UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:	)	DOCKET NUMBER
	)	
Greg Abrams Seafood, Inc., and	)	SE1100895, F/V Lisa Ann
Milton Perry Alexander,	)	
	)	
Respondents	)	

INITIAL DECISION AND ORDER

Date: November 23, 2012

Before: Barbara A. Gunning, Administrative Law Judge
United States Environmental Protection Agency[1]

Appearances: Duane R. Smith, Esq.
Office of the Assistant General Counsel for Enforcement, Southeast Region, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, St. Petersburg, Florida, for the Agency

Russell R. Stewart, Esq.
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[1] The Administrative Law Judges of the United States Environmental Protection Agency 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.

INITIAL DECISION

I. PROCEDURAL HISTORY

The National Oceanographic and Atmospheric Administration ("NOAA" or "Agency"), acting on behalf of the Secretary of the United States Department of Commerce ("Secretary of Commerce"), initiated this proceeding on December 7, 2011, by issuing a Notice of Violation and Assessment of Administrative Penalty ("NOVA") to Greg Abrams Seafood, Inc., and Milton Perry Alexander ("Respondents"). The NOVA charges Respondents with one count of violating 50 C.F.R. § 635.21(A)(4)(vii), in violation of 50 C.F.R. § 635.71(a)(30) and Section 307(1)(A) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A). For this alleged violation, the Agency seeks to impose a penalty of $20,000 jointly and severally against Respondents.

By letter dated December 22, 2011, Respondents jointly requested a hearing before an Administrative Law Judge regarding the alleged violation. The Agency subsequently notified the office of the undersigned by letter that it had received Respondents' request for a hearing and that Respondents would be represented by Russell R. Stewart, Esq., in this proceedings. The Agency submitted a copy of the NOVA and Respondents' request with its letter.

On January 5, 2012, my esteemed colleague, Chief Administrative Law Judge Susan L. Biro, issued a Notice of Transfer and Assignment of Administrative Law Judge and Order Requiring Preliminary Positions on Issues and Procedures (PPIP) ("PPIP Scheduling Order"). In the PPIP Scheduling Order, Judge Biro described the procedures governing this proceeding and directed the parties to file and serve their respective PPIPs on or before February 6, 2012. The office of the undersigned received the Agency's PPIP on February 6, 2012, and a supplement to the Agency's PPIP on April 27, 2012. Upon the failure of Respondents to submit their PPIP on or before February 6, 2012, Judge Biro issued to Respondents Order to Show Cause dated February 17, 2012, directing Respondents to show good cause for their failure to comply with the PPIP Scheduling Order and submit their PPIP on or before March 2, 2012. The office of the undersigned received Respondents' Response to Order to Show Cause and PPIP on February 24, 2012. By Decision on Response to Order to Show Cause and Hearing Order dated March 9, 2012, Judge Biro accepted Respondents' Response and PPIP; scheduled the evidentiary hearing in this matter to be held during the week of May 21, 2012, in or around Panama City, Florida; and informed the parties that they would be notified of the precise date, time, and location of the hearing at a later date.

The undersigned was designated to preside in this proceeding on April 24, 2012. On April 26, 2012, the undersigned issued a Notice of Hearing advising the parties of the precise date, time, and location of the hearing. Counsel for the Agency filed a Motion Requesting a Change of Hearing Date ("Motion") on April 27, 2012, stating that he attempted to contact Respondents' counsel, Russell R. Stewart, to discuss his request but that he was unable to reach him prior to filing the Motion. The undersigned subsequently granted the Motion on May 2, 2012, and rescheduled the hearing for May 24, 2012.

The hearing was held on May 24, 2012, in Panama City, Florida. The Agency presented the testimony of two witnesses at the hearing: NOAA Special Agent Elizabeth Nelson and Commander Patrick O'Shaughnessy. The Agency also proffered 11 exhibits that were received into evidence and marked as Agency Exhibits ("A's Ex.") 1-11. Respondents presented the testimony of one witness, Milton Perry Alexander.

On June 18, 2012, copies of the transcript were served upon the parties. The undersigned subsequently directed the parties to file any post-hearing briefs on or before July 18, 2012, and any reply briefs on or before August 2, 2012. The undersigned received the Agency's Initial Post-Hearing Brief ("Agency's Brief" or "A's Br.") on July 18, 2012, and Respondents' Brief ("Rs' Br.") on July 23, 2012. The undersigned received notice that the Agency did not intend to file a reply brief on August 2, 2012. The undersigned received Respondents' Reply Brief ("Rs' Reply Br.") on August 17, 2012.

II. STATUTORY AND REGULATORY BACKGROUND

A. LIABILITY

1) Magnuson-Stevens Fishery Conservation and Management Act

In 1976, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act," "Act" or "MSA"), 16 U.S.C. §§ 1801-1883, as amended, "to conserve and manage the fishery resources found off the coasts of the United States, and the Anadromous species and Continental Shelf fishery resources of the United States, by exercising sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish, within the exclusive economic zone." Pub. L. No. 94-265, § 2, 90 Stat. 331 (1976). In order to achieve this purpose, Congress empowered the Secretary of the Department of Commerce to assess civil penalties and/or impose permit sanctions against any person who commits an act prohibited by Section 307 of the Act. 16 U.S.C. § 1858(a), (g). In turn, Section 307(1)(A) states: "It is unlawful for any person to violate any provision of this Act or any regulation or permit issued pursuant to this Act." 16 U.S.C. § 1857(1)(A). The statutory definition of the term "person" includes "any individual (whether or not a citizen or national of the United States), any corporation, partnership, association or other entity (whether or not organized or existing under the laws of any State)." 16 U.S.C. § 1802(36).

2) Implementing Regulations

As noted above, Section 307(1)(A) of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A), prohibits the violation of any regulations issued pursuant to the Act. One such regulation, 50 C.F.R. § 635.71(a)(30), provides that "[i]t is unlawful for any person or vessel subject to the jurisdiction of the United States to . . . deploy or fish with any fishing gear from a vessel or anchor a fishing vessel, permitted or required to be permitted under this part, in any closed area as specified at § 635.21." In turn, the regulations at 50 C.F.R. § 635.21(a)(4) describe a number of "area closures" applicable to "all Atlantic HMS fishing gears," including:

> Caribbean, Gulf, and South Atlantic EEZ area closures related to Deepwater Horizon oil spill. Effective May 11, 2010, no vessel issued, or required to be issued, a permit under this part, may fish or deploy any type of fishing gear in the areas designated at §§ 622.22(c), 622.34(n), or 622.35(m) of this chapter.

50 C.F.R. § 635.21(a)(4)(vii).

As this regulation reflects, NOAA closed areas of the Gulf of Mexico ("Gulf") exclusive economic zone ("EEZ") to certain activities through a series of emergency rules in response to the Deepwater Horizon oil spill on April 20, 2010. In particular, on May 6, 2010, NOAA provided notice in the Federal Register of the following addition to 50 C.F.R. § 622.34:

> (n) *Gulf EEZ area closure.* Effective May 2, 2010 through 12:01 a.m., local time, May 12, 2010, all fishing is prohibited in the portion of the Gulf EEZ bounded by rhumb lines connecting the following points: From the point where 88°33' W. long. intersects with the 3 nautical mile state line south of Pascagoula, MS; proceeding southeasterly to the point 29°54.5' N. lat. and 88°24' W. long.; thence, easterly to the point 29°54.5' N. lat. and 86°55' W. long.'; thence southwesterly to the point 28°40' N. lat. and 88°20' W. long.; thence, northwesterly to the point whether 29° N. lat. intersects with the 3 nautical mile state line east of Garden Island Bay, LA; thence along the seaward limit of Louisiana's waters and Mississippi's waters, as shown on the current edition of NOAA chart 11360.

75 Fed. Reg. 24,822, 24823 (May 6, 2010). On May 12, 2010, NOAA provided notice in the Federal Register that paragraph (n) of 50 C.F.R. § 622.34 was being removed and reserved, while paragraph (o) was being added as follows:

> (o) *Gulf EEZ area closure related to Deepwater Horizon oil spill.* Effective May 7, 2010 through 12:01 a.m., local time, May 17, 2010, all fishing is prohibited in the portion of the Gulf EEZ bounded by rhumb lines connecting, in order, the following points: From the point where 29°50' N. lat. intersects with the 3 nautical mile Louisiana state boundary; proceeding easterly to the point 29°50' N. lat. and 87°28' W. long.; thence, southeasterly to the point 29°20' N. lat. and 86°55' W. long.; thence, southwesterly to the point 28°18' N. lat. and 87°44' W. long.; thence, northwesterly to the point 28°30' N. lat. and 89° W; thence, northwesterly to the point where 28°52' N. lat. intersects with the 3 nautical mile Louisiana state boundary; thence along the seaward limit of Louisiana's waters.

