UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:	)	**DOCKET NUMBER**
	)	
Pauline Marie Frenier and	)	SE1103883, F/V Miss Pauline
Daniel Joseph Rotoli,	)	
	)	
	)	
Respondents	)	

INITIAL DECISION AND ORDER

Date: September 27, 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

Omar Farooq, Esq.
Law Office of Omar Farooq, PLLC,
Jacksonville, Florida, for Respondents

[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 Oceanic 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 November 2, 2011, by issuing a Notice of Violation and Assessment of Administrative Penalty ("NOVA") to Pauline Marie Frenier and Daniel Joseph Rotoli ("Respondents"). The NOVA charges Respondents with one count of violating Section 9 of the Endangered Species Act, 16 U.S.C. § 1538, and the regulations found at 50 C.F.R. § 223.205(b)(1).[2] For this alleged violation, the NOVA seeks to assess a civil administrative penalty in the amount of $5,750 jointly and severally against Respondents.

By letter dated November 27, 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

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[2] In the section of the NOVA entitled "Facts Constituting Violation," the Agency alleges that Respondents failed to comply with 50 C.F.R. § 226(d) and that this failure constituted a violation of the Endangered Species Act, 16 U.S.C. § 1538 *et seq.*, and 50 C.F.R. § 225.205(b)(1). In its Initial Post-Hearing Brief ("Agency's Brief") and Reply to Respondents' Post-Hearing Brief ("Agency's Reply"), the Agency contends that these citations were typographical errors and requests that the undersigned amend the citations to 50 C.F.R. § 223.206(d), 16 U.S.C. § 1531 *et seq.*, and 50 C.F.R. § 223.205(b)(1) respectively. The Agency cites 15 C.F.R. § 904.207(c) as the legal authority for such amendments. That provision states, "Harmless errors in pleadings or elsewhere in the record may be corrected (by deletion or substitution of words or figures), and broad discretion will be exercised by the Judge in permitting such corrections." 15 C.F.R. § 904.207(c).

I agree with the Agency's characterization of the errors contained in the "Facts Constituting Violation" section of the NOVA. While the citation to the Endangered Species Act misstates the first section of the statute, the error generates no confusion as to the statute under which Respondents are being charged. In addition, one may reasonably assume that the citations to 50 C.F.R. § 226(d) and 50 C.F.R. § 225.205(b)(1) were erroneous and that the Agency intended to refer to 50 C.F.R. § 223.206(d) and 50 C.F.R. § 223.205(b)(1). First, neither of the regulatory provisions cited in the "Facts Constituting Violation" section of the NOVA exists. Second, in a subsequent section of the NOVA entitled "Statute/Regulation/Permit Violated," the Agency refers to 50 C.F.R. § 223.205(b)(1) as the regulation allegedly violated by Respondents. That provision, in turn, explicitly refers to 50 C.F.R. § 223.206(d) to describe the requirements with which the given person must comply. Finally, counsel for the Agency cited 50 C.F.R. § 223.205(b)(1) and 50 C.F.R. § 223.206(d) in the Agency's Preliminary Position on Issues and Procedures ("PPIP"), at the hearing, and in the Agency's post-hearing briefs as the regulations at issue in this proceeding. In view of these considerations, I find that Respondents received adequate notice of the allegations against them, notwithstanding the defects in the NOVA, and, consequently, that these defects were harmless. Accordingly, in the exercise of my discretion, I hereby grant the Agency's request.

that Respondents would be appearing *pro se* in this proceeding. The Agency submitted a copy of the NOVA and Respondents' request with its letter.

On December 9, 2011, 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 January 20, 2012. The office of the undersigned received the Agency's PPIP on January 20, 2012, and Respondents' PPIP on January 25, 2012. By Order dated February 3, 2012, Judge Biro directed Respondents to file and serve a Supplementary PPIP containing information Respondents had failed to submit with their initial PPIP. Upon the request of Respondents, Judge Biro extended the filing deadline for this document from February 17, 2012, to March 19, 2012. Respondents submitted their Response to Order to Respondents to Supplement Preliminary Position on Issues and Procedures (PPIP) ("Supplementary PPIP" or "Supp. PPIP") on that date. Judge Biro subsequently scheduled the evidentiary hearing in this matter to be held during the week of May 21, 2012, in or around Jacksonville, 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. Upon the request of counsel for the Agency and with the consent of Respondents, the undersigned subsequently rescheduled the hearing for May 22, 2012.

The hearing was held on May 22, 2012, in Jacksonville, Florida. The Agency presented the testimony of three witnesses at the hearing: Richard Myles Chesler III, Jill Izsak, and Robert Dale Stevens. The Agency also proffered six exhibits that were received into evidence and marked as Agency Exhibits ("Agency Ex.") 1-6. Respondents, who were represented by counsel at the hearing, presented the testimony of one witness, Daniel Joseph Rotoli. The parties jointly proffered one exhibit that was received into evidence and marked as Joint Exhibit ("Jt. Ex.") 1.

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 parties timely filed post-hearing briefs. The Agency also timely filed a reply brief.

II. STATUTORY AND REGULATORY BACKGROUND

A. LIABILITY

1) Endangered Species Act

In 1973, Congress enacted the Endangered Species Act ("Act" or "ESA"), 16 U.S.C. §§ 1531-1544, as amended, "[t]o provide for the conservation of endangered and threatened species of fish, wildlife, and plants" that are "of esthetic, ecological, educational, historical, recreational,

and scientific value to the Nation and its people." 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 certain criteria and to list any such species in the Federal Register. 16 U.S.C. § 1533. In turn, Section 9 of the Act provides, in pertinent part:

> [W]ith respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to --
>
> (A) import any such species into, or export any such species from the United States;
> (B) take any such species within the United States or the territorial sea of the United States;
> (C) take any such species upon the high seas;
> (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);
> (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever an in the course of a commercial activity, any such species;
> (F) sell or offer for sale in interstate or foreign commerce any such species; or
> (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.

16 U.S.C. § 1538(a)(1).

All species of sea turtle found in United States waters, including the Loggerhead, Kemp's ridley, Leatherback, and Green, are listed as either threatened or endangered under the Act. Agency Ex. 5; Jt. Ex. 1; Tr. at 78; *see also* 50 C.F.R. §§ 223.102(b), 224.101(c). While the Act prohibits the "taking" of sea turtles, as that term is defined by Section 3 of the Act, 16 U.S.C. § 1532(19), "[t]he incidental taking of turtles by shrimp trawlers in the Atlantic Ocean off the coast of the southeastern United States and in the Gulf of Mexico is exempted from the prohibition if trawlers employ specified sea turtle conservation measures," described below. 57 Fed. Reg. 57,348, 57,349 (Dec. 4, 1992).

