25). Of this, \$7,000,000 includes the market value of the F/V FLICKA and F/V DYRSTEN. (Agency Ex. 25). An outstanding mortgage value of \$3,500,000 still exists on these vessels. (Id.). As a result of recent financial difficulties, H & L Axelsson restructured the mortgage on these vessels and obtained a short deferment on making payments. (Tr. at 202). H & L Axelsson was able to remain viable after obtaining this debt relief. However, the vessels are due for maintenance, which will cost in the *19 hundreds-of-thousands of dollars, and there is a significant possibility that any substantial additional debt incurred would result in the company's bankruptcy. (Tr. at 200-07).

H & L Axelsson attempted to sell the F/V FLICKA and F/V DYRSTEN several times during the last five (5) years; however, there does not seem to be a market for these types of fishing vessels in the United States. (Tr. at 202-03). The F/V DYRSTEN is currently up for sale through a marine broker and there is hope a market for these vessels may exist overseas. (Id.). H & L Axelsson has reported net losses during the last three years, -\$378,348 in 2006, -\$574,131 in 2007, and -\$258,293 in 2008. (Respondent Ex. D). Lars and Dan Axelsson have made between \$33,000 and \$66,000 in income during each of the last three (3) years from commercial fishing. (Respondents Ex. C). Their net worth's are derived mainly from their equity in H & L Axelsson and their homes. (Id.). While H & L Axelsson has substantial assets on paper, its repeated net profit losses during the last several years have resulted in financial difficulties and its main equity exist in vessels which have very little actual market value. H & L Axelsson's employees, to include Respondent's Lars and Dan Axelsson, have reported modest incomes derived from commercial fishing.

Appropriate Sanction

The above factors establish good cause for reducing the Agency's proposed penalties conditioned on Respondents completion of a period of probation. The reporting violations did not result in over-fishing of herring nor did Respondents obtain increased economic gains. The evidence shows Respondents negligently failed to accurately comply with the regulations but did not intentionally attempt to circumvent fishery limits. Once the Agency informed Respondents of their failure to submit timely reports, Respondents cooperated with the Agency in

correcting their deficient reports. Respondents have been in the fishing industry for over ~~*20~~ thirty (30) years and have no history of prior offenses. H & L Axelsson is in a weakened financial position and a large economic penalty or permit sanction may result in bankrupting the business. Taking all these factors into account, good cause is shown to assess a penalty less than the Agency's proposed sanctions provided that there is a probationary period for the suspended portion of the penalty to address the need for compliance and protect the fishery resource.

While a review of the factors listed in [15 C.F.R. § 904.108\(a\)](#) establish that good cause exists to impose a reduction in the proposed sanction, the undersigned concurs with NOAA that “[t]o be effective, enforcement must result in the removal of the incentive to commit further violations.” (Agency PHB at 28). A partially suspended sanction will achieve that goal. Such a sanction will deter others from violating the regulations, as it shows that even a negligent violation of the regulations will result in significant time and money expenditures contesting the charges. A suspended penalty will also deter Respondents from committing further violations, for a future violations will result in the entire sanction being imposed. The specifics of the partially suspended sanction are detailed in the Order section of this Decision.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Ultimate Findings of Fact and Conclusions of Law are based on a thorough and careful analysis of the documentary evidence, the testimonies of witnesses, the exhibits admitted into evidence and the entire record as a whole.

1. Respondents Lars Axelsson, Dan Axelsson and H & L Inc. are “persons” within the meaning of the Magnuson-Stevens Act, [16 U.S.C. § 1802 \(31\)](#).
2. NOAA has proved by a preponderance of reliable, probative, substantial and credible evidence that:
 - (a.) For the dates in question Respondents failed to submit timely IVR reports as required by the regulations in violation of [50 C.F.R. § 648.7](#) and [§ 648.14\(a\)\(4\)](#).
 - *21 (b.) For the dates in question Respondents failed to submit timely FVTR reports as required by the regulations in violation of [50 C.F.R. § 648.7](#) and [§ 648.14\(a\)\(4\)](#).
 - (c.) Consideration of all of the evidence of record and the factors contained in [15 C.F.R. § 904.108](#) supports the determination that part of the proposed sanction should be suspended on probation.

V. CONCLUSION

Based on the record developed in this proceeding, it is found NOAA established by a preponderance of the reliable and credible evidence that Respondents committed twenty-seven (27) separate violations of the Magnuson-Stevens Act.

WHEREFORE,

VI. ORDER

IT IS HEREBY ORDERED that a civil penalty in the amount of \$270,000 (\$10,000 per violation) is assessed jointly and severally against Respondents Lars Axelsson, Dan Axelsson, and, H & L Axelsson, Incorporated. Of this civil penalty, **\$216,000 is suspended** for a period of two (2) years from the day on which this Initial Decision becomes final. If any Respondent is found to have violated any provision of the Magnuson-Stevens Act during their

probationary timeframe, the entire suspended penalty shall become immediately due and payable.

IT IS HEREBY FURTHER ORDERED that permit sanctions are imposed totaling eight (8) months against Lars Axelsson, four (4) months against Dan Axelsson, and twelve (12) months against H & L Axelsson, Incorporated. However, **permit sanctions for each of the Respondents are imposed outright for one (1) month.** The remainder of these permit sanctions **are suspended** for a period of two (2) years from the date on which this Initial Decision becomes final. If any of the Respondents are found to have violated any provision of the Magnuson-Stevens Act during their probationary timeframe, the respondent(s) found to have committed the violations shall immediately begin to serve the remainder of their individual permit sanction.

PLEASE BE ADVISED that a failure to pay the **unsuspended portion** of the civil penalty, **\$54,000**, within thirty (30) days from the date on which this decision becomes final Agency action will result in interest being charged at the rate specified by the United States Treasury regulations and an assessment of charges to cover the cost of processing and handling the delinquent penalty. Further, in the event the penalty or any portion thereof becomes more than ninety (90) days past due, an additional penalty charge not to exceed six (6) percent per annum may be assessed.

***22 PLEASE BE FURTHER ADVISED** that any party may petition for administrative review of this decision. The petition for review must be filed with the Administrator of the National Oceanic and Atmospheric Administration within thirty (30) days from the day of this initial decision as provided in [15 C.F.R. § 904.273](#). Copies of the petition should also be sent to the ALI Docketing Center, NOAA counsel, and the presiding judge. A copy of [15 C.F.R. § 904.273](#) is attached as Attachment III to this order.

If neither party seeks administrative review within 30 days after issuance of this order, this initial decision will become the final decision of the agency.

Michael J. Devine
Administrative Law Judge
United States Coast Guard

FN1. Although the order consolidating these cases (Docket Numbers NE0704311 and NE0704313) was not issued until after the hearing, the hearing was conducted jointly at the request of the parties and the evidence and witnesses were considered in respect to both cases as discussed on the record and in this decision. However, where necessary for clarity in the record, the two cases will be referenced separately.

FN2. The parties agreed by stipulation to admission of an email by Ms. Kohl Kanwit as Respondent's Exhibit "H," however, the next exhibit in order is "I" and the Exhibit is admitted as Respondent's Exhibit I.

FN3. PHB stands for Post Hearing Brief.

ATTACHMENT I

LIST OF WITNESSES AND EXHIBITS

AGENCY WITNESS LIST

- *23 1. Hannah Food Goodale
2. Alison Ayers Verry
3. James M. MacDonald

AGENCY EXHIBITS

1. Magnuson-Stevens Act, [16 U.S.C Section 1857](#) and [1861](#)
2. Federal Register - [50 CFR Section 648.14](#) (1)(4), [648.7\(b\)\(2\)\(i\)](#), [648.7\(b\)\(1\)\(i\)](#), & [648.7\(f\)\(2\)](#)
3. Northeast Region Civil Administrative Penalty Schedule (revised 05/02) & 3 page Preface thereto
4. Federal fisheries vessel permits (#330725) for the F/V Dyrsten in effect on 10-24-00 and on and between 01-10-07 and 04-04-07 (and herring Category 1 section materials)
5. Corporate documentation for H & L Axelsson, Inc.
6. Certificate of Documentation for the F/V Dyrsten
7. Federal operator permit (#10010787) information of Dan Axelsson for the period covering 01-10-07 and 04-04-07
- 8(a). Permit holder letter dated 10-24-00
- 8(b). Small entity compliance guide dated 03-09-07
9. Enforcement Action Report #148238 dated 11-20-08
10. Curriculum vitae of NOAA OLE Special Agent James M. MacDonald
11. Investigative Report (10 pages) of Special Agent James M. MacDonald dated 11-23-07
12. E-mail dated 10-18-07 from Lars Axelsson to Alison Verry and e-mail dated 10-19-07 from Alison Verry to James Cassin and James MacDonald
13. Memorandum to record dated 11-18-07 from Alison Verry
14. Fishing Vessel Trip Report (FVTR) #10439197 dated 01-11-07
15. FVTR #10439198 dated 01-12-07
16. FVTR #10439199 for landing dated 01-15-07
17. FVTR #10856601 dated 01-25-07
- *24 18. FVTR #10456602 dated 01-25-07
19. FVTR #10456605 dated 02-15-07
20. FVTR #10456606 dated 02-15-07
21. FVTR #10456607 dated 03-16-07
22. FVTR #10456609 dated 03-16-07
23. FVTR #10456611 dated 03-31-07
24. Dealer Report for Lund's Fisheries, Inc. showing landing of herring and other fish by the F/V Dyrsten from January through October 2007.
25. Statement of Financial Condition (2 pages) signed by Harry Axelsson of H & L Axelsson, Inc. on 02-25-09
26. Federal Fisheries Permit 410332 (issued to F/V FLICKA)
27. Operator Permit information for Lars Axelsson
28. Certificate of Inspection F/V FLICKA
29. Enforcement Action Report dated 11/20/07 citing Lars Axelsson for failure to complete reports in a timely manner.
30. Offense Investigation Report dated 11/23/07 (FLICKA)
31. Dealer Report for FLICKA (14 January 2007 - 29 September 2007)
32. FLICKA Fishing vessel trip report (FVTR) 10843452 for 1/14/07
33. FLICKA FVTR 10843453 for 1/19/07
34. FLICKA FVTR 10843454 for 1/25/07
35. FLICKA FVTR 10843455 for 2/1/07
36. FLICKA FVTR 10843456 for 2/11/07
37. FLICKA FTVR 1084357 for 2/22/07
38. FLICKA FTVR 10843458 for 3/1/07
39. FLICKA FVTR 10843459 for 3/16/07
40. FLICKA FVTR 10843460 for 3/31/07
41. FLICKA FVTR 10843461 for 4/12/07
42. FLICKA FVTR 10843462 for 4/23/07
43. FLICKA FVTR 10843464 for 6/23/07

44. January 12, 2004 letter to H&L Axelsson, Inc., for FLICKA, Federal Permit No. 410332 regarding IVR Fishing Report requirements.

