



**UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

In the Matter of:)	Docket Number:
Ralph C. Crosby and Wade L. Barber,)	SE1305317, F/V Apalachee Warrior
Respondents.)	

INITIAL DECISION AND ORDER

Date: June 8, 2015

Before: Christine Donelian Coughlin, Administrative Law Judge, U.S. EPA¹

Appearances:

For the Agency:
Loren Remsburg, Esq.
Office of the General Counsel, Enforcement Section
National Oceanic and Atmospheric Administration
U.S. Department of Commerce
St. Petersburg, FL

For Respondents:
Ralph C. Crosby

¹ The Administrative Law Judges of the United States Environmental Protection Agency (“U.S. EPA”) are authorized to hear cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011. See 5 U.S.C. § 3344; 5 C.F.R. § 930.208.

I. STATEMENT OF THE CASE

The National Oceanic and Atmospheric Administration (“NOAA” or “Agency”) issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”), dated March 28, 2014, to Ralph C. Crosby and Wade L. Barber (“Respondent Crosby” and “Respondent Barber,” respectively, or “Respondents,” collectively). In the NOVA, the Agency alleged four counts, all occurring on October 25, 2013, in which Respondents violated Section 9 of the Endangered Species Act (“ESA” or “Act”), 16 U.S.C. § 1538, and regulations promulgated under the Act at 50 C.F.R. §§ 223.205(b)(1), 223.206(d), and 223.207(a).² The Agency sought to impose a total penalty of \$7,500 against Respondents for these violations, jointly and severally. Respondents timely requested a hearing before an Administrative Law Judge.

By letter dated May 13, 2014, the parties were invited to participate in mediation for settlement of the case through an Alternative Dispute Resolution (“ADR”) process offered by this office. While the Agency agreed to participate in ADR, Respondents did not respond to the invitation. Consequently, this matter proceeded to litigation. By Order of Designation issued on May 29, 2014 by Chief Administrative Law Judge Susan Biro, I was designated to preside over the hearing in this case. On June 2, 2014, I issued an Order to Submit Preliminary Positions on Issues and Procedures (PPIP) (“PPIP Scheduling Order”) to the parties, setting forth various prehearing filing deadlines and procedures. Pursuant to the PPIP Scheduling Order, the Agency was required to file its PPIP on or before July 11, 2014, and Respondents were required to file their PPIPs on or before July 25, 2014.

On June 11, 2014, The Agency submitted a status report of settlement discussions between the parties and requested a 14-day extension of the PPIP deadlines. I granted this request on June 12, 2014, and extended the deadline by which the Agency was required to file its PPIP to July 25, 2014, and the deadline by which Respondents were required to file their PPIPs to August 8, 2014. On July 23, 2014, the Agency filed its PPIP. The filing of Respondent Crosby’s PPIP was delayed due to medical reasons until August 19, 2014. Respondent Barber did not submit his own PPIP. On October 22, 2014, the Agency submitted its first amended PPIP. Thereafter, Respondent Crosby submitted his first amended PPIP.

On August 20, 2014, I issued an Order Scheduling Hearing, scheduling the hearing to begin in this matter on December 2, 2014 in Panama City, Florida. Prior to hearing and in response to the Agency’s motion, I issued an Order on Motion for Judicial Notice of Agency’s Penalty Policy, dated November 24, 2014, in which I took official notice of the Agency’s Penalty Policy in effect at the time of the alleged violations. On December 2, 2014, I conducted a hearing in this matter in Panama City, Florida. The Agency presented Agency’s Exhibits (“AX”) 1 through 5, 7, 9, 9a, and 10 through 12, which were admitted into evidence. The Agency also presented the testimony of three witnesses: Robert Dale Stevens (“Stevens”), NOAA Harvesting Systems and Engineering Division of the National Marine Fisheries Service laboratory in

² Given the date of the charged violation, the 2013 edition of the Code of Federal Regulations (C.F.R.) is applicable to this case and is the edition used for citations herein, unless otherwise specified.

Pascagoula, Mississippi, who was qualified as an expert at the hearing with respect to Turtle Excluder Devices (“TEDs”), Rob Geib (“Geib”), a law enforcement officer with the Florida Fish and Wildlife Conservation Commission, and Adam Bunker (“Bunker”), also a law enforcement officer with the Florida Fish and Wildlife Conservation Commission. Respondent Crosby appeared for the hearing and represented himself as well as Respondent Barber.³ Respondent Crosby presented Respondents’ Exhibits (“RE”) 1 through 4, 9, and 10, which were admitted into evidence. Respondent Crosby testified on Respondents’ behalf and also subpoenaed Stevens, Geib, and Bunker, each of whom testified as part of Respondents’ direct case. The parties also presented Joint Exhibit (“JX”) 1, a copy of the parties’ Joint Set of Stipulated Facts, Exhibits, and Testimony, which was admitted into evidence.

The Hearing Clerk of this office received the certified transcript of the hearing on December 11, 2014. A paper copy of the transcript was mailed to Respondent Crosby on December 19, 2014, and an electronic copy of the transcript was served on the Agency on December 29, 2014.⁴ On January 8, 2015, I issued an Order Scheduling Post-Hearing Briefs, which set the following filing deadlines: January 30, 2015, as the deadline for any motions to conform the transcript to the actual testimony; February 6, 2015 as the deadline for the Agency’s Initial Post-Hearing Brief; February 20, 2015, as the deadline for Respondents’ Initial Post-Hearing Brief; March 6, 2015, as the deadline for the Agency’s Reply Post-Hearing Brief; and March 20, 2015, as the deadline for Respondents’ Reply Post-Hearing Brief.

On January 29, 2015, the Agency filed a Motion to Conform Hearing Transcript to Testimony. On February 6, 2015, the Agency filed its Initial Post-Hearing Brief (“Ag. In. Br.”). On March 2, 2015, Respondent Crosby filed an Initial Post-Hearing Brief (“Resp. In. Br.”), presumably on behalf of Respondents collectively. On March 6, 2015, the Agency filed its Reply Brief (“Ag. Rep. Br.”). On March 24, 2015, Respondent Crosby filed a Reply Brief (“Resp. Rep. Br.”), presumably on behalf of Respondents collectively.

II. RULING ON MOTION TO CONFORM THE TRANSCRIPT

I considered the Agency’s Motion to Conform Hearing Transcript to Testimony (“Motion”), filed on January 29, 2015. Given that the proposed corrections to the transcript were relatively minor, I elected to rule on the Motion within this Initial Decision, rather than issuing an earlier ruling. After carefully reviewing the transcript in this matter, I **GRANT** the Agency’s Motion and conform the transcript accordingly.

In addition, I correct, *sua sponte*, an erroneous “off the record” reference during the Agency’s rebuttal examination of Stevens. See Tr. 249. Based on my recollection of the proceedings in this matter, as well as my customary practice in conducting and maintaining the integrity of an administrative hearing, the only recesses taken throughout this proceeding were for meal and comfort breaks.

³ See RE 1.

⁴ Citations herein to the transcript are made in the following format: “Tr. [page].”

III. STATEMENT OF THE ISSUES

A. Liability

The issue presented in this proceeding is whether Respondent Crosby, as owner and operator of the F/V Apalachee Warrior, and Respondent Barber, as owner of the F/V Apalachee Warrior, jointly and severally violated the Act and regulations promulgated under the Act, which require any shrimp trawler in the Gulf Area to have an approved TED installed in each net that is rigged for fishing. At issue is whether the two TEDs located on the Port side of the vessel each contained sufficient flotation, meaning that each had two expanded ethylene vinyl acetate ("EVA") or polyvinyl chloride ("PVC") floats attached. Also at issue is whether the two TEDs located on the Starboard side of the vessel each contained grids that had deflector bars with more than 4 inches between each bar.

B. Civil Penalty

Once liability for a charged violation is established, I must then determine the amount of any imposed civil penalty that is appropriate. To this end, I may evaluate certain factors, including the nature, circumstances, extent, and gravity of the violation; Respondents' degree of culpability and any history of prior violations; and such other matters as justice may require.⁵

IV. FACTUAL SUMMARY

The following is a summary of the facts that I have found in this matter based on a careful and thorough review of the evidentiary record.

All species of sea turtles found in United States waters are either threatened or endangered. AX 7; *see* Tr. 38-39. Five of the seven species of sea turtles that are listed as either endangered or threatened under the Act are found in the Gulf of Mexico. Tr. 36-7. The incidental capture of sea turtles in shrimp trawls has been found to be a greater threat to the survival of sea turtles in the United States than all other human activity combined. AX 7. TEDs were thus designed to be installed in shrimp trawl nets and allow for the escape of sea turtles that are incidentally captured while trawling for shrimp. Tr. 19, 36-7, AX 7. To facilitate such an escape, TEDs incorporate a metal grate and an escape opening, usually covered by a webbing flap, which together allow sea turtles to escape from trawl nets. AX 7. A witness at the hearing, Stevens, is a methods and equipment specialist, primarily with regard to the use of TEDs, works for the Agency's National Marine Fisheries Service, and was qualified as and deemed, without objection, an expert in the design, use, and effects of TEDs. Tr. 19-28, AX 12. Stevens explained that, to comply with regulations, the bar spacing of the metal bars of the TED cannot exceed four inches, so that objects larger than four inches, namely sea turtles, are stopped from passing through the grate and into the end of the trawl net, or the cod end, while smaller objects like shrimp and fish are allowed to pass through the four-inch bars and collect in the cod end.

⁵ While "ability to pay" is another factor that may be considered when determining penalty, Respondents did not raise such a claim in this case. *See* JX 1, paragraph 18. Consequently, this factor was not considered in rendering my decision. *See* 15 C.F.R. § 904.108.