75 Fed. Reg. 26,679, 26,680 (May 12, 2010). Finally, on May 14, 2010, NOAA provided notice in the Federal Register that it was adding paragraph (n) in its current form:

> (n) *Gulf EEZ area closure related to Deepwater Horizon oil spill.* Effective May 11, 2010, all fishing is prohibited in the portion of the Gulf EEZ identified in the

map shown on the NMFS Web site:
http://sero.nmfs.noaa.gov/deepwater_horizon_oil_spill.htm.[2]

75 Fed. Reg. 27,217, 27,218 (May 14, 2010) (codified at 50 C.F.R. § 50 C.F.R. § 622.34(n)).

The phrase "exclusive economic zone" or "EEZ" is defined as "the zone established by Presidential Proclamation 5030, 3 CFR part 22, dated March 10, 1983, and is that area adjacent to the United States which, except where modified to accommodate international boundaries, encompasses all waters from the seaward boundary of each of the coastal states to a line on which each point is 200 nautical miles (370.40 km) from the baseline from which the territorial sea of the United States is measured." 50 C.F.R. § 600.10.

The phrase "Atlantic HMS" is defined as "Atlantic tunas, billfish, sharks, and swordfish." 50 C.F.R. § 635.2.

The terms "fishing" and "to fish" are defined as:

> [A]ny activity, other than scientific research conducted by a scientific research vessel, that involves:
>
> (1) The catching, taking, or harvesting of fish;
> (2) The attempted catching, taking, or harvesting of fish;
> (3) Any other activity that can reasonably be expected to result in the catching, taking, or harvesting of fish; or
> (4) Any operations at sea in support of, or in preparation for, any activity described in paragraphs (1), (2), or (3) of this definition.

50 C.F.R. § 600.10. In turn, "catch, take or harvest includes, but is not limited to, any activity that results in killing any fish or bringing any live fish on board a vessel." *Id.*

Finally, the term "fishing vessel" is defined as "any vessel, engaged in fishing, processing, or transporting fish loaded on the high seas, or any vessel outfitted for such activities." 50 C.F.R. § 635.2.

B. CIVIL PENALTY

"Any person who is found by the Secretary . . . to have committed an act prohibited by section 307 [of the Magnuson-Stevens Act] shall be liable to the United States for a civil penalty." 16 U.S.C. § 1858(a); *see also* 50 C.F.R. § 600.735 ("Any person committing, or fishing vessel used in the commission of a violation of the Magnuson-Stevens Act . . . and/or any

[2] Information regarding areas closed due to the Deepwater Horizon oil spill is now available at http://sero.nmfs.noaa.gov/deepwater_horizon/closure_info/index.html. A map of the boundaries of the area closure effective from February 2, 2011, to April 19, 2011, including the alleged date of violation on February 22, 2011, is available at http://sero.nmfs.noaa.gov/deepwater_horizon/closure_info/documents/pdfs/bp_oilspill_fisherycl osuremap_020211.pdf.

regulation issued under the Magnuson-Stevens Act, is subject to the civil and criminal penalty provisions and civil forfeiture provisions of the Magnuson-Stevens Act, to this section, to 15 CFR part 904 (Civil Procedures), and to other applicable law."). The procedural rules governing this proceeding, found at 15 C.F.R. part 904 ("Rules of Practice"), provide that "[a] NOVA may assess a civil penalty against two or more respondents jointly and severally. Each joint and several respondent is liable for the entire penalty but, in total, no more than the amount finally assessed may be collected from the respondents." 15 C.F.R. § 904.107(a).

To determine the appropriate amount of civil penalty to assess, the Act identifies certain factors to consider:

> [T]he Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require. In assessing such penalty the Secretary may also consider any information provided by the violator relating to the ability of the violator to pay . . . .

16 U.S.C. § 1858(a). Similarly, the 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).

Effective June 23, 2010, NOAA modified the Rules of Practice to remove any presumption in favor of the Agency's proposed sanction and the requirement that the presiding Administrative Law Judge state good reasons for departing from the Agency's analysis. 75 Fed. Reg. 35,631, 35,631 (June 23, 2010). Instead, the presiding Administrative Law Judge may assess a civil penalty *de novo*, "taking into account all of the factors required by applicable law." 15 C.F.R. § 904.204(m).

III. FACTUAL BACKGROUND

The parties did not stipulate to any facts prior to or during the evidentiary hearing. Tr. at 8. However, the parties do not contest the following facts presented in this proceeding.

At all times relevant to the charges in the NOVA, Greg Abrams Seafood, Inc., ("Respondent Abrams Seafood") was the owner and Milton Perry Alexander ("Respondent Alexander") was the operator of the Fishing Vessel ("F/V") Lisa Ann, Official Number 652211, a vessel permitted to catch and sell highly migratory fish under 50 C.F.R. § 635. Tr. at 15-16, 122; A's Br. at 11; Rs' Reply Br. at physical page 3;[3] A's Ex. 1, 2, 3. Specifically, the F/V Lisa

[3] Respondents' Reply Brief is not paginated.

Ann was permitted to engage in longline fishing[4] for Atlantic tuna and swordfish, among other fisheries, in the Gulf of Mexico. Tr. at 17-18, 122-23; A's Ex. 1, 2. A Vessel Monitoring System ("VMS") unit was installed on the F/V Lisa Ann on September 2, 2010. Tr. at 66; A's Ex. 6. VMS units are programmed to report the position of vessels at regular intervals typically of one hour. Tr. at 62-63. However, NOAA can manually request more frequent polling of a vessel's location from the VMS unit at its discretion and without the vessel's knowledge. Tr. at 69-70, 73.

Captained by Respondent Alexander, the F/V Lisa Ann engaged in fishing operations targeting Atlantic tuna and swordfish between January 27, 2011, and February 24, 2011. Tr. at 19, 122, 129-130; A's Ex. 3; A's Br. at 11; Rs' Reply Br. at physical page 3. On the morning of February 23, 2011, John Howard, a VMS technician at NOAA's Southeast Office of Law Enforcement in St. Petersburg, Florida, notified Commander Patrick O'Shaughnessy, the VMS Program Manager, that hourly VMS reporting from the F/V Lisa Ann indicated that the vessel was inside the area of the Gulf EEZ closed due to the Deepwater Horizon oil spill starting from the hourly poll at 04:08 Universal Coordinated Time ("UTC")[5] that day. Tr. at 57, 71; A's Ex. 7. To assess the activity of the F/V Lisa Ann, Commander O'Shaughnessy ordered manual polling to track the vessel's movement on a more frequent basis than the programmed hourly polling. Tr. at 71. A record of the hourly and manual polling collected by the Agency[6] reflects that the F/V Lisa Ann was present in the closed area from at least 04:08 UTC until at least 13:08 UTC on February 23, 2011, and that the F/V Lisa Ann had exited the closed area by the poll at 14:08 UTC, as depicted in the chart below. Tr. at 71-72; A's Ex. 7.

Boundaries of the closed area of the Gulf EEZ on February 22-23, 2011, due to the Deepwater Horizon oil spill.	29° 0'0'' North	88° 30'0'' West
	29° 0'0'' North	88° 0'0'' West
	28° 30'0'' North	88° 30'0'' West

[4] The term "longline" is defined as "fishing gear that is set horizontally, either anchored, floating, or attached to a vessel, and that consists of a mainline or groundline with three or more leaders (gangions) and hooks, whether retrieved by hand or mechanical means." 50 C.F.R. § 635.2. The term "gangion" is defined as "a line that serves to attach a hook, suspended at a specific target depth, to the mainline of a longline." *Id.*

[5] According to Commander O'Shaughnessy, Universal Coordinated Time is five hours ahead of Central Standard Time in February. Tr. at 104-05.