45. January 12, 2004 letter to H&L Axelsson, Inc., for DYRSTEN Federal Permit No. 330725 regarding IVR Fishing Report requirements.

***25 RESPONDENT'S WITNESS LIST**

1. Lars R. Axelsson
2. Dan Harry Axelsson

RESPONDENT'S EXHIBITS

- A. Diagram of Herring Management Areas
- B. Dan Axelsson Tax Returns (2008, 2007)
- C. L. Axelsson Tax Returns (2008, 2007, 2006)
- D. H&L Axelsson, Inc., Tax Returns (2008, 2007, 2006)
- E. Atlantic Herring Landings Report for 2007 fishing year
- F. Photograph of F/V DYRSTEN
- G. Photograph of F/V FLICKA
- H. Listing of NOAA Northeast Region Permit Holder Letters and Announcements
- I. Email from Ms. Kanwit dated November 08, 2006 submitted as an attachment to the post-hearing stipulation^[FN4] by the parties dated June 23, 2009.

JOINT STIPULATION

In keeping with discussion of evidentiary matters at the hearing the parties agreed to a joint stipulation submitted on June 23, 2009 regarding the admission of an email by Ms. Kohl Kanwit (Respondent Exhibit I) and later submission of signed tax returns by Respondent Lars Axelsson.

ATTACHMENT II

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. AGENCY'S PROPOSED FINDINGS OF FACT

General

*26 1. Respondents H & L Axelsson, Inc., Dan Axelsson, and Lars Axelsson are persons within the meaning of the Magnuson Act, [16 U.S.C. §1802 \(36\)](#).

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

2. At all times relevant to these matters the F/V Dyrsten (official # 954436) held an Atlantic herring permit (# 330725). (Agency Ex. 4).

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

3. At all times relevant to these matters the F/V Flicka (official # 669492) held an Atlantic herring permit (# 410332). (Agency Ex. 26).

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

4. At all times relevant to these matters H & L Axelsson, Inc. was the owner of the F/V Dyrsten (official # 954436). (Agency Ex. 5 and 6).

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

5. At all times relevant to these matters H & L Axelsson, Inc. was the owner of the F/V Flicka (official # 669492). (Agency Ex. 5 and Agency Ex. 28).

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

6. At all times relevant to these matters Dan Axelsson was the operator of the F/V Dyrsten (official # 954436). (Agency Ex. 11 and Tr. 131-132)

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

7. At all times relevant to these matters Lars Axelsson was the operator of the F/V Flicka (official # 669492). (Agency Ex. 30 and Tr. at 131-132).

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 1 - F/V Dyrsten -

*27 8. The F/V Dyrsten fished for, caught, or landed herring on or about January 5, 2007, during herring IVR reporting week # 1. Agency Ex. 11, 14, and 24.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

9. Not later than 24:00 hours on January 09, 2007, the owner and operator of the F/V Dyrsten were required to provide telephone notification to the IVR system regarding catches (both retained and discarded) of herring caught during the reporting week to an Interactive Voice Response (IVR) reporting system. These reports were required to be made not later than midnight on Tuesday of the week following fishing activity. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(2\)\(i\)](#), including which herring management areas were fished and the number of pounds of herring caught (and discarded) from each area. Even if no herring is caught during a given reporting week, a report so stating must be submitted. Agency Ex. 2, 5, 6, 7, 8, 13, and 45 and Tr. At 63-65.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

10. H & L Axelsson, Inc. and Dan Axelsson failed to report the F/V Dyrsten's herring fishing activity during herring IVR reporting week # 1 to the IVR system by midnight on January 09, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, all the required information for that fishing week was not submitted to the agency's IVR system until October 18, 2007, (i.e 282 days late). Agency Ex. 9, 11, 12, and 13.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 2 - F/V Dyrsten -

11. The F/V Dyrsten fished for, caught, or landed herring on or about January 12, 2007, during herring IVR reporting week # 2. Agency Ex. 11, 15, and 24.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

12. Not later than 24:00 hours on January 16, 2007, the owner and operator of the F/V Dyrsten were required to provide telephone notification to the IVR system regarding catches (both retained and discarded) of herring caught during the reporting week to an Interactive Voice Response (IVR) reporting system. These reports were required to be made not later than midnight on Tuesday of the week following fishing activity. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(2\)\(i\)](#), including which herring management areas were fished and the number of pounds of herring caught (and discarded) from each area. Even if no herring is caught during a given reporting week, a report so stating must be submitted. Agency Ex. 2, 5, 6, 7, 8, 13, and 45.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

*28 13. H & L Axelsson, Inc. and Dan Axelsson failed to report the F/V Dyrsten's herring fishing activity during herring IVR reporting week # 2 to the IVR system by midnight on January 16, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, all the required information for that fishing week was not submitted to the agency's IVR system until October 18, 2007, (i.e. 275 days late). Agency Ex. 9, 11, 12, and 13.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 3 - F/V Dyrsten -

14. The F/V Dyrsten fished for, caught, or landed herring on or about January 15, 2007, and January 19, 2007, during herring IVR reporting week # 3. Agency Ex. 11, 16, 17, and 24.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

15. Not later than 24:00 hours on January 23, 2007, the owner and operator of the F/V Dyrsten were required to provide telephone notification to the IVR system regarding catches (both retained and discarded) of herring caught during the reporting week to an Interactive Voice Response (IVR) reporting system. These reports were required to be made not later than midnight on Tuesday of the week following fishing activity. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(2\)\(i\)](#), including which herring management areas were fished and the number of pounds of herring caught (and discarded) from each area. Even if no herring is caught during a given reporting week, a report so stating must be submitted. Agency Ex. 2, 5, 6, 7, 8, 13, and 45.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

16. H & L Axelsson, Inc. and Dan Axelsson failed to report the F/V Dyrsten's herring fishing activity during herring IVR reporting week # 3 to the IVR system by midnight on January 23, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, all the required information for that fishing week was not submitted to the agency's IVR system until October 18, 2007, (i.e 268 days late). Agency Ex. 9, 11, 12, and 13.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 4 - F/V Dyrsten -

17. The F/V Dyrsten fished for, caught, or landed herring on or about January 25, 2007, during herring IVR reporting week # 4. Agency Ex. 11, 18, and 24.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

18. Not later than 24:00 hours on January 30, 2007, the owner and operator of the F/V Dyrsten were required to provide telephone notification to the IVR system regarding catches (both retained and discarded) of herring caught during the reporting week to an Interactive Voice Response (IVR) reporting system. These reports were required to be made not later than *29 midnight on Tuesday of the week following fishing activity. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(2\)\(i\)](#), including which herring management areas were fished and the number of pounds of herring caught (and discarded) from each area. Even if no herring is caught during a given reporting week, a report so stating must be submitted. Agency Ex. 2, 5, 6, 7, 8, 13, and 45.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

19. H & L Axelsson, Inc. and Dan Axelsson failed to report the F/V Dyrsten's herring fishing activity during herring IVR reporting week # 4 to the IVR system by midnight on January 30, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, all the required information for that fishing week was not submitted to the agency's IVR system until October 18, 2007, (i.e. 261 days late). Agency Ex. 9, 11, 12, and 13.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 5 - F/V Dyrsten -

20. The F/V Dyrsten fished for, caught, or landed herring on or about February 10, 2007, during herring IVR reporting week # 6. Agency Ex. 11, 19, and 24.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

21. Not later than 24:00 hours on February 13, 2007, the owner and operator of the F/V Dyrsten were required to provide telephone notification to the IVR system regarding catches (both retained and discarded) of herring caught during the reporting week to an Interactive Voice Response (IVR) reporting system. These reports were required to be made not later than midnight on Tuesday of the week following fishing activity. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(2\)\(i\)](#), including which herring management areas were fished and the number of pounds of herring caught (and discarded) from each area. Even if no herring is caught during a given reporting week, a report so stating must be submitted. Agency Ex. 2, 5, 6, 7, 8, 13, and 45.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

22. H & L Axelsson, Inc. and Dan Axelsson failed to report the F/V Dyrsten's herring fishing activity during herring IVR reporting week # 6 to the IVR system by midnight on February 13, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, all the required information for that fishing week was not submitted to the agency's IVR system until October 18, 2007, (i.e. 247 days late). Agency Ex. 9, 11, 12, and 13.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 6 - F/V Dyrsten -

*30 23. The F/V Dyrsten fished for, caught, or landed herring on or about February 14, 2007, during herring IVR reporting week # 7. Agency Ex. 11, 20, and 24.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

24. Not later than 24:00 hours on February 20, 2007, the owner and operator of the F/V Dyrsten were required to provide telephone notification to the IVR system regarding catches (both retained and discarded) of herring caught during the reporting week to an Interactive Voice Response (IVR) reporting system. These reports were required to be made not later than midnight on Tuesday of the week following fishing activity. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(2\)\(i\)](#), including which herring management areas were fished and the number of pounds of herring caught (and discarded) from each area. Even if no herring is caught during a given reporting week, a report so stating must be submitted. Agency Ex. 2, 5, 6, 7, 8, 13, and 45.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

25. H & L Axelsson, Inc. and Dan Axelsson failed to report the F/V Dyrsten's herring fishing activity during herring IVR reporting week # 7 to the IVR system by midnight on February 20, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, all the required information for that fishing week was not submitted to the agency's IVR system until October 18, 2007, (i.e 240 days late). Agency Ex. 9, 11, 12, and 13.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 7 - F/V Dyrsten -

26. The F/V Dyrsten fished for, caught, or landed herring on or about March 1, 2007, during herring IVR reporting week # 9. Agency Ex. 11, 21, and 24.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

27. Not later than 24:00 hours on March 06, 2007, the owner and operator of the F/V Dyrsten were required to provide telephone notification to the IVR system regarding catches (both retained and discarded) of herring caught during the reporting week to an Interactive Voice Response (IVR) reporting system. These reports were required to be made not later than midnight on Tuesday of the week following fishing activity. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(2\)\(i\)](#), including which herring management areas were fished and the number of pounds of herring caught (and discarded) from each area. Even if no herring is caught during a given reporting week, a report so stating must be submitted. Agency Ex. 2, 5, 6, 7, 8, 13, and 45.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

*31 28. H & L Axelsson, Inc. and Dan Axelsson failed to report the F/V Dyrsten's herring fishing activity during herring IVR reporting week # 9 to the IVR system by midnight on March 6, 2007, as required, in violation of [50](#)

C.F.R. § 648.14(a)(4). In fact, all the required information for that fishing week was not submitted to the agency's IVR system until October 18, 2007, (i.e. 225 days late). Agency Ex. 9, 11, 12, and 13.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 8 - F/V Dyrsten -

29. The F/V Dyrsten fished for, caught, or landed herring on or about March 8, 2007, during herring IVR reporting week # 10. Agency Ex. 11, 22, and 24.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