Tr. 32-3, 141-42. The metal grid of the TED therefore permits the capture of shrimp but prevents the capture of sea turtles. *Id.* And because the TED's metal grate is sewn into the net such that it is pulled through the water at an angle, when the turtle meets the grate, it is directed towards the escape flap opening, which is positioned either on the top or bottom of the TED's metal grate. Tr. 32-4, 37-8, 45-6, AX 7. A TED that has an escape opening at the top is referred to as a "top-exiting TED" whereas a TED with an escape opening at the bottom is referred to as a "bottom-exiting TED." Tr. 33-4. In order to be certified by the National Marine Fisheries Service, a TED design must have been shown during experimental testing to exclude sea turtles from trawl nets 97 percent of the time. AX 7.

Stevens explained the use of flotation on TEDs and that a bottom-exiting TED is required to have flotation to keep the TED from dragging along the sea floor and preventing escape. Tr. 34, 134. More specifically, he explained:

. . . if the TED is not floating clear of the bottom . . . [i.e.,] not floated properly to where the TED rises off of the sea floor and it's dragging . . . on the sea floor then the flap would be pinned closed and anything trying to exit the device could not do so because it would [be] riding on the sea floor.

Tr. 134. According to Stevens, proper flotation on a bottom-exiting TED is critical because without such flotation, the TED could "drag on the sea floor," entrapping and drowning any sea turtle encountered by the trawl net. Tr. 143. Thus, to achieve sufficient flotation, a bottom-exiting offshore TED that is greater than 120 inches in circumference is required under federal regulations to have a minimum of two EVA or PVC floats, each no smaller than 6.75 inches by 8.75 inches. Tr. 133, 139. To keep such a TED off of the sea floor, Stevens explained that the floats are to be attached "to the top of the TED" and "opposite of the escape opening" that is on the bottom of the net. Tr. 34, 136.

Although flotation is not required for top-exiting TEDs, Stevens explained that in his experience eighty to ninety percent of the vessels he has observed have flotation on top-exiting TEDs "to keep the net from chafing on the sea floor." Tr. 34, 136. In these instances, the floats are typically positioned "on either side of the frame" of the TED. Tr. 137, 214. Alternatively, the floats could be attached "behind the surface of the grid at the top of the net." *Id.* The latter positioning necessitates the floats being fed through the cod end of the net and attached from "behind the surface of the grid" and from "inside the net" so as to avoid any potential interference with the escape opening also located on the top of the TED. Tr. 136-37, 214. In effect, such flotation would be attached to the TED's frame from within the trawl net itself so that the flotation does not physically interfere with a turtle's ability to escape through the opening that is also located at the top of the net. *Id.*

In any case, Stevens opined that a fisherman would not place flotation on the bottom of a TED frame because doing so would "automatically put a twist in the net" as the float(s) rotate toward the surface of the water. Tr. 135-36, 208-09, 212-13. According to Stevens, "[t]hat float's going to come to the top at depth so then you'd have a twisted net. Nothing would pass through the net. The fisherman would lose all his catch back out the mouth of the net." Tr. 135-

36. In response to Respondent Crosby's contention at the hearing — that a fisherman could rotate a trawl net that has a bottom-exiting TED so that the TED would function as a top-exiting TED, without altering the attached flotation⁶ — Stevens explained that in his 28 years of experience he has never seen anyone “pull [meaning, use for fishing] a top-exiting TED with floats attached on the bottom of the net.” Further, he opined, based on his experience, that the characteristics of the floats and the position of the TED in the trawl net “would throw a twist in the net.” Tr. 208-09, 223-32, 249-50.

To quickly determine whether a TED is bottom-exiting versus top-exiting, Stevens offered that one can look at the use and placement of flotation on the TED, because the flotation on a bottom-exiting device will be attached opposite of the escape opening. Tr. 34, 135-36. However, if no floats were present, or to be certain as to whether the TED is bottom-exiting or top-exiting, he acknowledged that one would have to “run the seams down” the net, meaning follow the seam of the net from the mouth of the net to the tail of the net. Tr. 209-12.

Respondents are subject to the jurisdiction of the United States and are “persons” within the meaning of the Act. JX 1, paragraph 1. Respondents own the F/V Apalachee Warrior, a shrimp trawling vessel, and Respondent Crosby operates the vessel. JX 1, paragraphs 3-5, 11. On October 25, 2013, Respondent Crosby was operating the F/V Apalachee Warrior in the “Gulf Area,” as that term is defined in Agency regulations, and the vessel's four nets were “rigged for fishing,” as that term is defined in Agency regulations. JX 1, paragraphs 6-9, 12. On this date, Officers Geib and Bunker, and fellow Officer Corey Bridwell (“Bridwell”), were conducting “offshore” patrol, as that term is defined in Agency regulations, and encountered Respondents' vessel. JX 1, paragraphs 6, 13, AX 1. The officers boarded Respondents' vessel, still in in the Gulf Area and offshore, and they conducted TED inspections of the four nets. JX 1, paragraphs 9, 12-14, AX 1. At the time of this boarding by the officers, the F/V Apalachee Warrior had been at sea for about a week and had been fishing for shrimp. JX 1, paragraph 8.

While conducting the TED inspections, the officers found four violations that are the subject of this dispute. AX 1. On both the inboard and outboard Starboard nets, they noted that the bar spacing on each net's TED grid exceeded the 4-inch maximum provided by regulation. *Id.* Specifically, they found one of the Starboard TEDs to have bar spacing of 5.5 inches and the other Starboard TED to have bar spacing of 4.75 inches. Tr. 57-62, 72, 121-22, AX 1 at 2, AX 2. Although the bars on a TED are typically welded to the frame of the TED, thereby creating fixed spacing between the bars, it is possible for the bars of a TED to become bent from, for example, large debris that gets caught in the TED during trawling. Tr. 121-22, 219-20.

In addition, the officers found deficiencies with the amount of flotation on both the inboard and outboard Port-side TEDs, resulting in cited violations. Tr. 62-65, 119-21, AX 1 at 1-2, AX 2. Specifically, both Port-side TEDs were offshore hard TEDs of 120 inches or greater in circumference, and were determined to be bottom-exiting TEDs requiring the use of two EVA or PVC floats; however, each Port-side TED had only one such float, not two. Tr. 63-4, 119-21,

⁶ Meaning that the float(s) would remain attached to the TED opposite to the escape opening, and submerged underwater. Tr. 223-32.

234, AX 1 at 1-2, AX 2. At the time of the inspection, the officers observed a single float that was located opposite the escape opening on each Port-side TED, which indicated to them that they were inspecting a bottom-exiting TED. Tr. 61-64, 119-20, AX 1 at 1-2, AX 2. Indeed, these TEDs had been used by Respondents as bottom-exiting TEDs.⁷ Tr. 234. At no point during the inspection did Respondent Crosby, or anyone else, advise the officers that the Port-side TEDs were not being used as bottom-exiting TEDs. Tr. 237-38, 245-46. In fact, at the time of the inspection, Respondent Crosby explained to one of the boarding officers that he removed one of the two floats on each Port-side TED because he thought the TEDs had adequate flotation with just one float. Tr. 59-61, AX 2 at 2. Respondent Crosby also provided his own written statement following the inspection in which he stated: “Two floats on port side was [sic] taken off to see if TED was floating to[o] high.” Tr. 241-42, AX 3. Following this inspection and violations noted by the officers, the Agency issued the NOVA dated March 28, 2014, that gave rise to this proceeding.

V. PRINCIPLES OF LAW

A. Liability

In 1973, Congress enacted the ESA, 16 U.S.C. §§ 1531-1544, as amended, “[t]o provide for the conservation of endangered and threatened species of fish, wildlife, and plants” that are “of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” Endangered Species Act of 1973, Pub. L. No. 93-205, pmb1., § 2(a)(3), 87 Stat. 884, 884 (1973). Section 4 of the ESA directs the Secretary of Commerce, in coordination with the Secretary of the Interior, to identify any species that are endangered or threatened by using certain criteria and to list any such species in the Federal Register. 16 U.S.C. § 1533. In turn, Section 9 of the ESA provides, in pertinent part, that “it is unlawful for any person subject to the jurisdiction of the United States to . . . violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.” 16 U.S.C. § 1538(a)(1)(G). “Person” is defined by the statute, in pertinent part, to mean “an individual.” 16 U.S.C. § 1532(13); *see also* 50 C.F.R. § 222.102.

Six species of sea turtle found in waters of the United States are listed as either threatened or endangered under the ESA. AX 7, 50 C.F.R. §§ 223.102(e), 224.101(h). Regulations implementing the Act, as they pertain to sea turtles, provide that “it is unlawful for any person subject to the jurisdiction of the United States to . . . [o]wn, operate, or be on board a vessel, except if that vessel is in compliance with all applicable provisions of § 223.206(d).” 50 C.F.R. § 223.205(b)(1). In turn, the provisions of 50 C.F.R. § 223.206(d)(2)(i) require the following:

Any shrimp trawler that is in the Atlantic Area or Gulf Area must have an approved TED installed in each net that is rigged for fishing. A net is rigged for fishing if it is in the water, or if it is shackled, tied, or otherwise connected to any trawl door or

⁷ At the hearing, Respondent Crosby claimed that these TEDs had been used as bottom-exiting TEDs before and after this trip but that during this trip they were used as top-exiting TEDs. Tr. 234.

board, or to any tow rope, cable, pole or extension, either on board or attached in any manner to the shrimp trawler.

50 C.F.R. § 223.206(d)(2)(i). Although exceptions to this requirement are identified in 50 C.F.R. § 223.206(d)(2)(ii), these exceptions are not applicable in this case. Specifications for an “approved TED” are set out in 50 C.F.R. § 223.207. In particular, they provide that “[t]he space between deflector bars and the deflector bars and the TED frame must not exceed 4 inches (10.2 cm).” 50 C.F.R. § 223.207(a)(4). The escape opening must be “centered on and immediately forward of the frame at either the top or bottom of the net when the net is in the deployed position.” 50 C.F.R. § 223.207(a)(6). “The escape opening must be at the top of the net when the slope of the deflector bars from forward to aft is upward, and must be at the bottom when such slope is downward.” *Id.* In addition: “Floats must be attached to the top one-half of all hard TEDs with bottom escape openings.” 50 C.F.R. § 223.207(a)(9). “Floats must be constructed of aluminum, hard plastic, expanded polyvinyl chloride, or expanded ethylene vinyl acetate unless otherwise specified.” *Id.* For hard TEDs with a circumference of 120 inches or greater, “a minimum of either one round, aluminum or hard plastic float, no smaller than 9.8 inches . . . in diameter, or two expanded polyvinyl chloride or expanded ethylene vinyl acetate floats, each no smaller than 6.75 inches . . . in diameter by 8.75 inches . . . in length, must be attached.” 50 C.F.R. § 223.207(a)(9)(i).