[6] Commander O'Shaughnessy explained that data from VMS units are collected in the following manner: the unit installed on a given vessel transmits the position of the vessel to a satellite; the satellite transmits the data to a "land station"; and then the data is transmitted both to NOAA and to the manufacturer of the unit. Tr. at 62-64, 113-14. Commander O'Shaughnessy testified that he verified with the manufacturer of the F/V Lisa Ann's VMS unit that the unit was functioning properly on the dates in question. Tr. at 65-69; *see also* A's Ex. 6. He also obtained records of the VMS data collected by the manufacturer on those dates. Tr. at 65-66; A's Ex. 6. Commander O'Shaughnessy testified that the data collected by the manufacturer and the Agency "correlate precisely," with the exception of the manual polling ordered by the Agency of which the manufacturer received no record. Tr. at 72-73.

50 C.F.R. § 622.34(n); A's Ex. 10.	28° 30'0'' North	88° 0'0'' West	
VMS Polling Positions for F/V Lisa Ann on February 23, 2011, inside the closed area of the Gulf EEZ due to the Deepwater Horizon oil spill. A's Ex. 7.	29°02'2'' North	88°11'4'' West	2/23/11, 03:08 UTC
	28°58'4'' North	88°12'5'' West	2/23/11, 04:08 UTC
	28°57'5'' North	88°15'5'' West	2/23/11, 05:08 UTC
	28°57'9'' North	88°14'6'' West	2/23/11, 06:08 UTC
	28°58'4'' North	88°13'6'' West	2/23/11, 07:08 UTC
	28°58'7'' North	88°12'6'' West	2/23/11, 08:08 UTC
	28°59'0'' North	88°11'6'' West	2/23/11, 09:08 UTC
	28°59'3'' North	88°10'5'' West	2/23/11, 10:08 UTC
	28°59'5'' North	88°09'3'' West	2/23/11, 11:08 UTC
	28°57'0'' North	88°08'3'' West	2/23/11, 12:08 UTC
	28°57'0'' North	88°04'8'' West	2/23/11, 13:08 UTC
	29°00'1'' North	88°01'7'' West	2/23/11, 14:08 UTC

When the F/V Lisa Ann returned to the dock of Respondent Abrams Seafood in Panama City, Florida, on February 24, 2011, Elizabeth Nelson, a Special Agent with NOAA Enforcement, was awaiting the arrival of the vessel with the intention of investigating its activity in the closed area of the Gulf EEZ. Tr. at 15-16; A's Ex. 3. As the F/V Lisa Ann approached the dock, Special Agent Nelson and Greg Abrams, the owner of Respondent Abrams Seafood, observed a Customs and Border Patrol Air and Marine Operations ("CBP AMO") vessel, with at least two armed agents in uniform on board, approaching the dock as well. Tr. at 16, 38-39, 48; A's Ex. 3. At the hearing, Special Agent testified that she did not request any assistance from CBP AMO and that their presence was unrelated to her investigation and appeared to be coincidental. Tr. at 38-40; *see also* A's Ex. 3. Upset by their arrival, however, Mr. Abrams promptly departed the area. A's Ex. 3.

Once the F/V Lisa Ann had docked, Special Agent Nelson boarded the vessel and introduced herself to the captain, Respondent Alexander. Tr. at 16; A's Ex. 3. After verifying his identity, she proceeded to question Respondent Alexander about the just-completed trip. Tr. at 17; A's Ex. 3. Special Agent Nelson also requested to see a record of the locations where the vessel's fishing gear had been set during the trip, which Respondent Alexander retrieved for her. Tr. at 17, 19, 137; A's Ex. 3. This "set log" contained information that Respondent Alexander recorded at the time the longline fishing gear was deployed in the water, including coordinates obtained from the F/V Lisa Ann's GPS unit and the time of deployment, for the purpose of aiding the vessel in the retrieval of the line. Tr. at 52-54, 90, 147-48. Entries in the F/V Lisa Ann's set log dated to the beginning of the voyage on January 27, 2011, and continued to February 24, 2011. Tr. at 21, 93, 129-30; A's at Ex. 3. By plotting the coordinates of the set locations recorded in the set log on NOAA Chart 411,[7] Special Agent Nelson determined that of the five positions where the longline was set on the trip's final day of fishing operations on February 22, two were located within the area closed due to the Deepwater Horizon oil spill, as set forth below. Tr. at 20-28; A's Ex. 3, 4, 11.

Boundaries of the closed area of the Gulf EEZ on February 22, 2011, due	29° 0'0'' North	88° 30'0'' West
	29° 0'0'' North	88° 0'0'' West

[7] This nautical chart is available at http://www.charts.noaa.gov/OnLineViewer/411.shtml.

to the Deepwater Horizon oil spill. 50 C.F.R. § 622.34(n); A's Ex. 10.	28° 30'0'' North	88° 30'0'' West
	28° 30'0'' North	88° 0'0'' West
Longline set locations on February 22, 2011, inside the closed area of the Gulf EEZ due to the Deepwater Horizon oil spill on February 22-23, 2011. Tr. at 20-28; A's Ex. 3, *see also* A's Ex. 4, 11.	28°58' North	88°14' West
	28°57' North	88°15' West

These points correspond to two and three nautical miles south of the northern boundary of the closed area, respectively. Tr. at 115; A's Ex. 4.

As previously discussed, NOAA provided notice of the boundaries of the closed area in the Gulf EEZ as a result of the Deepwater Horizon oil spill through publication in the Federal Register and codification at 50 C.F.R. part 622. 75 Fed. Reg. 24,822 (May 6, 2010); 75 Fed. Reg. 26,679 (May 12, 2010); 75 Fed. Reg. 27,217 (May 14, 2010)); 50 C.F.R. § 622.34(n); Tr. at 71; A's Ex. 10. The area at issue in this proceeding had been closed continuously since the closure first went into effect on May 2, 2010. Tr. at 45-46, 140, 155; A's Ex. 4, 10.

During Special Agent Nelson's interview of him, however, Respondent Alexander informed her that he was unaware of the boundaries of the closed area in effect in the Gulf EEZ and that he may have unknowingly been inside the boundaries. A's Ex. 3; Tr. at 29. Respondent Alexander signed a written statement attesting to his claim that he did not know where the longline had been set and that he did not intentionally fish in the closed area. A's Ex. 3; Tr. at 29. Respondent Alexander also claimed in this written statement, "Drifted inside." A's Ex. 3; Tr. at 29.

Special Agent Nelson testified that both Respondent Alexander and one of the crew members of the F/V Lisa Ann, Donald Boles, estimated in separate interviews that 200 to 250 pounds of swordfish were caught on or about February 22, the last day of their fishing operations.[8] Tr. at 31; A's Ex. 3. Special Agent Nelson testified that Respondent Alexander did not remember catching anything from the two sets made inside the closed area on February 22 but that she was unable to verify that none of the swordfish caught that day had been from the closed area because the set log lacked any information regarding the pounds or species caught in each set. Tr. at 31; A's Ex. 3. Describing herself as "overly cautious," Special Agent Nelson explained that she decided to seize the entire catch from the sets made on February 22 because of the possibility that the swordfish had been caught on the longline set in the closed area and were tainted with oil from the Deepwater Horizon spill. Tr. at 31-32.

Respondent Alexander signed the corresponding abandonment form. A's Ex. 3. Special Agent Nelson testified that Mr. Abrams, on the other hand, was "slightly heated" and refused to assist her with the removal of the swordfish from the vessel. Tr. at 32; *see also* A's Ex. 3. In

[8] Special Agent Nelson noted this information on her copy of the set log by drawing stars next to the two sets located in the closed area and writing "Donald Deckhand 200-250 Swords." Tr. at 21; A's Ex. 3.

response, Special Agent Nelson notified Mr. Abrams that she would be required to seize the trip's catch in its entirety or lock the vessel's fish-hold until she received assistance. Tr. at 33, 49-50; A's Ex. 3. Mr. Abrams subsequently apologized and cooperated. Tr. at 33; A's Ex. 3. Special Agent Nelson arranged for the weighing of the catch from February 22, which consisted of five swordfish weighing a total of 272.1 pounds, and the transfer of those fish to the CBP AMO vessel for disposal. Tr. at 32, 38, 126; A's Ex. 3. After the CBP AMO vessel departed, Mr. Abrams signed the corresponding abandonment form. A's Ex. 3.