30. Not later than 24:00 hours on March 13, 2007, the owner and operator of the F/V Dyrsten were required to provide telephone notification to the IVR system regarding catches (both retained and discarded) of herring caught during the reporting week to an Interactive Voice Response (IVR) reporting system. These reports were required to be made not later than midnight on Tuesday of the week following fishing activity. Each report was required to include all the information outlined in 50 C.F.R. § 648.7(b)(2)(i), including which herring management areas were fished and the number of pounds of herring caught (and discarded) from each area. Even if no herring is caught during a given reporting week, a report so stating must be submitted. Agency Ex. 2, 5, 6, 7, 8, 13, and 45.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

31. H & L Axelsson, Inc. and Dan Axelsson failed to report the F/V Dyrsten's herring fishing activity during herring IVR reporting week # 10 to the IVR system by midnight on March 13, 2007, as required, in violation of 50 C.F.R. § 648.14(a)(4). In fact, all the required information for that fishing week was not submitted to the agency's IVR system until October 18, 2007, (i.e. 219 days late). Agency Ex. 9, 11, 12, and 13.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 9 - F/V Dyrsten -

32. The F/V Dyrsten fished for, caught, or landed herring on or about March 30, 2007, during herring IVR reporting week # 13. Agency Ex. 11, 23, and 24.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

33. Not later than 24:00 hours on April 03, 2007, the owner and operator of the F/V Dyrsten were required to provide telephone notification to the IVR system regarding catches (both retained and discarded) of herring caught during the reporting week to an Interactive Voice Response (IVR) reporting system. These reports were required to be made not later than *32 midnight on Tuesday of the week following fishing activity. Each report was required to include all the information outlined in 50 C.F.R. § 648.7(b)(2)(i), including which herring management areas were fished and the number of pounds of herring caught (and discarded) from each area. Even if no herring is caught during a given reporting week, a report so stating must be submitted. Agency Ex. 2, 5, 6, 7, 8, 13, and 45.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

34. H & L Axelsson, Inc. and Dan Axelsson failed to report the F/V Dyrsten's herring fishing activity during herring IVR reporting week # 13 to the IVR system by midnight on April 03, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, all the required information for that fishing week was not submitted to the agency's IVR system until October 18, 2007, (i.e. 148 days late). Agency Ex. 9, 11, 12, and 13.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 1 - F/V Flicka -

35. The F/V Flicka fished for, caught, or landed herring on or about January 14, 2007, and January 19, 2007, during herring IVR reporting week # 3. Agency Ex. 30, 31, 32, and 33.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

36. Not later than 24:00 hours on January 23, 2007, the owner and operator of the F/V Flicka were required to provide telephone notification to the IVR system regarding catches (both retained and discarded) of herring caught during the reporting week to an Interactive Voice Response (IVR) reporting system. These reports were required to be made not later than midnight on Tuesday of the week following fishing activity. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(2\)\(i\)](#), including which herring management areas were fished and the number of pounds of herring caught (and discarded) from each area. Even if no herring is caught during a given reporting week, a report so stating must be submitted. Agency Ex. 2, 5, 8, 13, 26, 27, 28 and 44.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

37. H & L Axelsson, Inc. and Lars Axelsson failed to report the F/V Flicka's herring fishing activity during herring IVR reporting week # 3 to the IVR system by midnight on January 23, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, all the required information for that fishing week was not submitted to the agency's IVR system until October 18, 2007, (i.e 237 days late). Agency Ex. 29, 30, 12, and 13.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 2 - F/V Flicka -

*33 38. The F/V Flicka fished for, caught, or landed herring on or about January 25, 2007, during herring IVR reporting week # 4. Agency Ex. 29, 30, 31, and 34.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

39. Not later than 24:00 hours on January 30, 2007, the owner and operator of the F/V Flicka were required to provide telephone notification to the IVR system regarding catches (both retained and discarded) of herring caught during the reporting week to an Interactive Voice Response (IVR) reporting system. These reports were required to be made not later than midnight on Tuesday of the week following fishing activity. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(2\)\(i\)](#), including which herring management areas were fished and the number of pounds of herring caught (and discarded) from each area. Even if no herring is caught during a given reporting week, a report so stating must be submitted. Agency Ex. 2, 5, 8, 13, 26, 27, 28 and 44.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

40. H & L Axelsson, Inc. and Lars Axelsson failed to report the F/V Flicka's herring fishing activity during herring IVR reporting week # 3 to the IVR system by midnight on January 30, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, all the required information for that fishing week was not submitted to the agency's IVR system until October 18, 2007, (i.e 261 days late). Agency Ex. 29, 30, 12, and 13.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 3 - F/V Flicka -

41. The F/V Flicka fished for, caught, or landed herring on or about February 1, 2007, during herring IVR reporting week # 5. Agency Ex. 29, 30, 31, and 35.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

42. Not later than 24:00 hours on February 6, 2007, the owner and operator of the F/V Flicka were required to provide telephone notification to the IVR system regarding catches (both retained and discarded) of herring caught during the reporting week to an Interactive Voice Response (IVR) reporting system. These reports were required to be made not later than midnight on Tuesday of the week following fishing activity. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(2\)\(i\)](#), including which herring management areas were fished and the number of pounds of herring caught (and discarded) from each area. *34 Even if no herring is caught during a given reporting week, a report so stating must be submitted. Agency Ex. 2, 5, 8, 13, 26, 27, 28 and 44.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

43. H & L Axelsson, Inc. and Lars Axelsson failed to report the F/V Flicka's herring fishing activity during herring IVR reporting week # 5 to the IVR system by midnight on February 6, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, all the required information for that fishing week was not submitted to the agency's IVR system until October 18, 2007, (i.e. 254 days late). Agency Ex. 29, 30, 12, and 13.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 4 - F/V Flicka -

44. The F/V Flicka fished for, caught, or landed herring on or about February 11, 2007, during herring IVR reporting week # 7. Agency Ex. 29, 30, 31, and 36.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

45. Not later than 24:00 hours on February 20, 2007, the owner and operator of the F/V Flicka were required to provide telephone notification to the IVR system regarding catches (both retained and discarded) of herring caught during the reporting week to an Interactive Voice Response (IVR) reporting system. These reports were required to be made not later than midnight on Tuesday of the week following fishing activity. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(2\)\(i\)](#), including which herring management areas were fished and the number of pounds of herring caught (and discarded) from each area. Even if no herring is caught during a given reporting week, a report so stating must be submitted. Agency Ex. 2, 5, 8, 13, 26, 27, 28 and 44.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

46. H & L Axelsson, Inc. and Lars Axelsson failed to report the F/V Flicka's herring fishing activity during herring IVR reporting week # 7 to the IVR system by midnight on February 20, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, all the required information for that fishing week was not submitted to the agency's IVR system until October 18, 2007, (i.e. 240 days late). Agency Ex. 29, 30, 12, and 13.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 5 - F/V Flicka -

*35 47. The F/V Flicka fished for, caught, or landed herring on or about February 22, 2007, during herring IVR reporting week # 8. Agency Ex. 29, 30, 31, and 37.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

48. Not later than 24:00 hours on February 27, 2007, the owner and operator of the F/V Flicka were required to provide telephone notification to the IVR system regarding catches (both retained and discarded) of herring caught during the reporting week to an Interactive Voice Response (IVR) reporting system. These reports were required to be made not later than midnight on Tuesday of the week following fishing activity. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(2\)\(f\)](#), including which herring management areas were fished and the number of pounds of herring caught (and discarded) from each area. Even if no herring is caught during a given reporting week, a report so stating must be submitted. Agency Ex. 2, 5, 8, 13, 26, 27, 28 and 44.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

49. H & L Axelsson, Inc. and Lars Axelsson failed to report the F/V Flicka's herring fishing activity during herring IVR reporting week # 8 to the IVR system by midnight on February 27, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, all the required information for that fishing week was not submitted to the agency's IVR system until October 18, 2007, (i.e. 240 days late). Agency Ex. 29, 30, 12, and 13.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 6 - F/V Flicka -

50. The F/V Flicka fished for, caught, or landed herring on or about April 12, 2007, during herring IVR reporting week # 15. Agency Ex. 29, 30, 31, and 41.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

51. Not later than 24:00 hours on April 17, 2007, the owner and operator of the F/V Flicka were required to provide telephone notification to the IVR system regarding catches (both retained and discarded) of herring caught during the reporting week to an Interactive Voice Response (IVR) reporting system. These reports were required to be made not later than midnight on Tuesday of the week following fishing activity. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(2\)\(i\)](#), including which herring management areas were fished and the number of pounds of herring caught (and discarded) from each area. Even if no herring is caught during a given reporting week, a report so stating must be submitted. Agency Ex. 2, 5, 8, 13, 26, 27, 28 and 44.

***36 ACCEPTED AND INCORPORATED**, as provided in the Decision and Order.

52. H & L Axelsson, Inc. and Lars Axelsson failed to report the F/V Flicka's herring fishing activity during herring IVR reporting week # 15 to the IVR system by midnight on April 17, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, all the required information for that fishing week was not submitted to the agency's IVR system until October 18, 2007, (i.e 184 days late). Agency Ex. 29, 30, 12, and 13.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 7 - F/V Flicka -

53. The F/V Flicka landed herring on or about January 14, 2007. Agency Ex. 29, 30, and 32.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

54. Not later than 24:00 hours on February 15, 2007, the owner and operator of the F/V Flicka were required to submit a fishing vessel trip report (FVTR) relating to that landing. [50 C.F.R. § 648.7\(b\)\(1\)](#). Such a report was required to be either received by the National Marine Fisheries Service (NMFS) or, if mailed, postmarked within 15 days after the end of the month in which the landing took place. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(1\)\(i\)](#), including when each fishing trip began and ended, the chart area fished, and how many pounds of fish (broken down by species) were landed. Finally, if no fishing trip was made during a month, a report stating so must have been received or submitted by the aforementioned due date. Agency Ex. 2, 5, 8, 26, 27, 28 and 44.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

55. H & L Axelsson, Inc. and Lars Axelsson failed to submit the FVTR relating to that trip by midnight on February 15, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, the FVTR for the landing at issue was not received by the agency until May 29, 2007, (i.e. 102 days late). Agency Ex. 29, 30, 32, and Tr.-120-125.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 8 - F/V Flicka -

56. The F/V Flicka landed herring on or about January 19, 2007. Agency Ex. 29, 30, and 33.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

***37** 57. Not later than 24:00 hours on February 15, 2007, the owner and operator of the F/V Flicka were required to submit a fishing vessel trip report (FVTR) relating to that landing. [50 C.F.R. § 648.7\(b\)\(1\)](#). Such a report was required to be either received by the National Marine Fisheries Service (NMFS) or, if mailed, postmarked within 15 days after the end of the month in which the landing took place. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(1\)\(i\)](#), including when each fishing trip began and ended, the chart area fished, and how many pounds of fish (broken down by species) were landed. Finally, if no fishing trip was made during a month, a report stating so must have been received or submitted by the aforementioned due date. Agency

Ex. 2, 5, 8, 26, 27, 28 and 44.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

58. H & L Axelsson, Inc. and Lars Axelsson failed to submit the FVTR relating to that trip by midnight on February 15, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, the FVTR for the landing at issue was not received by the agency until May 29, 2007, (i.e. 102 days late). Agency Ex. 29, 30, 33, and Tr. 120-125.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 9 - F/V Flicka -

59. The F/V Flicka landed herring on or about January 25, 2007. Agency Ex. 29, 30, and 34.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

60. Not later than 24:00 hours on February 15, 2007, the owner and operator of the F/V Flicka were required to submit a fishing vessel trip report (FVTR) relating to that landing. [50 C.F.R. § 648.7\(b\)\(1\)](#). Such a report was required to be either received by the National Marine Fisheries Service (NMFS) or, if mailed, postmarked within 15 days after the end of the month in which the landing took place. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(1\)\(i\)](#), including when each fishing trip began and ended, the chart area fished, and how many pounds of fish (broken down by species) were landed. Finally, if no fishing trip was made during a month, a report stating so must have been received or submitted by the aforementioned due date. Agency Ex. 2, 5, 8, 26, 27, 28 and 44.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

61. H & L Axelsson, Inc. and Lars Axelsson failed to submit the FVTR relating to that trip by midnight on February 15, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, the FVTR for the landing at issue was not received by the agency until May 29, 2007, (i.e. 102 days late). Agency Ex. 29, 30, 34, and Tr. 120-125.