“Vessel” means “a vehicle used, or capable of being used, as a means of transportation on water which includes every description of watercraft” 50 C.F.R. § 222.102. “Shrimp trawler” means “any vessel that is equipped with one or more trawl nets and that is capable of, or used for, fishing for shrimp” *Id.* “Gulf Area” means “all waters of the Gulf of Mexico west of 81 [degrees] W. long. (the line at which the Gulf Area meets the Atlantic Area) and all waters shoreward thereof (including ports).” *Id.* An approved TED means “a device designed to be installed in a trawl net forward of the cod end for the purpose of excluding sea turtles from the net, as described in 50 CFR 223.207.” *Id.*

B. Standard of Proof

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

There is no presumption in favor of the penalty proposed by the Agency, and an Administrative Law Judge is not “required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document.” *Tommy*

Nguyen & William J. Harper, 2012 NOAA LEXIS 2, at *21 (NOAA Jan. 18, 2012) (“*Nguyen & Harper*”); see 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631 (June 23, 2010). The Administrative Law Judge must independently determine an appropriate penalty “taking into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m); see 15 C.F.R. § 904.108 (enumerating factors that may be considered in assessing a penalty).

C. Civil Penalty

The Act provides:

Any person who knowingly violates . . . any provision of this Act, . . . or any regulation issued in order to implement [16 U.S.C. § 1538(a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d), (f), or (g)], may be assessed a civil penalty by the Secretary of not more than \$25,000 for each violation. Any person who knowingly violates . . . any provision of any other regulation issued under this Act may be assessed a civil penalty by the Secretary of not more than \$12,000 for each such violation. Any person who otherwise violates any provision of this Act, or any regulation, permit, or certificate issued hereunder, may be assessed a civil penalty by the Secretary of not more than \$500 for each such violation.⁸

16 U.S.C. § 1540(a)(1). Although the Act does not set forth any factors to be considered when assessing a penalty, the procedural rules governing this proceeding, set forth at 15 C.F.R. part 904 (“Rules of Practice”) provide, in pertinent part:

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

15 C.F.R. § 904.108(a).

For enforcement cases charged between March 16, 2011, and July 1, 2014, the Agency utilizes the “Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions” (“Penalty Policy”) to calculate a civil penalty. 76 Fed. Reg. 20,959 (Apr. 14, 2011), *available at* http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf. Under the Penalty Policy, penalties are based on two criteria:

⁸ Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, the Secretary increased the maximum civil penalty available under the ESA to \$32,500 for a “knowing violation of Section 1538,” to \$13,200 for an “other knowing violation,” and to \$650 for an “otherwise violation.” Civil Monetary Penalties; Adjustment for Inflation, 73 Fed. Reg. 75,321, 75,322 (Dec. 11, 2008) (codified at 15 C.F.R. § 6.4(f)(13)).

(1) A “base penalty” calculated by adding (a) an initial base penalty amount . . . reflective of the gravity of the violation and the culpability of the violator and (b) adjustments to the initial base penalty . . . upward or downward to reflect the particular circumstances of a specific violation; and (2) an additional amount added to the base penalty to recoup the proceeds of any unlawful activity and any additional economic benefit of noncompliance.

Penalty Policy at 4. As mentioned above, the “initial base penalty” amount consists of two factors, collectively constituting the seriousness of the violation: “(1) the gravity of the prohibited act that was committed; and (2) the alleged violator’s degree of culpability” (assessing the mental culpability in committing the violation). *Id.* The “gravity” factor (also referred to as “gravity of the violation” or “gravity-of-offense level”) is comprised of four or six (depending upon the particular statute at issue) different offense levels, reflective of a continuum of increasing gravity, taking into consideration the nature, circumstances, and extent of a violation.⁹ *Id.* at 6-8. Thus, offense level I represents the least significant offense level and offense level VI represents the most significant offense level. *Id.*

The “culpability” factor (also referred to as “degree of culpability”) is comprised of four levels of increasing mental culpability: unintentional activity (such as an act that is inadvertent, unplanned, and the result of accident or mistake); negligence (such as carelessness or a lack of diligence); recklessness (such as a conscious disregard of substantial risk of violating conservation measures); or an intentional act (such as a violation that is committed deliberately, voluntarily, or willfully). Penalty Policy at 6, 8-9.

These factors are depicted in a penalty matrix, with the “gravity” factor represented by the vertical axis of the matrix and the “culpability” factor represented by the horizontal axis of the matrix. Penalty Policy at 6. The intersection point from the levels used in each factor then identifies a penalty range on the matrix. *Id.* at 7. The midpoint of this penalty range determines the “initial base penalty” amount. *Id.* Once an “initial base penalty” amount is determined, “adjustment factors” are considered in order to move up or down (or not at all) from the midpoint of the penalty range, or to move to an altogether different penalty range. *Id.* at 10. The “adjustment factors” are as follows: an alleged violator’s history of non-compliance; whether the alleged violator’s conduct involves commercial or recreational activity; and the alleged violator’s conduct after the violation. *Id.* After the application of any adjustment factors, the resulting figure constitutes the “base penalty.” *Id.* at 5. Next, the proceeds gained from unlawful activity and any additional economic benefit of non-compliance to an alleged violator are considered and factored into the penalty calculation (such as the gross value of fish, fish product, or other product illegally caught, or revenues received; delayed costs; and avoided costs). *Id.* at 12-13.

⁹ Where a violation and corresponding offense level are not listed in the Penalty Policy, the offense level is determined by using the offense level of an analogous violation or by independently determining the offense level after consideration of the factors outlined in the Penalty Policy. Penalty Policy at 7-8.

VI. ANALYSIS

A. Parties' Arguments

The Agency argues that Respondents violated the ESA by having insufficient flotation on the vessel's Port-side TEDs and by having excessive space between the grid bars on the two Starboard-side TEDs. Ag. In. Br. at 5. As to flotation, the Agency asserts that a minimum of two PVC or EVA floats were required, but each of Respondents' Port-side TEDs had only one float. *Id.* The Agency asserts that these Port-side TEDs were "bottom-shooting, meaning the turtle escape opening was at the bottom of the TED frame" as evidenced by the fact that the floats were "attached opposite the escape opening on the outside of the TED frame." *Id.* (citing Tr. 62-64, 135-38, 209-09.)

Contrary to Respondent Crosby's assertion at hearing, the Agency argues these "port-side TEDs were not top-shooting, because top-shooting TEDs, . . . though . . . not required, always have floats attached either at the sides . . . or at the top of the frame beneath the netting." *Id.* at 5-6 (citing Tr. 62-64, 135-38, 208-09), and 10 (citing Tr. 62-64, 135-38, 208-14, AX 1 at photos 1,4, and 5, AX 2). To attach floats to the bottom of a top-shooting TED "would cause the net to twist as the float rises in the water, effectively disabling the net from retaining shrimp." *Id.* at 6 (citing Tr. 135-36), 10 (citing Tr. 135-37, 211-13).

The Agency submits that Respondent Crosby's argument at hearing — that the Port-side TEDs, with flotation attached opposite of the escape opening, were being used as top-shooting TEDs and, as such, did not require flotation — defies logic, the laws of physics, and is simply not credible. *Id.* at 10-12. In support, the Agency refers to the testimony of its TED expert, Stevens, who explained that when flotation is used on a top-shooting TED, as is commonly the case, the float(s) would only be "attached at the sides of the TED grid or inside the net, behind the escape opening" since "a float attached to the bottom of a TED grid will cause the TED to flip as the float rises in the water, causing the net to twist." *Id.* at 10. According to Stevens, "the port-side TEDs could not have been top-shooting because of the placement of the floats opposite the escape opening." *Id.* (citing Tr. 134-38). The Agency adds that in Stevens' experience, comprising "twenty-eight years of testing, observing, and inspecting TEDs," he "has never seen a top-shooting TED with floats attached opposite the escape opening." *Id.* at 10-11 (citing Tr. 208-14, 249-50).

Furthermore, the Agency points out that "[a]t no time during the boarding did Respondent Crosby assert that the port-side TEDs were top shooting TEDs." *Id.* at 6 and 11 (citing Tr. 237-38, 245-46). Rather, Respondent Crosby explained that, while experimenting, he had removed flotation from each port-side TED to determine whether the TED was floating too high. *Id.* at 9-10 (citing Tr. 225) and 11 (citing Tr. 241, AX 3). The Agency notes that "Respondents asserted for the first time that their TEDs were top-shooting only shortly before the hearing" and did not raise this argument in their Preliminary Position on Issues and Procedures ("PPIP"), which the Agency argues is "suspect." *Id.* at 11-12. In their PPIP, the Agency contends, Respondents "asserted a different explanation for the insufficient flotation: that the single float on each port-side net was extra-large and therefore probably sufficient to float the TEDs." *Id.* at 11 (citing Respondents' PPIP at 2). The Agency points out that this

initial argument — that the Port-side floats were extra-large — “undermines their later argument that the TEDs were actually top-shooting, because an extra-large float would be even more likely to twist the net.” *Id.* at 11.

As to the alleged excessive grid-spacing, the Agency argues that the evidence it presented established that the grids on Respondents’ Starboard-side TEDs “exceeded the four-inch maximum spacing requirement in some places,” which Respondents have not rebutted. *Id.* at 7-8. Specifically, the Agency relies on the testimony of the boarding officers, who took measurements of the grid spacing on the Starboard TEDs, using their standard procedure for taking measurements, which revealed excessive space on each Starboard TED (5.5 inches of space on one of the Starboard TEDs, and 4.75 inches of space on the other Starboard TED). *Id.* at 7 and 8. The Agency contends Respondent Crosby admitted to one of the grid-spacing violations and did not contest the other. *Id.* at 6 and 8.