IV. LIABILITY

A. BURDEN OF PROOF

In order to prevail on its claims that Respondents violated the Act and the implementing regulations, the Agency is required to prove facts supporting the alleged violation by a preponderance of reliable, probative, substantial, and credible evidence. *Cuong Vo*, NOAA Docket No. SE010091FM, 2001 WL 1085351 (ALJ, Aug. 17, 2001) (citing *Dep't of Labor v. Greenwich Colleries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100-103 (1981)); *see also* 5 U.S.C. § 556(d); 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, and Dean Strickler*, Docket No. NE970052FM/V, 1999 WL 1417462 (ALJ, Aug. 23, 1999). To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence. *Cuong Vo*, 2001 WL 1085351 (citing *Steadman*, 450 U.S. at 101). The burden of producing evidence to rebut or discredit the Agency's evidence shifts to Respondents only after the Agency satisfies its burden of proof. *Id.*

B. DISCUSSION

In the NOVA, the Agency alleges that on or about February 22, 2011, Respondents fished in violation of gear operation and deployment restrictions imposed through emergency rules closing areas of the Gulf EEZ from May 2, 2010, to April 19, 2011, due to the Deepwater Horizon oil spill. In particular, these regulations prohibit any person or vessel subject to the jurisdiction of the United States from anchoring a fishing vessel permitted or required to be permitted, or fishing or deploying any type of fishing gear from such a vessel, in areas designated as closed by the applicable regulations. 50 C.F.R. §§ 635.71(a)(30), 635.21(a)(4)(vii), 622.34(n).

Thus, to satisfy its burden of proof in this proceeding, the Agency was required to demonstrate by a preponderance of the evidence that on or about February 22, 2011:

1) Each Respondent constituted a "person," as that term is defined by 16 U.S.C. § 1802(36), and was subject to the jurisdiction of the United States;

2) The F/V Lisa Ann was a "fishing vessel," as that term is defined by 50 C.F.R. § 635.2, and was required to be permitted, or was in fact issued permits, to fish for species governed by 50 C.F.R. part 635; and

3) Respondents anchored the F/V Lisa Ann, or deployed fishing gear or "fished" from the F/V Lisa Ann, as that term is defined by 50 C.F.R. § 600.10, within an area of the Gulf EEZ closed to such activities because of the Deepwater Horizon oil spill.

As set forth in the Factual Background section of this Initial Decision, the parties do not dispute the evidence in the record supporting the first two elements of the Agency's *prima facie* case. With respect to the third element, however, Respondents contend in their post-hearing brief that the evidence proffered by the Agency does not show that the F/V Lisa Ann engaged in fishing activities in the closed area of the Gulf EEZ on or about February 22, 2011. Rs' Br. at physical page 2.[9] Rather, Respondents contend, the preponderance of the evidence establishes "only [that] drifting/transiting after gear problems" occurred. *Id.* at physical page 3. I disagree. As discussed below, I find that the preponderance of the evidence in the record demonstrates that Respondent Alexander deployed fishing gear in the closed area of the Gulf EEZ on or about February 22, 2011, in violation of the MSA and the implementing regulations.

First, as found by Special Agent Nelson, the set log clearly reflects that the F/V Lisa Ann deployed its longline fishing gear in two locations within the boundaries of the portion of the Gulf EEZ closed to fishing activities on February 22, 2011. Tr. at 20-28, 52-54, 90, 147-48; A's Ex. 3, 4, 10, 11; 50 C.F.R. § 622.34(n). Commander O'Shaughnessy corroborated this evidence at the hearing, testifying that a comparison of the information contained in the set log and the polling data reported by the F/V Lisa Ann's VMS unit confirms the accuracy of the positions of the fishing gear recorded by Respondent Alexander in the set log at the time the gear was deployed. Tr. at 87-91, 103. As he explained, "[T]he VMS data independently verifies what the vessel captain recorded in his set logs. There's no disagreement there." Tr. at 103. Commander O'Shaughnessy depicted this correlation on NOAA Chart 11360[10] and an overlay plotting the VMS polling data collected by the manufacturer of the VMS unit for the F/V Lisa Ann on February 22 and 23, and the manual polling data collected by the Agency on February 23; the positions of the longline fishing gear set by the F/V Lisa Ann on February 22; and the boundaries of the closed area of the Gulf EEZ effective on those dates. Tr. at 77-87; A's Ex. 8, 9.

Qualified as an expert on the subject of navigation, including navigation systems such as VMS, Commander O'Shaughnessy described his considerable experience in this field at the hearing. Tr. at 57-61. For example, he testified that he first received formal training in navigation as a student at the Coast Guard Academy, that he has completed formal retraining programs on three occasions since that time, and that as the commander of three separate Coast Guard cutters during his 20 years of service in the Coast Guard, he was responsible for not only safely navigating those vessels but also responding to mariners in distress and intercepting narcotics traffickers, which required detailed navigation. Tr. at 57-58. Based upon these credentials, I find that his testimony and the evidence he presented are entitled to significant weight.

Respondents, on the other hand, did not offer any persuasive evidence in rebuttal. When first questioned about the allegations at the hearing, Respondent Alexander expressed some

[9] Respondents' Brief is not paginated.

[10] This nautical chart is available at http://www.charts.noaa.gov/OnLineViewer/11360.shtml.

doubt about the accuracy of the positions he recorded in the set log but denied only that he intentionally conducted fishing operations in the closed area:

> Q: Now, the question then arises, this 29 line, the northern boundary of the closed area. At any time did you intentionally violate the line setting out the gear?
>
> A: Not intentionally, no.
>
> Q: You don't know for sure whether you violated it or not, do you?
>
> A: I know I was below it. When we drifted on the parachute,[11] I was below the line. But not intentionally and – I'm not sure about the gear. You know what I mean? I wrote the numbers down. But that last deal here was so screwed up, we was trying to finish up the trip, you know, and we got all fouled up with this here.[12]

Tr. at 135. Later in his testimony, Respondent Alexander again denied intentionally engaging in fishing operations in the closed area:

> Q: Now, I guess what it boils down to, Mr. Alexander, is at any time on the 22nd or the 23rd of February, did you intentionally fish inside the closed area?
>
> A: Not intentionally.

Tr. at 142.

The law is well-settled that the MSA is a strict liability statute and that an alleged violator's state of mind is irrelevant. *See, e.g., Northern Wind, Inc., v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999) (holding that scienter is not required to impose civil penalties for violations of the MSA and the implementing regulations); *Bartholomew O. Niquet & Thomas C. Niquet*, NOAA Docket No. SE1100310, 2012 WL 3012675 (ALJ, May 4, 2012) (holding that legal notice of a closed area is sufficient, and actual knowledge is not required, for a finding of liability under the MSA). Thus, any claim that Respondent Alexander lacked intent to conduct fishing operations in the closed area of the Gulf EEZ is not a valid defense to the charged violation. Further, Respondents do not dispute that the Agency provided sufficient notice of the closed area.

Most significantly, Respondent Alexander admitted unequivocally to the alleged violation during questioning by counsel for the Agency:

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[11] As Commander O'Shaughnessy explained, some vessels deploy a "parachute" in the water to slow their drift at times when the depth of the water or consistency of the sea floor precludes the use of an anchor. Tr. at 106-07.

[12] With regard to being "fouled up," Respondent Alexander claimed that the longline fishing gear became entangled with an oil rig at some point during the F/V Lisa Ann's fishing operations in that area. Tr. at 131-36, 143. Respondents did not offer any evidence to substantiate this claim.

Q: Is this a copy of your set log?

A: Yes, it is.
Q: Is that your handwriting?

A: Yeah, that's mine.

* * *

Q: So you're writing these down, you're taking them from your GPS, you're recording the numbers, the positions. And I assume you're doing this accurately, yes?

A: Yes.

Q: Because it helps you find your gear?

A: Well, no, that don't help me find my gear. That just show where I put.

Q: That shows where you put your gear?

A: Yes.

* * *

Q: So getting to the last set. February 22nd was your last set, correct?

A: Yeah.

Q: And you've got these positions recorded, again sequentially. This is all one set. I'm looking at page 24 out of 38 [of the Agency's Exhibit 3]?

A: Yes.

Q: So that's all one set on the last day of the trip?

A: Uh-huh.

Q: And this is the position where you put your gear in the water?

A: Uh-huh.

Q: Where you deployed your gear?

A: Yes, sir.

Q: Now, you said that you're aware that the 29 line was – you couldn't fish any farther –

A: Uh-huh.

Q: – than 29, yes?

A: Yes.

Q: But you deployed gear at 28 –

A: Uh-huh.

Q: -- twice –

A: Yes.