2) Implementing Regulations

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 [threatened or endangered] species." 16 U.S.C. § 1533(d). The regulations promulgated at 50 C.F.R. § 223.205(a) contain prohibitions pertaining to threatened and endangered species of sea turtle and explicitly provide 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). These regulations further provide, in pertinent part:

> (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). The term "vessel" is defined by the regulations as "a vehicle used, or capable of being used, as a means of transportation on water which includes every description of watercraft." 50 C.F.R. § 222.102.

Section 223.206(d) establishes gear requirements for trawlers. Of particular relevance in the present proceeding, section 223.206(d)(2)(i) requires certain trawlers to install an approved turtle excluder device ("TED") in each net rigged for fishing, subject to exceptions not applicable here:

> (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)(2)(i). The phrase "shrimp trawler" is defined by the regulations, in pertinent part, as "any vessel that is equipped with one or more trawl nets and that is capable of, or used for, fishing for shrimp." 50 C.F.R. § 222.102. In turn, the phrase "Atlantic Area" is defined as "all waters of the Atlantic Ocean south of 36°33'00.8" N. lat. (the line of the North Carolina/Virginia border) and adjacent seas, other than waters of the Gulf Area, and all waters shoreward thereof (including ports). 50 C.F.R. § 222.102.

The regulations at section 223.207 set forth the specific design criteria for "Approved TEDs." 50 C.F.R. § 223.207. These regulations also describe allowable modifications to certain types of approved TEDs, including the use of a webbing flap to cover the escape opening of the TED. 50 C.F.R. § 223.207(d)(3). In particular, the regulations provide that when a hard TED employs a "[d]ouble cover offshore TED flap," the flap "must be composed of two equal size rectangular panels of webbing" that "may overlap each other no more than 15 inches (38.1 cm)." 50 C.F.R. § 223.207(d)(3)(iii). The term "offshore" is defined by the regulations as "marine and tidal waters seaward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by [NOAA] . . . and as described in 33 CFR part 80." 50 C.F.R. § 222.102.

B. CIVIL PENALTY

"Any person who knowingly violates" the Endangered Species Act and the implementing 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). 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).

While the Act does not specify any factors to consider in determining the appropriate amount of civil penalty to assess, 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). Recent modifications to the Rules of Practice removed any presumption in favor of the Agency's proposed penalty 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 stipulated to, or did not contest, the following facts presented in this proceeding.

Pauline Marie Frenier and Daniel Joseph Rotoli are "persons," as that term is defined by 16 U.S.C. § 1532(13), and are subject to the jurisdiction of the United States. Jt. Ex. 1. At all times relevant to the charges in the NOVA, Respondent Frenier was the owner and Respondent Rotoli was the operator of the Fishing Vessel ("F/V") Miss Pauline. Agency Ex. 1, 2; Jt. Ex. 1; Transcript ("Tr.") at 34-36, 114. Respondent Frenier purchased the F/V Miss Pauline on June 29, 2011. Agency Ex. 1; Tr. at 114. She subsequently obtained a Certificate of Documentation for the vessel from the United States Coast Guard on July 7, and a Federal Fisheries Permit for South Atlantic Penaeid Shrimp for the vessel from the National Marine Fisheries Service ("NMFS"), a division of NOAA, on August 1. Agency Ex. 1, 2; Tr. at 34-35. According to Respondent Rotoli, at the time he began captaining the F/V Miss Pauline, the vessel was used primarily for the purpose of fishing for shrimp and had "[f]our nets [to] drag with." Tr. at 115.

On August 19, 2011, the F/V Miss Pauline was engaged in fishing operations targeting shrimp approximately 1.8 nautical miles north of the Mayport Florida Jetties near the St. John's River Entrance. Jt. Ex. 1; Agency Ex. 3; Tr. at 28-29. At the hearing in this matter, Respondent

Rotoli testified that he and his crew began the fishing trip on August 18 and that they "started dragging" early in the morning of August 19. Tr. at 117; *see also* Agency Ex. 3; Tr. at 30.

At approximately 12:45 p.m. on August 19, Richard Myles Chesler III, a Special Agent from NOAA's Office of Law Enforcement, and Jill Izsak, Robert Geib, and Tim Shearer, law enforcement officers from the Florida Fish and Wildlife Conservation Commission ("FL FWCC"), departed the United States Coast Guard Sector Jacksonville on board the FL FWCC Patrol Vessel Sea Hawk ("Sea Hawk"), captained by Lieutenant Brad Givens, to conduct a Protected Resources Enforcement Team patrol. Agency Ex. 3; Tr. at 56. At approximately 3:20 p.m., the crew of the Sea Hawk observed the F/V Miss Pauline at anchor in position 30° 25.966' N latitude, 081° 22.847' W longitude, a location that falls within the regulatory definition of the terms "offshore" waters and "Atlantic Area." Jt. Ex. 1; Agency Ex. 3; Tr. at 28-29. Special Agent Chesler testified that he determined that the F/V Miss Pauline was a shrimp trawler at that time based upon his observation of its rigging and layout. Tr. at 28. He and the FL FWCC law enforcement officers subsequently boarded the vessel. Jt. Ex. 1; Agency Ex. 3; Tr. at 29, 56, 68.

At the time of their boarding, each of the F/V Miss Pauline's four nets was connected to the trawl doors and raised above the deck, with two nets on the port side and two nets on the starboard side of the vessel. Agency Ex. 3, 4; Tr. at 28, 51-53, 59-60, 63, 121. The parties agree that the nets were "rigged for fishing," as that phrase is defined by the applicable regulations. Jt. Ex. 1; Tr. at 53, 63, 73, 134. After introducing themselves to Respondent Rotoli and advising him of their intent to inspect the TEDs onboard, Special Agent Chesler and Jill Izsak[3] accompanied Respondent Rotoli to the pilothouse of the F/V Miss Pauline to examine the vessel's records. Agency Ex. 3; Tr. at 29-30, 68, 125, 158. While in the pilothouse, Respondent Rotoli informed Special Agent Chesler and Investigator Izsak that he had towed his gear to catch shrimp earlier that morning and that approximately 150 pounds of white shrimp were onboard. Agency Ex. 3; Tr. at 30.

Following the inspection of the F/V Miss Pauline's records, Special Agent Chesler, Investigator Izsak, and Respondent Rotoli moved to the stern of the vessel, where Officer Geib and Officer Shearer had begun to inspect the nets onboard. Agency Ex. 3; Tr. at 30-31, 69, 125. The FL FWCC law enforcement officers proceeded to perform the inspection, while Special Agent Chesler observed and recorded the measurements taken of the TEDs on an NMFS TED Enforcement Boarding Form. Agency Ex. 3; Tr. at 31-32, 37-38, 56-57, 69. They found three of the TEDs to be in compliance with applicable regulations. Agency Ex. 3; Tr. at 33, 64, 125-26. When they inspected the outboard net on the starboard side of the vessel ("Net 4"), however, they found that the attached TED employed a double-cover design and that the panels of webbing composing the flap overlapped by 32 inches, exceeding the limit of 15 inches set by regulations. Jt. Ex. 1; Agency Ex. 3; Tr. at 33, 126, 142.