As to penalty, the Agency urges that I assess the penalty it proposed, \$7,500, against Respondents, jointly and severally, for the four counts of violations charged. It argues that the violations “presented a serious risk to any endangered or threatened sea turtle that may have encountered Respondents’ nets” and that the proposed penalty assessed by the Agency “is reasonable and necessary to convey to Respondents and other shrimp fishermen the gravity of the infractions.” *Id.* at 13.

The Agency argues it “presented uncontroverted expert testimony establishing the risks posed by Respondents’ TEDs,” noting that “[m]ost grave was the risk created by the insufficient flotation on the port side, because *any* sized sea turtle would be unable to escape if the TED dragged low along the sea floor.” *Id.* at 15 (citing Tr. 143). Further, the Agency suggests from the record that “the non compliant TEDs were in use for several days, if not weeks” and that the risk of capturing turtles was multiplied by the “[p]rolonged, repeated use of the TEDs with insufficient flotation” and excessive bar spacing. *Id.* The Agency urges that the civil penalty imposed should be adequate to deter shrimp fishermen from “lax compliance with regulations” designed to prevent harm to endangered and threatened turtles, and from “modifying or ‘experimenting’ with their TED gear” due to frustration over shrimp production. *Id.*

The Agency contends further that Respondents, as “long-time shrimpers with knowledge of the TED regulations,” were “at a minimum, negligent, when they trawled for shrimp with non-compliant TEDs.” *Id.* at 16. The Agency suggests a pattern of noncompliance with TED regulations on the part of Respondents, which “eliminate[s] any possibility that Respondents exercised due care or deserve mitigation due to mistake.” *Id.*

Presumably on behalf of Respondents collectively, Respondent Crosby filed an initial post-hearing brief in this matter¹⁰ arguing that “in the last year boats have found a float on the

¹⁰ Respondent Crosby’s initial post-hearing brief consists of two sections. The first section is captioned “post hearing brief” consisting of numbered pages 1 through 9, which I cite to as “Section 1” followed by the specific page number(s) cited. The second section is captioned “agency post hearing brief my reply” consisting of numbered pages 1 through 10, followed by a

bottom of the TED an discharge out of the top of the net worked and did not flip.” Resp. In. Br. Section 1 at 1. Respondents asserts that while Stevens testified he had never seen a top-exiting TED used with floats on the bottom and contended that doing so would cause the net to twist, he argues that Stevens’ testimony was a mere “indication[] of what might happen or could happen” and that Stevens lacked evidentiary proof to support such statements. *Id.* at Section 1 at 1-2, Section 2 at 1. Further, they call into question the impartiality of Stevens, stating that Stevens “would not tell the court that the trawel doors was [sic] on the outrigger until my questions left him no choice.” *Id.* at Section 1 at 8. Respondents also argue that had the officers who inspected the TEDs “run the seam of the nets down from front to back they would have had proof I was discharging from the top of the net.” *Id.* at Section 1 at 1, 8, Section 2 at 1-2, and 10.

Additionally, Respondents offer arguments that appear to question the level of detail afforded by the officers who boarded the F/V Apalachee Warrior and which represent general challenges to the procedures the officers followed during the inspection. For example, Respondents contend that one of the officers testified that the crew aboard the vessel comprised four individuals (citing Tr. 56), yet, according to Respondent Crosby, there were only three individuals on board.¹¹ He also notes that the officers decided to forego a safety inspection of the vessel even though “safety is always first on a shrimp trawler.” *Id.* at Section 1 at 4-5, Section 2 at 2. Later in Respondents’ Reply Brief, Respondent Crosby further explained that his intention behind raising this point was to identify an alleged inconsistency between Bunker’s incident summary report in which he states the officers asked the Captain to “pull all four shrimp nets into his vessel for us to conduct an inspection after checking all of his required safety equipment and commercial licenses[,]” and Bunker’s hearing testimony in which he explained that the officers relied on a recent Coast Guard Boarding form in lieu of conducting a separate safety inspection to expedite the otherwise lengthy inspection process. Tr. 57-59, AX 1 at 1, Resp. Rep. Brief. at 5-6.

Respondents also note that the certificate of documentation for the F/V Apalachee Warrior expired in September 2013, prior to this incident, and they argue that had the officers verified such information, they would have been issued a citation or warning for the expired documentation. *Id.* at Section 1 at 5, Section 2 at 2. Further, they argue, as Respondent Crosby did at the hearing, that the photographic evidence presented by the Agency of excessive bar spacing on the Starboard TEDs, contained in AX 1, is not reliable evidence of each claimed violation because photograph numbers 6 and 8 are actually of the same TED. *Id.* at Section 1 a 7, Section 2 at 3, and 10. *See also*, RE 9, pages 2 and 3 of 3, Tr. 84-100. In a related argument, they also seem to suggest that the physical measurements taken by the officers of the bar spacing of the Starboard TEDs was duplicative — that is, they measured “the same TED twice” — and is

certification of service, which I cite to as “Section 2” followed by the specific page number(s) cited.

¹¹ I note that Respondent Crosby does not cite to support in the record for his contention that only three individuals were aboard the vessel at the time of this inspection, but is presumably relying on the statements offered by the other crew members who were present during the inspection, which were admitted into evidence as RE 2 and RE 3.

equally unreliable evidence. *Id.* at Section 2 at 6. Thus, they contend “there should be only one violation” of the bar spacing regulation. *Id.*

Furthermore, Respondents challenge the Agency’s assertion that non-compliant TEDs were in use for days, if not weeks, arguing that the shrimping nets and TEDs were checked every evening and any bar spacing problems would have been promptly corrected. *Id.* at Section 2 at 8. They further argue that they would stand no benefit from breaking the law and suggest that “you cannot pull a net tight enough on the bottom to trap a turtle” because “the bag will fill up with mud or sand and will either [sic] tear the net in half or stop the vessel” They state further that allowing a TED to drag along the sea floor from insufficient flotation could cause damage to the net and cost time and money to shrimpers. *Id.* at Section 2 at 9. They also argue that excess bar spacing on a TED could cause excess debris to remain pushed “against the bars” of the TED, allowing shrimp to escape the net, and causing a loss of shrimp production. *Id.* at Section 2 at 8.

Respondent Crosby notes that he has had “one minor federal shrimping violation in 34 years as a captain-owner of a shrimping trawler.” *Id.* at Section 1 at 7, Section 2 at 7, and 9. He also states that of the various times he has had his vessel boarded by law enforcement, he has never before been “treated so badly and with such disrespect.” *Id.* He argues that, rather than be assessed a civil penalty by the Agency, he should have been given an oral or written warning. *Id.* at Section 1 at 9, Section 2 at 6. He also contends that he was discouraged from discussing the claimed violations with the officers during the inspection and was instead advised to “take any issues up with NOAA.” *Id.* at Section 2 at 4 and 10.

In its reply, the Agency argues that Respondents have raised “a host of unsubstantiated arguments that merely distract from the facts that establish Respondents’ liability for four violations of the ESA.” Ag. Rep. Br. at 1. As to the bar spacing violations, the Agency argues that regardless of the possibility that photographs 6 and 8 may be of the same TED, the independent measurements of the bar spacing taken during the inspection and recorded on the boarding form are nevertheless correct. *Id.* at 2. Further, the Agency notes that the photographs were “merely illustrative” and “not a photograph of showing each individual measurement taken of each of the several components of each TED.” *Id.* Contrary to Respondents’ representations that the grid bars of each TED are regularly inspected to ensure proper spacing (since contact with debris in the water can cause the bars to become bent), the Agency points out that Respondent Crosby has been previously cited for a bar spacing violation that resulted in a summary settlement, which suggests Respondent Crosby is “less than diligent” when it comes to such inspections. *Id.* at 3.

The Agency also challenges Respondents’ claim that their Port-side TEDs were top-shooting, stating that this “post hoc rationalization” is unsupported in that they failed to make mention of the use of top-shooting TEDs to the boarding officers or in the written statement made after the inspection and failed to raise this argument in their PPIP. *Id.* In the absence of such support, the Agency contends Respondents “question the credibility and bases of [Stevens’] expert testimony” with unsubstantiated allegations that this Court should reject. It notes that Stevens agreed with Respondent Crosby — that the trawl doors were on the outriggers — making any claims of bias unclear. *Id.* at 3-4. The Agency defends Stevens’ knowledge and

expertise, which Respondents have challenged, by drawing attention to the testimonial evidence that Stevens' office "conducts annual testing in Panama City to observe how well sea turtles escape TEDs, that Stevens has "conducted extensive testing in commercial situations," though less certification testing as of late "because TED design has not changed," and that, as a commercial shrimper himself, Stevens has personal knowledge of the industry. *Id.* at 4 (citing Tr. 20, 24-25, 28-29, 48). The Agency reiterates that Stevens has twenty eight years of experience "as a gear specialist" with responsibility for "testing, inspecting, and conducting training and outreach on TEDs," who "[a]t some time or another . . . has made contact with nearly every shrimp fisherman in the Gulf and South Atlantic." *Id.* (citing Tr. 19-22, 145). The Agency urges that I find Respondents' argument — that their Port-side TEDs were top-shooting — incredible, stating it is implausible that Respondents "discovered a method to defy basic physics and pull top-shooting TEDs with floats attached at the bottom, for no apparent gain in production, in direct contravention to [Stevens'] testimony that such a TED will flip." *Id.* at 4-5.

The Agency reiterates its position, contrary to Respondents' suggestions, that insufficient flotation on a TED is quite serious because it can "entrap a turtle because the escape opening may be pinned closed by the sea floor." *Id.* at 5 (citing Tr. 134, 143, 154, 158). In support, it relies on the testimony of its expert, Stevens, whose explanation was based on "testing in which scientists and divers observe sea turtles of various sizes pass through TEDs in varying circumstances." *Id.* (citing Tr. 28-30, 45, 144, 158).