Q: – as you were running the longline gear out; is that correct?

A: Where did you get twice from?

Q: I'm sorry. The fourth position you recorded and the fifth position you recorded are both the 28th.

A: This area between here, a 15 and a 14, that's one mile, if you figure nautical miles.

Q: Yes, sir. So the one was two miles into the closed area, and the next one was three miles into the closed area; is that correct?

A: Yeah.

Tr. at 146-52.

Thus, by Respondent Alexander's own admission, he deployed fishing gear on February 22, 2011, within the area of the Gulf EEZ closed to that activity because of the Deepwater Horizon oil spill. The foregoing evidence unquestionably supports a finding of liability for Respondent Alexander for the charged violation.

As for Respondent Abrams Seafood, the doctrine of *respondeat superior* is well-recognized in NOAA jurisprudence, and tribunals have consistently held that the owner of a vessel may be found liable for violations committed by the vessel's operator in the scope of his or her employment. *See, e.g., Bluefin Fisheries, Inc., & Rodney J. Baker*, NOAA Docket No. SE1000062FM,.2011 WL 7030846 (ALJ, July 28, 2011) ("When a corporation owns a vessel, it acquires a share of the vessel's proceeds from the fishing trip and thus, the corporation benefits financially from the illegal acts of the vessel's captain during the fishing trip. Therefore, the

vessel owner should not be allowed to escape responsibility for the transgressions of the captain . . . "); *Amy N., Inc., & William C. Hauck*, NOAA Docket No. SE0900879, 2010 WL 3524742 (ALJ, July 19, 2010) ("The owner or operator of the vessel may be held liable for the actions of a crewmember that violates the Magnuson-Stevens Act or its underlying regulations under the legal doctrine of respondeat superior."). Nothing in the record supports a deviation from this doctrine. Respondent Alexander affirmed at the hearing that Respondent Abrams Seafood shares in any profits from fishing operations conducted by the vessel. Tr. at 156. Moreover, Respondents admit that the actions of Respondent Alexander are attributable to Respondent Abrams Seafood. *See* A's Br. at 12; Rs' Reply Br. at physical page 4. Accordingly, as the owner of the F/V Lisa Ann, Respondent Abrams Seafood is jointly and severally liable for the violation of the gear deployment and fishing restrictions set forth at 50 C.F.R. § 635.21(a)(4)(vii) committed by Respondent Alexander.

C. CONCLUSION

In accordance with the foregoing discussion, I find that the Agency has demonstrated by a preponderance of reliable and credible evidence that on or about February 22, 2011, Respondents Greg Abrams Seafood, Inc., and Milton Perry Alexander conducted fishing operations in violation of the gear operation and deployment restrictions set forth at 50 C.F.R. § 635.21(A)(4)(vii). Specifically, Respondents deployed fishing gear within waters of the Exclusive Economic Zone of the Gulf of Mexico closed as a result of the Deepwater Horizon oil spill. This activity constitutes a violation of 50 C.F.R. 635.71(a)(30) and Section 307(1)(A) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A), for which Respondents are jointly and severally liable.

V. CIVIL PENALTY

A. ARGUMENTS OF THE PARTIES

1) The Agency's Position

As noted above, the NOVA seeks to assess a civil administrative penalty in the amount of $20,000 jointly and severally against Respondents for the charged violation. The NOVA does not contain any rationale for this figure. In its Brief, however, the Agency explains that it "considered the factors enumerated in 15 C.F.R. 904.108, and the internal policy guidance contained in the NOAA Penalty Policy and Penalty Schedules . . . ."[13] A's Br. at 7.

The Penalty Policy instructs that civil penalties assessed under the Policy[14] are based upon the following two criteria:

[13] The NOAA Penalty Policy and Penalty Schedules ("Penalty Policy" or "Policy") is accessible to the public at http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf and http://www.gc.noaa.gov/enforce-office3.html.

[14] According to the Policy, it applies to "all civil administrative enforcement cases charged on or after its issuance on March 16, 2011." Penalty Policy at 1.

> (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. The initial base penalty amount is determined by first finding the charged violation on the schedules set forth in Appendix 3 of the Penalty Policy, which assign a "gravity-of-offense level" or "offense level" to the most common violations charged by the Agency. *Id.* at 4-5, 7-8. The offense levels range from least significant ("I") to most significant ("IV") and are designed to reflect the nature, circumstances, and extent of these violations. *Id.* at 7-8.

In describing its consideration of the Penalty Policy, the Agency first refers to the "Magnuson-Stevens Act Schedule" in Appendix 3. A's Br. at 7. As pointed out by the Agency, under the heading "Violations Regarding Time, Area, Effort, or Sector Restrictions," the schedule characterizes "[f]ishing in a closed area or during a closed season" as a level III violation. Penalty Policy at 36.

The next consideration under the Penalty Policy is the culpability of the alleged violator while engaged in the conduct for which the penalty is being sought. The Penalty Policy identifies four levels of culpability in increasing order of severity: 1) unintentional, including accident, mistake, and strict liability; 2) negligence; 3) recklessness; and 4) intentional. Penalty Policy at 8-9. To determine the alleged violator's level of culpability, the Penalty Policy advises counsel for the Agency to consider a number of factors, including whether the alleged violator took reasonable precautions against the events constituting the violation; the level of control the alleged violator had over these events; and whether the alleged violator knew or should have known of the potential harm associated with the conduct. *Id.*

The Agency explains in its Brief that at the time the NOVA was issued, "the Agency believed Respondents committed the offense recklessly, based on the fact that the closed area was widely publicized and the area in which LISA ANN was fishing had been closed since the very first day the closed area went into effect." A's Br. at 7 (citing A's Ex. 4, 10). The Penalty Policy defines "recklessness" as follows:

> Recklessness is a conscious disregard of a substantial risk of violating conservation measures that involves a gross deviation from the standard of conduct a law-abiding person would observe in a similar situation. Recklessness occurs where someone does not intend a certain result, but nonetheless foresees the possibility that his or her actions will have that result and consciously takes that risk. Recklessness may also occur where someone does not care about the consequences of his or her actions. Recklessness involves a lesser degree of fault than intentional wrongdoing but a greater degree of fault than negligence.

Penalty Policy at 9.

The offense levels correspond to the vertical axis, and the levels of culpability correspond to the horizontal axis, of the penalty matrices in Appendix 2 of the Penalty Policy. According to the Policy, "[t]he proper penalty range is determined by using the offense level and the alleged violator's degree of culpability, to find a penalty box within the appropriate matrix. The initial base penalty is the midpoint of the penalty range within that box." Penalty Policy at 5.

The initial base penalty may then be adjusted upward or downward within the range of penalties – or, with the approval of NOAA General Counsel or Deputy General Counsel, to a different penalty box altogether – "to reflect legitimate differences between similar violations." Penalty Policy at 8. Adjustment factors may include the alleged violator's history of non-compliance and the conduct of the alleged violator after the violation. *Id.* at 5, 10. After application of any adjustment factors, the resulting figure constitutes the "base penalty." *Id.* at 5. Once the base penalty is determined, an additional amount may be added to account for any proceeds or other economic benefit gained by the alleged violator as a result of the unlawful activity. *Id.*

Referring to the "Penalty Matrix for the Magnuson-Stevens Act" in Appendix 2, the Agency points out that a level III violation committed recklessly corresponds to a civil penalty range of $15,000 to $20,000 per violation. A's Br. at 7. As noted above, the Penalty Policy advises counsel for the Agency to select the midpoint of the penalty range as the initial base penalty and then adjust that amount to reflect the particular circumstances of the given violation. Penalty Policy at 5. The Agency explains that it proposed in the NOVA to assess a penalty of $20,000 "to reflect the seriousness of violating this particular public safety-based closed area." A's Br. at 7. As Respondents voluntarily abandoned the swordfish caught on the date of the violation, the Agency did not add an additional amount to this figure to account for any economic benefit of noncompliance. *Id.*

Based upon the evidence presented at the hearing, the Agency now believes that Respondent Alexander acted intentionally in setting the longline fishing gear in the closed area of the Gulf EEZ. A's Br. at 7 (citing Tr. at 150-52). The Penalty Policy defines "intentional" violations as follows:

> An intentional violation generally exists when a violation is committed deliberately, voluntarily or willfully, i.e., the alleged violator intends to commit the act that constitutes the violation. A person intends a result when he or she both foresees the result that will arise if certain actions are taken and desires the result to occur. Intent may be particularly demonstrated by violations committed as part of a pattern, course of conduct, common scheme or conspiracy, or where a violator has been charged in the past with a similar violation, even if not fully adjudicated.