***38 ACCEPTED AND INCORPORATED**, as provided in the Decision and Order.

Count 10 - F/V Flicka -

62. The F/V Flicka landed herring on or about February 1, 2007. Agency Ex. 29, 30, and 35.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

63. Not later than 24:00 hours on March 15, 2007, the owner and operator of the F/V Flicka were required to submit a fishing vessel trip report (FVTR) relating to that landing. [50 C.F.R. § 648.7\(b\)\(1\)](#). Such a report was required to be either received by the National Marine Fisheries Service (NMFS) or, if mailed, postmarked within 15 days after the end of the month in which the landing took place. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(1\)\(i\)](#), including when each fishing trip began and ended, the chart area fished, and how many pounds of fish (broken down by species) were landed.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

64. H & L Axelsson, Inc. and Lars Axelsson failed to submit the FVTR relating to that trip by midnight on March 15, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, the FVTR for the landing at issue was not received by the agency until May 29, 2007, (i.e. 74 days late). Agency Ex. 29, 30, 35, and Tr. 120-125.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 11 - F/V Flicka -

65. The F/V Flicka landed herring on or about February 11, 2007. Agency Ex. 29, 30, and 36.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

66. Not later than 24:00 hours on March 15, 2007, the owner and operator of the F/V Flicka were required to submit a fishing vessel trip report (FVTR) relating to that landing. [50 C.F.R. § 648.7\(b\)\(1\)](#). Such a report was required to be either received by the National Marine Fisheries Service (NMFS) or, if mailed, postmarked within 15 days after the end of the month in which the landing took place. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(1\)\(i\)](#), including when each fishing trip began and ended, the chart area fished, and how many pounds of fish (broken down by species) were landed. Finally, if no *39 fishing trip was made during a month, a report stating so must have been received or submitted by the aforementioned due date. Agency Ex. 2, 5, 8, 26, 27, 28 and 44.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

67. H & L Axelsson, Inc. and Lars Axelsson failed to submit the FVTR relating to that trip by midnight on March 15, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, the FVTR for the landing at issue was not received by the agency until May 29, 2007, (i.e. 74 days late). Agency Ex. 29, 30, 36, and Tr. 120-125.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 12 - F/V Flicka -

68. The F/V Flicka landed herring on or about February 22, 2007. Agency Ex. 29, 30, and 37.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

69. Not later than 24:00 hours on March 15, 2007, the owner and operator of the F/V Flicka were required to submit a fishing vessel trip report (FVTR) relating to that landing. [50 C.F.R. § 648.7\(b\)\(1\)](#). Such a report was required to be either received by the National Marine Fisheries Service (NMFS) or, if mailed, postmarked within 15 days after the end of the month in which the landing took place. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(1\)\(i\)](#), including when each fishing trip began and ended, the chart area fished, and how many pounds of fish (broken down by species) were landed. Finally, if no fishing trip was made during a month, a report stating so must have been received or submitted by the aforementioned due date. Agency Ex. 2, 5, 8, 26, 27, 28 and 44.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

70. H & L Axelsson, Inc. and Lars Axelsson failed to submit the FVTR relating to that trip by midnight on March 15, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, the FVTR for the landing at issue was not received by the agency until May 29, 2007, (i.e. 74 days late). Agency Ex. 29, 30, 36, and Tr. 120-125.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 13 - F/V Flicka -

71. The F/V Flicka landed herring on or about March 1, 2007. Agency Ex. 29, 30, and 38.

***40 ACCEPTED AND INCORPORATED**, as provided in the Decision and Order.

72. Not later than 24:00 hours on April 15, 2007, the owner and operator of the F/V Flicka were required to submit a fishing vessel trip report (FVTR) relating to that landing. [50 C.F.R. § 648.7\(b\)\(1\)](#). Such a report was required to be either received by the National Marine Fisheries Service (NMFS) or, if mailed, postmarked within 15 days after the end of the month in which the landing took place. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(1\)\(i\)](#), including when each fishing trip began and ended, the chart area fished, and how many pounds of fish (broken down by species) were landed. Finally, if no fishing trip was made during a month, a report stating so must have been received or submitted by the aforementioned due date. Agency Ex. 2, 5, 8, 26, 27, 28 and 44.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 14 - F/V Flicka -

73. The F/V Flicka landed herring on or about March 16, 2007. Agency Ex. 29, 30, and 39.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

74. Not later than 24:00 hours on April 15, 2007, the owner and operator of the F/V Flicka were required to submit a fishing vessel trip report (FVTR) relating to that landing. [50 C.F.R. § 648.7\(b\)\(1\)](#). Such a report was required to be either received by the National Marine Fisheries Service (NMFS) or, if mailed, postmarked within 15 days after the end of the month in which the landing took place. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(1\)\(i\)](#), including when each fishing trip began and ended, the chart area fished, and how many pounds of fish (broken down by species) were landed. Finally, if no fishing trip was made during a month, a report stating so must have been received or submitted by the aforementioned due date. Agency Ex. 2, 5, 8, 26, 27, 28 and 44.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

75. H & L Axelsson, Inc. and Lars Axelsson failed to submit the FVTR relating to that trip by midnight on April 15, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, the FVTR for the landing at issue was not received by the agency until May 29, 2007, (i.e. 44 days late). Agency Ex. 29, 30, 39, and Tr. 120-125.

~~ACCEPTED AND INCORPORATED~~, as provided in the Decision and Order.

Count 15 - F/V Flicka -

*41 76. The F/V Flicka landed herring on or about March 31, 2007. Agency Ex. 29, 30, and 40.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

77. Not later than 24:00 hours on April 15, 2007, the owner and operator of the F/V Flicka were required to submit a fishing vessel trip report (FVTR) relating to that landing. [50 C.F.R. § 648.7\(b\)\(1\)](#). Such a report was required to be either received by the National Marine Fisheries Service (NMFS) or, if mailed, postmarked within 15 days after the end of the month in which the landing took place. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(1\)\(i\)](#), including when each fishing trip began and ended, the chart area fished, and how many pounds of fish (broken down by species) were landed. Finally, if no fishing trip was made during a month, a report stating so must have been received or submitted by the aforementioned due date. Agency Ex. 2, 5, 8, 26, 27, 28 and 44.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

78. H & L Axelsson, Inc. and Lars Axelsson failed to submit the FVTR relating to that trip by midnight on April 15, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, the FVTR for the landing at issue was not received by the agency until May 29, 2007, (i.e. 44 days late). Agency Ex 29, 30, 40, and Tr. 120-125.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 16 - F/V Flicka -

79. The F/V Flicka landed herring on or about April 12, 2007. Agency Ex. 29, 30, and 41.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

80. Not later than 24:00 hours on May 15, 2007, the owner and operator of the F/V Flicka were required to submit a fishing vessel trip report (FVTR) relating to that landing. [50 C.F.R. § 648.7\(b\)\(1\)](#). Such a report was required to be either received by the National Marine Fisheries Service (NMFS) or, if mailed, postmarked within 15 days after the end of the month in which the landing took place. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(1\)\(i\)](#), including when each fishing trip began and ended, the chart area fished, and how many pounds of fish (broken down by species) were landed. Finally, if no fishing trip was made during a month, a report stating so must have been received or submitted by the aforementioned due date. Agency Ex. 2, 5, 8, 26, 27, 28 and 44.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

81. H & L Axelsson, Inc. and Lars Axelsson failed to submit the FVTR relating to that trip by midnight on May 15, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, *42 the FVTR for the landing at issue was not received by the agency until May 29, 2007, (i.e. 14 days late). Agency Ex. 29, 30, 41, and Tr. 120-125.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 17 - F/V Flicka -

82. The F/V Flicka landed herring on or about April 23, 2007. Agency Ex. 29, 30, and 42.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

83. Not later than 24:00 hours on May 15, 2007, the owner and operator of the F/V Flicka were required to submit a fishing vessel trip report (FVTR) relating to that landing. [50 C.F.R. § 648.7\(b\)\(1\)](#). Such a report was required to be either received by the National Marine Fisheries Service (NMFS) or, if mailed, postmarked within 15 days after the end of the month in which the landing took place. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(1\)\(i\)](#), including when each fishing trip began and ended, the chart area fished, and how many pounds of fish (broken down by species) were landed. Finally, if no fishing trip was made during a month, a report stating so must have been received or submitted by the aforementioned due date. Agency Ex. 2, 5, 8, 26, 27, 28 and 44.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

*43 84. H & L Axelsson, Inc. and Lars Axelsson failed to submit the FVTR relating to that trip by midnight on May 15, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, the FVTR for the landing at issue was not received by the agency until May 29, 2007, (i.e. 14 days late). Agency Ex. 29, 30, 42, and Tr. 120-125.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

Count 18 - F/V Flicka -

85. The F/V Flicka landed herring on or about June 23, 2007. Agency Ex. 29, 30, and 43.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

86. Not later than 24:00 hours on July 15, 2007, the owner and operator of the F/V Flicka were required to submit a fishing vessel trip report (FVTR) relating to that landing. [50 C.F.R. § 648.7\(b\)\(1\)](#). Such a report was required to be either received by the National Marine Fisheries Service (NMFS) or, if mailed, postmarked within 15 days after the end of the month in which the landing took place. Each report was required to include all the information outlined in [50 C.F.R. § 648.7\(b\)\(1\)\(i\)](#), including when each fishing trip began and ended, the chart area fished, and how many pounds of fish (broken down by species) were landed. Finally, if no fishing trip was made during a month, a report stating so must have been received or submitted by the aforementioned due date. Agency Ex. 2, 5, 8, 26, 27, 28 and 44.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

87. H & L Axelsson, Inc. and Lars Axelsson failed to submit the FVTR relating to that trip by midnight on July 15, 2007, as required, in violation of [50 C.F.R. § 648.14\(a\)\(4\)](#). In fact, the FVTR for the landing at issue was not received by the agency until August 15, 2007, (i.e. 31 days late). Agency Ex. 29, 30, 43, and Tr. 120-125.

