Forest and other near-by lands including the communities of Chenega, Cordova, Tatitlek, Valdez and Whittier. The RAC is responsible for approving projects with funds made available from years 2008–2012.

The public is welcome to attend the April 22–23 RAC meeting. Committee discussion is limited to Forest Service staff and Committee members. However, public input opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. Public input sessions will be provided and individuals who made written requests by April 21st will have the opportunity to address the Committee at those sessions.

Dated: March 23, 2011.

Teresa M. Benson,

District Ranger.

[FR Doc. 2011–8001 Filed 4–4–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[10–BIS–0001]

Manoj Bhayana, Respondent; Final Decision and Order

This matter is before me upon a Recommended Decision and Order ("RDO") of an Administrative Law Judge ("ALJ"), as further described below.[1]

I. Background

As discussed in the RDO, the allegations in this case stem from an investigation by the Bureau of Industry and Security ("BIS") of a sale and (unlicensed) export of graphite rods and pipes from the United States to Pakistan, via the United Arab Emirates ("UAE"), in which Respondent Manoj Bhayana directly participated. *See* RDO, at 2, 4. During the investigation, BIS sought to determine, *inter alia,* the type of graphite that had been exported by SparesGlobal, Inc. ("SparesGlobal"), of Pittsburgh, Pennsylvania, and the ultimate end-user of the items. Respondent was SparesGlobal's primary sales representative for the transaction, working directly with the U.S. supplier (Ameri-Source, Inc.) and freight forwarder (K.C. International Transport, Inc.), and with SparesGlobal's customer (Taif Trading, LLC), a trading company located in Dubai, UAE. *See* RDO, at 4–5; Order Partially Granting BIS's Motion for Summary Decision, at 3, 5.[2]

The transaction documentation included a mill test certificate certifying that the graphite being exported met the specifications for a type of graphite (CS grade extruded graphite) produced by UCAR Carbon Company, doing business as GrafTech International Ltd. ("UCAR/GrafTech"). As he later admitted, Respondent Bhayana knew that the exported graphite items were not UCAR graphite and had not been produced by UCAR/Graftech. He also knew that the mill test certificate, which was on UCAR/GrafTech letterhead, had been created at Ameri-Source, Inc. ("Ameri-Source"), not by UCAR/GrafTech. Respondent sent the mill test certificate to the freight forwarder to facilitate the export, which occurred in December 2003. RDO, at 4–5.

During the course of BIS's investigation of this matter, in a September 7, 2004 e-mail to a BIS Special Agent, Respondent denied having any knowledge of the origin of the mill test certificate. Following months of additional investigation, BIS executed a search warrant at SparesGlobal in November 2004. Bhayana was present and was interviewed by BIS Special Agents. During that interview, Respondent provided the mill test certificate in response to the Special Agents' questions about the exported items, knowing, but not informing the agents, that the certificate contained false and misleading information. *See* RDO, at 5–6.

In a Charging Letter issued on January 15, 2010, BIS alleged that Respondent Bhayana had committed two violations of the Export Administration Regulations ("EAR" or "Regulations").[3] Charge One alleged that Respondent had violated Section 764.2(b) of the Regulations when he caused, aided or abetted the submission of a false and misleading SED. In Charge Two, the remaining charge at issue here,[4] BIS alleged that respondent violated Section 764.2(g) by making false and misleading statements to BIS Special Agents during the course of a BIS investigation.

Charge Two alleged, in full, as follows:

Charge 2: 15 CFR 764.2(g): False Statement Made to BIS During an Investigation

Bhayana made false and misleading representations and statements in the course of a BIS investigation. On or about September 8, 2004, a BIS Special Agent asked about the mill certificate relating to the Shipper's Export Declaration (SED) filed on December 2, 2003, and referenced in Charge 1 above. In an e-mailed response to the Special Agent, Bhayana stated: "The test certificate was provided by [our supplier] to us. We do not have any knowledge about its origin." On or about November 3, 2004, Bhayana was again asked about the mill certificate during an in-person interview with BIS Special Agents, and again provided copies of this forged mill certificate to the Special Agents. During this interview, Bhayana also gave the BIS Special Agents a signed written statement referencing the mill test certificate specifications or "specs," in which, he indicated, "These specs which are being submitted here [to the Special Agents] are the material specs which were shipped under this shipment." In fact, Bhayana had worked with others to create the forged mill certificate falsifying the type of graphite rod being exported and knew that the certificate contained false information when he provided it to the Special Agents. When confronted later in the same interview by the Special Agents with evidence that the certificate had been forged, Bhayana signed a second written statement. In this second signed statement, Bhayana admitted that his earlier statements to the Special Agents were false. Specifically, Bhayana admitted that SparesGlobal's supplier, Ameri-Source, Inc., which was not the actual manufacturer or distributor of GrafTech's UCAR graphite, "suppl[ied] * * * the certificate on [GrafTech] UCAR letterhead showing the [false] specs and mill test reports," and then "prepared some certificate and faxed it to us for the approval." In so doing, Bhayana committed one violation of Section 764.2(g) of the Regulations.

[1] I received the certified record from the ALJ, including the original copy of the RDO, for my review on March 1, 2011. The RDO is dated February 28, 2011, and incorporates the ALJ's October 12, 2010 Order Partially Granting BIS's Motion for Summary Decision. As discussed further *infra,* BIS moved for summary decision as to Charge Two of the Charging Letter in July 2010. The Order Partially Granting BIS's Motion for Summary Decision granted BIS summary decision on Charge Two, but reserved ruling as to the recommended sanction because Charge One was still pending. In order to expedite resolution of this matter, BIS withdrew Charge One in November 2010. The Order Partially Granting BIS's Motion for Summary Decision is part of the RDO, but where that Order is cited, for ease of reference, the citations are made directly to the pertinent pages of that Order, rather than citing it as an attachment to the RDO.