Penalty Policy at 8-9. Referring again to the "Penalty Matrix for the Magnuson-Stevens Act" in Appendix 2, the Agency points out that a level III violation committed intentionally corresponds to a civil penalty range of $20,000 to $40,000 per violation and that the midpoint of this range, $30,000, would be the appropriate initial base penalty, before any adjustments. A's Br. at 7-8.

Acknowledging that the undersigned assesses any civil penalties *de novo*, the Agency concluded:

> [W]hen Respondents seek to minimize their responsibility for their misconduct and when that misconduct posed a direct threat to the health and safety of the public, a penalty severe enough to ensure both specific and general deterrence is appropriate. The vast majority of the fishing industry, who obeyed the closed area, should not have to be economically disadvantaged by the few scofflaws who didn't. And if at some point in the future the Agency is once again forced to close areas to fishing in order to protect the public's safety, Respondents, and the fishing industry as a whole, should understand clearly that the penalty for doing so will greatly exceed any potential benefit gained from poaching inside the closed area and attempting to introduce adulterated seafood products into the stream of commerce.

A's Br. at 8.

2) Respondents' Position

Respondents claim that "NOAA's Administrative Penalty Schedule found at www.gc.noaa.gov/documents/enforcement/penalty-policy identifies 14 factors to be considered as aggravating/mitigating circumstances. Of the 14 factors none are aggravating circumstances particular to this case. In fact most all are mitigating factors . . . ." Rs' Br. at physical page 2. The "Administrative Penalty Schedule" to which Respondents refer was expressly superseded by the Penalty Policy used by the Agency to determine the penalty requested in this proceeding. Penalty Policy at 1. I note, however, that the 14 factors listed in the Administrative Penalty Schedule were largely incorporated into the Penalty Policy.

With respect to those 14 factors, Respondents point out that the alleged violation occurred on or about February 22, 2011, and the closure of the area in question was lifted less than 60 days later on April 19, 2011. Rs' Br. at physical page 2. Respondents next point out that the resource was not harmed by Respondent Alexander's conduct because the seized fish were "legally targeted to catch/sell." *Id.* Respondents argue that they derived no economic benefit from the alleged violation but, rather, lost the value of the seized swordfish. *Id.* at physical page 3. Respondents further argue that Respondent Alexander's conduct "should be considered unintentional at worst." *Id.* Finally, Respondents point out that Respondent Alexander cooperated with Special Agent Nelson during the course of her investigation, as she confirmed at the hearing, and that he has been a captain for 28 years with no history of prior violations. *Id.* Each of these considerations, Respondents claim, mitigates the penalty sought by the Agency. Rs' Br. at physical page 2.

Based upon these factors, Respondents contend, the alleged violation should be characterized as a level II violation and the level of culpability should be characterized as unintentional under the Penalty Policy, which corresponds to a civil penalty in the range of $2,000 to $5,000 in the Penalty Matrix for the Magnuson-Stevens Act found in Appendix 2. Rs' Br. at physical page 3. Respondents conclude, "[S]ince the value of the seized swordfish is

$1,632.00 and the alleged violation should be considered more appropriately at the lowest level or degree of a level II offense[,] . . . a proper civil penalty, if any, assessed by the Court should be a written warning or at most a $500.00 penalty."[15] *Id.*

B. DISCUSSION

1) Nature, Circumstances, Extent, and Gravity of the Charged Violation

As previously discussed, the Magnuson-Stevens Act identifies certain factors to consider in determining the appropriate amount of civil penalty to assess for violations of the statute and the implementing regulations. The first of these factors are "the nature, circumstances, extent, and gravity of the prohibited acts committed." 16 U.S.C. § 1858(a).

The Penalty Policy advises that in determining the gravity of a given violation, a number of considerations are pertinent, including the nature and status of the resource at issue in the violation, the extent of the potential or actual harm done to the resource or to the regulatory scheme, whether the violation involves fishing in a closed area, whether the violation provides a significant competitive advantage over those operating legally, and whether the violation is difficult to detect without compliance mechanisms such as VMS. Penalty Policy at 8. These considerations weigh in favor of the $30,000 penalty proposed by the Agency in its Brief. As discussed above, the preponderance of the evidence in this proceeding supports a finding that Respondents deployed fishing gear in a closed area of the Gulf EEZ. Further, this violation was detected with the aid of VMS. The documentary evidence proffered by the Agency reflects that the size of the closed area on the date of violation, while certainly smaller than previous closures, was large enough that the violation would have been difficult to detect without the aid of compliance mechanisms such as VMS before any tainted seafood products entered the stream of commerce. *See, e.g.*, A's Ex. 4, 10. In addition, as argued by the Agency, such violations provide a significant competitive advantage over those striving to operate within the bounds of the law.

Pointing out that the violation occurred on or about February 22, 2011, and the closure of the area in question was lifted less than 60 days later on April 19, 2011, Respondents claim that this consideration mitigates the gravity of the violation. Rs' Br. at physical page 2. Respondents did not offer any evidence, however, to support a finding that the closure remained in effect during that time merely as a formality and that the conditions justifying the closure had been abated before the date on which the closure was lifted. Thus, I fail to see how the lifting of the closure 56 days after the date of violation reduces its gravity.

Respondents also point out that the resource at issue in this proceeding was not harmed by Respondent Alexander's conduct because the seized fish were "legally targeted to catch/sell." Rs' Br. at physical page 2. During her testimony, Special Agent Nelson appears to agree, explaining that the relevant portion of the Gulf EEZ was closed not for the purpose of protecting the resource but for the purpose of protecting public safety:

[15] While Respondents object to the assessment of a penalty of the magnitude sought by the Agency, Respondents do not challenge that the Agency increased the proposed penalty from $20,000 to $30,000 in its Brief.

Q: Agent Nelson, what happened after you retrieved the set logs and determined that the vessel had been fishing in the closed area?

A: Well, during the course of my interview with the captain, Alexander, and one of his deckhands, Donald Boles, I determined that on the last day, which would be about February 22nd, they estimated they caught about approximately 200 to 250 pounds of swordfish, saying it was kind of a low day for them.

And the captain, Alexander, said he didn't remember catching anything inside, or he didn't remember catching anything in those two sets that I noted as inside the closed area. But since he didn't keep a log of his weights or what was caught – because some other captains will keep a log of what they brought up with each haul, I couldn't be sure that nothing was caught on those two lines. And because of the nature of the closed area being a public safety concern, and not one that would be for spawning or rebuilding a stock, that his fish might be adulterated or tainted in any way, I wanted to be overly cautious. I took the last day's worth of swordfish, that they both estimated in separate interviews was up to 200 to 250 pounds. And they said that they knew exactly where they were located, in the right-side compartment of the fish-hold.

So I seized the last day's catch that may or may not have been tainted with oil, and I had it taken by CBP offshore and disposed of.

Tr. at 30-32.

The Federal Register notice of the first emergency rule setting the boundaries of the closed area emphasizes this concern for public safety:

> The oil leaking from the Deepwater Horizon drilling rig has resulted in more than 1 million gallons (3.8 million liters) of oil being released into the Gulf of Mexico. [The National Marine Fisheries Service ("NMFS")] is currently assessing the impacts this oil spill will have on the fishing industry. NMFS is closing the portion of the Gulf EEZ where the oil slick resides for public safety concerns.

75 Fed. Reg. at 24,823. A subsequent Federal Register notice revising the boundaries of the closed area reiterated this concern:

> This rule replaces the existing closure rule, which became effective May 7, 2010, and will remain in effect until terminated by subsequent rulemaking, which will occur once the existing emergency conditions from the oil spill no longer exist. Fish and shellfish in oil affected waters may be contaminated with levels of hydrocarbons above baseline levels. The [Food and Drug Administration] considers such seafood to be adulterated. The intent of this emergency rule is to prohibit the harvest of adulterated seafood and for public safety.

* * *

> Any delay of implementation of this fisheries closure could constitute unsafe fishing conditions for the fishing industry. In addition, any delay would pose a clear risk of the lawful harvest of adulterated product, which is not in the public interest.