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[3] Jill Izsak's precise job title is unclear from the record. In the Investigation Report prepared by Special Agent Chesler, she is referred to as "Ofc. Izsak." Agency Ex. 3. At the hearing, she was addressed by an assortment of titles, including "Investigator," "Officer," and "Inspector." *See, e.g.*, Tr. at 29, 30, 56, 66, 69, 161. For purposes of consistency, she will hereafter be referred to as "Investigator Izsak" in this Initial Decision.

After photographing the non-compliant TED, Special Agent Chesler advised Respondent Rotoli of the discrepancy and instructed him to remedy it by removing the excess webbing. Agency Ex. 3, 4; Tr. at 49-51, 53-55, 65. Respondent Rotoli immediately complied. Agency Ex. 3; Tr. at 55, 65, 71. At 4:15 p.m., Special Agent Chesler issued an Enforcement Action Report to Respondent Rotoli detailing the violation.[4] Agency Ex. 3; Tr. at 55, 57, 157-58.

Special Agent Chesler testified at the hearing that he returned to the Sea Hawk shortly thereafter, while the FL FWCC law enforcement officers remained onboard the F/V Miss Pauline to continue their inspection. Tr. at 158. Investigator Izsak testified that she was prompted by her observation of egg-bearing blue crabs in the nets to examine a cooler located at the stern of the vessel after Special Agent Chesler had issued the Enforcement Action Report to Respondent Rotoli. Tr. at 72-73, 185, 187; *see also* Agency Ex. 3. The cooler contained three egg-bearing blue crabs in violation of state law. Agency Ex. 3; Tr. at 72, 185. After one of the crewmembers of the F/V Miss Pauline admitted to retaining the crabs, Investigator Izsak issued him a citation for the violation. Agency Ex. 3; Tr. at 72. Upon investigation, she also determined that a warrant for the crewmember had been issued in Georgia for an unrelated charge, and she placed the crewmember in restraints and transferred him to the Sea Hawk. Agency Ex. 3; Tr. at 186-91. The FL FWCC law enforcement officers subsequently departed the F/V Miss Pauline at approximately 4:44 p.m. Agency Ex. 3; Tr. at 190-91.

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 violations 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). The Agency may rely upon either direct or circumstantial evidence to satisfy its burden of proof. *Cuong Vo*, 2001 WL 1085351 (citing *Steadman*, 450 U.S. at 101).

B. DISCUSSION

In the NOVA, the Agency alleges that on or about August 19, 2011, Respondents Frenier and Rotoli owned, operated, or were on board a vessel that failed to comply with 50 C.F.R. § 223.206(d), in violation of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, and 50 C.F.R.

[4] While the NOVA cites 50 C.F.R. § 223.205*(b)(1)* as the regulation violated by Respondents, the Enforcement Action Report cites 50 C.F.R. § 223.205*(b)(2)*. *See* Agency Ex. 3. By definition, this proceeding is a "civil administrative hearing *on a NOVA*." 15 C.F.R. § 904.2 (emphasis added); *see also* 15 C.F.R. § 904.201(a). Moreover, counsel for the Agency has sought a finding of liability based upon a violation of 50 C.F.R. § 223.205(b)(1) throughout this proceeding. Accordingly, the undersigned will consider Respondents' liability for an alleged violation of 50 C.F.R. § 223.205(b)(1), rather than 50 C.F.R. § 223.205(b)(2).

§ 223.205(b)(1). 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 August 19, 2011:

1) Each Respondent constituted a "person," as that term is defined by 16 U.S.C. § 1532(13), and was subject to the jurisdiction of the United States;

2) Each Respondent either owned, operated, or was on board a "vessel," as that term is defined by 50 C.F.R. § 222.102;

3) The vessel was a "shrimp trawler," as that term is defined by 50 C.F.R. § 222.102;

4) The vessel was located in "offshore" waters in either the "Atlantic Area" or "Gulf Area," as those terms are defined by 50 C.F.R. § 222.102; and

5) An "approved TED," as that phrase is defined by 50 C.F.R. § 223.207, was not installed on each net of the vessel that was "rigged for fishing," as that phrase is defined by 50 C.F.R. § 223.206(d)(2)(i).

Each of these elements is supported by undisputed facts in the evidentiary record, as set forth above in the section of this Initial Decision entitled "Factual Background." *See, e.g.*, Jt. Ex. 1. While Respondents admit to the violative conduct, they argue in their Post-Hearing Brief[5] that "certain mitigating factors led to [Respondent Rotoli's] net not being in compliance with the TED regulations" and that the Agency, therefore, "fails to prove by a preponderance of the evidence that a violation was committed." Respondents' Brief at physical page 5. In its Reply, the Agency counters:

> Because the TED installed in net #4 was not an approved TED (based on a double-cover flap more than twice the legal limit), Respondents were in violation of the regulations as soon as that TED was installed and the net rigged for fishing. This is so even if Respondent Rotoli's post hoc explanations for how the illegal TED came to be installed in the vessel's net #4 are accepted as credible . . . .

Agency's Reply at 2.

I agree with the Agency's reasoning. The applicable regulations require "[a]ny shrimp trawler that is in the Atlantic Area or Gulf Area [to] have an approved TED installed in each net that is rigged for fishing." 50 C.F.R. § 223.206(d)(2)(i). Therefore, as the Agency contends, a violation of the regulations occurs as soon as a shrimp trawler located in the Atlantic Area or Gulf Area installs a non-compliant TED in a net rigged for fishing, regardless of the circumstances under which the installation occurred. Consideration of the mitigating factors described by Respondents is appropriate in determining the civil administrative penalty to assess for such a violation, not in determining liability.

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[5] Respondents' post-hearing brief was entitled "Initial Decision." Herein, it will be referred to as "Respondents' Post-Hearing Brief" or simply "Respondents' Brief." Because the document is not paginated, any reference to it will cite the physical page number.

C. CONCLUSION

In accordance with the foregoing discussion, I find that the Agency demonstrated by a preponderance of the evidence that on or about August 19, 2011, Respondents Pauline Marie Frenier and Daniel Joseph Rotoli owned, operated, or were on board a vessel that was not in compliance with all applicable provisions of 50 C.F.R. § 223.206(d), namely, that it failed to have an approved TED installed in each net rigged for fishing. This failure constitutes a violation of 50 C.F.R. § 223.205(b)(1) and Section 9 of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(G).

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 $5,750 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 ("Penalty Policy" or "Policy")[6] . . . ." Agency's Brief at 3.