The Agency challenges Respondent Crosby's assertion that he was not permitted to speak during the boarding and maintains that the boarding officers did not provide such an instruction. *Id.* at 6. In fact, the Agency points out, Respondent Crosby testified that at the time of boarding ". . . the first thing I told the marine patrol, it's got plenty of floats" when referring to the flotation on the TEDs. *Id.* at 7 (citing Tr. 156). Thus, the Agency concludes, "[h]e had ample opportunity to, and did, communicate with the officers about the flotation and his increasingly strident claims that he was silenced during the boarding are not credible." *Id.* In response to Respondents' criticism that the boarding officers did not conduct a safety inspection of the vessel, the Agency argues such a decision was immaterial and that the officers' "belief that the vessel had undergone a Coast Guard safety boarding not long prior sufficed as a check of the safety equipment." *Id.* (citing Tr. 57). As a result, the Agency states, the officers "asked to see the fisheries permit and moved on to the TED inspection." *Id.*

In Respondents' Reply Brief, they takes issue with the Agency's suggestion that Respondent Crosby was "less than diligent" when inspecting his fishing equipment. Respondent Crosby estimates that state and federal officials across various states have inspected his vessel forty-five times in his thirty-four years in the shrimping industry and he has only incurred one prior violation in all that time. Resp. Rep. Br. at 1-2. Respondents reiterate arguments they have previously made that I need not repeat here. *Id.* at 1 and 6 (referring to photographs 6 and 8), 2 (allegations of bias on the part of Stevens), 4-5 (alleged instructions by the boarding officer(s) not to speak and to take any issues up with NOAA), 6 (inaccuracies or discrepancies with regard to a safety inspection during the boarding), and 7 (that the officers did not and could not have checked his nets, presumably by following the seams of the net, to determine whether the TED was discharging from the top). In addition, Respondent Crosby attempts to refute the Agency's claim that he failed to previously raise his argument — that the Port-side TEDs were top-

shooting — in his PPIP filings by referring to arguments presented in Respondents’ initial post-hearing brief. *Id.* at 3 (referring to Resp. In. Br. at Section 2 at 10).

Respondents argue that the testing Stevens conducts occurs in Panama City, Florida, which consists of “a white sandy bottom in 30 to 50 foot of water where [sic] diver can look at the TEDs” differs from “shrimp production in federal water 70 to 200 feet.” *Id.* at 3. They also contend that the shrimp industry is changing all the time, including the designs of TEDs. *Id.* at 3-4. Lastly, they reiterate that the boarding officers who conducted this TED inspection failed to “run the seam of my nets from the mouth of my nets down to the TEDs to see that I was discharging out of the top of my net.” *Id.* at 7.

B. Liability

i. Port-side TEDs

At issue is whether Respondents’ two Port-side TEDs lacked sufficient flotation. The regulations require that shrimp trawlers in the Atlantic or Gulf areas have an “approved TED” installed in each net that is rigged for fishing. 50 C.F.R. § 223.206(d)(2)(i). To be an “approved TED” there are various requirements that must be met, including requirements related to flotation for bottom-exiting TEDs. To this end, a hard TED with a circumference of 120 inches or greater, as here, and with a bottom escape opening, must have floats “attached to the top one-half” of the TED, and such “floats must be constructed of aluminum, hard plastic, expanded polyvinyl chloride, or expanded ethylene vinyl acetate” 50 C.F.R. § 223.207(a)(9). With the use of expanded polyvinyl chloride (or PVC) or expanded ethylene vinyl acetate (or EVA) flotation material, two such floats are required to be attached to the TED and each float may be “no smaller than 6.75 inches . . . in diameter by 8.75 inches . . . in length.” *Id.*

There is no dispute as to the type of TEDs Respondents were using, that is, hard offshore TEDs with a circumference of 120 inches or greater, and no dispute as to the flotation material Respondents used, namely PVC or EVA, not aluminum or hard plastic. Tr. 64, 225, 233-34, AX 1 at 1-2, AX 2. Respondents also do not dispute that, by the time of the boarding and TED inspection, Respondent Crosby had removed one of the two floats that had been on each Port-side TED so that only one float remained attached to each TED. Tr. 218, 225, 227, 231, AX 1 at 1-2, AX 2, AX 3.

The evidence further shows that the officers inspecting the Port-side TEDs concluded that each was a bottom-exiting TED that lacked sufficient flotation, as was recorded on the TED Enforcement Boarding Form. Tr. 62, AX 2. While not explicitly stated, it appears from the record that the officers concluded the Port-side TEDs were bottom-exiting TEDs from the placement of the flotation opposite of the escape opening, since such placement, as opined by Stevens, would be consistent with a bottom-exiting TED. Tr. 34, 61-64, 119-20, 135-36, AX 1 at 1-2, AX 2. Moreover, no information to the contrary was provided to the boarding officers. Tr. 237-38, 245-46.

However, Respondents contend that these Port-side bottom-exiting TEDs were used as top-shooting TEDs during this trip and, as such, the TEDs did not require flotation. Tr. 225-27,

234. While Respondents acknowledge that these same TEDs were used prior to and since this inspection as bottom-exiting TEDs, they claim that on this particular trip, the TEDs were turned 180 degrees and used as top-shooting (or top-exiting) TEDs in an, albeit unsuccessful, attempt to increase shrimp production by the nets on the Port-side of the vessel. So, according to Respondents, the use of any flotation under such circumstances was not necessary. Tr. 223-24, 225-27, 230-32, 234.

I have carefully considered Respondents' arguments concerning the Port-side TEDs, but find that such arguments lack credibility. At the time of the inspection and in spite of the officers noting violations with these TEDs for insufficient flotation, Respondent Crosby made no mention of his current claim that he was using bottom-exiting TEDs as top-shooting TEDs and that therefore, flotation was not required. Tr. 237-38, 245-46. Respondent Crosby asserts that he did not mention such use of the TEDs during the inspection because he had been told by one of the boarding officers, Bunker, to address any issues with NOAA. Tr. 237 ("On the first, the very first measure, first time I was warned that if I had issues bring it up with NOAA. That they was doing their job. And that's what aggravated me."), 245-48. Respondent Crosby interpreted this as a warning not to speak. Tr. 236-37, 245, Resp. In. Br. at Section 2 at 4 and 10. Agency witnesses, Geib and Bunker, dispute any allegation that Respondent Crosby was told not to speak. Tr. 245-48. Regardless of whether or not Bunker told Respondent Crosby to refrain from speaking, the fact remains that other boarding officers (Geib and Bridwell) were present during the inspection with whom Respondent Crosby could have spoken. Yet, he made no mention of his current claims to anyone. Tr. 237-38, 245-46. To the contrary, Respondent Crosby provided a different explanation for the lack of flotation on the TEDs. At the time of the inspection, one of the officers recorded an oral statement he received from Respondent Crosby in which he stated that he had purposely removed one of the two floats on two TEDs "because he thought the grid had enough flotation due to air inside the grid." Tr. 59-61, AX 2 at 2. Respondent Crosby did not deny making this statement. Tr. 241. Respondent Crosby's allegation — that he was warned not to speak and therefore failed to mention the manner in which he claims to have used the Port-side TEDs — is simply not credible considering the inconsistencies he presents.

Respondent Crosby also provided a written statement at the time of the inspection, providing his explanation for this and other violations noted by the officers during this boarding. Tr. 241-42, AX 3. As it related to the flotation on the Port-side TEDs, Respondent Crosby stated: "Two floats on Port side was taken off to see if TED was floating too high." AX 3. Thus, on two separate occasions throughout the inspection process, Respondents provided different explanations for the removal of flotation on the Port-side TEDs — first, because the TED had adequate flotation with just one float attached, then second, to determine whether the TED "was floating too high" — and both of these explanations are different from what Respondents now claim as part of the litigation process, namely that these bottom-exiting TEDs were used as top-exiting TEDs thereby eliminating any requirement for flotation.¹² The inconsistent explanations by Respondents in response to the lack of sufficient flotation on the Port-side TEDs cast doubt upon the veracity of their claims and lead me to conclude that Respondents, and the arguments they have advanced, lack credibility.

¹² I note that Respondents did not raise this argument in its initial PPIP submission, but did so in supplemental PPIP documents submitted prior to hearing.

Moreover, Respondents' argument — that they used bottom-exiting TEDs as top-exiting TEDs on this particular fishing trip — defies common sense and is contrary to the experience and opinion of a TED expert, Stevens. As a starting point, "a float" when used as a noun is commonly defined as "something that floats in or on the surface of a fluid." *See*, <http://www.merriam-webster.com/dictionary/float>. "Flotation" is commonly defined as "the act, process, or state of floating or of causing or allowing something to float." *See*, <http://www.merriam-webster.com/dictionary/flotation>. With these definitions in mind, Stevens explained that, on a bottom-exiting TED, a minimum of two EVA or PVC floats are required to be attached "to the top of the TED" and "opposite of the escape opening" in order to create sufficient flotation to keep the bottom of the TED, where the escape opening is located, from dragging along the sea floor. The purpose of such flotation is to create sufficient space between the TEDs bottom escape opening and the sea floor so that a captured sea turtle can exit the net through the TED and have sufficient room from the sea floor to be released into the open water. *See* Tr. 34, 133-34, 136, 143. Stevens further explained that while flotation is not required for a top-exiting TED, it is often still used "to keep the net from chafing on the sea floor." Tr. 34, 136. In such cases, the flotation is attached on either side of the TED frame, or alternatively, at the top of the TED frame "behind the surface of the grid" and from "inside the net" so as to avoid any potential interference with the escape opening that is also positioned at the top of the TED. Tr. 136-37, 214.

Regardless of whether a fisherman is using a bottom-exiting or top-exiting TED, Stevens opined that a fisherman would not attach or use floats on the bottom of a TED frame because doing so would "automatically put a twist in the net" as the float(s) rotate toward the surface of the water. Tr. 135-36, 208-9, 211-13. He elaborated, "that float's going to come to the top at depth so then you'd have a twisted net. Nothing would pass through the net. The fisherman would lose all his catch back out the mouth of the net." Tr. 135-36. Further, Stevens offered that in his 28 years of experience he has never seen someone "pull a top-exiting TED with floats attached on the bottom of the net." In his opinion, the characteristics of the floats and the position of the TED in the trawl net "would throw a twist in the net." Tr. 208-09, 211-12, 249-50.