~~ACCEPTED AND INCORPORATED~~, as provided in the Decision and Order.

Penalties & Permit Sanctions

88. After taking into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violators, their degree of culpability, their ability to pay, and such other matters as justice may require, it is determined that a civil penalty of \$10,000 per violation charged in the NOVA/NOPS issued on October 1, 2008, (for a total of \$270,000) is jointly and severally imposed upon the Respondents H & L Axelsson, Inc, Lars Axelsson, and Dan Axelsson.

ACCEPTED IN PART AND REJECTED IN PART, see the Penalty Assessment and Permit Sanction section of the Decision and Order.

*44 89. After taking into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, his degree of culpability and such other matters as justice may require, it is determined that an operator permit sanction of 4 months is imposed on Dan Axelsson's federal operator permit (# 10010787).

ACCEPTED IN PART AND REJECTED IN PART, see the Penalty Assessment and Permit Sanction section of the Decision and Order.

90. After taking into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, his degree of culpability and such other matters as justice may require, it is determined that an operator permit sanction of 8 months is imposed on Lars Axelsson's federal operator permit (# 10003017).

ACCEPTED IN PART AND REJECTED IN PART, see the Penalty Assessment and Permit Sanction section of the Decision and Order.

91. After taking into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, its degree of culpability and such other matters as justice may require, it is determined that a vessel permit sanction of 4 months is imposed on H & L Axelsson's federal vessel permit (# 330725) for the F/V Dyrsten.

ACCEPTED IN PART AND REJECTED IN PART, see the Penalty Assessment and Permit Sanction section of the Decision and Order.

92. After taking into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, its degree of culpability and such other matters as justice may require, it is determined that a vessel permit sanction of 8 months is imposed on H & L Axelsson's federal vessel permit (# 410332) for the F/V Flicka.

ACCEPTED IN PART AND REJECTED IN PART, see the Penalty Assessment and Permit Sanction section of the Decision and Order.

B. RESPONDENT'S PROPOSED FINDINGS OF FACT

The Respondents, Lars Axelsson, Dan Axelsson and H&L Axelsson, Inc. (collectively "the Axelssons") hereby file

their Requests for Findings of Fact and Rulings of Law Post Hearing Brief.

1. Hannah Goodale is a team supervisor in the sustainable fisheries division of NMFS, Goodale, T-38.

ACCEPTED

2. The herring fishery is controlled through annual catch limits or total allowable catches (TACs), Goodale, T-39.

***45 ACCEPTED AND INCORPORATED**, as provided in the Decision and Order.

3. Herring catch is recorded in three manners: Interactive Voice Response, Vessel Trip Reports and Dealer reporting, Goodale, T 39-40.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

4. IVRs provide timely area catch information, Goodale, T-44.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

5. Timely catch information is used to close the herring fishery by region if the TAC is close to being exceeded, Goodale, T 39-40.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

6. IVRs provide weekly catch information, Goodale, T-40.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

7. The VTRs are known to have time lag, including working data up, Goodale, T-43-44.

ACCEPTED

8. According to Hannah Goodale, getting timely IVR data is critical.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

9. The herring fleet is relatively small, 100 vessels or so, Goodale, T. 45.

ACCEPTED

10. 2009 was the first year that Area 2 was closed due to quota concerns, Goodale, T-46.

ACCEPTED

11. NMFS was aware that the State of Maine personnel were involved in assisting fishermen to get their IVR data in on a timely basis, Goodale, T-47.

ACCEPTED

12. NMFS does not rely on any one source, but synthesizes data from all sources, including dealer reports and IVR reports, Goodale, T-54.

ACCEPTED AND INCORPORATED IN PART, as provided in the Decision and Order (there were reasons provided for the different reporting requirements). (Tr. at 39-85).

***46** 13. NMFS was able to utilize data from dealers for landings not reported through IVR by distributing it

across areas in the same pattern as the fleet achieved that week, because they knew where the landings occurred, Goodale, T-54.

ACCEPTED

14. NMFS fisheries statistics conducts a weekly analysis to determine if vessels' IVRs match dealer data, Goodale, T-56.

ACCEPTED

15. NMFS was aware that the State of Maine "handed the program back to the agency in 2007..." and was aware of how the programs had been handled by the State of Maine, and that the State of Maine would not longer handle it in the same fashion, Goodale, T-62.

ACCEPTED IN PART AND REJECTED IN PART, the witness testified that she was not aware of Kohl Kanwit's reporting actions until after the fact. (Tr. at 62-65).

16. The transfer of the program back to NMFS ended a sort of "hand holding" of the industry, Goodale, T-63.

ACCEPTED

17. In 2007, as NMFS was implementing Herring Amendment 1, they advised the industry that the underlying management program, including reporting would remain the same, Goodale, T-65.

ACCEPTED

18. NMFS does not attempt to notify vessels or owners that are non-compliant, but does notify NOAA law enforcement, Goodale, T-67.

ACCEPTED IN PART, the witness testified regarding activities or notice by her office only, not for all of NMFS and the notice provided to enforcement agents in the field was from "time to time." Tr. 67.

19. The FLICKA and DYRSTEN have reporting requirements in other fisheries besides herring, Goodale, T-76.

ACCEPTED

20. NMFS was aware of the manner in which IVR reporting through the State of Maine changed after Kohl Kanwit's departure in the latter part of 2006, Goodale, T-81, see also Kohl Kanwit e-mail, Respondents' Exhibit I.

***47 REJECTED**, witness Goodale testified that she was not aware of Kohl Kanwit's reporting actions until after the fact. (Tr. at 62-65). On cross-examination she referred to Respondents' counsel's assertion of Ms Kanwit's action and again stated she was not aware of Kanwit's actions until recently. (Tr. at 81-84). The email from Ms. Kanwit (Respondent's Ex. I) does not provide evidence of NMFS knowledge of how the State of Maine was acting in regard to IVR reports. It does provide evidence that Ms. Kanwit informed the addressees of that email including "FVFlicka@comcast.net" that "If you have been emailing or calling me with your IVR numbers you will now have to call them in to NMFS directly." (Respondent Ex. I).

21. NMFS was aware that the State of Maine was involved in reporting but not sure to what extent, and it didn't matter as long as IVRs were submitted in a timely fashion, Goodale, T-84-85.

ACCEPTED IN PART, as noted previously, witness Goodale testified that she was not aware of Kohl Kanwit's reporting actions until after the fact. (Tr. at 62-65).

22. NMFS personnel made no attempt to determine cause of IVR failure, but instead referred the case to the Office of Law Enforcement, Goodale T-86.

ACCEPTED IN PART AND REJECTED IN PART, witness Goodale only testified that her office did not provide notice to vessels that they were noncompliant and from time to time sent information to enforcement agents in the field that met with captains. (Tr. 65-67). There was no evidence of "IVR failure."

23. NMFS statistics forwarded information regarding non-reporting for the FLICKA and DYRSTEN because they were looking for reports from the vessels, Verry, T-91.

ACCEPTED

24. Contrary to Ms. Verry's statement that the FLICKA and DYRSTEN landings were first reported on October 18, 2007, Verry, T-91-92, as noted in Agency Exhibit 13, the landings were reported by the purchasing dealer and in the vessels' trip reports, Verry, T-104.

REJECTED, Ms. Verry testified that FLICKA and DYRSTEN IVR reporting system reports were first submitted on October 18, 2007. The witness agreed with Respondent counsel that other types of reports, vessel trip reports and dealer reports were made prior to that date as far as the witness knew. Tr. 104.

25. In 2007, IVR compliance dropped to as low as 63%, Verry, T-102.

ACCEPTED IN PART. The witness testified that she did not know about 2004-2006 but in 2007 68% of vessels were reporting on time, then in 2008 96% and 2009 99%. (Tr. at 101-102).

*48 26. Allison Verry acknowledged that the Agency was aware for some time that the DYRSTEN and FLICKA were not reporting through the IVR system, but were landing herring in Cape May, New Jersey, Verry, T-104.

ACCEPTED IN PART, the witness testified that her office was looking at vessels that had not been reporting their herring to the IVR system in mid to late 2007. The witness did not testify about landings of herring in Cape May, New Jersey. (Tr. at 104-105).

27. NMFS took no steps to bring vessels into compliance other than sending the case to the Office of Law Enforcement, Verry, T-105.

ACCEPTED IN PART., the witness only testified that with respect to her office not for all of NMFS.

28. In October of 2007, Lars Axelsson called Allison Verry to get his IVRs brought up to date, Verry, T-108.

ACCEPTED

29. Federally permitted dealers submit purchase reports on a weekly basis, MacDonald, T-125.

ACCEPTED

30. The DYRSTEN and FLICKA herring landings for 2007 were timely reported by Lund's Fisheries in Cape May, NJ, Agency Exhibits 24.

ACCEPTED IN PART, the report indicates landings but it is not clear whether this was for all of DYRSTEN and FLICKA herring landings for 2007.

31. In or about October, 2007, Lars Axelsson was interviewed by NOAA Special Agent Dave Mayeski. The agency has no record of this interview, MacDonald, T-135.

REJECTED, the cited testimony (Tr. at 135) reveals that Agent McDonald was unsure if Agent Mayeski interviewed Lars Axelsson and Agent McDonald testified that he did not give Agent Mayeski directions to complete

any part of his investigation. (Tr. at 134-35).

32. The 2007 Herring landings were timely reported for the DYRSTEN by the dealer and by the VTR.

NEITHER ACCEPTED NOR REJECTED, no citations are provided for this proposed finding to prove that all dealer and VTR were reported timely in 2007. There was no evidence that submission of these reports affects the requirements to submit timely IVR reports.

*49 33. The 2007 herring landings for the FLICKA were timely reported by the dealer and VTRs were compliant before NOAA Office for Law Enforcement contacted the Axelssons.

NEITHER ACCEPTED NOR REJECTED, no citations to the record are provided to support this proposed finding to prove that all dealer and VTR were reported timely in 2007. There was no evidence that submission of these reports affects the requirements to submit timely IVR reports.

34. The Axelssons came into compliance between the time they were visited by Dave Mayeski and the telephone interview of Agent MacDonald in November of 2007, MacDonald, T-137-138.

ACCEPTED

35. Lars Axelsson was cooperative with Agent MacDonald, and Agent MacDonald had no reason to believe that the Axelssons would not remain in compliance, MacDonald, T-139.