Dated March 16, 2011, the Penalty Policy instructs that civil penalties assessed under the Policy are based upon the following two criteria:

> (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. At this stage, the Policy also contemplates whether the species at issue is endangered or threatened, setting a higher penalty for the former and a lower penalty for the latter. *Id.* at 8.

In describing its consideration of the Penalty Policy, the Agency first refers to the "Endangered Species Schedule" in Appendix 3. Agency's Brief at 4. As pointed out by the

[6] The Penalty Policy is accessible to the public at the following URLs: http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf and http://www.gc.noaa.gov/enforce-office3.html.

Agency, under the heading "Violations Related to Turtle Excluder Devices (TEDS)," the schedule characterizes "[d]iscrepancies likely to kill *all* turtles encountered, including but not limited to . . . [d]ouble cover TED overlap of 20" or above (stretched)," as a level IV violation.[7] Penalty Policy at 50 (emphasis added).

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 argues in its Brief that "Respondents' failure to obey the Agency's regulations was at a minimum negligent conduct," maintaining that "Respondents participate in a pervasively regulated activity and are charged with knowing and abiding by the requirements of the regulations governing their business." Agency's Brief at 4. The Penalty Policy defines "negligence" as follows:

> Negligence is the failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances. Negligence denotes a lack of diligence, a disregard of the consequences likely to result from one's actions, or carelessness. Negligence may arise where someone exercises as much care as he or she is capable of, yet still falls below the level of competence expected of him or her in the situation. The failure to know of applicable laws/regulations or to recognize when a violation has occurred may itself be evidence of 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-

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[7] In contrast, the schedule characterizes "[d]iscrepancies likely to kill *some* turtles encountered, including but not limited to . . . [d]ouble-[c]over TED overlap of 16-17" (stretched)," as a level II violation. Penalty Policy at 50 (emphasis added). The schedule characterizes "[d]iscrepancies likely to kill *most* turtles encountered, including but not limited to . . ."[d]ouble-[c]over TED overlap between 18-19" (stretched)," as a level III violation. *Id.* (emphasis added).

compliance and the conduct of the alleged violator after the violation. *Id.* at 5, 8. 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 Endangered Species Act" in Appendix 2, the Agency points out that the alleged offense and culpability levels correspond to a civil penalty range of $4,500 to $7,000 per violation for species listed as threatened under the Act. Agency's Brief at 4. 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. In the present proceeding, the NOVA seeks to assess a penalty in the amount of $5,750, which is the midpoint of the penalty range advocated by the Agency in its Brief. Thus, the Agency appears not to have found any adjustments based upon the particular circumstances of the alleged violation, or consideration of any proceeds or other economic benefit gained as a result of the alleged violation, necessary in this proceeding.

2) Respondents' Position

Respondents contend that the penalty sought by the Agency should be reduced or eliminated, and that Respondent Rotoli should have received only a written warning for the charged violation. Respondents' Brief at physical page 5-6. Respondents identify a number of mitigating factors, summarized below, as support of their position.

First, Respondents claim that the non-compliant TED had just been installed by a crewmember of the F/V Miss Pauline and that Special Agent Chesler and the FL FWCC law enforcement officers boarded the vessel before Respondent Rotoli had an opportunity to inspect it and remedy the deficiency. Respondents' Brief at physical page 4-5. Respondents argue that documentary and testimonial evidence in the record demonstrates that Respondent Rotoli had not fished with the non-compliant TED prior to the boarding:

> It is obvious that Respondent [Rotoli] was not fishing with a TED device that was not in compliance. This is obvious from the fact that the vessel was on anchor, and from the fact that the net that was not in compliance had never been used before. As noted in the testimony of the Respondent, if the net had been used prior to the inspection, there would be "dollar fish" or "nickel fish" lodged in the net, along with debris from the bottom of the ocean. The pictures that the Agency submitted clearly show a clean net with nothing caught in it.

Id. at 6.

As another mitigating factor, Respondents argue that Respondent Rotoli is not a "flagrant violator," as demonstrated by the fact that three of the four TEDs installed in his nets were in compliance with the applicable regulations and that Respondent Rotoli has no history of violations. *Id.* at 6. Respondents cite *Edwin J. Price*, NOAA Docket No. 035-254, 1992 NOAA

LEXIS 14 (ALJ, Mar. 5, 1992), as analogous to the present proceeding. *Id.* In that matter, the presiding Administrative Law Judge found that only three of the respondent's four fishing nets had the required TEDs installed. *Edwin J. Price*, 1992 NOAA LEXIS at *7. The respondent disputed the charged violation, claiming that he had been using TEDs in all of his nets during his trawling operations but that one net became damaged, prompting him to remove it and use a spare net that lacked a TED until the damaged net was repaired. *Id.* at *3. The respondent further claimed that he obtained permission from the Coast Guard to continue his operations without the required TED. *Id.* at *4 n.2, 5. In reducing the amount of the assessed penalty, the Administrative Law Judge reasoned that the respondent "had TEDs in three of his four nets" and that "the fourth net with a TED installed was on the deck of his vessel in a damaged condition," which "indicate[d] that there was some significant attempt at compliance." *Id.* at *8. The Administrative Law Judge concluded, "The $8,000 civil penalty proposed in the face of the conduct here is simply out of line with the violation." *Id.*

Finally, Respondents point out that Respondent Rotoli "fixed the [non-compliant] net on the spot." Respondents' Brief at physical page 5.

B. DISCUSSION

As noted above, "[a]ny person who knowingly violates" the Endangered Species Act and the implementing 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). Thus, as a preliminary matter, I must consider whether Respondents "knowingly" violated the Act and the implementing regulations within the meaning of that term.

The term "knowingly" has been found to require only "knowledge of the commission of the acts which constitute the offense." *Darrin Coulon*, NOAA Docket No. SE025420ES, 2004 WL 882794 (ALJ, Mar. 19, 2004) (citing *Kuhn & McCeney*, 5 O.R.W. 408, 412 (ALJ, 1988)). While Respondent Rotoli claims that he was not aware that the overlap of the TED's double-cover flap exceeded the regulatory limit at the time a crew member attached the TED to Net 4, Tr. at 126-27, 135-36, his testimony at the hearing reflects that the TED was installed and Net 4 was rigged for fishing with his knowledge, *see, e.g.*, Tr. at 117-20. Accordingly, I find that Respondent Rotoli possessed the requisite knowledge of the commission of the acts constituting the violation charged in this proceeding.

