UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	)	Docket Number:
Eli Tobias Bruce, Sr.,	)	**SE1102622, F/V Sweet Bucket**
Respondent.	)	

INITIAL DECISION AND ORDER

Date: August 14, 2012

Before: Susan L. Biro, Chief Administrative Law Judge, U.S. EPA[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

Charles Green, Esq.
Office of General Counsel, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, Silver Spring, Maryland, for the Agency

[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.

I. PROCEDURAL HISTORY

On October 24, 2011, counsel for the National Oceanic and Atmospheric Administration ("NOAA" or "Agency"), on behalf of the Secretary of Commerce, instituted this action by issuing a Notice of Violation and Assessment of Administrative Penalty ("NOVA") to Eli Tobias Bruce, Sr., owner/operator of the F/V Sweet Bucket ("Respondent"). The NOVA charges Respondent with two counts of violating the Endangered Species Act, 16 U.S.C. § 1538, and Agency regulations at 50 C.F.R. § 225.205(b)(1), and proposes a total assessed penalty of $7,000, or $3,500 per count. Respondent was advised therein of his right to respond and request "a hearing (like a trial) before an Administrative Law Judge (ALJ)" within thirty days of receiving the notice.

The Agency sent the NOVA to Respondent at his physical address, 12253 West 123rd Street, Cut Off, LA 70345 ("123rd Street address"), identifying thereon a certified mail number.[2] Attached to the copy of the NOVA submitted to this Tribunal is a copy of the certified mail green card, or Domestic Return Receipt, with the same number as listed on the NOVA sent to Respondent, which was signed by a recipient and has Respondent's mailing address written in box D: "PO Box 9 CUT OFF LA 70345" ("P.O. Box address"). The return receipt was stamped in Cut Off, Louisiana, on November 2, 2011, by the U.S. Postal Service ("USPS"). The Agency also submitted tracking confirmation for its NOVA from the USPS website, which stated that the mail arrived at "Unit" in Cut Off, LA, on October 26, 2011, that notice was left that day, and that it was finally "Delivered" on November 2, 2011.

On December 13, 2011, the Agency filed a letter with this Tribunal stating that it had received a request for a hearing from Respondent on December 8, 2011, and that the Agency prefers the hearing be held in New Orleans, Louisiana, for the convenience of Respondent and the Agency's witnesses. The Agency submitted a copy of Respondent's hearing request and a copy of the Agency's NOVA with its letter. Respondent's request reads as follows: "To Whom [] We have decide we would like to talk to Judge regard this matter [] Thank you [] Eli T Bruce." The return address stated on the envelope in which the hearing request was mailed is "P.O. Box 09 C.O. La 70345." The Agency represented in its December 13, 2011 letter that Respondent's address is the 123rd Street address, and that his phone number is (985) 637-6075. Respondent's forwarded hearing request constitutes the entirety of his contact with this Tribunal during this proceeding.

On December 14, 2011, the undersigned 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, the undersigned set forth various prehearing filing deadlines and procedures, and ordered the parties to file their respective PPIPs on or before January 20, 2012. The PPIP Scheduling Order also listed the 123rd Street address that this Tribunal had on file for Respondent, and stated: "If this information is inaccurate or incomplete, please contact the ALJ's staff attorney, Steven Sarno, at (202) 564-6245 or Sarno.Steven@epa.gov." Further, the parties were advised that they "may also contact

[2] In his June 2009 Federal Permit Application for Vessels Fishing in the Exclusive Economic Zone (EEZ) Respondent self-identified his "mailing address" as P.O. Box 09, Cutoff, LA, 70345, and his "physical address" as 12253 West 123, Cutoff, LA, 70345. Agency's Ex. 1 at 7, 9.

Steven Sarno with any procedural questions," and were warned that failure to comply with the PPIP requirements may result in adverse action.

The PPIP Scheduling Order was sent by this Tribunal to Respondent at the 123rd Street address via regular mail on December 14, 2011. On December 27, 2011, that mailing was returned with the explanation of "No such number [] Unable to forward." On January 4, 2012, staff of the undersigned re-mailed the PPIP Scheduling Order via certified mail, with return receipt requested, to Respondent at his P.O. Box mailing address. The return receipt for this mailing was signed by "Syble Bruce" on January 24, 2012, and received by this Tribunal on February 9, 2012.

In the interim, on December 15, 2011, the Agency filed a Motion in Opposition to Untimely Hearing Request ("Motion"), seeking to have the NOVA declared the final administrative decision and order in this matter, and on January 20, 2012, timely filed its PPIP. Respondent failed to file his PPIP by the deadline set. The undersigned denied the Agency's Motion by Order dated January 27, 2012, which was sent by regular mail to Respondent at the P.O. Box address. Contemporaneously, the undersigned issued an Order to Show Cause to Respondent, and mailed it via certified mail with return receipt requested to Respondent at the P.O. Box address. On February 8, 2012, this Tribunal received the return receipt for the Order to Show Cause mailing, which was signed by "Syble Bruce" as "Agent" on January 31, 2012. The Order to Show Cause required a response by Respondent on or before February 10, 2012.

On February 15, 2012, the Agency filed a Petition for Reconsideration of the Court's Order Denying Agency's Motion in Opposition to Untimely Hearing Request ("Petition"). On March 6, 2012, the undersigned denied the Agency's Petition and, because Respondent had still not yet responded to the Order to Show Cause or filed a PPIP, ruled that "Respondent shall not be permitted to introduce any defenses, testify, offer any evidence, call any witnesses, or otherwise introduce matters at hearing that he was required to identify in this PPIP." Respondent maintained his rights, however, to cross-examine Agency witnesses, dispute the authenticity or admissibility of Agency evidence, and make non-testimonial statements on his behalf at the hearing. This Order was sent to Respondent on March 6, 2012, at the 123rd Street address via certified mail, and as the return receipt shows, was signed for by "Sybl Bruce" on March 12, 2011.

On March 9, 2012, the undersigned issued a Hearing Order in this matter, setting forth prehearing filing deadlines and scheduling the hearing for the week of May 7, 2012, in New Orleans, Louisiana. The Hearing Order also set deadlines for the filing of a status report, discovery motions, joint stipulations, and prehearing briefs, listed this Tribunal's various addresses, and explained the filing and service requirements set forth in the rules that govern this proceeding, 15 C.F.R. part 904 ("Rules of Practice"). Finally, the Hearing Order provided:

> If either party does not intend to attend the hearing, or has good cause for not being able to attend the hearing as scheduled, it shall notify Adrienne Fortin, a staff attorney of the undersigned, at (202) 564-7862 or fortin.adrienne@epa.gov, at the earliest possible moment.