75 Fed. Reg. at 27,217-18.

By identifying the question of whether a particular violation involves fishing in a closed area as a pertinent factor in determining the gravity of the violation, the Penalty Policy clearly reflects that such a violation is considered a serious offense by the Agency. Given the nature and purpose of the area closures in the Gulf EEZ as a result of the Deepwater Horizon oil spill, Respondent Alexander's deployment of fishing gear within the closed area on two occasions represents a particularly grave infraction. Had it not been detected by the Agency, adulterated fish may have entered the stream of commerce and posed a serious risk to public safety. Based on these considerations, I find that the gravity of Respondents' violation warrants a substantial penalty.

2) Respondents' Degree of Culpability, Any History of Prior Violations, and Ability to Pay

The next factors to consider under the Act are the violator's degree of culpability, any history of prior offenses, and ability to pay. The record reflects that Respondents have not raised an inability to pay claim or proffered any evidence in support of such a claim at any stage of this proceeding. The Rules of Practice require respondents who wish for the presiding Administrative Law Judge to consider their inability to pay to submit "verifiable, complete, and accurate financial information" to the Agency in advance of the hearing. 15 C.F.R. § 904.108(e). In the absence of such information in the record, consideration of Respondents' ability to pay a civil penalty in this proceeding is unwarranted.

The record is also devoid of evidence that Respondents committed any violations of fishery regulations before or after the offense charged in this proceeding. To the contrary, Respondent Alexander testified that he has not been cited for any violations of NOAA regulations during his 28 years of experience in the commercial fishing industry.[16] Tr. at 143. Respondents identify this consideration as a mitigating factor. Rs' Br. at physical page 2-3. The Agency did not offer any evidence or argument in rebuttal.

Upon consideration, I agree with Respondents that the absence of any prior or subsequent offenses can serve as a mitigating factor and support the assessment of a lower civil penalty under certain circumstances. *See, e.g.*, *Michael Straub & Steven Silk*, NOAA Docket No. SE110071I, 2012 WL 1497025, at *15 (ALJ, Feb. 1, 2012) ("The absence of prior offenses . . .

[16] Respondent Alexander testified, however, that he spent 14 or 15 of those years fishing in Mexico. Tr. at 143. Presumably, he would not have been subject to any NOAA regulations during that time.

tends to favor a low civil monetary penalty."); *The Fishing Co. of Alaska et al.*, NOAA Docket Nos. 316-030, 316-031, 316-032, 1996 WL 1352612, at *24 (ALJ, Apr. 17, 1996) ("In an industry that is so heavily regulated, this absence of prior violations by any of the Respondents has been taken into consideration as a mitigating factor in the penalty assessment."). For example, the absence of any prior or subsequent violations during an extensive career in the commercial fishing industry, such as the 28 years of experience of Respondent Alexander, is noteworthy.

Turning now to Respondents' degree of culpability, as noted above, the Agency calculated the penalty sought in the NOVA based upon its belief that Respondents recklessly violated the ban on fishing activities in the closed area. A's Br. at 7. Following the hearing, however, the Agency argues that the evidentiary record supports a finding that Respondents intentionally violated the ban. *Id.* Respondents, on the other hand, claim that the violative conduct was "unintentional at worst." Rs' Br. at physical page 3.

The Agency's position is persuasive. First, during Special Agent Nelson's questioning of Respondent Alexander on February 24, 2011, he claimed that he was unaware of the boundaries of the closed area in effect in the Gulf EEZ due to the Deepwater Horizon oil spill. A's Ex. 3; Tr. at 29. His testimony at the hearing clearly contradicts this claim, however. In particular, Respondent Alexander described the manner in which he received notifications of the boundaries of the closed areas and then explained that he was aware of the boundaries of the closed area specifically in effect on the date of violation and that he understood the prohibition against fishing operations in that area as a result of the closure:

> Q: Now, back then, did any of your charts have a printed outline of the Macondo well closed area that we're talking about here?
>
> A: Well, none of the charts that was on the boat, you know, I mean, or the computer, because it just was one that you couldn't program it into, you know, like an alarm or nothing, the type we had.
>
> Q: In other words, the Coast Guard or NOAA charts like the ones on the wall, they don't show it as a permanent fixture or anything like that?
>
> A: No. It was just pamphlets and stuff, or a radio.
>
> Q: So you-all come back up – what I refer to as, you came back north from down south [during the fishing trip in question]. And you heard Mr. O'Shaughnessy talk about that you-all had went up on the west side of the boundary of the closed area, and then you ended up fishing for several days north of the closed area. Does that reconcile with what your remembrance of it is?
>
> A: Oh, yeah. Well, we knew where the area was. They give you different charts. But you know, they kept changing. But yeah, they will give you charts to know to stay out of there, but it was changing up and down. Anyway, that's why we went west and tried to stay west of the area.

Q: So the northern boundary line, we refer to it as the 29 line.

A: Uh-huh.

Q: When you say – when I refer to the 29 line, what does that reference to you as far as the closed area?

A: That's the top corner of it.

Q: Okay. So if you're –

A: Top part.

Q: If you're putting your gear out and you're operating with your system, as long as your number is 29.000 or higher, you're north and clear and outside the closed area?

A: Yes.

Tr. at 127-29.[17] Respondent Alexander reiterated his knowledge of the boundaries of the closed area throughout his testimony. *See* Tr. at 140, 151-52.

Notwithstanding his purported understanding of the area closure, Respondent Alexander claimed that the F/V Lisa Ann merely drifted into the closed area and that the fishing gear became entangled with an oil rig during the F/V Lisa Ann's fishing operations in that area. *See, e.g.*, Tr. at 131-36, 139, 142-43; A's Ex. 3. Neither of these unsubstantiated claims is sufficient to rebut the substantial evidence in the record demonstrating that Respondent Alexander knowingly deployed his fishing gear in the closed area, including the set logs in which he recorded the coordinates inside the closed area at which the fishing gear was deployed on February 22, 2011, and his own testimony concerning the F/V Lisa Ann's activities, discussed in detail above. *See, e.g.*, A's Ex. 3; Tr. at 146-52. Moreover, as argued by the Agency, one may reasonably infer that Respondent Alexander chose to engage in fishing operations in the closed area in order to salvage a largely unsuccessful trip:

> We said we caught 250 pounds in that area. We made three sets. That's why we quit. There was nothing going on. We had to pay expenses. We was in the hole. We had been out there a month, still didn't make no money. We were trying to pay the fuel and the ice, so when we went on the next trip, we wouldn't have to pay double. That's the way that fishing goes.

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[17] His testimony concerning the manner in which he received notifications of the boundaries of the closed areas is consistent with one of the Federal Register notices related to the oil spill, which explains that the Agency "will announce the revised closed area via NOAA Weather Radio, fishery bulletin, and NOAA Web site updates." 75 Fed. Reg. at 27,218.

Tr. at 158. Based on the foregoing discussion, I find that Respondents' violation was intentional, as argued by the Agency, and that a substantial penalty is warranted.

3) Other Matters as Justice May Require

Finally, the Act directs the undersigned to consider "such other matters as justice may require." 16 U.S.C. § 1858(a). The parties identified several such considerations in their briefs.

In particular, the Agency argues in favor of a penalty severe enough to deter Respondents and the fishing industry as a whole from failing to comply with the type of fisheries regulations at issue in this proceeding. A's Br. at 8. Respondents counter that Respondent Alexander has no history of violations during his 28 years of experience in the fishing industry and that the closure of the Gulf EEZ has been lifted. Rs' Br. at physical page 3.

As previously discussed, the record supports a finding that Respondents have not committed any violations of fishery regulations before or after the offense charged in this proceeding, which demonstrates that Respondents have not engaged any pattern of violative conduct. Nevertheless, Respondents have sought to minimize their responsibility for the violation. Moreover, the Agency's argument for a penalty severe enough to serve as a general deterrent is compelling. While portions of the Gulf EEZ are no longer closed to fishing activities as a result of the Deepwater Horizon oil spill, the assessment of a substantial penalty against Respondents would show those fishermen who might consider disobeying any regulations closing areas in the future that the penalty for doing so greatly exceeds any benefit to be gained from the violative conduct. Accordingly, I find that this consideration strongly supports the assessment of the penalty sought by the Agency.

As a mitigating factor, Respondents cite the loss of the value of the catch confiscated by Special Agent Nelson on February 24, 2011. Rs' Br. at physical page 3. The Agency did not respond to this argument. Rather, the Agency asserts that because Respondents voluntarily abandoned the swordfish caught on the date of the violation, the Agency did not add an additional amount to the proposed penalty to account for any economic benefit of noncompliance. A's Br. at 7.