As for Respondent Frenier, the law is well-established that the knowledge and actions of the operator of a fishing vessel may be imputed to the owner of the vessel under the Endangered Species Act. *Faithful Lady, Inc.*, NOAA Docket No. SE950116ES, 1996 WL 1352599, at *8 (ALJ, Nov. 6, 1996) ("It is well established in the law that owners are liable for the acts of a captain, master or operator of a vessel, whether he is an independent operator or an employee, even 'knowing' violations of the ESA."). Therefore, I find that Respondent Frenier similarly possessed knowledge of the violative conduct. Because Respondents Frenier and Rotoli "knowingly" violated the Act and the implementing regulations within the meaning of that term, a civil penalty may be assessed against them under Section 11 of the Act, 16 U.S.C. § 1540(a)(1).

I now turn to the regulatory factors that I may consider in assessing a civil penalty for the violation found in this proceeding. As previously discussed, these factors 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).

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

At the hearing, the Agency presented ample evidence as to the nature, circumstances, extent, and gravity of the charged violation. In particular, the Agency proffered an undated document entitled "The Turtle Excluder Device (T.E.D.)," which explains that all species of sea turtle found in United States waters are listed as either threatened or endangered under the Act. Agency Ex. 5; *see also* Tr. at 78; 50 C.F.R. §§ 223.102(b), 224.101(c). The document further explains that of the seven worldwide species of sea turtles, the Loggerhead, Kemp's ridley, Green, and Leatherback species occur most frequently in the Atlantic waters of the United States. Agency Ex. 5. Finally, the document describes the population status of these species and characterizes incidental capture in fishing gear such as shrimp trawls as a significant threat to their recovery. *Id.*

The Agency also proffered testimonial evidence demonstrating the dangers posed to sea turtles by non-compliant TEDs, and non-compliant double-cover designs in particular. The Agency first presented the testimony of Special Agent Chesler, who explained that double-cover flaps are designed to operate "like a French door" and that the "doors" of Respondents' non-compliant TED would not open as intended because of the degree to which they overlapped, effectively "restrict[ing] the escape opening to where most turtles, if not all turtles, would have difficulty . . . exiting." Tr. at 38-39.

The Agency next presented the testimony of Robert Dale Stevens, a Fisheries Methods and Equipment Specialist for the Agency whose duties include the research and development of various types of fishing gear, including TEDs, and the training of shrimp fishermen and law enforcement officers on the design criteria of TEDs. Tr. at 74, 76, 79-80. Qualified as an expert as to shrimp trawling and TEDs, Mr. Stevens testified that he has been responsible for the research and development of TEDs at the Agency for the last 25 years, and for the training of shrimp fishermen and law enforcement officers on the design criteria of TEDs for the last six to seven years. Tr. at 74-77, 79-80, 171. Mr. Stevens also testified that he was a commercial shrimp trawler from the age of seven until his employment by the Agency. Tr. at 75, 169.

Mr. Stevens concurred with Special Agent Chesler's description of a double-cover flap, explaining that "[i]t opens up down the middle allowing easy passage for turtles, large and small." Tr. at 91. When questioned about the violation charged in this proceeding, Mr. Stevens testified as follows:

> Q: So is it fair to say, then, that the violation found on respondents' vessel effectively reduced the opening size [of the TED]?
>
> A: Very much so.

Q: And what effect would that have had on larger turtles?

A: It would – it would have likely captured any turtles that it encountered.

Q: What turtles breed in the population?

A: Large turtles, adult turtles.

Q: When you say it would have captured, what do turtles breathe, air or water?

A: They breathe air.

Q: So what's the result of capturing a turtle and holding it in the net?

A: It would drown, kill the turtle.

Tr. at 92.

Mr. Stevens later reiterated that the overlap of webbing found on Respondents' non-compliant TED would "definitely . . . impede a turtle's escape," as illustrated by testing performed by the Agency. Tr. at 93. Specifically, Mr. Stevens explained that in response to the request of fishermen to create a greater overlap in the webbing of the double-cover flap for purposes of retaining more shrimp during trawling operations,[8] Mr. Stevens personally constructed a double-cover flap that consisted of webbing that overlapped by 20 inches, rather than the 15 inches required by regulation. Tr. at 93-95, 104. Mr. Stevens testified that upon conducting experimental testing of this device, the Agency found that it captured each of the 24 "small turtles, dinner plate size turtles, if you will, two-year-old turtles" used in the testing. Tr. at 94-95. After the device's webbing was cut back to create a 15 inch overlap, Mr. Stevens testified, the device immediately excluded each of the nine turtles used in the testing. Tr. at 95, 98. In view of this result, Mr. Stevens maintained that he would expect the capture rate of Respondents' non-compliant TED to be 100 percent and that it would fail to exclude both small and large turtles. Tr. at 94, 98-99. Finally, Mr. Stevens testified that he had seen an overlap of the magnitude found on Respondents' non-compliant TED only once before in his experience. Tr. at 106-07, 109.

Respondents did not contest any of the foregoing evidence or offer any evidence in rebuttal at the hearing. *See* Jt. Ex. 1. Upon consideration, I find the Agency's characterization of the charged violation as a gravity-of-offense level IV violation, the most serious type of offense possible under the "Endangered Species Schedule" in the Penalty Policy, to be well supported by the evidentiary record. The documentary evidence proffered by the Agency reflects that species of sea turtles listed as either endangered or threatened under the Endangered Species Act occur in Atlantic waters of the United States, including the location of the F/V Miss Pauline on the date of the violation, and that incidental capture by shrimp trawls poses a significant threat to their

[8] As Special Agent Chesler testified, because a greater overlap is "more restrictive, it doesn't allow shrimp to be lost out of [the] escape opening [of the TED]." Tr. at 63-64.

recovery. The testimony of Mr. Stevens is particularly compelling that Respondents' non-compliant TED would capture and kill all of the sea turtles it encountered during trawling operations because of the extent to which the webbing of the double-cover flap overlapped. These considerations weigh strongly in favor of the penalty proposed by the Agency in the NOVA.

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

First, I note that Respondents explicitly state in their Supplementary PPIP that they "will not assert an inability to pay the penalty proposed in the NOVA at this time." Supp. PPIP, Attachment 4. The record reflects that Respondents did not raise an inability to pay claim, or proffer any evidence in support of such a claim, at any later stage of this proceeding.[9] 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 Rotoli testified that he has 11 years of experience in the maritime industry, including seven years intermittently as a boat captain, and that he has never "gotten any prior violations ever." Tr. at 130; *see also* Tr. at 114-15, 127, 129, 137, 142, 151. Respondent Rotoli further testified that upon Respondent Frenier's purchase of the F/V Miss Pauline on June 29, 2011, he and a crewmember, Willie Allen, inspected the fishing gear aboard the vessel, including the TEDs, to "make sure everything was up in compliance and also to make sure everything was in good enough shape to start fishing." Tr. at 115-16. Respondent Rotoli maintained that the Coast Guard boarded the F/V Miss Pauline twice during that time, including once at Respondent Rotoli's request, and that the vessel "passed every inspection with flying colors."[10] Tr. at 117; *see also* Tr. at 146, 148-51. Finally, when questioned whether he had "received any subsequent violations," Respondent Rotoli responded, "No, just that one. I've never had any other problems on a shrimp boat at all, never. Never have been in violation of anything. I've always kept a top-notch boat." Tr. at 129.