In spite of such expert testimony, Respondents assert, and urge that I believe, that they utilized the bottom-exiting TEDs as top-exiting TEDs with flotation attached to the bottom of the TED frame, that is, opposite to the escape opening. Respondent Crosby testified that he used bottom-exiting TEDs as top-exiting TEDs by simply turning the TED 180 degrees. Tr. 227. He alleges that he initially used the TEDs in this fashion with two floats on each TED, attached to the outside of the TED frame and opposite the escape opening, meaning that the floats were on the bottom of the TED's frame and remained submerged under water while trawling. Tr. 227-29. According to Respondent Crosby, and in direct contradiction to the opinions offered by Stevens, the trawl nets did not twist. Tr. 228-29 ("It didn't flip. It just didn't. We pulled it. [] They was there and it worked, and I had no problem, and I never changed them."), Tr. 230 ("It works. It just works."). Unsurprisingly, the alleged use of the TEDs in this fashion also did not improve Respondents' shrimp production. Tr. 230-31. According to Respondent Crosby, he then removed one float from each Port-side TED, leaving one float still attached to the bottom of the

TED's frame, as he trawled for shrimp. Tr. 231-32. Again, he claims, the net did not twist, and shrimp production did not improve. Tr. 231.

Respondents' position and Respondent Crosby's testimony is simply implausible. To believe such a rendition suggests that the "floats" Respondents used on their Port-side TEDs lost all capacity for flotation. While I recognize, as Stevens testified, that a PVC or EVA float may lose some of its buoyancy over time due to compression and depth in the water, it is not feasible to suggest that it will lose all of its flotation and, more importantly, no credible evidence has been presented to support such a proposition. Tr. 139-41, 147, 150-52. As Stevens opined,

The float is never going to reduce in size to a point where it has no flotation. It's, just physically can't go away. So even if a float starts out on the surface at this big and at 150 feet it's this big due to compression from the pressure at depth, it's still got some flotation to it.

Tr. 151. Respondents' position is also inconsistent with other evidence offered by Respondent Crosby. For example, Respondent Crosby alleged in his testimony that the floats on the Port-side TEDs were "big floats" and "a lot bigger than the 6-inch float." Tr. 232. He also justified removing one of the floats on each of these TEDs because he questioned whether the TEDs had "too much float." *Id.* Both of these statements would suggest ample buoyancy of the floats that would, in turn, lend support for the opinions of Stevens. In a written statement offered into evidence at the hearing by Respondent Crosby, he states that he left one float on the Port-side TEDs for two reasons, one of which was "to be legal by having one float that had the right length and width to be legal." RE 4 at 2. This is in direct contradiction to his repeated claims during the hearing that the Port-side TEDs were "legal" and did not require any flotation. Tr. 218-19, 225, Resp. In. Br. at Section 2 at 4-5.

In an effort to gain credence for their claims concerning the use of the Port-side TEDs as top-exiting TEDs, Respondents attempt to discredit the testimony and opinions offered by Stevens, who was qualified as and deemed, without objection, an expert in the design, use, and effects of TEDs. Tr. 19-28, AX 12. Respondents suggest that Stevens' testimony and opinions are simply an "indication[]" of what might or could happen" and lacked evidentiary support. Res. In. Br. at Section 1 at 1-2, Section 2 at 1. Further, they question the impartiality of Stevens, stating that Stevens "would not tell the court that the trawl doors was [sic] on the outrigger until my questions left him no choice." *Id.* at Section 1 at 8. Lastly, they challenge the conditions of the testing Stevens conducted, arguing that such testing occurred in shallower water and clearer conditions than that which exists when shrimping commercially. Resp. Rep. Br. at 3.

I find no merit in Respondents' challenges to Stevens' credibility and the reliability of his testimony. Stevens' training and experience is well-documented and establishes his wealth of experience not only as a commercial shrimp fisherman for many years but also his decades of experience as a Methods and Equipment Specialist with regard to TEDs. Tr. 19-30, AX 12. Since his employment with NOAA in 1988, he has been responsible for the design, development, and research of TEDs. Tr. 20. Drawing from these many years of specialized experience and knowledge concerning TEDs, he is well-qualified to offer expert opinions as to hypothetical

situations affecting TEDs. Further, I found Stevens' testimony throughout the hearing to be candid and credible and I afforded his opinions great weight. It is also curious that Respondents now question Stevens' impartiality given that, while under oath, Respondent Crosby made a point of telling Stevens: "Mr. Stevens, like I say out of respect, I've heard of you for ages. You're an honest and fair man." Tr. 39. On another occasion during the hearing, he told Stevens "I have great respect for you." Tr. 24. He also made a point of shaking Stevens' hand during the course of the evidentiary hearing, which was documented in the transcript. Tr. 40.

Respondents' suggestion that Stevens was not forthcoming in responding to questions about the placement of the trawl doors is simply without merit. A complete reading of the hearing transcription of testimony reveals that Stevens was trying to understand and be responsive to a convoluted line of questioning by Respondent Crosby, which even raised questions of relevancy by the Court. See Tr. 197-201. Notably, even Respondent Crosby remarked at the conclusion of this questioning "Okay, that's what I wanted. My vocabulary ain't very good. My mind tells me, but then my mouth don't tell me what to say." Tr. 201. The fact that it may have taken Stevens some time to understand and respond to Respondent Crosby's inquiry does not bring into question Stevens' impartiality.

As to TED testing conditions, Stevens credibly testified that he has "spent an extensive amount of time on commercial trawlers testing these devices." He explained that before a TED is approved, protocol involves taking it out on the vessel of the fisherman who submitted it for testing, and that fisherman "goes and trawls wherever he wants to go and trawl" while Stevens, and others, "go along simply to observe." Tr. 25-29. He testified that he has spent "many many days on vessels testing these devices in the manner with which the person that submitted it for testing wants to test it." Tr. 25. Such testing has included many areas along the Atlantic seaboard and the Gulf of Mexico, including Mexico where Stevens spent two weeks on a commercial trawler. Tr. 25-29. Contrary to Respondents' suggestion, Stevens also explained that while annual testing is conducted in shallow clear water, its purpose is primarily "to observe how the turtle is escaping the TED. Is this turtle going to escape this device rigged as that device is rigged[]" and less "to observe the gear itself." Tr. 29.

Based on the foregoing, I do not find Respondents' challenges to Stevens persuasive. Rather, as stated, I found the testimony and opinions offered by Stevens well-supported based on his years of training and specialized experience and his testimony otherwise very credible. As such, I have placed great weight on Stevens' testimony and opinions offered in the evidentiary hearing.

I also considered Respondents' argument that had the officers "run the seam of the nets down from front to back" it would have established that Respondents were using the TEDs as top-exiting TEDs, and therefore no flotation was required. Respondents' argument relies on some level of doubt as to the type of TEDs they used, bottom-exiting or top-exiting, such that a need to look at the seams of the net existed. However, there was no doubt or question on the part of the officers and the credible evidence presented in this case does not create any doubt or question. The placement of the flotation opposite to the escape opening on each TED led the officers to reasonably conclude that they were inspecting bottom-exiting TEDs, a conclusion that

is supported by Stevens' expert testimony and that was not challenged by Respondents at the time of the inspection. Thus, I find Respondents' argument unconvincing.

I conclude that the Agency has established by a preponderance of the credible evidence presented that Respondents violated the Act and Agency regulations by failing to have an "approved TED" installed in each of the Port-side nets that were rigged for fishing on the date in question. Accordingly, Respondents are liable for Counts 1 and 2 of the NOVA.

ii. Starboard-side TEDs

At issue is whether the deflector bars on each of Respondents' two Starboard TEDs were spaced more than four inches from each other and from the TED frame. As set out previously in this decision, the specifications for an "approved TED" require that, among other things, "the space between deflector bars and the deflector bars and the TED frame must not exceed 4 inches." 50 C.F.R. § 223.207(a)(4). Respondents agree that the bar spacing on one of the two Starboard TEDs exceeded 4 inches. Tr. 215-16, 219-21, AX 1, AX 2. However, with the second Starboard TED, Respondent Crosby testified that he did not know if the bar spacing exceeded the maximum of 4 inches. Tr. 216, 220-21.

While not directly disputing the Agency's measurements of the bar spacing for each Starboard TED, Respondent Crosby questioned the photographic evidence the Agency presented, namely photographs 6 and 8 of AX 1, because, according to him, the photographs are of the same, not different, TEDs. Tr. 215-16, 220-21, RE 9. In response to such challenges, Agency witness Bunker explained through testimony that while it is possible photographs 6 and 8 might have been of the same TED, since he could have mistakenly included photos of the same TED during the sorting of all the photographs taken during the inspection, he nevertheless "strongly believe[d]" in the accuracy of the measurements recorded on the TED Enforcement Boarding Form. Tr. 95-99. The basis for his conviction was attributable to the methodology the officers follow when conducting a TED inspection, namely a process whereby the inspecting officer(s) inspect each net in order as they work their way around the vessel, calling out the location of the net relative to the vessel, for example "Starboard Outboard," "Starboard Inboard," and so forth, followed by the information related to that TED and net that is simultaneously recorded on the TED Enforcement Boarding Form by another officer. Tr. 57-58, 96-100, 120-22, AX 2. According to Bunker "there's no way I could be yelling these measurements back to somebody else and they're also getting them both—both wrong." Tr. 97, AX 2.