The Hearing Order was sent via certified mail with return receipt requested to Respondent at the 123rd Street address, was signed for by "Sybil Bruce" on March 26, 2012, and had the P.O. Box address written onto it as the correct address.

On April 2, 2012, staff of the undersigned unsuccessfully attempted to obtain a functioning phone number and e-mail address for Respondent from the Agency, after calls to the phone number in the record for Respondent prompted the message that the number was not in service.[3] In order to try and hold a prehearing conference call with the parties, an attorney in this Tribunal sent Respondent a letter dated April 6, 2012, via certified mail with return receipt requested and regular mail to both the P.O. Box address and the 123rd Street address. The letter notified Respondent that the telephone number this Tribunal had on file for him was not in service, and asked Respondent to call the Tribunal at his earliest convenience. Return receipts for both certified mailings were signed by "Syble Bruce" on April 17, 2012.

On April 17, 2012, the Agency filed a "Notice of Amendment One to Agency's Pleadings," which corrected statutory and regulatory citation errors in Count 1 and Count 2 as written in the NOVA. On the same day, the Agency filed "Supplement One to Agency's PPIP," wherein it corrected a typographical error in its PPIP, and introduced two additional proposed exhibits.

On April 19, 2012, a Notice of Hearing advising the parties of exact date and location of the hearing was issued and sent to Respondent at the P.O. Box address by certified mail with return receipt requested and also by regular mail. On May 14, 2012, after the hearing had taken place, the certified mailing was returned to this office with the following notations: "Return to sender [] Unclaimed [] Unable to forward." Also noted on the envelope: "1st Notice 4-23 [] 2nd Notice 4-28 [] Returned 5-8." The regular mail was not returned.

In accordance with the Notice, the hearing in this matter was held on Wednesday, May 9, 2012, at the John Minor Wisdom U.S. Court of Appeals Building, 600 Camp Street, New Orleans, Louisiana. Respondent did not appear for hearing, and no person appeared on Respondent's behalf. The Agency requested that the undersigned issue a default judgment against Respondent. Tr. 6 at 7-9.[4] Upon consideration, and finding that Respondent had waived his right to a hearing and consented to a decision on the record, the undersigned entered default judgment against Respondent in accordance with 15 C.F.R. § 904.211. Tr. 9 at 20-25; 10 at 1-4. The Agency then presented its evidence, introducing five exhibits and the testimony of three witnesses: Richard Myles Chesler, III, Mark Robert Fields and Robert Dale Stevens, an expert in turtle excluder devices ("TEDs"). In closing arguments, Agency counsel referenced the specific code sections Respondent is alleged to have violated, and the record closed thereafter.

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[3] On April 16, 2012, staff for the undersigned contacted Agency counsel to ask if he had been in touch with Respondent, and Agency counsel answered in the negative.

[4] Citations herein to the transcript are made in the following format: "Tr. [page] at [line]." A digital copy of the transcript of the hearing in this matter was e-mailed to the office of the undersigned and to Agency counsel on May 24, 2012. The physical copies were received by this office on May 25, 2012. On June 14, 2012, this office mailed a copy of the transcript to Respondent at the P.O. Box address via regular mail.

II. FACTUAL BACKGROUND

Eli T. Bruce of 12253 West 123rd Street, P.O. Box 9, Cut Off, Louisiana, is the owner of the Fishing Vessel ("F/V") Sweet Bucket ("Sweet Bucket"). Agency Ex. 2 (NOAA Certificate of Documentation, Abstract of Title). On July 1, 2009, Eli Tobias Bruce, Sr., was issued a Federal Fisheries Permit for Gulf of Mexico Shrimp (Moratorium) Number SPGM-1173 ("Permit") by the National Marine Fisheries Service ("NMFS"), a division of NOAA. Agency Ex. 1; Tr. 15 at 20-25. The Permit, which expired on March 31, 2010, authorized the Sweet Bucket to access the Gulf of Mexico shrimp fishery in the Exclusive Economic Zone ("EEZ"). *Id.* Agency records show that Respondent's Permit was terminated on March 31, 2011. *Id.*; Agency Ex. 1 at 11-15 (print outs from "Permits Information Management System").

On June 3, 2011, at approximately 9:45 a.m., NOAA Special Agents Richard Myles Chesler, III, and Mark Robert Fields, and NOAA Gear Specialists Robert Dale Stevens[5] and Jack Forrester ("NOAA crew"), departed the NMFS Pascagoula Lab on board an NMFS Gear Monitoring Team SafeBoat, to conduct a Protected Resources Enforcement Patrol. Agency Ex. 3 (Investigation Report, June 27, 2011, by Richard Chesler ("Investigation Report")) at 1; Tr. 19 at 4-8. The NOAA crew entered the Mississippi Sound and "went to the west, traveling approximately a couple of miles off the coast." Tr. 19 at 9-11.

Mr. Chesler testified at hearing that at approximately 11:49 a.m., the NOAA crew observed the Sweet Bucket, which "was towing, had cables in the water, indicating that it was actively fishing at the time." Tr. 19 at 13-16; Agency Ex. 3 at 2. The Sweet Bucket was "in position 30° 21.027' N latitude, 088° 55.481'W longitude; approximately two point eight nautical miles (2.8nm) southwest of Biloxi, MS." Agency Ex. 3 at 2; *see also* Agency Ex. 3 at 4; 16 (NOAA Fisheries Office of Law Enforcement Boarding/Inspection Report ("Boarding Report")); 22 (NOAA Enforcement Action Report ("Enforcement Report")); and 38 (NOAA nautical chart mapping Sweet Bucket's location on June 3, 2011). For purposes of TED requirements, this location is considered to be in "inshore waters" and part of the waters of the Gulf of Mexico, explained Mr. Chesler. *Id.*; Tr. 19 at 17-20; 20 at 5-6; 24 at 12-19.

Messrs. Fields, Stevens and Chesler then boarded the Sweet Bucket, identified themselves as law enforcement officers, and introduced themselves to Respondent, "who identified himself as the captain and the owner of the vessel." Tr. 20 at 10-16; Agency Ex. 3 at 2. The crew observed that there were approximately 6,500 pounds of brown shrimp and 50 pounds of white shrimp on board the Sweet Bucket. Agency Ex. 3 at 3, 19; Tr. 25 at 5-25; 26 at 1-7. Mr. Chesler recorded in the Investigation Report that the Sweet Bucket had started its trip on March 31, 2011, and would end on June 5, 2011. Agency Ex. 3 at 3.