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[9] Respondent Rotoli testified at the hearing only that he has "no problem paying $5,000 cash." Tr. at 138.

[10] During his questioning of Respondent Rotoli, counsel for the Agency elicited testimony suggesting that the sole purpose of the inspections conducted by the Coast Guard was to examine the safety equipment aboard the F/V Miss Pauline, such as life rafts and fire extinguishers, rather than the fishing gear. Tr. at 148-51. This testimony clarifies the nature of those particular inspections and casts doubt as to whether the Coast Guard inspected the TEDs at that time. However, it does not contradict Respondent Rotoli's claims of having no history of prior violations.

The Agency did not offer any evidence in rebuttal. Rather, the Agency appears to concede in its Reply that Respondents do not have any history of prior violations. As noted above, Respondents argue in their Brief that this absence of prior violations weighs in favor of reducing the penalty assessed for the charged violation. Respondents' Brief at physical page 5-6. The Agency objects to this view in its Reply. Citing the Penalty Policy, the Agency argues that a respondent's history of prior violations is an aggravating factor and serves only as a basis for adjusting a penalty upward. Agency's Reply at 2 (citing Penalty Policy at 10-11). Consequently, the Agency argues, "Respondents *were* credited for their lack of any prior offenses because the base penalty was not increased based on a history of non-compliance." Reply at 2 (emphasis in original).

As previously discussed, I am not bound by the Penalty Policy. 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. SE1100711, 2012 WL 1497025, at *15 (ALJ, Feb. 1, 2012) ("The absence of prior offenses . . . 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 11 years of experience of Respondent Rotoli, is noteworthy.

Turning now to Respondents' degree of culpability, as noted above, the Agency argues that Respondents were, at a minimum, "negligent" in failing to comply with the regulations governing double-cover flaps. Agency's Brief at 4. The Penalty Policy defines the term "negligence" as follows:

> Negligence is the failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances. Negligence denotes a lack of diligence, a disregard of the consequences likely to result from one's actions, or carelessness. Negligence may arise where someone exercises as much care as he or she is capable of, yet still falls below the level of competence expected of him or her in the situation. The failure to know of applicable laws/regulations or to recognize when a violation has occurred may itself be evidence of negligence.

Penalty Policy at 9.

The obligation of the regulated community to be aware of and comply with applicable laws and regulations is well-established. *See, e.g., Timothy Jones & AO Shibi, Inc.*, NOAA Docket No. PI1001697, 2011 WL 7030849, at *13 (ALJ, Dec. 20, 2011) ("[A] highly regulated industry, like the professional fishing community, is presumed to know the regulations that govern its enterprise and must comply accordingly."); *Dennis O'Neil*, NOAA Docket No. 315-189, 1995 WL 1311365, at *5 (ALJ, June 14, 1995) ("[C]ommercial 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."); *Charles Peterson & James Weber*, 6 O.R.W. 486, 490, 1991 WL

288720 (ALJ, July 19, 1991) ("When one engages in a highly regulated industry, that person bears the responsibility of knowing and interpreting the regulations governing that industry."). At the hearing, Respondent Rotoli testified as to his knowledge of the regulations governing double-cover flaps:

> Q: So you're familiar with the TED regulations and you know what the requirements are for a double-cover TED?
>
> A: Yes. I'm not disputing that one bit.

Tr. at 130; *see also* Tr. at 115. Respondent Rotoli undoubtedly breached his duty to abide by the regulations, however. Furthermore, he acknowledged his failure to recognize that the overlap of the double-cover flap at issue significantly exceeded the regulatory limit at the time of the TED's installation. Tr. at 135-36; *see also* Tr. at 126-27.

While these considerations support a finding that Respondents were negligent in failing to comply with the applicable regulations, Respondent Rotoli sought to minimize his responsibility at the hearing by claiming that the non-compliant TED had been installed shortly before the law enforcement officers boarded the F/V Miss Pauline and that he did not have an opportunity to verify its condition and remedy any deficiencies prior to their inspection. Specifically, Respondent Rotoli testified that Net 4 became "snagged" on an unknown object during trawling operations, resulting in loss of the attached TED and "bag,"[11] on the morning of August 19, 2011. Tr. at 118-19, 123-24, 145-46. Consequently, Respondent Rotoli claimed, he and the crew of the F/V Miss Pauline anchored the vessel, pulled the nets from the water, and emptied the three intact nets of their catch onto the deck. Tr. at 118-19, 123-24. Respondent Rotoli estimated that between 150 and 200 pounds of shrimp had been caught, along with "a lot of trash," such as crab. Tr. at 133. Respondent Rotoli further testified that while he was anchoring the vessel and culling the catch, Mr. Allen retrieved a spare TED and bag from the fish hold, installed them on Net 4 as it rested on the deck of the vessel, and then raised Net 4 to allow the crew to cull the catch from that portion of the deck and inspect the newly-installed TED.[12] Tr. at 118-20, 124, 135.

In describing the TED in question at the time Mr. Allen retrieved it from the fish hold, Respondent Rotoli testified:

> I know for sure we had two turtle shooters [TEDs] down there [in the fish hold], one had a broken bar in the extractor itself, so we didn't put that one on. The other one we brought up looked like it was in pretty good shape, it looked almost like it was new. It was – it was in really good shape, the bars weren't bent, nothing. Usually you get bent bars or broken bars, you know, but they were all – looked good, so we opted to put that one on.

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[11] The portion of the net in which shrimp are collected during trawling operations is referred to throughout the record as a "bag," "tailbag," or "codend." *See, e.g.*, Tr. at 53, 82, 84, 120.

[12] Respondent Rotoli explained that a net must be raised into the rigging of a vessel in order to inspect the attached TED for certain deviations from regulatory standards. Tr. at 128.

Tr. at 126-27; *see also* Tr. at 118. Respondent Rotoli explained that the device "was all wrapped around" the spare 14-foot bag at that time, which prevented him from observing the condition of the double-cover flap, but that he was aware of a potential discrepancy because Mr. Allen informed him, "We've still got to check the TED, we've got to check it and make sure it's right, it doesn't look right . . . ." Tr. at 135-36.