[2] *See* note 1, *supra.*

[3] The Regulations, which are currently codified at 15 CFR parts 730–774 (2010), were issued pursuant to the Export Administration Act of 1979, as amended (50 U.S.C. app. 2401–2420 (2000)) (the "Act"). Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13,222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 12, 2010 (75 FR 50,681 (Aug. 16, 2010)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.*). The violation remaining at issue in this case occurred in 2004. The Regulations governing the violation at issue are found in the 2004 version of the Code of Federal Regulations (15 CFR parts 730–774 (2004)). The 2010 Regulations govern the procedural aspects of this case.

[4] As referenced *supra* at note 1 and as discussed further *infra,* BIS withdrew Charge One after BIS had moved for and been granted summary decision as to Charge Two.

Charging Letter, at 2.[5]

Respondent has been represented by counsel throughout this litigation. In response to requests for admission served by BIS, Respondent made a series of admissions, including that he knew throughout the investigation that the exported graphite rods and pipes were not UCAR graphite and had not been produced by UCAR/GrafTech; that the mill test certificate had been created at Ameri-Source, not by UCAR/GrafTech or any UCAR/GrafTech affiliate; and that when he was interviewed by BIS Special Agents in November 2004, he knew, but did not inform the agents, that the mill test certificate he handed to them contained false and misleading information. *See* Order Partially Granting BIS's Motion for Summary Decision, at 6–7, 9–10.

BIS moved for summary decision as to Charge Two on July 30, 2010, and as part of that motion requested that the ALJ recommend that Respondent's export privileges be denied for a period of at least two years. As set forth in his October 12, 2010 Order Partially Granting BIS's Motion for Summary Decision, the ALJ determined that Charge Two had been proven by BIS and granted the motion for summary decision as to that violation of Section 764.2(g), but reserved ruling on a recommended sanction because Charge One was still pending.

On November 12, 2010, BIS withdrew Charge One of the Charging Letter in order to expedite resolution of this case. A briefing schedule was established on the issue of sanctions, and on November 23, 2010, Respondent filed his Memorandum Regarding Possible Sanctions, contending at bottom that no sanction should be imposed against him. In his sanctions memorandum, Respondent asserted, *inter alia,* that he had started an "export business" after he had left SparesGlobal in November 2008, but that he could not afford to implement an effective export compliance program. *See* RDO, at 13–14 (discussing and citing Respondent's Memorandum Regarding Possible Sanctions, filed November 23, 2010, at 11). In response, on December 6, 2010, BIS renewed its request for a denial order of at least two years in order, in sum, to sanction Respondent's violation of Section 764.2(g) appropriately and to prevent or deter future violations.

On February 28, 2011, based on the entire record (including the findings and conclusions set forth in the Order Partially Granting BIS's Motion for Summary Decision), the ALJ issued the RDO to the parties, in which he recommended that a denial period of two years be assessed against Respondent Bhayana. The RDO contains a detailed review of the facts and applicable law relating to both merits and sanctions issues in this case.

Based on the record, the ALJ determined, *inter alia,* that Respondent knowingly and willfully made false and misleading statements during the course of a BIS investigation and that those statements impeded and hampered the investigation. *See* RDO, at 8 ("Respondent willfully committed a violation of the EAR" and "knowingly tried to hide the fact that [the] mill test certificate contained false and misleading information when questioned on it by BIS investigators."); *id.,* at 9 (Respondent "imped[ed] an export control investigation"); *id.,* at 10 ("Respondent's violation * * * was an intentional decision to provide misleading and false information rather than comply with the requirements of the law and regulations"); *id.,* at 11 ("Respondent's actions hampered BIS's investigation."); and *id.,* at 14 (a two-year denial order is an appropriate sanction in this case and "necessary for deterring persons from providing false and misleading information that frustrates enforcing compliance with the regulations.").

The ALJ determined that Respondent had demonstrated a serious disregard for his export compliance responsibilities when he made the false and misleading statements at issue. *See* RDO, at 9, 13–14. The ALJ also determined that the record shows that Respondent admittedly does not have the resources to implement an effective compliance program in connection with the "export business" that Respondent claims to have started after he left SparesGlobal in late 2008.[6] *Id.* at 13–14 (quoting and citing Respondent's Memorandum Regarding Possible Sanctions, at 11). The ALJ found, furthermore, that compliance with the export control laws still is not a priority for Respondent and that Respondent's continued efforts to excuse his misconduct "demonstrate[] Respondent's attitude towards ensuring compliance with the regulations *still* takes a backseat to personal factors." *Id.* (emphasis added).

The ALJ rejected Respondent's repeated attempts to attribute his false statements to an asserted lack of export experience, training, or knowledge of the Regulations. The ALJ ruled that even accepting Respondent's assertions as true, his unlawful conduct did not result from such factors. "Respondent's violation was not the result of a misinterpretation [of the Regulations], but instead was an intentional decision to provide misleading and false information rather than comply with the requirements of the law and regulations." RDO, at 10; *see also id.,* at 12 ("Respondent's actions were not an unintentional or unknowing violation of the [R]egulations."); *see generally id.,* at 9–13.