Upon stating their intent to inspect Respondent's TEDs, Respondent told the NOAA crew that he was boarded by Mississippi Department of Marine Resources patrol officers the day before, on June 2, 2011, and that those officers had inspected his TEDs. Agency Ex. 3 at 2; Tr. 20 at 17-22. According to the Agency's Investigation Report, Respondent told the NOAA crew

[5] Mr. Stevens's official job title is "Fisheries methods and equipment specialist," however he has been referred to as a "gear specialist" throughout this proceeding. Agency Ex. 3; Tr. 19 at 4-8; 20 at 10-16; 37 at 15-16, 19-20; 43 at 6-7, 24-25; 44 at 1; Agency PPIP at 4.

that the state patrol officers had him relocate escape panels on "both TEDs." Agency Ex. 3 at 2. At hearing, Mr. Chesler testified that Respondent told them the state officers had him relocate "one of his escape openings." Tr. 20 at 22-24; 33 at 12-15. Mr. Fields testified that Respondent "extended the side cuts on the TED . . . to make them legal." Tr. 42 at 7-19. Mr. Chesler testified that the state's records show that the Sweet Bucket was deemed to be in compliance with TED requirements after their inspection, and was not issued a citation. Tr. 31 at 18-25; 32 at 1-19; Agency Ex. 3 at 4; 27-36 (Mississippi Department of Marine Resources boarding log ("State Boarding Log"); *see* Agency Ex 3. at 31; Tr. 32 at 1-15).

During the June 3, 2011 boarding, the NOAA crew inspected the two double cover flap type TEDs that the Sweet Bucket had installed in its two shrimp fishing nets. Agency Ex. 3 at 2; Tr. 38 at 5-6; *see* Agency Ex. 3 at 10-12 (photographs taken during the inspection). In order for the nets to be properly inspected, they were hauled in from the water and hung up on the vessel one at a time in a manner replicating their position when being towed in the water. Tr. 21 at 2-20; 37 at 19-25; 38 at 1-2. Respondent assisted the NOAA crew throughout their inspection, for example, by providing "cut off fishing hooks, to attach to the net as a stretch measurement mechanism," thereby allowing "better leverage to extend the net as much as possible." Tr. 22 at 19-25; 23 at 1-7; 39 at 18-25; 40 at 1-8. He fully cooperated at all times, each witness testified. *Id.*; Tr. 23 at 8-16; 24 at 4-6; 34 at 14-16; 42 at 24-25; 51 at 3-10.

Messrs. Stevens and Fields inspected the port net first. Agency Ex. 3 at 2; Tr. 38 at 3-5. The TED angles were required by regulation to be between 30 and 55 degrees, Mr. Chesler testified. Tr. 22 at 5-7. Mr. Fields held the angle meter against one of the even TED grid bars and read aloud the angle measurement, 59 degrees, to Mr. Chesler, who recorded all the measurements on an NMFS TED Enforcement Boarding Form for Double-Cover TEDs ("TED Form"). Agency Ex. 3 at 2-3, 8; Tr. 38 at 3-25; 39 at 1-12; 44 at 19-25; 45 at 1-4; 49 at 14. The crew determined that the measurements of the side cuts, panel overlap, and flap length of the port net TED were compliant, and then dropped the net to the deck to measure the top escape opening. Agency Ex. 3 at 3, 8; Tr. 22 at 11-16; 42 at 11-19; 46 at 16-25; 47 at 1-22. The NOAA crew members testified that the escape opening measurement must be 56 inches at a minimum, but that Respondent's port net TED's top escape opening could only be stretched to 44 inches. Agency Ex. 3 at 3, 8; Tr. 22 at 8-16; 23 at 8-13; 40 at 6-8, 24-25; 48 at 5-19.

Next, the starboard net was hung. Agency Ex. 3 at 3; Tr. 23 at 19-21. The TED angle measured 64 degrees, and the escape opening measured 41 inches. Agency Ex. 3 at 3; Tr. 23 at 21-22; 24 at 1-3; 40 at 24-25; 48 at 15-19; 49 at 14. The side cuts, panel overlap, and flap length were also measured, and were in compliance. Agency Ex. 3 at 3, 8; Tr. 42 at 16-19; 47 at 8-22.

After the measurements were recorded, Messrs. Stevens and Chesler "went over the discrepancies" with Respondent. Agency Ex. 3 at 4. They told Respondent how to fix the angles and the escape opening cuts, advised him that the nets had to be fixed before he fished again, and issued Respondent the Enforcement Report ("essentially a ticket documenting the violations"). *Id.*; Agency Ex. 3 at 22-23; Tr. 26 at 11-21. At approximately 12:29 p.m., the NOAA crew returned to the NMFS SafeBoat. Agency Ex. 3 at 4.

III. APPLICABLE LAW AND REGULATIONS

A. Liability

i. Endangered Species Act

In 1973, the U.S. Congress passed the Endangered Species Act (as amended, 16 U.S.C. §§ 1531-1544 ("the Act")), "[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." Pub. L. No. 93-205, pmbl., § 2, 87 Stat. 884, 884 (1973).

Section 4 of the Act directs the Secretary of Commerce, in coordination with the Secretary of the Interior, to determine any species that are endangered or threatened using specific criteria, and then to list any such species in the Federal Register. 16 U.S.C. § 1533. Pursuant to Section 4(d) of the Act, "the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species." 16 U.S.C. § 1533(d). Section 9 of the Act provides that:

> [W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to --
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> * * *
>
> (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

16 U.S.C. § 1538(a)(1)(G).

"Any person who knowingly violates" the regulations may be assessed a civil penalty pursuant to the authority bestowed upon the Secretary by Section 11 of the Act. 16 U.S.C. § 1540(a)(1). It has been established that "[t]he term 'knowingly' only requires knowledge of the commission of the acts which constitute the offense." *Coulon*, NOAA Docket No. SE025420ES, 2004 WL 882794 (ALJ, Mar. 19, 2004) (citing *Kuhn & McCeney*, 5 O.R.W. 408, 412 (ALJ, 1988)).[6] No penalty assessment may be made unless the alleged violator is given notice and opportunity for a hearing conducted in accordance with Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554. 16 U.S.C. § 1540(a). Pursuant to 5 U.S.C. § 3344 and 5 C.F.R. § 930.208, the U.S. Office of Personnel Management approved an agreement between the Agency and the U.S. Environmental Protection Agency ("EPA"), which holds that EPA Administrative Law Judges may preside over certain Agency administrative enforcement proceedings initiated pursuant to the Endangered Species Act and other statutes.

