

**UNITED STATES 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 Number:**

NE0704313 F/V FLICKA  
NE0704311 F/V DYRSTEN

Consolidated

**INITIAL DECISION**

**Issued:**

December 8, 2009

**Issued By:**

Hon. Michael J. Devine

**Appearances:**

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## **I. PRELIMINARY STATEMENT**

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.<sup>1</sup>

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.

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<sup>1</sup> 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.

On October 29, 2008, the cases were assigned to the undersigned judge. Following receipt of Preliminary Positions on Issues and Procedures (PPIP) 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.<sup>2</sup>

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.

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<sup>2</sup> 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.

## II. FINDINGS OF FACT

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).

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).

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).



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. § 556(d); 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



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 (PPIP). 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

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*

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)

*LARS AXELSSON & F/V FLICKA NE0704313*

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

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. I).

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

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,

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:*

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).<sup>3</sup> 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 WL 1277937 (NOAA 1988).

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<sup>3</sup> PHB stands for Post Hearing Brief.



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

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

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

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

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).

(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

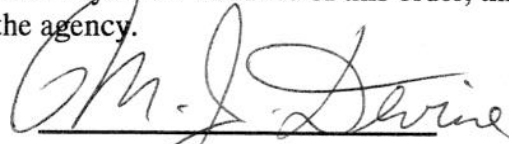
**IT IS HEREBY ORDERED** that a civil penalty in the amount of \$270,000 (\$10,000 per violation) is assessed jointly and severally against Respondents Lars Axelsson, Dan Axelsson, and, H & L Axelsson, Incorporated. Of this civil penalty, **\$216,000 is suspended** for a period of two (2) years from 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.

**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 ALJ 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.

A handwritten signature in black ink, appearing to read "Michael J. Devine", written over a horizontal line.

**Michael J. Devine**  
**Administrative Law Judge**  
**United States Coast Guard**

Done and dated this 8th day of December, 2009  
Baltimore, Maryland