ACCEPTED

36. Lars Axelsson's logbooks for the FLICKA for the months January to April were filed on May 29, 2007, before any contact with the Office of Law Enforcement, MacDonald, T-140.

REJECTED, the testimony at Tr. 140 addresses vessel trip reports.

37. All of the herring landed by the DYRSTEN and FLICKA in 2007 was reported both by the dealer and in the vessel VTRs, MacDonald, T-147.

ACCEPTED

38. Lars Axelsson was, at all times relevant to this case, the captain of the F/V FLICKA.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

39. Lars Axelsson has been a commercial fisherman since age 12, and began fishing full time after high school in 1973, L. Axelsson, T 166-167.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

40. Lars Axelsson is married and has seven children, one of them a special needs child, L. Axelsson, T-166-167.

ACCEPTED

*50 41. During the course of this case, his wife suffered from a brain tumor, L. Axelsson, T-208.

ACCEPTED

42. Lars Axelsson is a part owner of H&L Axelsson, Inc, which owns the DYRSTEN and FLICKA. The other shareholders include his father and brother, Dan Axelsson, Corporate Tax Returns, Respondent's Exhibit D.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

43. The F/V DYRSTEN was reconstructed and enlarged and freezing systems added in 1998 so the vessel could fish further offshore, including joint ventures for underutilized species, like squid, L. Axelsson, T-170.

ACCEPTED

44. The FLICKA was also enlarged to participate in these fisheries, and was finished in 1997, just as squid quotas were dramatically reduced, L. Axelsson, T-172.

ACCEPTED

45. The business has struggled since the vessels were enlarged, due to reductions in allowable landings, payment issues with dealers and closures of fisheries, such as the bluefin seine fishery, L. Axelsson, generally.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

46. The FLICKA and the DYRSTEN began to fish in the Gulf of Maine in the late 1990's and early 2000's, L. Axelsson, T-175.

ACCEPTED

47. Lars Axelsson discovered difficulty in keeping with weekly compliance, because as a freezer vessel they were forced out to sea for weeks at a time, and ultimately was introduced to Kohl Kanwit, L. Axelsson, T-177.

ACCEPTED IN PART, the witness testified about being out at sea and not having phone service as a problem for compliance. (Tr. at 177-78).

48. Lars Axelsson would e-mail the DYRSTEN and FLICKA's landings to Ms. Kanwit on a weekly or bi-weekly basis, and the information was getting to NMFS, L. Axelsson, T-177-178.

ACCEPTED IN PART, Lars Axelsson testified he provided Ms. Kanwit with information. However, the evidence regarding what Ms. Kanwit did with this information on behalf of the fishermen did not present any evidence that such practices or procedures in reporting affected the *51 individual fisherman's obligation to comply with the regulations. Additionally, the evidence indicates that this practice occurred prior to the time of all charged violations which occurred some time after Ms. Kanwit notified fishermen that she would no longer be working in that capacity as noted in Respondent Exhibit I.

49. The FLICKA and The DYRSTEN have been fishing in the mackerel fishery for a number of years, L. Axelsson, T-182.

ACCEPTED

50. At times when fishing for mackerel, vessels will encounter herring, L. Axelsson, T-183.

ACCEPTED

51. Herring is a less valuable species, and often there is no market for it, L. Axelsson, T-183-184.

ACCEPTED

52. Lars Axelsson would have Ms. Kanwit enter negative reports for months in advance if they believed they were not going to encounter herring, L. Axelsson, T-.

ACCEPTED IN PART, Lars Axelsson testified he provided Ms. Kanwit with information. However, the evidence regarding what Ms. Kanwit did with this information on behalf of the fishermen did not present any evidence that such practices or procedures in reporting affected the individual fisherman's obligation to comply with the

regulations. Additionally, the evidence indicates that this practice occurred prior to the time of all charged violations which occurred some time after Ms. Kanwit notified fishermen that she would no longer be working in that capacity as noted in Respondent Exhibit I.

53. It was not until Lars Axelsson met with NOAA Special Agent Dave Mayeski that he learned Ms. Kanwit was not actually involved with the IVR system, L. Axelsson, T-185-186.

ACCEPTED

54. Lars Axelsson attended Mid-Atlantic Fishery Management Council meetings and has worked with the Coast Guard to improve their interaction with fishermen, L. Axelsson, T-188-189.

ACCEPTED

55. Lars Axelsson has never been cited for a fisheries violation, and has no past history.

***52 ACCEPTED AND INCORPORATED**, as provided in the Decision and Order.

56. Lars Axelsson often held his logbooks up to ensure his data was very accurate, L. Axelsson, T-192-193, 224-225.

ACCEPTED IN PART, this is the testimony of the witness however they may have been other reasons not submitting the data earlier.

57. When Lars Axelsson met with Special Agent Mayeski, he understood that he had been late in his VTRs, and brought them up to date, L. Axelsson, T-194.

ACCEPTED

58. H&L Axelsson's financial condition is shaky, due in large part to the loss of fishing opportunity expected when the vessels were enlarged, reduced TACs in most fisheries and increasing costs, particularly fuel, L. Axelsson, T-199, T-202.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

59. Both the DYRSTEN and FLICKA have been for sale at various times over the years, but neither has been sold, L. Axelsson, T-203.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

60. The FLICKA is currently in need of a haul out, expected to cost as much as \$100,00 for a haul out and engine work for almost \$63,000. The vessel's nets are in poor shape, and the corporation can not sustain a large fine, L. Axelsson, T-203-204, 206.

ACCEPTED

61. The crews of the DYRSTEN and FLICKA are living hand to mouth, and a large fine or permit suspension would force the layoff of as many as 18 crew, and cut off support for their families, L. Axelsson, T-206-207.

ACCEPTED

62. Lars Axelsson's net income from serving as Captain of the F/V FLICKA totaled:

a. 2008 \$66,074

b. 2007 \$38,938

c. 2006 \$62,627

Respondents' Exhibit C.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

63. Lars Axelsson shows a net worth on his financial statement of \$1,435,569, of which approximately \$265,000 represent equity in a home he and his wife own and *53 purchased for \$31,000 in 1978, and approximately a \$1,200,000 in equity in H&L Axelsson's fishing vessels, after consideration of the debt, L. Axelsson T-202-203. There appears to be no market for these vessels, and the company is currently having problems meeting its current debt service, Respondents' Exhibit C.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

64. Although H&L Axelsson shows substantial equity in its vessels based on improvements to the vessels, H&L Axelsson financial statement, Respondents' Exhibit D, the assets are not saleable, as attempts to sell them have failed.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

65. H&L Axelsson show the following profits and losses:

a. 2008 -258,293

b. 2007 -574,131

c. 2006 -378,348

Respondents' Exhibit D.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

66. H&L Axelsson recently was forced to restructure its loans to avoid default, and was able to get a temporary respite from principal payments on its loans, L. Axelsson, T-202.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

67. Dan Axelsson's tax returns shows the following income from fishing:

a. 2008 \$33,376

b. 2007 \$51,583

Respondents' Exhibit B.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

68. Dan Axelsson shows a net worth of approximately \$921,000, which represents equity in the H&L Axelsson boats of approximately \$600,000 and approximately \$295,000 in equity in a home purchased by Dan and his wife in 1991 for \$120,000.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

ATTACHMENT III

PROCEDURES GOVERNING ADMINISTRATIVE REVIEW 15 C.F.R. § 904.273

§ 904.273 Administrative review of decision.

*54 (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

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

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.

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

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

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

(i) If the Administrator issues an order denying discretionary review, the order will be served on all parties

personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.

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

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

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

*56 (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.

FN4. This Exhibit was initially marked H but is entered as Respondent Ex. I. See note 2 supra..

2009 WL 5231065 (N.O.A.A.)
END OF DOCUMENT

2009 WL 4829744 (N.O.A.A.)

In the Matters of: F/V Twister, Inc., F/V Reaper, Inc., Gregory Duckworth, Respondents.

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Docket No.: NE0602397FM/V, NE0601409FM/V

November 25, 2009

**CORRECTION TO ORDER MODIFYING INITIAL DECISION AND DENYING MOTION TO
STAY**

The second to last paragraph of the Order Modifying Initial Decision and Denying Motion to Stay is hereby modified to read as follows:

Accordingly, I hereby modify the Initial Decision to reduce the monetary penalty as follows: In case NE0601409FM/V (the false statement case), the monetary penalty is reduced to \$50,000. In case NE0602397FM/V (the lobster trap case), the monetary penalty is reduced to \$50,000. The permit revocations imposed by the ALJ are reduced to permit suspensions for a period of 48 months. Respondents' motion to stay the proceedings is denied.

This corrected Order constitutes the final administrative action of NOAA and becomes effective for the purpose of judicial review on the date of service.

Jane Lubchenco
Secretary of Commerce for Oceans and Atmosphere

U.S. Department of Commerce
National Oceanic and Atmospheric Administration

2009 WL 4829744 (N.O.A.A.)
END OF DOCUMENT

In the Matters of: F/V Twister, Inc., F/V Reaper, Inc., Gregory Duckworth, Respondents.

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Docket No.: NE0602397FM/V, NE0601409FM/V

November 24, 2009

ORDER MODIFYING INITIAL DECISION AND DENYING MOTION TO STAY

I. Introduction

Presently pending before the Administrator of the National Oceanic and Atmospheric Administration (**NOAA**) is the administrative appeal of Respondents Gregory Duckworth and his corporations F/V Reaper, Inc. and F/V Twister, Inc. (sometimes jointly referred to hereinafter as Duckworth) in the above-referenced cases. In case NE0601409FM/V, Respondent Duckworth and F/V Twister, Inc. were charged with submitting a false statement to **NOAA**. In case NE0602397FM/V, Duckworth and F/V Reaper, Inc. were charged with fishing for lobsters without a valid limited access American lobster permit or a federal vessel operator's permit.

After a hearing before an Administrative Law Judge (ALJ), on October 6, 2008, the ALJ ruled in favor of **NOAA** on all charges in both cases. Respondent Duckworth filed a timely petition for reconsideration with the ALJ, which was denied. Respondents filed a Petition for Discretionary Review with the **NOAA** Administrator which was granted in part. After further briefing by the parties, this case is now ripe for decision.

II. Background Facts

A. The "Falsified Document" case

*1 On April 24, 2006, Duckworth submitted an application to the National Marine Fisheries Service (NMFS) for a federal fisheries permit for the F/V Twister. Included in that application was a Coast Guard certificate of documentation for the F/V Twister that Duckworth admittedly altered to appear as if it were current. He had applied to the Coast Guard for the certificate and had been told by the Coast Guard that the certificate had been mailed but it had not yet arrived, and the permit for the F/V Twister was due to expire on May 1, 2006. Duckworth, therefore, altered a *2 prior certificate of documentation with the new information provided by the Coast Guard to make the document appear to be authentic and current when it was not, and then submitted it to NMFS.