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[6] Nor is knowledge of the law an element of criminal violations of the Act. H.R. Rep. No. 95-1625, at 26 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9453, 9476; *United States v. McKittrick*, 142 F.3d 1170 (9th Cir. 1998).

ii. Regulations

The regulations at 50 C.F.R. § 223.205 explicitly state that "[t]he prohibitions of section 9 of the Act (16 U.S.C. 1538) relating to endangered species apply to threatened species of sea turtle . . . ." 50 C.F.R. § 223.205(a). Many species of sea turtle found in U.S. waters, including the loggerhead, Kemp's ridley, leatherback, green, and hawksbill, are listed as either threatened or endangered pursuant to the Endangered Species Act. 50 C.F.R. §§ 223.102(b) (threatened list), 224.101(c) (endangered list). Further, the regulations set forth in pertinent part that:

> (b) Except as provided in § 223.206, it is unlawful for any person subject to the jurisdiction of the United States to do any of the following:
>
> > (1) Own, 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).[7] In turn, section 223.206(d) sets forth gear requirements for trawlers, and, specifically applicable to the Sweet Bucket, TED requirements for shrimp trawlers, as follows:

> (i) TED requirement for shrimp trawlers. 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 board, or to any tow rope, cable, pole or extension, either on board or attached in any manner to the shrimp trawler. Exceptions to the TED requirement for shrimp trawlers are provided in paragraph (d)(2)(ii) of this section.

50 C.F.R. § 223.206(d)(i).[8] "Gulf Area" means "all waters of the Gulf of Mexico west of 81° W. long. (the line at which the Gulf Area meets the Atlantic Area) and all waters shoreward thereof (including ports)." 50 C.F.R. § 222.102.

Section 223.207 sets forth the specific design criteria for all "Approved TEDs," which include Hard TEDs, Special Hard TEDs, and Soft TEDs. 50 C.F.R. § 223.207. The regulations require that the angle of the deflector grid of a Hard TED "must be between 30° and 55° from the

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[7] The Boarding Report and the Enforcement Report cite 50 C.F.R. § 223.205*(b)(2)*, not (b)(1), as the provision Respondent violated. Agency Ex. 3 at 20, 22. However, (b)(1) is cited in the NOVA, and Agency counsel has pursued a liability determination solely on the grounds of a (b)(1) violation throughout this proceeding. NOVA (as amended April 17, 2012); Agency PPIP at 3. Respondent has received adequate notice of the allegations against him, as discussed above and below, and this proceeding is by definition a "civil administrative hearing *on a NOVA*." 50 C.F.R. §§ 904.2 (emphasis added); 904.201(a). The discussion herein is limited to Respondent's liability under Section 223.205(b)(1).

[8] The certain exceptions in (d)(2)(ii) to the TED requirements apply to shrimp trawlers that comply with alternative tow-time restrictions, have exempted equipment (beam or roller trawls), or are fishing for primarily royal red shrimp. 50 C.F.R. § 223.206(d)(2)(ii)(A), (B).

normal, horizontal flow through the interior of the trawl." 50 C.F.R. § 223.207(a)(3)(i). Further, a "Single-grid hard TED" with a double cover offshore opening must comply with the following escape flap opening requirements:

> (7) Size of escape opening–
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> * * *
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> (ii) Single-grid hard TEDs.
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> * * *
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> (C) Double cover offshore opening. . . . The resultant length of the leading edge of the escape opening cut must be no less than 56 inches (142 cm) . . . . Either this opening or the one described in paragraph [ ] of this section must be used in all offshore waters but also in all inshore waters in Georgia and South Carolina, and may be used in other inshore waters.

50 C.F.R. § 223.207(a)(7)(ii)(C).

B. Penalty

The Act provides, in pertinent part, that "[a]ny person who knowingly violates . . . any provision of any other regulation issued under this chapter may be assessed a civil penalty by the Secretary of not more than $12,000 for each such violation." 16 U.S.C. § 1540(a)(1). The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended by the Debt Collection and Improvement Act of 1996, Pub. L. 104-134, resulted in the Secretary increasing this amount to $13,200 per violation. 5 C.F.R. § 6.4(e)(13)(ii); 73 Fed. Reg. 75321-01 (Dec. 11, 2008).

The Rules of Practice state that the following factors "may" be taken into account when assessing a penalty: (1) the nature, circumstances, extent, and gravity of the alleged violation; (2) the respondent's degree of culpability, any history of prior violations, and ability to pay; and (3) such other matters as justice may require. 15 C.F.R. § 904.108(a). Recent modifications to the Rules of Practice removed any presumption in favor of the Agency's proposed penalty and the requirement that the presiding judge state good reason(s) for departing from the Agency's analysis. 75 Fed. Reg. 35631-01 (June 23, 2010). Instead, the presiding judge has the "authority and duty" to "[a]ssess a civil penalty . . . , taking into account all of the factors required by applicable law." 15 C.F.R. § 904.204(m).

IV. DISCUSSION

A. Default Judgment

The Rules of Practice provide that the Agency may serve a NOVA "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." 15 C.F.R. § 904.3(a). Service is

considered effective upon receipt. *Id.* After the NOVA is served and a hearing is requested, all other documents must be served on the respondent "by first class mail (postage prepaid), facsimile, electronic transmission, or third party commercial carrier, to an addressee's last known address or by personal delivery." 15 C.F.R. § 904.3(b). Service for these papers is considered effective "upon the date of postmark . . . , facsimile transmission, delivery to third party commercial carrier, electronic transmission, or upon personal delivery." *Id.* For both a NOVA and all subsequently filed documents, service "may effectively be made on the agent for service of process, on the attorney for the person to be served, or other representative." 15 C.F.R. § 904.3(c).

The Agency mailed the NOVA to Respondent at the 123rd Street address, which was his known physical address at the time, by certified mail, in accordance with 15 C.F.R. § 904.3. As stated above in greater detail, the certified mail return receipt was signed for at the 123rd Street address and stamped by the USPS in Cut Off, Louisiana, on November 2, 2011, which is the same date that the tracking confirmation shows that it was delivered. Though the signature on the green card does not indicate that Respondent himself signed for the mailing, proper service was achieved. *Gonzalez et al. v. NOAA*, 420 Fed. Appx. 364, 368 (5th Cir. 2011) (under the Rules of Practice, NOAA may serve the NOVA by certified mail to the respondent's last known address "regardless of who signs for receipt") (citing *United States v. Robinson*, 434 F.3d 357, 366 (5th Cir. 2005) ("Due process does not require actual notice or actual receipt of notice.")); *United States v. Ngo Tra*, 1994 U.S. Dist. LEXIS 8948, *11 (E.D. La.). Pursuant to 15 C.F.R. § 904.3(a), the Agency served Respondent with the NOVA on November 2, 2011.