Respondent Rotoli testified that he and the crew of the F/V Miss Pauline intended to inspect the newly-installed TED after they finished culling the catch but that the law enforcement officers first boarded the vessel. Tr. at 120, 124-25, 133. He claimed that all of the tools necessary for repairing the device, including his sewing needles, spools of thread, and tape measure, were present on top of the fish hold during the boarding and that he even offered his tape measure to the law enforcement officers when theirs broke during the inspection. Tr. at 128-29, 135, 138. Respondent Rotoli further claimed that he informed Special Agent Chesler and Investigator Izsak during their inspection of the records in the wheelhouse that a TED had just been lost and replaced on one of the vessel's nets. Tr. at 125, 130-31, 136-37, 179-80. He explained that he did not notify them of any discrepancy, however, because he had not yet verified the condition of the device at the time of the boarding. Tr. at 136. Finally, he insisted, "I did not fish that net. I did not fish that TED, never. I wouldn't have put it down in the water until it was right." Tr. at 142.

The Agency disputes these claims and, as support for its position, points to evidence in the record that conflicts with Respondent Rotoli's account. Agency's Brief at 4-5. In particular, the Agency notes in its Brief that Special Agent Chesler and Investigator Izsak directly contradicted the testimony of Respondent Rotoli. Agency's Brief at 4. Indeed, Special Agent Chesler denied that Respondent Rotoli spoke of recently losing and replacing a TED either in the wheelhouse or at the time he issued the Enforcement Action Report, testifying that he would have remembered and documented being told of such an incident because "[i]t's fairly unusual." Tr. at 154-55; *see also* Tr. at 160. Investigator Izsak concurred with this testimony. *See* Tr. at 162, 164.

Citing the testimony of Mr. Stevens, the Agency next contends that "[i]t . . . defies logic, as well as standard industry practices, to have spent time sewing in a net when there was catch spoiling on the deck." Agency's Brief at 4-5. On rebuttal, Mr. Stevens explained the importance of culling a catch immediately upon releasing it from the nets onto the deck:

> Q: Why is it important to cull a catch immediately upon dumping it to the deck? What happens if you don't?
>
> A: Spoilage. The A-number-one priority, the top priority – when the bags are removed from the water or the catch is removed from the water, the top priority is to get that product off the deck. As everyone stated, it was – it was hot. Shrimp go through a heat, they spoil quick. The number one priority should be getting that – that product off of the deck and into the ice hold and preserved on ice.

> Q: So as someone who has a lot of experience both doing this and observing this, does it make sense to you that someone would take an hour to an hour and a half to sew in a net while the shrimp is still on the deck?
>
> A: No, sir. Again, the top priority would be to get the product off the deck of the boat and into the ice hold and then repairs to be made to – to the gear.

Tr. at 172. Mr. Stevens later reiterated that "time is very much of the essence" once shrimp have been released onto a vessel's deck, "especially with the weather being hot." Tr. at 174.

As also pointed out by the Agency, when questioned whether, in his experience, the captain of a shrimp trawler would immediately recognize an overlap of 32 inches in a TED's double-cover flap as a violation, Mr. Stevens responded, "I would have to say yes. I would think so." Tr. at 109. The Agency argues that "[i]t defies logic for Respondent Rotoli to have installed the TED without fixing the overlap first if he had any intention of fixing it." Agency's Brief at 4. In conclusion, the Agency contends:

> Given the contrary evidence, Respondent Rotoli's account that he had just sewn that TED into his net but he would have fixed the illegal TED before deploying it into the water is not credible . . . .[E]ven if Respondent Rotoli were telling the truth about having just sewn the illegal TED into his net, no adequate explanation exists for why he would be carrying that particular device as a spare without having taken the time to ensure it was legal.

Agency's Brief at 5.

Upon consideration, I find that Respondent Rotoli's account was plausible and that the evidence presented by the Agency was insufficient to rebut it. Respondent Rotoli did not deny that the day of the charged violation was "pretty warm" and that "shrimp will cook on the deck if you let them sit there." Tr. at 132. When, in response to that admission, counsel for the Agency questioned his decision to repair Net 4 prior to culling the catch, Respondent Rotoli credibly testified that he and a crewmember culled the catch, while Mr. Allen installed the spare TED and bag, in an effort to conserve time: "I tried to do both so I can get the boat back fishing because you know – you know as well as I do, there ain't a lot of shrimp out there and you've got to get every bit you can to make money." *Id.* He later elaborated that Net 4 was shielding the starboard side of the vessel's deck while Mr. Allen repaired it: "I didn't see any reason to have three of us culling the deck because half the net was covering that one side of the boat, so it was not like it was in the direct sun. The direct sun was on the opposite side, . . . and that's what we culled first." Tr. at 181. This course of action seems reasonable. Moreover, while Mr. Stevens emphasized the importance of culling a catch immediately upon releasing it onto the deck, he also conceded that "it's possible" to replace a TED and cull a catch when multiple crewmembers are present on the vessel, consistent with Respondent Rotoli's explanation. Tr. at 174.

As argued by Respondents in their Brief, the photographs taken by Special Agent Chesler of the double-cover flap lend support to Respondent Rotoli's account. Labeled as IMG_0435 and IMG_0436, these photographs depict webbing that appears to be in pristine condition. *See*

Agency Ex. 3, 4. During his testimony, Respondent Rotoli noted the absence of debris in the webbing to support his claim that the non-compliant TED had not been used in the vessel's trawling operations:

> [I]t never was in the water because if it was in the water you'd have all these little fish sticking out of here . . . . I'd have to sit there and spend two hours, pull all them fish out of there just to get a clear picture like this. There was never – it was never in the water. This shows it was never in the water.

Tr. at 147.

Neither Special Agent Chesler nor Investigator Izsak challenged this testimony. Mr. Stevens, on the other hand, testified on rebuttal that he could not determine whether the TED had ever been used in trawling operations based upon its appearance in the photographs because of the variety of factors that affect the amount of debris caught in a net. Tr. at 173-74. Respondent Rotoli convincingly responded to this equivocal testimony, stating that "[i]f you are not fishing [in the area where the F/V Miss Pauline was conducting its trawling operations] for any amount of time, you wouldn't know this," but a species of fish referred to as "dollar fish" or "nickel fish" are prevalent in that location and "thousands" would have been stuck in the webbing of the non-compliant TED had it been used. Tr. at 180-81. He explained that these small, flat fish "get caught in the webbing of your tailbag and your TEDs the worst because you have the thinner netting here" and that they were stuck in the other nets onboard. Tr. at 181. Investigator Izsak's observation of egg-bearing blue crab in the nets onboard confirms the presence of at least some bycatch caught in the nets at the time of the boarding. Tr. at 73. No such bycatch is visible in the photographs of the non-compliant TED, however. *See* Agency Ex. 3, 4.