The ALJ also rejected Respondent's efforts to attribute responsibility for his statements to his "low level" position at SparesGlobal or justify his misconduct based on his asserted fear that he would lose his job or work visa, concluding as follows:

> Even if this [assertion] is accepted as accurate, it does not provide a defense to making false statements to Government officials during a formal investigation. * * * When a person provides information or statements during an investigation, the law allows persons to either provide truthful statements or make an assertion of privilege. This applies equally to all individuals, even "lower" level employees, during the course of investigations so [that] violations at all levels can be effectively investigated. In summary, Respondent chose to mislead the investigators and appease his bosses, instead of being truthful with BIS and complying with the regulations. Such a decision does not show a good-faith misinterpretation of the rules and is not a valid basis for mitigation of sanctions.
>
> RDO, at 12–13.

II. Review Under Section 766.22

The RDO, together with the entire record in this case, has been referred to me for final action under Section 766.22 of the Regulations. I find that the record supports the ALJ's findings of fact and conclusions of law that Respondent violated Section 764.2(g) by making false and misleading statements and representations to BIS during the course of an investigation. In addition to other evidence submitted by BIS, Respondent effectively admitted the violation during discovery in response to BIS's requests for admission. Moreover, Respondent has not asserted in his response to the RDO that the ALJ committed any error as to the merits or that any of the ALJ's findings or conclusions on the merits is erroneous.

[5] As a result of the investigation, criminal charges were brought against SparesGlobal, which in October 2007, pled guilty in the United States District Court for the Western District of Pennsylvania to conspiracy under 18 U.S.C. 371. BIS filed administrative charges against Ameri-Source (Case No. 08–BIS–15) and Ameri-Source director Thomas Diener (Case No. 08–BIS–16) in December 2008. Ameri-Source and Mr. Diener settled those charges shortly after they were filed, with the final settlement orders issuing on February 6, 2009.

[6] As noted *supra,* BIS filing the Charging Letter in January 2010, and the record also indicates that BIS issued a Proposed Charging Letter to Respondent in January 2009.

I also find that the two-year denial order recommended by the ALJ upon his review of the entire record is appropriate, given the nature of the violations, the facts of this case, and the importance of deterring Respondent and others from seeking, through the provision of false and misleading information to BIS Special Agents, to thwart or impede BIS's enforcement of the Regulations.[7] Those who make false or misleading statements to BIS Special Agents during the course of an investigation strike at the heart of BIS's efforts to protect and promote the national security. A denial order also is appropriate here given the ALJ's findings, which are fully supported by the record, that Respondent does not possess the resources or the necessary commitment to meet his compliance obligations under the export control laws.[8]

Accordingly, based on my review of the entire record, I affirm the findings of fact and conclusions of law in the RDO without modification, but with one clarification. The RDO states at one point that "[w]hile it may not fit clearly within Mitigation Factor 4 [of the EAR's Penalty Guidance], the fact that sensitive materials were not involved is given some weight in mitigation" and that "since Respondent's representation seems to concern a non-sensitive item, that is a factor that can be considered toward mitigation." *Id.* at 11. I note first that the violation at issue is for making false statements during an investigation, not for making or causing an unlicensed export. Moreover, the false statements made by Respondent went directly to the type and specifications of the items that had been exported, information that was crucial for BIS to assess whether the export at issue required a license and the extent to which it could harm the national security. Although the mitigation credit discussion quoted above did not affect the outcome of this case, I want to clarify that a respondent who makes false statements to BIS during an investigation cannot properly claim, and should not be accorded, mitigation credit relating to the subject of those false statements.

In short, a respondent should not be allowed to reap any benefit from such false or misleading statements. With this clarification, I affirm the RDO.[9]

Accordingly, it is therefore ordered,

First, that, for a period of two (2) years from the date that this Order is published in the **Federal Register**, Manoj Bhayana, of 65 W. Manila Avenue, Pittsburgh, Pennsylvania 15220, and his representatives, assigns, agents or employees (hereinafter collectively referred to as "Denied Person") may not participate, directly or indirectly, in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

Second, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, that, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any person, firm, corporation, or business organization related to Manoj Bhayana by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

Fourth, that this Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology.

Fifth, that this Order shall be served on Manoj Bhayana and on BIS, and shall be published in the **Federal Register**. In addition, the ALJ's Recommended Decision and Order, except for the section related to the Recommended Order, shall also be published in the **Federal Register**.

This Order, which constitutes the final agency action in this matter, is effective upon publication in the **Federal Register**.

---

[7] *See, e.g.,* Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases ("Penalty Guidance"), Supplement No. 1 to part 766 of the Regulations, at ¶ III.A (Degree of Willfulness) (in cases involving a knowing or willful violation, a denial of export privileges is appropriate, and/or a greater monetary penalty than BIS typically would seek); *see also id.* (even in cases involving simple negligence, a denial order may be appropriate where, for example, the violation involves essential interests protected by the Regulations, the violation is of such a nature that a monetary penalty is an insufficient sanction, or the nature of the violation indicates that a denial order is needed to prevent future violations).

Although focused on the settlement context, the Penalty Guidance can be instructive where considered and applied consistent with the factual context of a litigated case.

[8] *See, e.g.,* Penalty Guidance, Supp. No. 1 to part 766, at ¶ IV.B ("An otherwise appropriate denial or exclusion order will be suspended on the basis of adverse economic consequences only if it is found that future export control violations are unlikely and if there are adequate measures (usually a substantial civil penalty) to achieve the necessary deterrent effect.") (parenthetical in original).

[9] The RDO inadvertently included (as Attachment B) an outdated version of Section 766.22(e) of the Regulations, regarding a possible appeal of the Final Decision and Order. Section 766.22(e) recently was deleted. *See Export Administration Regulations; Technical Amendments,* 75 FR 33,682 (June 15, 2010). Thus, Respondent should disregard Attachment B of the RDO.

Dated: March 28, 2011.

Eric L. Hirschhorn,

Under Secretary of Commerce for Industry and Security.