At the hearing, Duckworth defended himself against the allegation he had made a false statement to NMFS by claiming that he had notified NMFS that he had altered the certificate. He claimed he sent a cover letter with his permit application to explain he had made changes to an expired certificate of documentation to include the current factual information, NMFS employees testified that Duckworth's application did not include the cover letter and that the agency discovered the altered document on its own when examining the permit application. Duckworth also defended against the charge that he made a false statement to the agency by claiming that all the information in the altered document was true.

B. The "Lobster Trap" Case

In 2004, in an earlier NMFS enforcement case against Duckworth, he was found guilty by an ALJ of unlawfully catching and possessing monkfish in federal waters and assessed a fine of \$50,000. He appealed that ALJ's decision to the United States District Court for the District of Rhode Island which affirmed the ALJ's decision on March 22, 2006. By August 1, 2006, Duckworth had paid only \$12,500 of that fine and the remainder was due. Pursuant to negotiations underway between Duckworth's attorney and attorneys for the NOAA General Counsel's Office for Enforcement and Litigation (GCEL), Duckworth was on notice that if the remainder was not paid or a mutually acceptable settlement reached by August 1, 2006, Duckworth's operator and vessel permits would be sanctioned and he would not be permitted to fish for lobster.

During the final days of July 2006, Duckworth placed 800 lobster traps in the Exclusive Economic Zone (EEZ). When he did not reach a settlement with NMFS by August 1, 2006, the promised permit sanction went into effect. Nonetheless, Duckworth did not remove his lobster traps from the EEZ. NMFS learned from an informant that Duckworth was still fishing and ultimately discovered some 268 of the 800 lobster traps, many of which contained live lobsters that were returned to the sea. Eventually, Duckworth assisted the agency in locating and removing the lobster traps.

At the hearing, Duckworth defended against the charge that he was fishing for lobster without a permit by claiming that simply having lobster traps in the water does not qualify as "fishing" under the statute or regulations. He also claimed that he submitted a letter on August 1, 2006 to NMFS notifying the agency of the continuing presence of the lobster traps in the EEZ. NMFS employees denied receipt of such a letter and testified Duckworth did not notify the agency of the presence of his lobster traps in the EEZ until October 2, 2006, long after the agency discovered Duckworth's lobster traps and began removing them.

***3 III. Procedural Background**

On August 2, 2007, GCEL issued Notices of Violation and Assessment (NOVA) and Notices of Permit Sanction to Duckworth, F/V Reaper, Inc., and F/V Twister, Inc. There are two cases consolidated in this appeal for consideration. In the "falsified document" case, Respondent Duckworth and F/V Twister, Inc. were charged with submitting a false statement in violation of [50 C.F.R. §§ 648.14\(a\)\(3\)](#), [648.4\(c\)\(2\)\(i\)](#), and [648.14\(a\)\(79\)](#). In the "lobster trap" case, Duckworth and F/V Reaper, Inc. were charged with multiple counts of fishing for lobsters without a valid limited access American lobster permit or a federal vessel operator's permit in violation of [50 C.F.R. §§ 697.4\(a\)](#), [697.5\(a\)](#), and [697.7\(c\)\(1\)\(xxvi\)](#).

After a hearing, the ALJ issued his Initial Decision and Order on October 6, 2008 finding for the agency in both cases. In the "falsified document" case, the ALJ imposed a fine of \$130,000 (the statutory maximum) and revoked F/V Twister, Inc.'s vessel permit and Duckworth's operator's permit. In the "lobster trap" case, the ALJ imposed a fine of \$910,000 and revoked F/V Reaper, Inc.'s vessel permit, the vessel permit for the F/V True American, lobster trap tag number 240801, and Duckworth's operator's permit. Pursuant to [15 CFR 904.272](#), Respondent Duckworth filed a timely petition for reconsideration with the ALJ, which was denied. Respondents filed a Petition for Discretionary Review, which was deemed timely served as of December 3, 2008.

On April 1, 2009, I granted Respondent's petition for discretionary review in part and directed the parties to submit briefs addressing the following two issues:

1. Whether the fines and permit sanctions imposed in these two cases (case numbers NE061409FM/V and NE0602397FM/V) violate the Eighth Amendment of the United States Constitution, the Magnuson Act, or its regulations?
2. Whether the ALJ adequately considered whether Duckworth had the ability to pay the penalty imposed?

The Parties have submitted their briefs on these issues and I am now prepared to issue my decision in this matter.^[FN1] For the reasons explained more fully below, the Initial Decision is hereby modified as described below.

*4 IV. Decision and Discussion

For the reasons explained more fully below, I am reducing the fines imposed in the two cases at issue in this appeal to a total of \$ 100,000. While I am convinced that the original fines imposed in the amount of \$1.04 million do not violate the Eighth Amendment to the United States Constitution or the Magnuson Act and its regulations, the record indicates that the ALJ did not give adequate consideration to Respondents' ability to pay such a large fine. In addition, I am reducing the permit revocations to permit suspensions for a period of 48 months. Though the violations here are serious and Respondents' actions warrant a substantial penalty, under all the circumstances a fine of \$50,000 in each case and permit suspensions for 48 months is sufficient to vindicate the purposes of the Magnuson Act and to serve as a deterrent.

A. Respondents' Eighth Amendment Claims

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amdt. 8. The Eighth Amendment applies to civil fines that are imposed, in whole or in part, for punitive purposes. [United States v. Bajakajian](#), 524 U.S. 321 (1998); [Hudson v. United States](#), 522 U.S. 93 (1997); [Austin v. United States](#), 509 U.S. 602 (1993). The Supreme Court considers a fine to be excessive only if it is grossly disproportional to the gravity of the offense for which it is imposed. [Bajakajian](#), 524 U.S. at 337; [Towers v. City of Chicago](#), 173 F.3d 619, 624 (7th Cir. 1999).

Respondents have argued that the monetary penalties imposed by the ALJ in this case violate the excessive fines clause of the Eighth Amendment because they are beyond Respondents' ability to pay. However, the proportionality analysis adopted by the Supreme Court in [Bajakajian](#) involves comparing the size of the fine with the gravity of the offense, not with the defendant's ability to pay the fine. [United States v. Emerson](#), 107 F.3d 77, 81 (1st Cir. 1997)("[T]he 'touchstone' is the value of the fine in relation to the particular offense, not the defendant's means."); [United States v. Dubose](#), 146 F.3d 1141, 1146 (9th Cir. 1998)("[A]n Eighth Amendment gross disproportionality analysis does not require an inquiry into the hardship the sanction may work on the offender."); [United States v. Sato](#), 814 F.2d 449, 452 (7th Cir. 1987)("Rather than trigger a question of constitutional dimension, evidence of Sato's ability to pay would be a matter for consideration within the discretion of the sentencing judge."); [contra United States v. One Parcel of Real Property Located at 461 Shelby County Road 361, Pelham, Alabama](#), 857 F. Supp. 935, 938 (N.D. Ala. 1994)(Any analysis of the Eighth Amendment excessiveness inquiry must factor in the ability of the defendant to pay).^[FN2] The weight of authority does not support Respondents' argument.

Respondents have also argued that the fines violate the Eighth Amendment because they are *5 grossly disproportional to the offenses Respondents committed. Determining the appropriate range for fines belongs in the first instance with the legislature. [United States v. Bajakajian](#), 524 U.S. at 336; [United States v. Sato](#), 814 F.2d at 453. A fine within the range permitted by statute is presumptively constitutional. See [United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.](#), 175 F.3d 1304, 1309 (11th Cir. 1999); see also [Newell Recycling Co. v. United States Environmental Protection Agency](#), 231 F. 3d 204, 210 (5th Cir. 2000); [Balice v. U.S. Department of Agriculture](#), 203 F.3d 684, 699 (9th Cir. 2000); [Ghaith R. Pharaon v. Board of Governors of the Fed. Reserve System](#), 135 F.3d 148, 156 (D.C. Cir. 1998); [United States v. Emerson](#), 107 F.3d 77, 80 (1st Cir. 1997); [United States v. Eghbal](#), 475 F. Supp. 2d 1008, 1017 (C.D. CA 2007); [United States v. Mackby](#), 221 F. Supp. 2d 1106, 1110 (N.D. CA 2002). Because the penalties imposed by the ALJ in this case were within the range permitted by the Magnuson Act, Respondents have a heavy burden to show that the fines imposed are constitutionally excessive. They have not carried that burden.

Respondents' argument is based on Duckworth's claim that his actions were blameless. They point out that even though Duckworth altered the Coast Guard certificate of documentation that he submitted to NMFS with his permit renewal application, he altered it with true information provided by the Coast Guard. Respondents argue Duckworth notified NOAA that he was submitting an altered Coast Guard certificate of documentation with his application to

renew his NMFS permits because he had not received the certificate of documentation in the mail and his deadline for renewing his permits was fast approaching. With respect to the lobster trap case. Respondents claim that Duckworth placed the 800 lobster traps at sea in anticipation that he would have a negotiated payment plan in place with the agency so that his fishing permits would not be suspended. They also argue that Duckworth told NOAA officials that he had placed 800 lobster traps at sea. Duckworth testified to these matters at the hearing before the ALJ, where the ALJ had the opportunity to hear the testimony, see his demeanor, and assess his credibility. The witnesses for the agency and the documentary evidence presented by GCEL directly contradicted Duckworth's testimony, particularly with respect to the notice he claims to have provided to the agency. The ALJ specifically found that Duckworth's testimony and evidence regarding the notice he provided to the agency were not credible. The ALJ was in the best position to make such credibility determinations. For that reason, Duckworth's claim that his actions were blameless is not supported by the record.^[FN3]

GCEL argues that the penalties imposed were consistent with the nature, circumstances, and gravity of the offenses, including the intentional nature of the offenses and Duckworth's repeated efforts to mislead the agency and understate the magnitude of his offenses.

I agree with GCEL that the offenses in these cases warrant a substantial penalty. While *6 Respondents attempt to portray Duckworth as the victim of unfortunate circumstances, the record belies that characterization. The offenses involved in these two cases are serious. One case involved the intentional falsification of a Coast Guard certificate of documentation and submission of that document to NOAA to obtain permits. The second case, the lobster trap case, involved his maintenance of 800 lobster traps at sea with full knowledge that his lobster permit had been suspended for nonpayment of a prior civil penalty. Moreover, these offenses were not Duckworth's first violations of the fishing laws. In fact, they are his fourth and fifth offenses in which penalties or sanctions have been assessed.^[FN4] Duckworth's actions in these cases, combined with his record of three prior offenses for which he incurred increasingly severe penalties, demonstrates a cavalier attitude toward the agency's regulations and enforcement processes. Duckworth's actions raise legitimate concerns about whether he can be counted on to comply with the nation's regulatory processes designed to ensure sustainable fisheries for generations to come. In fairness to all those fishermen who strive to abide by the nation's fisheries laws, GCEL was right to propose substantial penalties in these cases, not only as a specific deterrent to Respondents but as a general deterrent to those who might consider flouting the fisheries regulations.