The presiding officer in an administrative proceeding is required by the Rules of Practice to "promptly serve on the parties notice of the time and place of hearing," which "will not be held less than 20 days after service of the notice of hearing . . . ." 15 C.F.R. § 904.250(a). On March 9, 2012, the undersigned issued a Hearing Order in this matter, scheduling the hearing for the week of May 7, 2012, in New Orleans, Louisiana. The Hearing Order was sent via certified mail with return receipt requested to Respondent at the 123rd Street address, and was received on March 26, 2012. On April 19, 2012, the undersigned issued and served the Notice of Hearing, which stated the specific date and location of the hearing. Though the certified mail copy sent to Respondent was returned as "Unclaimed," the copy sent via regular mail was not returned. When mail is properly addressed and proper postage has been affixed, there is a strong presumption that it was delivered in the ordinary course of mail and was received by the addressee. *Ark. Motor Coaches, Ltd. v. CIR*, 198 F.2d 189, 191 (8th Cir. 1952). Thus, it is found that Respondent was properly notified of the time and place of the hearing in accordance with the Rules of Practice. 15 C.F.R. § 904.250(a).

As to default, the Rules of Practice provide that "[i]f, after proper service of notice, any party appears at the hearing and an opposing party fails to appear, the Judge is authorized . . . [w]here the respondents have failed to appear, [to] find the facts as alleged in the NOVA . . . and enter a default judgment against the respondents." 15 C.F.R. § 904(a). Further, the Judge "may deem a failure of a party to appear after proper notice a waiver of any right to a hearing and consent to the making of a decision on the record." 15 C.F.R. § 904(d). Having been properly served with the NOVA, duly notified of the time and place of the hearing, and served effectively throughout this proceeding, Respondent failed to appear and thereby waived his right to further

contest the proceedings. Default judgment was properly entered against him at the hearing on May 9, 2012.

B. The Agency's Burden of Proof

Default judgment having been entered, all facts alleged in the NOVA are deemed true. 15 C.F.R. § 904.211(a)(2). However, because the facts alleged therein are insufficient on their own to prove a violation of the Endangered Species Act, the Agency presented evidence at the hearing, and findings on that evidence are made below.[9] *See O'Neil*, NOAA Docket No. 315-189, 1995 WL 1311366, at *5 (ALJ, June 14, 1995) (addressing each of respondent's defenses raised before the hearing even though respondent failed to appear at the hearing and was found in default, so as to ensure a "full and fair hearing" nonetheless).

To prevail on its claims that Respondent violated the Act and the TED 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*, 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)); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). Direct and circumstantial evidence may establish the facts constituting a violation of law. *Id.*

C. Ultimate Findings of Fact and Conclusions of Law as to Liability

Having imposed default judgment against Respondent, and the facts having been stated in detail above, it is appropriate to set forth abbreviated findings of fact and conclusions of law. Upon thorough and careful review of the documentary and testimonial evidence in the record of this proceeding, I find that the Agency has proven by a preponderance of the evidence the following:

1. Respondent Eli Tobias Bruce, Sr., is a "person" as defined by the Endangered Species Act, and is subject to the jurisdiction of the United States. 16 U.S.C. §§ 1532(13), 1538(a)(1)(G); 50 C.F.R. § 223.205(b); Agency Exs. 1, 2; Tr. 16 at 17-22; 37 at 17-18.

2. Respondent is the owner of the F/V Sweet Bucket, and was on board operating the F/V Sweet Bucket on June 3, 2011. 50 C.F.R. § 223.205(b)(1); NOVA at 1; Agency Exs. 2; 3 at 2, 16-17; Tr. 15 at 17-25; 16 at 19-22; 20 at 10-16; 37 at 13-14.

3. The F/V Sweet Bucket is a "vessel" and "shrimp trawler" as defined by the National Marine Fisheries Service. 50 C.F.R. § 222.102; Agency Exs. 2, 3; Tr. 19 at 12-16; 20 at 8-11.

4. The F/V Sweet Bucket was boarded in state, or inshore, waters in the Gulf Area. 50 C.F.R. § 222.102 ("inshore" and "Gulf Area"); Agency Ex. 3 at 2; Tr. 19 at 17-25; 20 at 1-6; 24 at 11-25; 25 at 1-4; *see also* Agency's Ex. 3 at 16 (Boarding Report); 22 (Enforcement Report); and 38.

[9] In the NOVA under "Facts Constituting Violation," there are two statements (one per count), which are mainly conclusions of law, not allegations of fact.

5. At the time of the boarding on June 3, 2011, the F/V Sweet Bucket was actively fishing and its nets were "rigged for fishing." 50 C.F.R. § 223.206(d)(i); Tr. 19 at 13-16; Agency Ex. 3 at 2.

6. On June 3, 2011, Respondent was "knowingly" fishing in the Gulf Area for shrimp with two TEDs in the F/V Sweet Bucket's nets. 16 U.S.C. § 1540(a)(1); Agency Ex. 3 at 3; Tr. 19 at 12-16; 20 at 8-16; 25 at 13-16; 34 at 22-25; 39 at 20-25; 41 at 13-25.

7. A single-grid hard TED with double cover offshore opening was installed in each of the F/V Sweet Bucket's two nets at the time of boarding on June 3, 2011. Tr. 38 at 5-6.

8. On June 3, 2011, the angle of the F/V Sweet Bucket's port net TED was 59 degrees. Agency Ex. 3 at 1, 3, 5, 8; Tr. 21 at 24-25; 22 at 1-2; 38 at 14-16; 49 at 14.

9. On June 3, 2011, the angle of the F/V Sweet Bucket's starboard net TED was 64 degrees. Agency Ex. 3 at 1, 3, 5, 8; Tr. 23 at 19-22; 49 at 14.

10. On June 3, 2011, the leading edge cut of the escape opening of the F/V Sweet Bucket's port net TED was 44 inches. Agency Ex. 3 at 1, 3, 5, 8; Tr. 22 at 8-16; 23 at 8-13; 40 at 6-8, 24-25; 48 at 13-19.

11. On June 3, 2011, the leading edge cut of the escape opening of the F/V Sweet Bucket's starboard net TED was 41 inches. Agency Ex. 3 at 1, 3, 5, 8; Tr. 24 at 1-3; 40 at 24-25; 48 at 13-19.

12. On June 3, 2011, the F/V Sweet Bucket's two TEDs were not in compliance with 50 C.F.R. § 223.207(a)(3)(i) or (a)(7)(ii), and were therefore not "approved TEDs." 50 C.F.R. § 223.206(d)(2)(i).

13. On June 3, 2011, Respondent owned, operated and was on board a vessel not in compliance with all applicable provisions of Section 223.206(d). 50 C.F.R. § 223.205(b)(1).

14. Respondent is liable under Section 9 of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(G), for violating a regulation pertaining to species of sea turtles listed pursuant to Section 4 of the Act, 16 U.S.C. § 1533.

15. Because Respondent knowingly violated regulations promulgated under the Endangered Species Act, the Secretary may assess a civil penalty against him in an amount no greater than $13,200 per violation. 16 U.S.C. § 1540(a)(1); 5 C.F.R. § 6.4(e)(13); 73 Fed. Reg. 75321-01 (Dec. 11, 2008).