Certificate of Service

I hereby certify that, on this 29st day of March, 2011, I have served the foregoing DECISION AND ORDER signed by Eric L. Hirschhorn, Under Secretary of Commerce for Industry and Security, in the matter of Manoj Bhayana (Docket No: 10–BIS–0001) to be send via United Parcel Service postage pre-paid to:

Louis W. Emmi, Esquire, Attorney At Law, 201 Lebanon Shops, 300 Mt. Lebanon Boulevard, Pittsburg, PA 15234, (fax): 412–341–8464 (By Facsimile and United Parcel Service).

Adrienne Frazier, Joseph Jest, John Masterson, Attorneys for Bureau of Industry and Security, Office of Chief Counsel for Industry and Security, U.S. Department of Commerce, Room HCHB 3839, 14th Street and Constitution Ave., NW., Washington, DC 20230, (fax): 202–482–0085 (Served via hand delivery).

Honorable Michael J. Devine, U.S. Coast Guard, U.S. Customs House, 40 South Gay Street, Room 412, Baltimore, MD 20102, (fax): 410–962–5155, (By Facsimile and United Parcel Service).

ALJ Docketing Center, Attention: Hearing Docket Clerk, 40 S. Gay Street, Room 412, Baltimore, Maryland 20212–4022 (By Untied Parcel Service).

Andrea A. Monroe

Office of the Under Secretary for Industry and Security

United States of America Department of Commerce Bureau of Industry and Security

IN THE MATTER OF: Manoj Bhayana, Respondent.

Docket No. 10–BIS–0001

Recommended Decision and Order

Issued: February 28, 2011

Issued By: Hon. Michael J. Devine Presiding

Appearances

For the Bureau of Industry and Security
Adrienne Frazier, Esq., Office of Chief Counsel for Industry & Security, U.S. Department of Commerce, Room H–3839, 14th Street & Constitution Ave., NW, Washington, DC 20230.

For Respondent Manoj Bhayana
Louis W. Emmi, Esq., 201 Lebanon Shops, 300 Mt. Lebanon Boulevard, Pittsburgh, PA 15234.

I. Preliminary Statement

This case arises from Manoj Bhayana's (Respondent) violation of the Export Administration Regulations (EAR or Regulations).[10] On January 15, 2010, the Bureau of Industry and Security (BIS or Agency) issued a Charging Letter against Respondent. In that Letter, BIS alleged Respondent committed two (2) violations of the Export Administration Act of 1979 (Act), as amended and codified at 50 U.S.C. App. §§ 2401–20 (2000), and the Export Administration Regulations (EAR or Regulations), as amended and codified at 15 CFR parts 730–74 (2000 & 2007)[11] while working for SparesGlobal, Inc (SparesGlobal). The charges read as follows:

Charge 1 15 CFR 764.2(b)—Causing, Aiding or Abetting a Violation of the Regulations

On or about December 2, 2003, Bhayana, while employed as a sales representative at SparesGlobal, Inc., caused, aided, abetted and permitted the submission of false and misleading representations and statements to the U.S. Government in connection with the preparation and submission of a Shipper's Export Declaration (SED), an export control document. The SED falsely represented and stated that the item being exported from the United States was "UCAR–GRAPHITE" and that the ultimate consignee was located in the United Arab Emirates (UAE). Bhayana and others created a forged mill certificate to indicate that the item was "UCAR–GRAPHITE." Bhayana submitted the fraudulent mill certificate to the freight forwarder and told the freight forwarder that the ultimate consignee was in the UAE, when the actual ultimate consignee was in Pakistan. Based on the information provided by Bhayana, the freight forwarder filed the SED stating that the item was "UCAR GRAPHITE" and the ultimate consignee was in the UAE. In so doing, Bhayana committed one violation of Section 764.2(b) of the regulations.

Charge 2 15 CFR 764.2(g)—False Statement Made to BIS During an Investigation

Bhayana made false and misleading representations and statements in the course of a BIS investigation. On or about September 8, 2004, a BIS Special Agent asked about the mill certificate relating to the Shipper's Export Declaration (SED) filed on December 2, 2003, and referenced in Charge 1 above. In an emailed response to the Special Agent, Bhayana stated: "The test certificate was provided by [our supplier] to us. We do not have any knowledge about its origin." On or about November 3, 2004, Bhayana was asked again about the mill certificate during an in-person interview with BIS Special Agents, and again provided copies of this forged mill certificate to the Special Agents. During this interview Bhayana also gave the BIS Special Agents a signed written statement referencing the mill test certificate specifications or "specs," in which he indicated, "These specs which are being submitted here [to Special Agents] are the material specs which were shipped under this shipment." In fact, Bhayana had worked with others to create the forged mill certificate falsifying the type of graphite rod being exported and knew that the certificate contained false information when he provided it to the Special Agents. When confronted later in the same interview by the Special Agents with evidence that the certificate had been forged, Bhayana signed a second written statement. In this second signed statement, Bhayana admitted that his earlier statements to the Special Agents were false. Specifically, Bhayana admitted that SparesGlobal's supplier, Ameri-Source, Inc., which was not the actual manufacturer or distributer of GrafTech's UCAR graphite, "suppl[ied] * * * the certificate on [GrafTech] UCAR letterhead showing the [false] specs and mill test reports," and the "prepared some certificate and faxed it to us for the approval." In so doing, Bhayana committed one violation of Section 764.2(g) of the Regulations.

On July 30, 2010, BIS filed a Motion for Summary Decision (BIS Motion) on Charge 2, asserting it was entitled to summary decision as a matter of law. Attached to its motion were fifteen (15) exhibits marked *Government Exhibit* (Gov't Ex.) 1–15. In support of the Motion BIS argued there were no genuine issues as to any material fact because of Bhayana's statements to BIS Special Agents during the course of a BIS investigation and due to Bhayana's admissions regarding the false mill certificate in the transaction that is the subject of this matter. BIS's Motion did not address Charge 1.