The offenses proven in this case were serious and warrant a substantial penalty. The penalties the ALJ imposed are consistent with and in proportion to the nature and gravity of those offenses and all the facts and circumstances. Accordingly, Respondents' constitutional challenge is not persuasive.

B. Respondents' Claims Under the Magnuson Act and its Regulations

Respondents have also claimed that the penalties imposed violate the Magnuson-Stevens Fishery Conservation and Management Act (the Magnuson Act) and its regulations. The Magnuson Act provides:

The amount of the civil penalty shall not exceed \$ 100,000 for each violation.^[FN5] Each day of a continuing violation shall constitute a separate offense. The amount of such civil penalty shall be assessed by the Secretary, or his designee, by written notice. In determining the amount of such penalty, the Secretary shall take into account the nature, *7 circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, and 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, *Provided*, That the information is served on the Secretary at least 30 days prior to an administrative hearing.

16 U.S.C.A. § 1858(a). The regulations promulgated with respect to civil penalties imposed for violations of the Magnuson Act provide, in part:

(a) 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.

(b) NOAA may, in consideration of a respondent's ability to pay, increase or decrease a civil penalty from an amount that would otherwise be warranted by the other relevant factors. A civil penalty may be increased if a respondent's ability to pay is such that a higher civil penalty is necessary to deter future violations, or for commercial violators, to make a civil penalty more than a cost of doing business. A civil penalty may be decreased if the respondent establishes that he or she is unable to pay an otherwise appropriate civil penalty amount.

[15 C.F.R. §904.108\(a\)](#) and [\(b\)](#).

The Respondents argue that the penalties imposed violate the Magnuson Act and its regulations for the same reasons that they argue that the penalties were unconstitutional. In addition, Respondents argue that the ALJ was required by the Magnuson Act to consider Respondents' ability to pay, and failed to do so.^[FN6] The statute does not require the ALJ to consider a respondent's ability to pay but does provide that the ALJ may consider a respondent's ability to pay as a *8 discretionary matter. The record indicates he did so in this case and imposed penalties within the range established in the statute and regulations. Thus, the penalties imposed do not violate the Magnuson Act or its regulations.

C. Respondents' Claim that the ALJ's Consideration of Ability to Pay was Inadequate

Respondents' final claim is that the ALJ's consideration of their ability to pay the penalties imposed was inadequate. GCEL argues that because the ALJ was not required to consider the Respondent's ability to pay, "it is not possible for him to have inadequately considered whether Duckworth had the ability to pay the penalties imposed." GCEL brief at 6. GCEL's position on this point is not persuasive. The adequacy of an ALJ's consideration of a respondent's ability to pay a proposed penalty is within the scope of appropriate subjects for review under the procedures for discretionary review set out in [15 C.F.R. § 904.273](#).

In support of Respondents' claimed inability to pay the fines, they submitted information regarding the financial resources of Duckworth individually and the assets of his corporations, F/V Reaper, Inc. and F/V Twister, Inc. Duckworth reported an expected income in 2008 of \$40,800 and annual living expenses for his family (he is married with four children) in 2008 of \$49,076. He listed his current assets as worth \$343,914 (including the family home worth an estimated \$329,000). He listed current liabilities of \$331,913 (including a mortgage of \$237,030).

Respondents' financial submission indicated that in March 2008 F/V Reaper, Inc. had assets of \$37,725 including an automobile, used fishing gear, and 423 lobster traps, and debts of \$13,544. There is no information in the submission about the financial status of F/V Twister, Inc. Duckworth testified at the hearing that F/V Reaper, Inc.'s corporate charter had expired and F/V Twister, Inc. had been dissolved. He also testified that in the past the corporations held title to three fishing vessels, but the vessels had been sold to his mother and nephew for below market prices.^[FN7] Respondents' financial submission reported the vessels were sold to "reduce liability," to come up with money in 2006 to pay the fines Duckworth owed to NMFS, and to satisfy an existing injury liability claim that Duckworth's nephew had against Duckworth.^[FN8] Though the ALJ appears to have believed the fishing vessels were worth substantially more than Duckworth sold them for, there is no evidence in the record about the actual market value of the vessels at the time of the hearing.

*9 In rejecting Respondents' claim of inability to pay, the ALJ said, "[o]f primary concern is Respondent Duckworth's actions of selling his fishing vessels to various family members at prices that are only a fraction of their full value..... By selling to family members, it appears that Respondent was attempting to shield his assets in an effort to avoid and/or minimize the impact of penalties. As such, the undersigned ALJ is not persuaded by Respondents' claim of an inability to pay." I.D. at 43-44. Therefore, the ALJ adopted the penalties proposed by GCEL.

The Initial Decision includes only a brief and cursory discussion on the issue of Respondents' ability to pay. Other than the reference to the transfer of the fishing vessels, the ALJ did not discuss Respondents' financial circumstances. Respondents' financial submission was the only evidence in the record regarding Respondents' ability to pay the fines, other than Duckworth's testimony regarding the transfer of his fishing vessels. The ALJ did not comment on the weight due to that submission or indicate it was insufficient or lacking credibility. The ALJ appears to have believed that the transfers of the fishing vessels from Duckworth's corporations to his family members were sham transactions, but even if they were, the ALJ did not explain how Respondents had sufficient financial resources to pay fines of \$1.04 million. In light of Respondents' financial submission, and the dearth of evidence in the record supporting a conclusion that Respondents had the ability to pay a \$1.04 million fine, the ALJ's consideration and discussion of this issue was not adequate.

While the offenses in these cases are serious and warrant a substantial penalty, Respondents introduced evidence supporting their claim that they do not have the ability to pay a \$1.04 million fine. GCEL points to no evidence in the record to support the conclusion that Respondents have the ability to pay a sum that large. Moreover, while GCEL points out that a substantial penalty is necessary for deterrence, a fine of the magnitude imposed in this case is larger than necessary to serve the deterrence function, in light of Respondents' financial resources and the permit sanctions also imposed in this case. Therefore, I will reduce the fines in these cases to a total of \$ 100,000. In light of the financial information in the record and all the facts and circumstances including the market value that Duckworth himself placed upon the fishing vessels he claims to have sold to family members, I believe that a \$100,000 fine is justified and appropriate.

In addition, I will reduce the permit revocations imposed by the ALJ to permit suspensions for a period of 48 months. Though the violations here are serious and are part of a pattern of disregard for fisheries regulation and enforcement, I believe a 48 month permit suspension, along with the fines imposed, is sufficient to vindicate the purposes of the Magnuson Act with respect to these violations and act as a deterrent.

*10 Accordingly, I hereby modify the Initial Decision to reduce the monetary penalty as follows: In case NE0601409FM/V (the false statement case), the monetary penalty is reduced to \$50,000. In case NE0602397FM/V (the lobster trap case), the monetary penalty is reduced to \$50,000. The permit revocations imposed by the ALJ are affirmed. Respondents' motion to stay the proceedings is denied.

This Order constitutes the final administrative action of NOAA and becomes effective for the purpose of judicial review on the date of service.

Jane Lubchenco, Ph.D.
Under Secretary of Commerce for Oceans and Atmosphere

FN1. On September 28, 2009, Respondents filed a motion to postpone the decision in this case to provide them with an opportunity to receive responses to Freedom of Information Act (FOIA) requests made on Respondents' behalf and to submit additional evidence. Pursuant to the rules governing this appeal, "the Administrator will not consider new or additional evidence that is not a part of the record before the Judge." [15 C.F.R. § 904.273\(d\)\(7\)](#). Respondents' motion provided no explanation of why they believe this rule should not apply in this case or how the documents they requested from NOAA might be relevant to their appeal. Therefore, the motion for stay will be denied.

FN2. Some courts apparently assume that ability to pay is part of the constitutional analysis but conclude that a claim that a fine is unconstitutionally excessive as applied due to the defendant's inability to pay could only become ripe when the government sought to enforce the fine and defendant demonstrated insufficient means to pay it. [United States v. Wong, 40 F.3d 1347, 1383 \(2d Cir. 1994\)](#); [United States v. Torres, 901 F.2d 205, 247-248 \(2d Cir.](#)

1990)).

FN3. Respondents argue that they are being treated more severely than other violators who have been found liable, referring to the cases entitled *In the Matter of Louis Mitchell* and *In the Matter of John Van Salisbury*. Those cases are distinguishable from this one on their facts. However, even if those cases were factually similar to this case, there is no legal requirement that the penalties assessed against Respondents be similar in severity to the penalties that were assessed in those cases. See [Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 \(1973\)](#).

FN4. On May 25, 2004, an ALJ found Duckworth and Reaper, Inc. liable for unlawfully catching and possessing monkfish without a valid permit and imposed a penalty of \$50,000. The ALJ's decision was upheld by the United States District Court for the District of Rhode Island on March 22, 2006. It was this fine which remained unpaid and resulted in the suspension of Duckworth's lobster permit on August 1, 2006. On February 14, 2006, Duckworth and Reaper, Inc. settled two cases involving multiple charges of improper reporting and recordkeeping which they admitted related to two vessels owned by Respondents, the F/V True American and the F/V Reaper. Duckworth and Reaper, Inc. agreed to serve 32 months of permit sanction time in lieu of paying civil penalties in the amount of \$365,000.

FN5. The original statutory maximum under the Magnuson Act was \$ 100,000. That amount increased due to inflation to \$130,000 at the time of the violations involved in this case pursuant to the Debt Collection improvement Act. [69 F.R 74416 \(Dec. 14, 2004\)](#).

FN6. Respondent's reliance upon the case [Diehl v. Franklin, 826 F. Supp. 874, 881 \(D.N.J. 1993\)](#) in support of their claim that the ALJ was required to consider ability to pay is misplaced. At the time that the hearing at issue in [Diehl](#) was held, the Magnuson Act required the ALJ to consider a respondent's ability to pay when imposing a civil penalty. The Magnuson Act was amended in 1996 to make ability to pay a discretionary rather than a mandatory consideration in assessing a penalty.

FN7. Duckworth testified that his three fishing vessels (F/V Reaper, F/V Twister, and F/V True American) were sold to family members for a combined total price of \$46,000 between 2006 and 2008 but that he would have expected to get as much as \$300,000 for them on the open market. According to Duckworth, the three vessels were purchased in the 1990s for \$410,000 to \$430,000. [I.D.](#) at 43.

FN8. Duckworth testified at the hearing that he sold two boats to his mother, who did not use them to fish, for approximately \$18,000 each. He also testified that he sold a third boat to his nephew for \$10,000 to settle the nephew's \$100,000 claim from an injury on Duckworth's boat during a prior fishing trip. Duckworth testified that the nephew had not filed a law suit but that he and Duckworth had signed a settlement agreement at the time the boat was sold to him for \$10,000. Duckworth also admitted that he had fished all the available days-at-sea as a crew member on the fishing vessel he sold to his nephew.

U.S. Department of Commerce
National Oceanic and Atmospheric Administration