D. Civil Penalty Assessment

i. The Agency's Penalty Analysis

The Agency attached two Penalty Assessment Worksheets with the NOVA, one for each count, each stating therein that the penalty proposed "is based on review and application of the

facts that comprise the violation(s) charged, penalty schedules, penalty matrixes, adjustment factors, and economic considerations set forth in NOAA's 'Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions'" ("Penalty Policy" and "Policy").[10] The Penalty Policy, dated March 16, 2011, was designed to help NOAA attorneys determine fair, consistent and appropriate penalties that would serve as a deterrent to potential violators and eliminate economic incentives for noncompliance. 76 Fed. Reg. 20959, 20959 (Apr. 14, 2011).

The Policy's first calculation is the gravity-of-offense level, which takes into account the nature, circumstances and extent of a violation, and ranges from least significant ("I") to most significant ("IV"). Penalty Policy at 7-8. At this stage, the Policy also contemplates whether the species at issue is endangered or threatened, setting a higher penalty for the former and lesser for the latter. *Id.* at 8. In TED cases, when the grid angle is between 58 and 60 degrees, the Policy categorizes that discrepancy as a level "II" violation, or one that is "likely to kill *some* turtles encountered." *Id.* at 50 (emphasis added). When the grid angle is between 61 and 70 degrees, the Policy deems the discrepancy a level "III" violation, or one that is "likely to kill *most* turtles encountered." *Id.* (emphasis added). Discrepancies related to the measurement of the escape openings do not appear to be explicitly associated with a gravity level, in which case the Policy advises Agency attorneys to apply the level assigned to an analogous offense. *Id.* at 7. The Agency's position as stated in the worksheets attached to the NOVA is that for both counts (port TED and starboard TED) the offense level is "III."

The second metric is Respondent's culpability level. The Penalty Policy considers four: intentional, recklessness, negligence, and unintentional (including accident, mistake, and strict liability). *Id.* at 8-9. Determining the violator's culpability level requires consideration of whether the violator took reasonable precautions against the events constituting the violation, how much control the violator had over the events constituting the violation, whether the violator knew or should have known about the potential harm, and other similar factors. *Id.* at 9. The Agency's position for both counts is that Respondent's culpability at the time of the violation was "Negligent."

Viewing the Agency's selected gravity-of-offense level ("III") and culpability level ("Negligent") as they relate on the Agency's Penalty Matrix for the Endangered Species Act ("Matrix") (Penalty Policy at 28), the base penalty range available for violations involving a threatened species is $2,500-$4,500. In the NOVA worksheets, the Agency concluded that the base penalty for each of the violations should be $3,500, or the middle of the Policy's range.

After determining the base penalty, the Policy instructs Agency attorneys to consider whether certain adjustment factors should increase or decrease that amount. Penalty Policy at 10. These factors are: the violator's history of noncompliance, whether the violator's conduct involves commercial or recreational activity, and the violator's conduct after the violation. *Id.* In the NOVA, the Agency does not propose to make any such adjustments to the base penalty, noting only that Respondent has "No priors," and that his operation is "Commercial."

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[10] The Agency's Penalty Policy is accessible to the public at the following URL: http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf

The Policy then directs the Agency to determine the violator's economic benefit from noncompliance and to add that amount to the penalty. Penalty Policy at 12. The Agency determined that Respondent's total economic benefit is $0, as measured by the Policy's two economic adjustment factors: proceeds of unlawful activity ($0), and any additional economic benefit ($0). Finally, the violator's ability to pay is to be considered if raised and supported by the alleged violator "at the appropriate stage." *Id.* at 14; 15 C.F.R. § 904.108. No evidence of Respondent's inability or ability to pay was submitted at any time in this proceeding, and the Agency did not adjust its proposed penalty based on this factor.

Pursuant to its analysis, NOAA seeks the imposition of a $3,500 penalty for each count, for a total civil penalty of $7,000. As stated above, the Agency's analysis is not presumed accurate, and its proposed penalty is not presumed appropriate. 75 Fed. Reg. 35631-01 (June 23, 2010); *Nguyen & Harper*, NOAA Docket No. SE0801361FM, 2012 WL 1497024, at *8 (ALJ, Jan. 18, 2012); 15 C.F.R. § 904.204(m). Nor must the presiding judge state good reasons for departing from the Agency's analysis or the guidelines set forth in the Penalty Policy materials. *Id.* However, given the similarities between the Penalty Policy's considerations and the factors listed in the Rules of Practice, it may be useful to consider the Agency's application of the Policy to the facts at bar. Therefore, in view of the Agency's determinations in the NOVA worksheets and the Penalty Policy, the following penalty is assessed in accordance with the factors set forth in 15 C.F.R. § 904.108(a).

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

At the hearing, Messrs. Stevens and Fields testified credibly and at great length to the great danger posed to sea turtles by noncompliant TED grid angles in fishing nets. Qualified as a TED expert, Mr. Stevens has 25 years of experience working with NOAA, and before that had worked as a crew member and as an owner/operator of a commercial shrimp trawler. Tr. 44 at 2-13. He co-authored the informational document titled "The Turtle Excluder Device (T.E.D.)" ("TED Sheet"), in the record as Agency's Ex. 4, with his boss at the NMFS, and personally wrote the section about the effectiveness of TEDs. Tr. 52 at 22-25; 53 at 1-2. The TED Sheet highlights two sea turtle species that are found specifically in the Gulf of Mexico, the Kemp's ridley turtle, which is endangered throughout its range, and the green turtle, endangered in some areas and threatened in all others. 50 C.F.R. §§ 223.102(b)(1) (threatened), 224.101(c)(1), (3) (endangered); Agency Ex. 4 at 2. Adult Kemp's ridley turtles "are considered the smallest marine turtles in the world," the TED Sheet states. Agency Ex. 4 at 2. For both species, incidental capture in fishing gear is one of the main reasons for the population decline. *Id.*

Mr. Stevens is accustomed to talking to fisherman about their TEDs and training them on TED requirements. Tr. 59 at 3-7, 18-21. To teach fisherman with double cover TEDs how to properly measure their dimensions, he advised, the Agency distributes a "Guide for Checking Double-Cover TED Opening" ("TED Guide") (Agency Ex. 5). Tr. 46 at 8-12. All TEDs, both double cover and single flap, are designed and required to exclude at least 97% of the turtles they encounter (meaning that even legal TEDs are expected to kill some turtles, Agency counsel argued). Tr. 52 at 6-8; 56 at 2-6; 64 at 9-11. As further qualification in the TED area, Mr. Stevens is involved in the Agency's annual TED testing. Tr. 50 at 13-23.