On October 12, 2010, the undersigned issued an Order Partially Granting BIS's Motion for Summary Decision. In that Order, the undersigned found Charge 2 had been proven, but reserved ruling as to the recommended sanction for the violation because Charge 1 remained

---

[10] The Export Administration Regulations, 15 CFR parts 730–744, are issued under the Export Administration Act of 1979 (EAA). The Act is codified at 50 U.S.C. app. §§ 2401–20 (2000), as amended by the Notice on August 13, 2009 (74 FR 41,325 (Aug. 14, 2009)).

[11] The EAA and all regulations promulgated there under expired on August 20, 2001. *See* 50 U.S.C. App. 2419. Three days before its expiration, on August 17, 2001, the President declared the lapse of the EAA constitutes a national emergency. *See* Exec. Order. No. 13222, *reprinted in* 3 CFR at 783–784, 2001 Comp. (2002). Exercising authority under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. 1701–1706 (2002), the President maintained the effectiveness of the EAA and its underlying regulations throughout the expiration period by issuing Exec. Order. No. 13222 on August 17, 2001. *Id.* The effectiveness of the export control laws and regulations were further extended by successive Notices issued by the President; the most recent being that of August 15, 2007. *See* Notice: Continuation of Emergency Regarding Export Control Regulations, 72 FR 46, 137 (August 15, 2007). Courts have held that the continuation of the operation and effectiveness of the EAA and its regulations through the issuance of Executive Orders by the President constitutes a valid exercise of authority. *See Wisconsin Project on Nuclear Arms Control* v. *United States Dep't of Commerce,* 317 F.3d 275, 278–79 (DC Cir. 2003); *Times Publ'g Co.* v. *U.S. Department of Commerce,* 236 F.3d 1286, 1290 (11th Cir. 2001).

pending. That Order included Findings of Fact and Ultimate Findings of Fact and Conclusions of Law and is included as Attachment A of this Recommended Decision and Order.

On November 5, 2010, a prehearing conference was held to discuss scheduling concerns in light of the Order Partially Granting Summary Decision. During that prehearing conference call, BIS informed the undersigned and Respondent they intended to withdraw Charge 1. On November 12, 2010, BIS filed its Notice of Withdrawal of Charge 1.

With the withdrawal of Charge 1, the only issue remaining is the appropriate sanction for the violation found proved in Charge 2. On November 23, 2010, Respondent filed his final written brief and closing arguments. On December 6, 2010, BIS submitted their final written brief and closing arguments. The following recommended findings of fact and recommended decision is based on a careful review of the facts and record as a whole including the parties final briefs, the facts found in the Order Partially Granting the BIS Motion for Summary Decision and the applicable law and regulations.

II. Recommended Findings of Fact

1. SparesGlobal, Inc., of Pittsburgh, PA, exported graphite rods and pipes from the United States on or about December 2, 2003. (BIS Motion—Ex. 5 at 3–4; Ex. 6).
2. Respondent was SparesGlobal's primary sales contact for this transaction. (BIS Motion—Ex. 5 at 1).
3. During the transaction, Respondent was in contact with the U.S. company that supplied the graphite rods and pipes for the transaction, Ameri-Source, Inc.; the freight forwarder for the transaction, K.C. International Transport, Inc.; and SparesGlobal's customer Taif Trading, LLC, located in Dubai, UAE. (BIS Motion—Ex. 5 at 4–5).
4. The transaction documentation included a mill test certificate certifying that the graphite being exported met the specifications for a type of graphite (CS grade extruded graphite) produced by UCAR Carbon Company and Respondent sent this certificate to the freight forwarder, K.C. International Transport, Inc. to facilitate the export transaction at issue. (BIS Motion—Ex. 5 at 4–5; Ex. 8)
5. Respondent admitted that the exported graphite rods were not UCAR graphite and were not produced by UCAR/GrafTech. (BIS Motion—Ex. 5 at 5).
6. Respondent knew the mill test certificate had been created by Ameri-Source, Inc., and that it had been created using UCAR/GrafTech letterhead. (BIS Motion—Ex. 5 at 6–8).
7. During a BIS investigation concerning this export transaction, in a September 7, 2004 email that he sent to a BIS Special Agent, Respondent denied having any knowledge of the origin of the mill test certificate. (BIS Motion—Ex. 5 at 7).
8. As part of BIS's investigation, Respondent was interviewed by BIS Special Agents at SparesGlobal's offices on or about November 3, 2004. (BIS Motion—Ex. 5 at 7–8).
9. During the interview, Respondent handed the BIS Special Agents his file relating to this export transaction, which included the fraudulent mill test certificate. (BIS Motion—Ex. 5 at 7–8).[12]

III. Recommended Ultimate Findings of Fact and

Conclusions of Law

1. Respondent and the subject matter of this proceeding are properly within the jurisdiction of the BIS in accordance with the Export Administration Act of 1979 (50 U.S.C. App. §§ 2401–2420) and the Export Administration Regulations (15 CFR parts 730–774).
2. When Respondent handed the file and the mill test certificate to the BIS Special Agents on or about November 3, 2004, he knew the certificate had been created at Ameri-Source and not by UCAR/GrafTech or any UCAR/GrafTech affiliate. (BIS Motion—Ex. 5 at 7–8).
3. When Respondent handed the BIS Special Agents the file and mill test certificate on or about November 3, 2004, Bhayana knew the certificate contained false and misleading information. (*Id.*).
4. When Respondent handed the file and certificate to the BIS Special Agents on or about November 3, 2004, he knew, but did not inform the agents that some of the information in the file contained false, inaccurate, and/or misleading information. (*Id.*).
5. Respondent is found to have made false and misleading representations to BIS Special Agents during the course of an investigation subject to the EAR, a violation of 15 CFR 764.2(g).