The argument that the seizure of a catch is a basis for mitigating the penalty proposed by the Agency was expressly rejected in *Bartholomew O. Niquet & Thomas C. Niquet*, NOAA Docket No. SE1100310, 2012 WL 3012675 (ALJ, May 4, 2012) ("*Niquet*"). As that tribunal explained:

> Respondents' argument regarding consideration of the loss of value of the catch and the effort of the fishing voyage is not persuasive and contrary to the design of the statutory scheme. Forfeiture provisions are in place, at least in part, to deter violators by preventing any benefit or incentive from failing to comply with the law and implementing regulations.

Niquet, 2012 WL 3012675, at *12. This reasoning is persuasive. Even if a reduction of the penalty based upon the value of the catch was deemed appropriate, the swordfish at issue in this

proceeding may have been contaminated with oil, which likely would have affected their market value. Accordingly, I find that the loss of the catch is not a mitigating factor here and that any value of the fish should not be added to the penalty because Respondents were deprived of the economic benefit of their violation by voluntarily abandoning the catch.

Finally, Respondents cite Respondent Alexander's cooperation with Special Agent Nelson as a mitigating factor. Rs' Br. at physical page 3. Special Agent Nelson testified that Respondent Alexander was cooperative during her investigation on February 24, 2011, and that while Mr. Abrams was "slightly heated" at first, he began to cooperate by the conclusion and even apologized to her for his earlier demeanor. Tr. at 32-33, 41.

Based upon the penalty amount proposed by the Agency and the absence of any discussion of the subject in its Brief, the Agency appears not to have considered this factor in setting the proposed penalty. Respondent Alexander's cooperative demeanor, and that eventually displayed by Mr. Abrams, should be encouraged. Therefore, I find that this consideration serves to mitigate the penalty sought by the Agency, as argued by Respondents. *See, e.g.*, *Straub & Silk*, 2012 WL 1497025, at *15 ("Respondents' truthfulness and cooperation throughout this process tends to favor a low civil monetary penalty."); *Lars Axelsson et al.*, NOAA Docket No. NE0704313, 2009 WL 5231065, at *16, *19 (ALJ, Dec. 8, 2009) (finding good cause to assess a penalty lower than that proposed by the Agency, in part, because the respondents cooperated with the Agency upon being informed of the violation).

C. CONCLUSION

After weighing the factors set forth in 16 U.S.C. § 1858(a) and the particular circumstances surrounding the violation committed by Respondents, I conclude that the penalty originally sought by the Agency in its NOVA is appropriate. A number of factors warrant the assessment of a substantial penalty. The evidentiary record supports a finding that the violation was intentional and that it unfairly disadvantaged those fishermen striving to abide by the regulations prohibiting fishing activities in the closed area of the Gulf EEZ. Strict adherence to those regulations was crucial in view of the emergency nature of the closure and the purpose of protecting the public from the consumption of adulterated seafood products. Thus, Respondent Alexander's misconduct is a particularly serious offense. Further, a substantial penalty is necessary as a specific deterrent to Respondents, as well as a general deterrent to those who might consider conducting their fishing operations in contravention of any area closures in the future. While Respondents' prior record of compliance and their cooperation with Special Agent Nelson's investigation support a reduction in the penalty, these factors are not sufficient to outweigh the seriousness of the infraction and Respondents' culpability in this proceeding to a significant degree.

Upon consideration, I find that a civil penalty in the amount of $20,000 is appropriate for the violation committed by Respondents.

VI. ULIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW[18]

1) Respondents Greg Abrams Seafood, Inc., and Milton Perry Alexander are "persons," as that term is defined by 16 U.S.C. § 1802(36), and are subject to the jurisdiction of the United States.*

2) At all times relevant to the NOVA, the F/V Lisa Ann was a registered and flagged vessel of the United States.*

3) At all times relevant to the NOVA, Respondent Abrams Seafood was a vessel required to be permitted, and was in fact issued permits, to fish for species governed by 50 C.F.R. part 635.*

4) At all times relevant to the NOVA, the F/V Lisa Ann was a "fishing vessel," as that term is defined by 16 U.S.C. § 1802(18).

5) At all times relevant to the NOVA, the F/V Lisa Ann was owned by Respondent Abrams Seafood and operated by Respondent Alexander.*

6) At all times relevant to the NOVA, Respondent Abrams Seafood was responsible for the actions of its vessel's operator, Respondent Alexander.*

7) At all times relevant to the NOVA, it was unlawful for any person to violate any provision of the Magnuson-Stevens Fishery Conservation and Management Act, or any regulations promulgated thereunder, in accordance with 18 U.S.C. § 1857(1)(A).*

8) At all times relevant to the NOVA, it was unlawful for any person or vessel subject to the jurisdiction of the United States to deploy or fish with any fishing gear from a fishing vessel, permitted or required to be permitted for species governed by 50 C.F.R. part 635, in the area enclosed by 29°00' North, 88°30' West; 29°00' North, 88°00' West; 28°30' North, 88°30' West; 28°30' North, 88°00' West in the Exclusive Economic Zone of the Gulf of Mexico, pursuant to 50 C.F.R. §§ 622.34(n), 635.21(a)(4)(vii), 635.71(a)(30).

9) Respondent Alexander was operating the F/V Lisa Ann during the fishing trip that began on January 27, 2011, and ended on February 24, 2011.*

10) During the fishing trip that began on January 27, 2011, and ended on February 24, 2011, Respondent Alexander fished for and harvested Atlantic swordfish.

11) During the fishing trip that began on January 27, 2011, and ended on February 24, 2011, Respondent Alexander recorded the positions in which he deployed fishing gear in the vessel's set log.

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[18] The findings of fact and conclusions of law marked with asterisks were proposed by the Agency in its post-hearing brief and subsequently adopted by Respondents in their reply brief. A's Br. at 11-12; Rs' Reply Br. at physical pages 3-4.

12) Respondent Alexander conducted fishing operations on February 22, 2011, during which he deployed longline fishing gear from the F/V Lisa Ann at the following positions: 28°58' North, 88°14' West and 28°57' North, 88°15' West.

13) On February 22, 2011, the positions 28°58' North, 88°14' West and 28°57' North, 88°15' West were located within the portion of the Exclusive Economic Zone in the Gulf of Mexico closed to fishing activities, pursuant to 50 C.F.R. §§ 622.34(n), 635.21(a)(4)(vii), 635.71(a)(30).

14) Respondent Alexander was aware that the positions 28°58' North, 88°14' West and 28°57' North, 88°15' West were located within the portion of the Exclusive Economic Zone in the Gulf of Mexico closed to fishing activities, but he intentionally deployed his longline fishing gear at those positions.

15) On or about February 22, 2011, Respondents violated the Section 307(1)(A) of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A), by failing to comply with the gear operation and deployment restrictions set forth at 50 C.F.R. § 635.21(a)(4)(vii), in violation of 50 C.F.R. § 635.71(a)(30).

16) A civil penalty in the amount of $20,000 is appropriate for the violation committed by Respondents.

17) Respondents are jointly and severally liable for the civil penalty.

ORDER

PLEASE TAKE NOTICE, that this Initial Decision becomes effective as the final Agency action **60 days** after service on **January 22, 2013**, unless the undersigned grants a petition for reconsideration of the Administrator reviews the Initial Decision. 15 C.F.R. § 904.271(d).

PLEASE TAKE FURTHER NOTICE, that a failure to pay the civil penalty to the Department of Commerce/NOAA within **30 days** from the date on which this Initial Decision becomes final Agency action will result in the total penalty becoming due and payable, and interest being charged at the rate specified by the United States Treasury regulations and an assessment of charges to cover the cost of processing and handling of the delinquent penalty. Further, in the event the penalty, or any portion thereof, becomes more than 90 days past due, Respondents may also be assessed an additional penalty charge not to exceed 6 percent per annum.

PLEASE TAKE FURTHER NOTICE, that any petition for reconsideration of this Initial Decision must be filed 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 is filed, any other party to this proceedings 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 Agency Administrator must be filed with the Administrator within **30 days** after the date of 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.

Barbara A. Gunning
Administrative Law Judge
U.S. Environmental Protection Agency

Dated: November 23, 2012
Washington, D.C.