Mr. Stevens asserted that of all TED discrepancies, any involving the grid's "critical angles" are the "most detrimental" to turtles. Tr. 61 at 2-13. When asked whether grid angles of 59 degrees and 64 degrees would kill turtles, Mr. Stevens responded in the affirmative. Tr. 50 at 24-25; 51 at 1-2. Mr. Stevens explained that when the angle is too steep, "[t]he water flow coming through the trawl will, not force, but hold the turtle against the grid and not allow him to escape the device," but instead, "drown." Tr. 49 at 17-25. He added that with a steep angle "[s]maller turtles would have more of a problem than a large turtle" because they "can't fight the water flow like the larger turtles can." Tr. 50 at 1-12. Referring to the June 2, 2011 boarding, Mr. Stevens expressed great concern that the state officers did not alert Respondent to the angle problems: "Well, when I find a violation as significant as these were on the TED angle, then that concerns me because these guys are not – they're missing something real bad that I need to go back and revisit with them." Tr. 60 at 2-7. As for the other TED discrepancies at issue on the Sweet Bucket, Mr. Stevens testified that when the leading edge cuts of the escape openings are too short, a turtle's exit from the net is impeded. Tr. 48 at 20-25; 49 at 1-3. The larger turtles, the ones that "breed," are the most affected by undersized escape openings. Tr. 49 at 4-9.

Mr. Fields testified that he and other agents' assignment to a patrol detail in the Gulf of Mexico was part of "almost like an emergency response from Louisiana to Texas to control the TEDs because turtles were washing up dead on the beaches." Tr. 36 at 10-18. He stated that "scientists" explained to him that the "really high" numbers of stranded (drowned) sea turtles had fin fish and shrimp in their stomachs, which indicates the turtles "were stuck in the shrimp net because otherwise they don't eat that fish." Tr. 36 at 18-24; 37 at 3-4. When the TED angles are too steep, the turtles that get caught by the net "will basically drown," Mr. Fields testified. Tr. 37 at 1-2. From his experience with TEDs in the field, Mr. Fields believes "the biggest factors that would prevent a turtle from escaping out of the TED and being able to get up and get air would be the angle being over 55 degrees." Tr. 40 at 12-19. The second highest danger, Mr. Fields explained, "would be the size" of the escape flap opening – "the bigger turtle is not going to be able to get out." Tr. 40 at 20-25. Even if the smaller turtles could fit through the escape opening, Mr. Fields surmised, they wouldn't be able to escape because of the noncompliant grid angles. *Id.*; Tr. 41 at 1-5. He concluded that Respondent's "two TEDs would have killed a turtle."[11] Tr. 41 at 1-5.

Considering the status of the sea turtle population in the Gulf of Mexico and the potential harm to that resource from trawling with noncompliant TEDs and specifically, steep grid angles, the Agency's characterization of the violations as level "III" in gravity, or very significant, is well-founded.

iii. Respondent's Degree of Culpability, Any History of Prior Violations, Ability to Pay

The duty to know and follow the law is squarely on Respondent. *O'Neil*, 1995 WL 1311366, at *5 ("commercial fishing is regulated and those engaged in it for profit activities are required to keep abreast of and abide by the laws and regulations that affect them"); *Peterson & Weber*, 6 O.R.W. 486, 1991 NOAA LEXIS 34, at *9 (ALJ, July 19, 1991) ("When one engages

[11] It is noted that the records of the state boarding and the NOAA inspection do not evidence that any turtle was actually caught in any of Respondent's nets or harmed as a result of Respondent's non-compliant TEDs. Agency Ex. 3.

in a highly regulated industry, that person bears the responsibility of knowing and interpreting the regulations governing that industry."). The difficulty involved in staying apprised and in compliance with complicated and technical TED regulations appears to be eased by the availability and help of agents like Mr. Stevens and the TED Guide.

The Agency asserts that Respondent was "negligent" in violating the TED regulations, which the Penalty Policy defines as "the failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances," or "carelessness." Penalty Policy at 9. Some of the Agency's witnesses testified to Respondent's knowledge of the TED requirements and his capabilities concerning TED construction. For example, Mr. Fields stated that Respondent "had seen an angle meter before, he was aware that [the TED angle] couldn't go over 55 degrees" and "understood he needed to fix it." Tr. 42 at 22-25; 43 at 1; *see* Tr. 39 at 18-25. Also, Respondent apparently was "very confident that he could fix those TEDs right there on the boat," "he knew what he was doing," and "was comfortable with it." Tr. 41 at 14-25; 42 at 3-6. This testimony suggests that "recklessness" may better characterize Respondent's violative behavior, which the Policy defines as "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." Penalty Policy at 9.

However, Mr. Fields' comments, when viewed with the rest of the testimony, appear to be indicative of Respondent's non-confrontational, cooperative attitude, eagerness to remedy the errors, and confidence that he could do so, instead of evidencing a reckless disregard for sea turtle regulations. Respondent's behavior during the inspection, immediately following it, and since the boarding affirms this interpretation of Respondent's culpability. For example, Mr. Fields testified that Respondent "helped us measure the TEDs," he made sure the TED was "hung right," and he "confirmed that the angles were what we saw." Tr. 39 at 18-25. Even prior to the NOAA crew departing, Respondent "began the process of repairing [the grid angles and escape openings]," Mr. Chesler testified and Mr. Fields stated. Tr. 34 at 17-25; 41 at 13-25. Also, Mr. Stevens testified that on "several occasions" since the June 3, 2011 boarding, Respondent has called upon him to check his TEDs, and each time Mr. Stevens has checked, the TEDs were in compliance. Tr. 51 at 6-16. The weight of evidence supports the Agency's finding that Respondent was "negligent" and not at a greater degree of fault.

There is considerable testimony in the record about the inspection of the Sweet Bucket by Mississippi state patrol officers on June 2, 2011. Mr. Chesler testified that the State Boarding Log shows Respondent was marked "yes" for TED compliance on that date, even though the state officers apparently "had him relocate his escape opening flap." Tr. 31 at 18-25; 32 at 1-19; 33 at 9-16; Agency Ex. 3 at 31. Mr. Stevens testified he was "concerned" by Respondent's assertion that the officers did not use an angle meter to measure the grid angle and only had a tape measure. Tr. 60; 61 at 1-20. According to Mr. Stevens, if what Respondent said is correct and the officers merely "measured up [a] side" and told Respondent he was "'good to go,'" then "they didn't do a proper inspection of the devices." Tr. 60 at 8-25; 61 at 1, 14-20.