IV. Recommended Sanction

A. Regulations

Section 764.3 of the EAR establishes the sanctions that BIS may seek for the violations charged in this proceeding. The sanctions permitted include: (1) A civil penalty, (2) a denial of export privileges under the Regulations, and (3) an exclusion from practice. *See* 15 CFR 764.3. Supplement Number 1 to 15 CFR part 766 (Supplement No. 1) provides published nonbinding guidance on what BIS considers in making penalty determinations in considering settlement of civil administrative enforcement cases. Various factors are considered by BIS including the degree of willfulness, the destination involved, whether there were any related violations, and the timing of any settlement. Both parties have referenced Supplement No. 1 in their final arguments and briefs in support of their position in this matter.

Both general factors and specific mitigating and aggravating factors are discussed in Supplement No. 1. Certain factors may be given greater weight than other factors. The Mitigating Factors include:

1. The party self-disclosed the violations (given great weight).
2. The party created an effective export compliance program (given great weight).
3. The violations resulted from a good-faith misinterpretation.
4. The export would likely have been granted upon request.
5. The party does not have a history of past export violations.
6. The party cooperated to an exception degree during the investigation.
7. The party provided substantial assistance in the BIS investigation.
8. The violation did not involve harm of the nature the regulations were intended to protect.
9. The party had little export experience and was not familiar with the requirement.

15 CFR part 766, Supp No. 1, at § III(B).

The Aggravating Factors include:

1. The party deliberately hid the violations (given great weight).
2. The party seriously disregarded export responsibilities (given great weight).
3. The violation was significant in view of the sensitivity of the item (given great weight).
4. The violation was likely to involve harm of the nature the regulations intended to protect.
5. The value of the exports was high, resulting in need to serve an adequate penalty for deterrence.
6. Other violations of law and regulations occurred.
7. The party has a history of past export violations.
8. The party lacked a systematic export compliance effort.

15 CFR part 766, Supp No. 1, at § III(B).

By examining the basic factors associated with the violations and by considering the appropriate mitigating and aggravating circumstances, an appropriate penalty is determined. A review of the factors and circumstances specific to this case are discussed below.

B. Respondent's Violations

In this case, Respondent is found to have provided false or misleading statements to a BIS Special Agent during the course of an investigation. (Order Partially Granting BIS's Motion for Summary Decision (Order)).[13] As set

[12] The legal analysis for the determination to grant the Motion for Summary Decision is contained in the discussion section of that Order. *See* Attachment A.

[13] The Order Partially Granting BIS's Motion for Summary Decision issued by this court on October 12, 2010 is Attachment A of this recommended

forth in the Ultimate Findings of Fact and Conclusions of Law, Respondent handed BIS Special Agents a file and mill test certificate that Respondent knew contained false and misleading information. (Order at 4). When Respondent handed the file and certificate to the BIS Special Agents, he knew, but did not inform the agents that some of the information in the file contained false, inaccurate, and/or misleading information. (*Id.*). Upon further investigation by BIS, Respondent admitted to his false statements. (Order at 6).

Aggravating Factors

As addressed within the Ultimate Findings of Fact and Conclusions of Law, Respondent willfully committed a violation of the EAR. While Respondent has presented argument asserting his excuses for providing false information to BIS, he nevertheless knowingly and willfully provided misleading information. An aggravating factor that is given great weight is a party's deliberateness in hiding a violation, Aggravating Factor 1. 15 CFR part 766, Supp No. 1, at § III(B). In this case, Respondent knowingly tried to hide the fact that a mill test certificate contained false and misleading information when questioned on it by BIS investigators. The court finds Respondent attempted to deliberately hide a violation. It was only after further investigation and confrontation with BIS Special Agents that Respondent eventually admitted to his attempt to hide the true facts.

An additional aggravating factor is when a party demonstrates a serious disregard for export compliance responsibilities, Aggravating Factor 2. *Id.* One such responsibility is to provide truthful statements to BIS Special Agents as they work to enforce our country's export control laws. In this case, Respondent seriously disregarded his export compliance responsibilities. While working as an exporter, Respondent is found to have misled BIS during the course of an investigation to enforce export controls. Respondent's explanation for his actions included his assertions that he was just a low level employee, that the value of the shipment was low, and that he might lose his job if he told the truth. Even if considered as accurate, Respondent's justifications for impeding an export control investigation demonstrate that compliance with his export responsibilities was of secondary importance. If an individual intends to engage in the export of goods, compliance with export controls is mandatory, and maintaining employment is not an excuse for violating the regulations.

No other aggravating factors seem applicable in this case. No evidence was presented that would establish Respondent's violation had circumstances that fit within one of the other aggravating factors. While Respondent admits his current company has not created a systematic export compliance effort, no evidence was presented that shows he was responsible for or lacked a systematic export compliance effort at the time of the violation. However, as discussed above, two aggravating factors are found to exist that are given great weight when determining an appropriate sanction. First, Respondent made a deliberate attempt to hide or conceal the violation and second, Respondent's conduct demonstrated a serious disregard for export compliance responsibilities.