I find this explanation, coupled with the documentary evidence related to the inspection, convincing. The TED Enforcement Boarding Form, completed at the time of the inspection and completed routinely as part of the inspection process, presents the most reliable evidence of the measurements taken. It is also consistent with the incident summary report that Bunker prepared sometime thereafter in which bar spacing in excess of the four-inch maximum is identified for both Starboard TEDs. AX 1 at 2. In addition, Respondent Crosby's handwritten statement offered at the time of the inspection does not challenge the grid spacing measurements of the Starboard TEDs. Further, at the evidentiary hearing, Respondents did not directly challenge the measurements taken or the methodology used by the boarding officers. Rather, Respondent Crosby challenged the accuracy and reliability of the photographic evidence, evidence upon

which I have placed little reliance in rendering this decision. Lastly, I note that both of the officers who testified at the evidentiary hearing possessed significant experience with conducting TED inspections, each having conducted roughly 75 inspections, which lends further support for the reliability of their inspection methods. Tr. 55, 117.

As an aside, I note that included in Respondents' PPIP materials, which are part of this case record, were statements conceding bar spacing violations on the Starboard TEDs. Specifically, the following was stated: "Starboard outboard TED[.] First Violation Bar Spacing. The bar spacing was off on this TED. But the U.S. Coast Gurd [sic] would have allow [sic] us to fix this TED if they though [sic] we were trying to obey the law to the best of our ability." As to the other TED, the following was stated: "Starboard inboard TED. First Violation[.] The bars on this TED needed readjustment." These statements were not offered and admitted into evidence or addressed at hearing. While my decision in this matter is confined to the evidentiary record of documentary and testimonial evidence presented during the hearing, Respondents' earlier concession on this issue is worth noting given that, even now, they do not directly refute the Agency's measurements of the Starboard TED's bar spacing.¹³

Based on the foregoing, I conclude that a preponderance of the evidence establishes that the space between the deflector bars in Respondents' two Starboard TEDs exceeded four inches, in violation of 50 C.F.R. § 223.207(a)(4). Accordingly, Respondents are liable for Counts 3 and 4 of the NOVA.

I also considered Respondents' general challenges to liability that appear to question the boarding officers' attention to detail during the inspection. In particular, Respondent Crosby notes that one of the officers, Bunker, testified that the crew of the vessel had four members on board, when, according to Respondent Crosby, there were only three crew members on board. Resp. In. Br. at Section 1 at 4-5, Section 2 at 2, Tr. 56. In the absence of any other direct evidence in the record establishing the number of crew on board the vessel at the time of inspection, Respondents presumably urge that I infer such by relying on the written statements of two crew members who, along with Respondent Crosby, were present at the time of the inspection. *See*, RE 2 and RE 3. If such a mistake were made by Bunker, I find it neither material nor of such significance as to raise concerns regarding Bunker's overall credibility.

Respondents also note that the officers elected to forego a safety inspection of the vessel and overlooked the fact that the certificate of documentation for the vessel had expired on September 30, 2013, a date prior to the inspection. With regard to the safety inspection, as the Agency noted, one of the boarding officers, Bunker, testified that Respondent Crosby "had a boarding form from the Coast Guard, and to expedite the process, because we were there for a

¹³ I also note that unlike many other civil administrative and judicial proceedings, where the respondent or charged party files an answer admitting, denying, or denying knowledge of the assertions in whatever charging document initiated the proceeding, in these NOAA proceedings, no such response to the charges is required until the judge orders that PPIPs must be exchanged and filed. 15 C.F.R. §§ 904.201, 904.240. Therefore, the PPIP is generally, and was in this matter, the charged parties' first response to the NOVA's allegations, and thus can provide insight, as it does here, to the consistency and credibility of respondents' arguments.

very long time, we decided to forego the safety inspection, and we accepted the Coast Guard boarding form.” Tr. 57. After verifying Respondents’ Federal shrimp permit, the officers proceeded to inspect the nets. *Id.* The fact that the officers chose to accept the Coast Guard’s inspection in lieu of conducting an independent safety inspection is immaterial to the issue of Respondents’ liability for the charged violations. With regard to Respondents’ later claim, advanced in their Reply Brief, alleging an inconsistency between Bunker’s incident summary report (wherein he states Respondent Crosby was asked to “pull all four shrimp nets into his vessel for us to conduct an inspection after checking all of his required safety equipment and commercial licenses”) and his hearing testimony (wherein he testified that the officers relied on a recent Coast Guard boarding inspection rather than performing a separate safety inspection to expedite the process), I do not find a true inconsistency. Tr. 57-59, AX 1 at 1, Resp. Rep. Br. at 5-6. Reliance on the recent Coast Guard boarding inspection by the officers as verification of safety measures aboard the vessel is not contrary to the summary statement in the incident report relating to a check of the vessel’s safety equipment. Even if these statements were construed as being in conflict, I do not find them material or of such significance as to discredit Bunker’s credibility.

Similarly, the fact that the officers did not separately inspect the vessel’s certificate of documentation has no bearing on the merits of this case and does not cast doubt on the accuracy of their inspection as it relates to the charged violations. Accordingly, I find no merit in Respondents’ arguments.

C. Civil Penalty Assessment

Having determined that Respondents are liable for the four charged violations, I must next determine the appropriate amount, if any, to impose as a civil penalty for the violative behavior. As previously stated, there is no presumption in favor of the penalty proposed by the Agency, and as the Administrative Law Judge presiding in this matter, I am not “required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document.” *Nguyen & Harper*, 2012 NOAA LEXIS 2, at *21; see 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631 (June 23, 2010). Rather, I must independently determine an appropriate penalty, “taking into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m); see 15 C.F.R. § 904.108 (enumerating factors that may be considered in assessing a penalty). Thus, in assessing the below penalty, I have considered the factors set forth in Agency regulations at 15 C.F.R. § 904.108(a).¹⁴ These factors include the nature, circumstances, extent, and gravity of the violation(s); the respondent’s degree of culpability, history of prior violations, and ability to pay; and such other matters as justice may require.

i. Nature, Circumstances, Extent, and Gravity of the Alleged Violation

The record contains ample evidence pertaining to the nature, circumstances, extent, and gravity of the violation in this matter. For example, according to a document proffered by the Agency entitled “The Turtle Excluder Device (T.E.D.),” all species of sea turtles found in waters

¹⁴ The Act does not specify factors to be considered when assessing a civil penalty.

of the United States are either threatened or endangered. AX 7; *see also* 50 C.F.R. §§ 223.102(e), 224.101(h). The document also states that the incidental capture of sea turtles in shrimp trawls has been found to be a greater threat to the survival of sea turtles in the United States than any other human activity combined. AX 7. Thus, the importance of adhering to the requirement to install an approved TED on any shrimp trawl net is found to be of particular significance. Even with the use of an approved and properly installed TED, exclusion of sea turtles from trawl nets is only successful 97 percent of the time.

The severity of the violative condition of Respondents' TEDs has been established by the evidence. With regard to the Starboard TEDs, the excessive grid space, that is, greater than the 4-inch maximum, posed risks to smaller sea turtles that could pass through excessive grid space on the TED's frame and become trapped in the trawl net without means of escape. Tr. 141-42. As Stevens explained, the four-inch maximum measurement was developed as a threshold as a result of studies of the average sizes of stranded sea turtles whose carapace depths mostly exceeded four inches. *Id.* Thus, a sea turtle with a carapace depth of four inches or greater would be too large to pass through the bars of the TED grid, and therefore instead of being captured in the cod end without means of escape, would be forced out from the net through the escape opening by the angle of the grid as the net was pulled through the water. *Id.* Here, where Respondents' Starboard TEDs each possessed grid spacing in excess of four inches, there was a risk created to any "small dinner-sized plate sea turtle" that "could have possibly passed through the grid bars and into the cod end where ultimately [it] would have been excluded from the [TED] device and could have drowned." Tr. 142.

As to the Port-side TEDs, the lack of sufficient flotation, that is, two EVA or PVC floats of minimum size on each TED, posed more critical violations in Stevens' opinion. Tr. 139, 143. As Stevens explained, if a bottom-exiting TED "is not floated properly to where the TED rises off the sea floor and it's dragging, it's towing on the sea floor then the flap would be pinned closed and anything trying to exit the device could not do so because it would be riding on the sea floor." Tr. 134. If the TED is dragging along the sea floor then "the turtle's entrapped in the device" and "the turtle's not going to get out, and he's going to – going to drown." Tr. 143. According to Stevens, the lack of proper flotation was "a really critical point." *Id.*

The Agency argues that these noncompliant TEDs were in use for "several days, if not weeks" and that this prolonged use multiplied the risk of capturing sea turtles. Ag. In. Br. at 15. The Agency argues that the civil penalty imposed should adequately deter shrimpers from "lax compliance with regulations" and from "modifying or 'experimenting' with their TED gear." *Id.*

Respondents argue, however, that shrimping nets and TEDs are checked every evening during a trip and any bar spacing problems would have been promptly corrected. Resp. In. Br. at Section 2 at 8. They also argue there is no benefit to violating the regulations since dragging netting along the sea floor can cause damage to the net and a loss of shrimp production. Further, they dispute that a fisherman could "pull a net tight enough on the bottom to trap a turtle." *Id.* at Section 2 at 9.