As was said at the hearing, the evidence in the record concerning the state boarding on June 2 has its "limitations" in terms of reliability.[12] Tr. 33 at 3-8. The fact of the state boarding has been sufficiently established by the corroborated and credible testimony of the Agency's witnesses, but what took place during the boarding is still unclear. Tr. 32 at 21-25; 33 at 1-16. Therefore, the problems with the position of the escape opening(s) on June 2, 2011, which apparently resulted in Respondent relocating it (or them), cannot fairly be deemed a prior violation and applied as an aggravating factor. Similarly, the state officers' alleged finding that Respondent was ultimately compliant cannot serve to mitigate the penalty. Under other circumstances, the reassurances of a government officer as to one's compliance immediately before another government officer cites a violation would perhaps constitute a mitigating circumstance in terms of the violator's culpability. *See, e.g.*, *Churchman & Paasch*, NOAA Docket No. SW0703629, 2011 WL 7030841, at *25, n.7 (ALJ, Feb. 18, 2011) (fact that neither NOAA observers or the Agency informed respondent he was fishing in a conservation area when that information was readily available to them "is a minor mitigating factor and in no way excuses his violations"). In the case at bar, no adjustment to the penalty is appropriate based on the events of June 2, 2011.

The Rules of Practice state that if the respondent wants the presiding judge to consider his inability to pay the penalty, he must submit "verifiable, complete, and accurate financial information" to the Agency in advance of the hearing. 15 C.F.R. § 904.108(e). No evidence of Respondent's inability or ability to pay was submitted at any time in this proceeding. As such, no adjustment based on Respondent's ability or inability to pay shall be made.

iv. Such Other Matters as Justice May Require

According to all three witnesses, Respondent was cooperative during the inspection on June 3, 2011. Mr. Fields testified that Respondent was "completely cooperative," helpful, and even agreeable when the TED discrepancies were bring recorded. Tr. 39 at 16-25; 40 at 1-8. Mr. Stevens stated the same, adding that the "several occasions" after the inspection where he interacted with Respondent, he was "very cooperative then, as well." Tr. 51 at 3-10. Mr. Chesler, who not only took and recorded the TED measurements with the rest of the crew, but also personally interviewed Respondent and inspected his identification and Coast Guard documentation, agreed. Tr. 20-24; 25 at 11-16; 26 at 11-20; 34 at 14-16; 37 at 13-18; 38 at 19; 39 at 3-6. As already described, Respondent assisted the NOAA crew in taking the measurements of the TEDs, stretching the nets and confirming the Agency's measurements. Tr. 22 at 17-25; 23 at 1-7. He never told the NOAA crew they "got it wrong" or contested the agents' activities. Tr. 23 at 8-16; 24 at 4-6.

[12] Notably, Mr. Chesler testified that Respondent did not have any paperwork indicating that he had been inspected by the state patrol officers, but that when Mr. Chesler checked with the Mississippi Department of Marine Resources he was told "they had received documents *from him* showing that he had been boarded on the day prior." Tr. 32 at 1-5 (emphasis added). He characterizes the Agency's Exhibit 3 at 27-36 as being "*from* the Mississippi Department of Marine Resources," yet ultimately it cannot be said with confidence where the actual data in the document originated and how accurate it is. Tr. 17 at 22-25 (emphasis added).

Interaction between members of a regulated community and law enforcement can be tense. Cooperation between them, while always a mutual benefit, seems particularly important when inspections for compliance occur in open water. The help offered by Respondent, his cooperative and agreeable demeanor, and his apparent commitment to coming into compliance quickly and permanently, should be encouraged, and here warrants a significant reduction in the penalty. *See Straub & Silk*, NOAA Docket No. SE1100711, 2012 WL 1497025, at *16 (ALJ, Feb. 1, 2012) ("The absence of prior offenses and Respondents' truthfulness and cooperation throughout this process tends to favor a low civil monetary penalty."); *Jones & AO Shibi, Inc.*, NOAA Docket No. PI1001697, 2011 WL 7030849, at *12 (ALJ, Dec. 20, 2011) (reducing penalty because respondents "recognize that the ultimate responsibility to renew their permits is theirs alone in spite of whatever reminders the Agency might chose to send" and "the penalty should reflect this fact"); *Axelsson et al.*, NOAA Docket No. NE0704313, 2009 WL 5231065, at *16, *19 (ALJ, Dec. 8, 2009) (good cause exists to reduce the penalty when respondents cooperated and corrected deficiency once the Agency informed them of it); *Pesca Azteca*, NOAA Docket No. SW0702652, 2009 WL 3721029, at *16 (ALJ, Oct. 1, 2009) (mitigating penalty in part because the fishing vessel's crew "fully cooperated" with U.S. Coast Guard patrol agents during their boarding of the vessel).

Finally, though it has been said that for small scale commercial fishing operations, "it only stands to reason that . . . any sanction assessed would impact such individuals more significantly than if imposed against a larger commercial enterprise," there is no evidence in the present record showing the size or profitability of Respondent's commercial operation, or Respondent's personal financial status. *Churchman & Paasch*, at *39. The only related facts in the record are that approximately 6,500 pounds of brown shrimp and 50 pounds of white shrimp were on board the Sweet Bucket on June 3, 2011. Tr. 25 at 5-25; 26 at 1-7; Agency Ex. 3 at 3, 19. Mr. Chesler estimated in his testimony that at that time, the range of value of the shrimp could have been between 60 cents a pound to a dollar a pound, but "probably more towards the lower end than the higher end." Tr. 34 at 1-11. As a caveat, he added that their price depends on their size, which is unknown in Respondent's case. Tr. 34 at 11-13. Respondent informed the NOAA crew that his fishing trip started May 31, 2011, according to the Investigation Report. Agency Ex. 3 at 3. It is reasonable to assume that Respondent earned at least some money from the shrimp they had caught while fishing from May 31 until the NOAA inspection on June 3. Using the lowest value suggested by Mr. Chesler (60 cents/pound), the shrimp on board the Sweet Bucket at the time of boarding could have totaled approximately $3,930. This speculation about Respondent's economic gain earned while his TEDs were noncompliant, before the boarding, does inform, albeit slightly, this penalty analysis.

Upon consideration of all the foregoing, it is hereby determined that for each of the two counts of violation, a civil penalty in the amount of $1,900 is appropriate.

ORDER

For Count 1, a civil penalty in the amount of $1,900 is appropriate and assessed.

For Count 2, a civil penalty in the amount of $1,900 is appropriate and assessed.

A total penalty of **$3,800** is hereby **IMPOSED** on Respondent Eli Tobias Bruce, Sr.

PLEASE TAKE NOTICE, that this Initial Decision becomes effective as the final Agency action **60 days** after service on **October 15, 2012,** 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 a failure to pay the civil penalty to the Department of Commerce/NOAA within **30 days** from the date on which this 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 U.S. 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, Respondent 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 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.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency[13]

Dated: August 14, 2012
Washington, DC

[13] As stated above, the Administrative Law Judges of the U.S. EPA are authorized to hear cases pending before the Agency pursuant to an agreement effective September 8, 2011.