Mitigating Factors

Within Respondent's Memorandum Regarding Possible Sanctions for his Violation (Memorandum), Respondent argues that several mitigating factors are relevant in his case. First, he suggests the violation was an isolated occurrence or the result of a good-faith misinterpretation. (*See* Memorandum at 7). This mitigation factor follows the general principle that while ignorance of the law is typically not an excuse for non-compliance, willful violations often receive higher penalties than unintentional violations. *See Cheek* v. *U.S.,* 498 U.S. 192, 199 (1991); *See also Iran Air* v. *U.S.,* 996 F.2d 1253 (DC Cir. 1993). To support this assertion, Respondent states he was a low level employee, worked long hours and did not take vacations, and felt great pressure to obey his superior's orders. However, this does not present a good-faith misinterpretation of the regulations. Instead, this argument highlights the fact Respondent knew he was misleading investigators. Even if his assertions are accepted as accurate, it demonstrates only that he decided to commit a violation because he felt pressure from the company to do so. Respondent's violation was not the result of a misinterpretation, but instead was an intentional decision to provide misleading and false information rather than comply with the requirements of the law and regulations.

Respondent's second argument for mitigation is based upon the assertion that the product he lied about did not require a license to ship, thus falling within Mitigation Factor 4. *See* 15 CFR part 766, Supp No. 1, at § III(B). The record does not contain any evidence that shows the exported goods (graphite) were a prohibited item. BIS asserts this mitigation factor should not apply, since the items in question were materials subject to the EAR (15 CFR 734.3(a)) and Respondent was charged with making a false statement, not with making an unlicensed export. It appears the export transaction that formed the basis of the misrepresentation and violation would likely have been granted anyway. While it may not fit clearly within Mitigation Factor 4, the fact that sensitive materials were not involved is given some weight in mitigation. If Respondent had made false statements about a highly sensitive and controlled item, such as nuclear material, that would certainly be an aggravating factor. Likewise, since Respondent's misrepresentation seems to concern a non-sensitive item, that is a factor considered towards mitigation.

Respondent's third argument for mitigation is that he has not been found to have committed any past export violations, Mitigation Factor 5. *See id.* No evidence has been provided showing Respondent has violated the EAR in the past. As such, Mitigation Factor 5 applies in this case.

Respondent's fourth argument for mitigation is that he cooperated to an exceptional degree with BIS's efforts to investigate SparesGlobal's conduct, Mitigation Factor 6 and 7. *See id.* This argument is not persuasive. The central violation relevant to this case revolves around Respondent making false and misleading statements to BIS during the course of an investigation. Attempting to mislead the investigator does not equate to providing an exceptional degree of cooperating with BIS's investigation. To the contrary, Respondent's actions hampered BIS's investigation.

Respondent's fifth argument for mitigation is that at the time of the violation he had little or no export experience and was not familiar with export practices, Mitigation Factor 9. *See id.* This mitigation factor is seemingly in place to account for individuals who unknowingly violate an export regulation, despite their good intentions to follow the regulations. In this case, even if Respondent had little export experience, it has been found he knowingly mislead investigators. Respondent's actions were not an unintentional or unknowing violation of the regulations. To the contrary, Respondent made a conscious effort to mislead in an attempt to appease his bosses. Since Respondent's violation is not a result of his inexperience with

decision and order. In that Order, Respondent was found to have violated Charge 2—providing false or misleading statements to a BIS Special Agent during the course of an investigation.

export regulations, Mitigation Factor 9 is found not to apply to this case.

Finally, Respondent also asserts throughout his pleadings that because he was a low level employee, seemingly more important people should be more culpable. Even if this is accepted as accurate, it does not provide a defense to making false statements to Government officials during a formal investigation. Allowing lower level employees to escape liability based on ignorance would provide an avenue to frustrate enforcement of legal export requirements. Additionally, violations by other persons or entities and actions against other persons or entities for violating the law are a collateral matter that is not demonstrated to be relevant to these proceedings. In response to Respondent's assertions, BIS contends the administrative proceedings against Respondent were apparently part of an enforcement effort against Respondent's employer, SparesGlobal.[14] The Court's decision is limited to the matters properly presented in the record. When a person provides information or statements during an investigation, the law allows persons to either provide truthful statements or make an assertion of a privilege. This applies equally to all individuals, even "lower" level employees, during the course of investigations so violations at all levels can be effectively investigated. In summary, Respondent chose to mislead the investigators and appease his bosses, instead of being truthful with BIS and complying with the regulations. Such a decision does not show a good-faith misinterpretation of the rules and is not a valid basis for mitigation of sanctions.

C. Denial of Export Privileges

In addition to the above mitigating factors, Respondent also argues that adverse financial hardships would result from a denial of export privileges. Respondent asserts that his only source of income is from his exporting business, which made $29,450 last year. (Memorandum at 14). Furthermore, he states if he is prevented from working in the export field, he would lose his Green Card status and would be forced to return to India with his family. (Memorandum at 15).

In accordance with the regulations, the financial impact of a denial of export privileges can be considered in determining if such a denial should be suspended. 15 CFR part 766, Supp No. 1, at § IV(B). However, a denial of export privileges will only be suspended if it is found that future export control violations are unlikely and if there are adequate measures to achieve a necessary deterrent, usually a substantial civil penalty. *Id.* Here, since Respondent asserts he has limited means, providing a suspended civil penalty would not provide the intended future deterrence.

Additionally, while Respondent has apparently accepted the court's ruling in regards to Charge Two, Respondent's arguments minimize his responsibility for his own lapse of judgment. In his Response, Respondent continues to attempt to excuse his actions by describing his lower level position with the company and excusing the behavior on the outside pressures he felt. The desire for continued employment is not a valid excuse for providing false and misleading information to investigators. Second, Respondent now runs his own company; however, he has not developed an effective export compliance program. (Memorandum at 11). Respondent excuses his failure to develop an effective export compliance program because "[h]e is not currently in a financial position * * *" to do so. (*Id.*) Such a response demonstrates Respondent's attitude towards ensuring compliance with the regulations still takes a backseat to personal factors. There could be pressure from a company he is working with to violate the regulations and the pressure to do so to maintain a profit would seem to be no different that the pressure from SparesGlobal to keep his job. Finally, the reference to any offers discussed during settlement negotiations by either party is generally inappropriate.