The evidence presented, through joint stipulations, reveals that at the time of boarding, Respondents' vessel "had been at sea for about a week and had been fishing for shrimp with four

nets.” JX 1, paragraph 8. During the hearing, Respondent Crosby initially testified that he adjusted the Port-side TEDs for “probably three weeks” and then later in his testimony for “about 15 days,” trying to determine if any of the adjustments would increase production to match the shrimp production from the Starboard TEDs. Tr. 225, 234. Thus, it would appear that, at least with regard to the insufficient flotation of the Port-side TEDs, such non-compliance existed for at least one week and as many as three weeks. This length of time in which Respondents operated non-compliant TEDs is a significant consideration in my assessment of penalty, since the potential for harm to sea turtles that may have encountered Respondents’ trawl nets spanned over many days, and possibly weeks. While Respondents assert that they check their fishing nets and TEDs every evening and would have promptly corrected any problems, the facts reveal that they did not. Had they checked their TEDs the evening before and corrected any problems, such as bar spacing, then the noncompliance they now face should not have existed when the officers boarded their vessel in the afternoon on October 25, 2013. Although Respondents challenge the potential to drag a trawl net along the sea floor tight enough to trap a sea turtle, they cite no support for their argument. Further, their contention is refuted by the credible evidence presented by TED expert Stevens.

ii. Respondents’ Degree of Culpability, History of Prior Violations, and Ability to Pay

With respect to the degree of Respondents’ culpability, the Agency argues that, as long-time shrimpers, Respondents were knowledgeable of the TED regulations and, therefore, at a minimum, acted negligently. Ag. In. Br. at 16. Regardless, it notes that “commercial fishing is a highly regulated industry and fishermen engaged in the industry for profit are required to know and abide by the laws and regulations governing them.” Ag. In. Br. at 16 (citing, e.g., *Dennis D. O’Neil*, 1995 NOAA LEXIS 20 at 7-8). Agreeing with the Agency that shrimping is a highly regulated industry, Respondents suggest that with an increase in enforcement, there has been a decrease in regulatory violations. Resp. In. Br. at Section 2 at 9. Further, they argue that it “make[s] no sense to try to break the law” since shrimpers know they can be subject to an inspection at any time. *Id.* Further, Respondents suggest that their actions were not deliberate and they assert that if they intended to violate Agency regulations, they would have had “many many violation[s] [a]nd not just one for a bar that had come loose at the top of a TED seven years ago.” *Id.* at Section 2 at 6-7. Respondents assert that their conduct was unintentional and that rather than being assessed a civil penalty, the Agency should have given them an oral or written warning. Tr. 251, Resp. In. Br. at Section 1 at 9, Section 2 at 6.

The Agency’s Penalty Policy discusses four levels of increasing mental culpability: unintentional, negligence, recklessness, and intentional. The Agency urges that Respondents acted negligently, while Respondents suggest their actions were unintentional. The Penalty Policy defines “negligence” as the “failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances. Negligence denotes a lack of diligence, a disregard of the consequences likely to result from one’s actions, or carelessness.” *See*, Penalty Policy, page 9. “Unintentional” conduct is defined as that which is “inadvertent, unplanned, and the result of an accident or mistake. An unintentional act is one not aimed at or desired.” *Id.*

The credible evidence presented in this case reveals a level of culpability by Respondents consistent with negligent behavior, not unintentional behavior. The most telling example of such

negligence is found in Respondents' adjustment of flotation on their Port-side TEDs. By their own admission, Respondents removed minimally required flotation from these TEDs, offering various explanations for doing so. Tr. 59-61, AX 2, at 2 (Respondent Crosby removed one of two floats on each TED because he thought there was adequate flotation with one float), Tr. 241-42, AX 3 (Respondent Crosby removed floats from the Port-side TEDs to determine whether the TEDs were floating too high), Tr. 223-24 (Respondent Crosby removed floats from the Port-side TEDs in an attempt to increase production of the Port-side trawl nets). Clearly, such conduct cannot be deemed unintentional — that is, inadvertent, unplanned, and due to an accident or mistake — since Respondents consciously removed flotation from the Port-side TEDs. Rather, Respondents' actions illustrate disregard for the consequences that could result from their removal of required flotation on these TEDs, namely the risk of harm posed to endangered or threatened sea turtles by trawling for shrimp with noncompliant TEDs. The fact that Respondents are experienced shrimp trawlers and otherwise familiar with the use of TEDs further supports a determination of negligent conduct.

With regard to excessive bar-spacing on Respondents' Starboard TEDs, the evidence demonstrates carelessness on the part of Respondents. Respondents have asserted that during a fishing trip they routinely check their gear (fishing nets and TEDs) every evening and correct any problems, noting that a TEDs grid bars can become bent from debris in the water. Tr. 219-20, Resp. In. Br. at Section 2 at 6, 8. Further, Respondents assert post-hearing that the bar spacing violations were fixed following the inspection and used that evening. Resp. In. Br. at Section 1 at 8, Section 2 at 6. Yet during the hearing, Respondent Crosby testified that he did not notice that the grid bars on the Starboard TEDs had become bent (thereby creating excessive space between the bars) and, specifically, with regard to one of these noncompliant TEDs, he "changed it out" and did not use it. Tr. 220. Such inconsistency aside, Respondents' actions were, at a minimum, careless in that they failed to monitor their equipment during this fishing trip and take action to remedy the excessive bar spacing that existed on their Starboard TEDs. Thus, a culpability level of negligent is supported by the evidence in this case.

As to any history of prior violations, Respondent Crosby argues he has had only one "minor" federal shrimping violation in 34 years in the industry and that, in the instant case, he should have been given an oral or written warning, not assessed a civil penalty. Resp. In. Br. at Section 1 at 7, 9, Section 2 at 6, 7, 9, Resp. Rep. Br. at 1-2. I considered this argument and find it notable that this "minor" violation also pertained to noncompliant TEDs and consisted of two counts that included a grid spacing violation. AX 9, 9A. While this previous violation occurred in 2007 and was not considered by the Agency in its penalty assessment,¹⁵ its existence reveals less than a clean record on Respondent Crosby's part as well as a repeated failure to comply with the regulatory requirements regarding approved TEDs. As such, I do not find Respondent Crosby's fishing history a basis for penalty mitigation.

As to the factor of "ability to pay," the parties stipulated that Respondents have not claimed a financial inability to pay a penalty and did not submit financial information to the Agency. JX 1, paragraph 18. As such, this factor was not considered in my assessment of the penalty in this case.

¹⁵ Tr. 243; *see also*, NOVA, Penalty Assessment Worksheets.

iii. Such Other Matters as Justice May Require

The evidence presented reflects that Respondent Crosby was cooperative during the officers' TED inspection, which lasted approximately 1.5 hours. Tr. 216, 235. According to Respondent Crosby, "I did everything they said." *Id.* Officers Bunker and Geib agreed that Respondent Crosby was "very cooperative" throughout much of the boarding process. Tr. 78, 122-23. Consequently, I have considered this level of cooperation in mitigation of the penalty.

Upon consideration of all the foregoing and the penalty factors listed in 15 C.F.R. § 904.108(a), it is hereby determined that for the four counts of violation of the Act, a civil penalty in the amount of \$7,000 is appropriate.

VII. DECISION AND ORDER

A total penalty of \$7,000 is hereby **IMPOSED** on Respondents Ralph C. Crosby and Wade L. Barber, jointly and severally, for the violations upon which they were found liable herein.

Once this Initial Decision becomes final under the provisions of 15 C.F.R. § 904.271(d), Respondents will be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein.

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

PLEASE TAKE FURTHER NOTICE, that any petition to have this Initial Decision reviewed by the NOAA Administrator must be filed with the Administrator within **30 days** after the date this Initial Decision is served and in accordance with the requirements set forth at 15 C.F.R. § 904.273. A copy of 15 C.F.R. §§ 904.271-273 is attached.

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

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

SO ORDERED.



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

Dated: June 8, 2015
Washington, DC

TITLE 15 -- COMMERCE AND FOREIGN TRADE
SUBTITLE B -- REGULATIONS RELATING TO COMMERCE AND FOREIGN
TRADE
CHAPTER IX -- NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
DEPARTMENT OF COMMERCE
SUBCHAPTER A -- GENERAL REGULATIONS
PART 904 -- CIVIL PROCEDURES
SUBPART C -- HEARING AND APPEAL PROCEDURES
DECISION

15 CFR 904.271-273

§ 904.271 Initial decision.

(a) After expiration of the period provided in § 904.261 for the filing of reply briefs (unless the parties have waived briefs or presented proposed findings orally at the hearing), the Judge will render a written decision upon the record in the case, setting forth:

(1) Findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law, or discretion presented on the record;

(2) An order as to the final disposition of the case, including any appropriate ruling, order, sanction, relief, or denial thereof;

(3) The date upon which the decision will become effective; and

(4) A statement of further right to appeal.

(b) If the parties have presented oral proposed findings at the hearing or have waived presentation of proposed findings, the Judge may at the termination of the hearing announce the decision, subject to later issuance of a written decision under paragraph (a) of this section. In such cases, the Judge may direct the prevailing party to prepare proposed findings, conclusions, and an order.

(c) The Judge will serve the written decision on each of the parties, the Assistant General Counsel for Enforcement and Litigation, and the Administrator by certified mail (return receipt requested), facsimile, electronic transmission or third party commercial carrier to an addressee's last known address or by personal delivery and upon request will promptly certify to the Administrator the record, including the original copy of the decision, as complete and accurate.

(d) An initial decision becomes effective as the final administrative decision of NOAA 60 days after service, unless:

(1) Otherwise provided by statute or regulations;

(2) The Judge grants a petition for reconsideration under § 904.272; or

(3) A petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative under § 904.273.

§ 904.272 Petition for reconsideration.

Unless an order or initial decision of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or initial decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of such order or initial decision. The filing of a petition for reconsideration shall operate as a stay of an order or initial decision or its effectiveness date unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the administrative proceeding may file an answer in support or in opposition.

§ 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse, modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

(c) Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for discretionary review, or review is timely undertaken on the Administrator's own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

(d) A petition for review must comply with the following requirements regarding format and content:

(1) The petition must include a concise statement of the case, which must contain a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;

(2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;

(3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations, and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;

(4) A copy of the Judge's initial decision must be attached to the petition;

(5) Copies of all cited portions of the record must be attached to the petition;

(6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and

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

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content

requirements in paragraph (d) of this section without further review.

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

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

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

(i) If the Administrator issues an order denying discretionary review, the order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.

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

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an

Administrator's decision to remand the initial decision to the Judge is not final agency action.

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

(1) The party seeking judicial review has exhausted its opportunity for administrative review by filing a petition for review with the Administrator in compliance with this section, and

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section.

(m) For purposes of any subsequent judicial review of the agency decision, any issues that are not identified in any petition for review, in any answer in support or opposition, by the Administrator, or in any modifications to the initial decision are waived.

(n) If an action is filed for judicial review of a final agency decision, and the decision is vacated or remanded by a court, the Administrator shall issue an order addressing further administrative proceedings in the matter. Such order may include a remand to the Chief Administrative Law Judge for further proceedings consistent with the judicial decision, or further briefing before the Administrator on any issues the Administrator deems appropriate.