While Respondent has pointed to mitigating factors that apply, including his otherwise clean exporting history and the non-sensitive nature of the parts he was exporting, I find that a two (2) year denial of export privileges as suggested by BIS is appropriate.

Respondent seems to have many personal factors affecting his ability to comply with the export regulations. And, while the court is sympathetic to Respondent's predicament, the court's determination in this matter is limited to issuing a decision in keeping with the law and regulations to ensure compliance with the export regulations. The court finds the argument of BIS persuasive. An appropriate sanction is necessary for deterring persons from providing false and misleading information that frustrates enforcing compliance with the regulations. In this case, a two (2) year denial of export privileges is deemed appropriate. Respondent may continue to seek administrative clemency from the Undersecretary in keeping with 15 CFR § 766.17(c) and 766.22.

V. Recommended Order [6]

Redacted Section (Pages 15 to 18)

Within thirty (30) days after receipt of this Recommended Decision and Order, the Under Secretary shall issue a written order, affirming, modifying, or vacating the Recommended Decision and Order. *See* 15 CFR 766.22(c). A copy of the Agency regulations for Review by the Under Secretary can be found as *Attachment B.*

Hon. Michael J. Devine,

Administrative Law Judge.

Done and dated February 28, 2011 at Baltimore, Maryland.

Attachment A: Summary Decision Order of October 12, 2010.

Attachment B: Notice of Review and Appeal rights 15 CFR 766.22.

Attachment B

Notice of Review by Under Secretary

15 CFR 766.22 Review by Under Secretary.

(a) *Recommended decision.* For proceedings not involving violations relating to part 760 of the EAR, the administrative law judge shall immediately refer the recommended decision and order to the Under Secretary. Because of the time limits provided under the EAA for review by the Under Secretary, service of the recommended decision and order on the parties, all papers filed by the parties in response, and the final decision of the Under Secretary must be by personal delivery, facsimile, express mail or other overnight carrier. If the Under Secretary cannot act on a recommended decision and order for any reason, the Under Secretary will designate another Department of Commerce official to receive and act on the recommendation.

(b) *Submissions by parties.* Parties shall have 12 days from the date of issuance of the recommended decision and order in which to submit simultaneous responses. Parties thereafter shall have eight days from receipt of any response(s) in which to submit replies. Any response or reply must be received within the time specified by the Under Secretary.

(c) *Final decision.* Within 30 days after receipt of the recommended decision and order, the Under Secretary shall issue a written order affirming, modifying or vacating the recommended decision and order of the administrative law judge. If he/she vacates the recommended decision and order, the Under Secretary may refer the case back to the administrative law judge for further proceedings. Because of the time

[14] The issues of selective prosecution or abuse of discretion in proceeding in this matter have not been raised in this matter.

limits, the Under Secretary's review will ordinarily be limited to the written record for decision, including the transcript of any hearing, and any submissions by the parties concerning the recommended decision.

(d) *Delivery.* The final decision and implementing order shall be served on the parties and will be publicly available in accordance with § 766.20 of this part.

(e) *Appeals.* The charged party may appeal the Under Secretary's written order within 15 days to the United States Court of Appeals for the District of Columbia pursuant to 50 U.S.C. app. § 2412(c)(3).

[FR Doc. 2011–7847 Filed 4–4–11; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Weather Modification Activities Reports

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before June 6, 2011.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Karen Williams, (301) 734–1196 or *karen.williams@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

Section 6(b) of Public Law 92–205 requires that persons who engage in weather modification activities (*e.g.,* cloud seeding) provide reports prior to and after the activity. They are also required to maintain certain records. The requirements are detailed in 15 CFR part 908. NOAA uses the data for scientific research, historical statistics, international reports and other purposes.

II. Method of Collection

Respondents have a choice of either electronic or paper forms. Methods of submittal include e-mail of electronic forms, mail and facsimile transmission of paper forms.

III. Data

OMB Control Number: 0648–0025.

Form Number: NOAA Forms 17–4 and 17–4A.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 55.

Estimated Time Per Response: 30 minutes per report (2 reports each).

Estimated Total Annual Burden Hours: 55.

Estimated Total Annual Cost to Public: $275.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 31, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–8002 Filed 4–4–11; 8:45 am]

BILLING CODE 3510–KD–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Southeast Region Gulf of Mexico Red Snapper IFQ Program

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before June 6, 2011.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov).*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Rich Malinowski, (727) 824–5305 or *Rich.Malinowski@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension of a currently approved information collection. National Marine Fisheries Service (NMFS) Southeast Region manages the Unites States (U.S.) fisheries of the exclusive economic zone (EEZ) off the South Atlantic, Caribbean, and Gulf of Mexico under the Fishery Management Plans (FMP) for each Region. The Regional Fishery Management Councils prepared the FMPs pursuant to the Magnuson-Stevens Fishery Conservation and Management Act. NMFS manages the red snapper fishery in the waters of the Gulf of Mexico under the Reef Fish FMP. The Individual Fishing Quota (IFQ) program was implemented to reduce the overcapacity in the fishery and end the derby fishing conditions that resulted from that overcapitalization.

The recordkeeping and reporting requirements at 50 CFR part 622 form the basis for this collection of information. NMFS Southeast Region requests information from fishery participants. This information, upon