The only conflicting evidence that Respondents failed to refute was the testimony of Special Agent Chesler and Investigator Izsak. In an effort to counter their claims that he never informed them of the loss and replacement of the TED on Net 4 just prior to their boarding, Respondent Rotoli argued that Investigator Izsak "wouldn't remember half the conversation because she was too busy handcuffing the boy on the boat and she was more concerned about him than she was anything on that boat." Tr. at 182. Until this allegation, the Agency's witnesses had only touched upon the arrest of one of the crewmembers onboard the F/V Miss Pauline. Their disinclination to discuss it was peculiar. The record reflects, however, that the circumstances culminating in the arrest did not arise until after Special Agent Chesler had issued the Enforcement Action Report to Respondent Rotoli. Tr. at 185-91. Moreover, when questioned about the arrest on rebuttal, Investigator Izsak dismissed it as unmemorable, testifying, "[B]oarding shrimp boats and fishing vessels, sometimes you come across something like that. So with my duty as a law enforcement officer, that's normally something that I would do, is check the warrants and put someone into custody." Tr. at 163. Thus, I do not find that it discredits the testimony of Special Agent Chesler and Investigator Izsak regarding their interactions with Respondent Rotoli during the boarding.

While the testimony of Special Agent Chesler and Investigator Izsak is undoubtedly at odds with that of Respondent Rotoli, I find that the weight of the evidence in the record supports his account of the circumstances under which the non-compliant TED was installed in Net 4. As

noted above, the Agency argues that "even if Respondent Rotoli were telling the truth about having just sewn the illegal TED into his net, no adequate explanation exists for why he would be carrying that particular device as a spare without having taken the time to ensure it was legal." Agency's Brief at 5. Respondent Rotoli admitted at the hearing that he "hadn't had a chance to look at [the spare TEDs in the fish hold]," which were included in the purchase of the vessel, and "maybe [he] was wrong by not checking it." Tr. at 127, 142. Respondent Rotoli's failure to inspect the spare TEDs stored in the fish hold at any time between the dates of Respondent Frenier's purchase of the vessel and the charged violation further supports a finding that Respondents were negligent in failing to comply with the applicable regulations.

Nevertheless, I find that the circumstances under which the non-compliant TED was installed warrant a reduction in the penalty sought by the Agency. Respondent Rotoli appeared to be sincere in his representations at the hearing that he intended to inspect the newly-installed TED and remedy any deficiencies prior to its deployment. Additionally, the evidentiary record did not establish that the TED had been used or that Respondent Rotoli deliberately attempted to circumvent conservation measures for sea turtles in order to retain more shrimp during trawling operations. Rather, the record supports a finding that the non-compliant TED had been installed just prior to the boarding on August 19 and that Respondent Rotoli negligently failed to inspect it and remove the excess webbing of the double-cover flap in a timely manner. Such a finding weighs in favor of a civil penalty in an amount no greater than necessary to ensure that inspections of TEDs occur either prior to their installation or immediately thereafter.

3) Other Matters as Justice May Require

Both Special Agent Chesler and Investigator Izsak described Respondent Rotoli's demeanor during the entire boarding as "cooperative." Tr. at 55, 65, 70. The record also reflects that Respondent Rotoli offered to correct the deficiency found in the TED immediately and that he did so without the assistance of Special Agent Chesler or the FL FWCC law enforcement officers. Agency Ex. 3; Tr. at 55, 70-71, 127.

Based upon the penalty amount proposed in the NOVA and the absence of any discussion of the subject in its Brief, the Agency appears not to have considered the cooperation exhibited by Respondent Rotoli during the boarding in setting the proposed penalty. His level of cooperation, interest in quickly coming into compliance, and ability to remedy the violation should be encouraged. Therefore, I find that these considerations support the assessment of a civil penalty lower than that proposed by the Agency. *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).

D. CONCLUSION

After weighing the factors set forth at 15 C.F.R. § 904.108(a) and the particular circumstances surrounding the violation committed by Respondents, I conclude that a penalty

lower than that sought by the Agency is appropriate. I agree with the Agency that the gravity of the charged violation necessitates the assessment of some penalty. However, a reduction in the penalty proposed by the Agency is deemed to be warranted based upon a number of mitigating factors. Specifically, the record reflects that Respondents, who have extensive commercial fishing experience, were never cited for any violations of fishery regulations before or after the offense charged in this proceeding. The record lacks probative evidence that Respondent Rotoli intended to violate the regulations governing TEDs. Rather, the record supports a finding that he was negligent in failing to inspect the TED and correct the deficiency in a timely manner but that the non-compliant TED had not been used in the trawling operations of the F/V Miss Pauline. Finally, Respondent Rotoli fully cooperated with the Agency upon being informed of the violation, expressed an interest in quickly coming into compliance, and demonstrated an ability to do so.

Upon consideration of these factors, I find that a civil penalty in the amount of $1,750 is appropriate for the violation committed by Respondents.

VI. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1) Respondent Pauline Marie Frenier and Respondent Daniel Joseph Rotoli are "persons," as that term is defined by 16 U.S.C. § 1532(13), and are subject to the jurisdiction of the United States.

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

3) At all times relevant to the NOVA, Respondent Frenier held a Federal Fisheries Permit for South Atlantic Penaeid Shrimp for the F/V Miss Pauline.

4) At all times relevant to the NOVA, the F/V Miss Pauline was a "vessel" and a "shrimp trawler," as those terms are defined by 50 C.F.R. § 222.102.

5) At all times relevant to the NOVA, the F/V Miss Pauline was owned by Respondent Frenier and operated by Respondent Rotoli.

6) On or about August 19, 2011, the F/V Miss Pauline was engaged in fishing operations targeting shrimp approximately 1.8 miles north of the Mayport Florida Jetties near the St. John's River Entrance.

7) On or about August 19, 2011, law enforcement personnel boarded the F/V Miss Pauline in position 30° 25.966' N latitude, 081° 22.847' W longitude.

8) At the time of the boarding, the F/V Miss Pauline was anchored in "offshore" waters in the "Atlantic Area," as those terms are defined by 50 C.F.R. § 222.102.

9) At the time of the boarding, the four nets onboard the F/V Miss Pauline were connected to the trawl doors and raised above the deck.

10) At the time of the boarding, each of the four nets was "rigged for fishing," as that term is defined by 50 C.F.R. § 223.206(d)(2)(i).

11) At the time of the boarding, the F/V Miss Pauline was required to have an "approved TED," as that phrase is defined by 50 C.F.R. § 223.207, installed in each net rigged for fishing pursuant to 50 C.F.R. § 223.206(d)(2)(i).

12) During the course of the boarding, the law enforcement personnel inspected the TEDs installed in each of the nets rigged for fishing. They found that the TED installed in the outboard net on the starboard side of the F/V Miss Pauline employed a double-cover design and that the panels of webbing composing the flap overlapped by at least 32 inches.

13) For a hard TED employing a double cover offshore TED flap to qualify as an "approved TED," the flap must be composed of two equal size rectangular panels of webbing that overlap each other no more than 15 inches pursuant to 50 C.F.R. § 223.207(d)(3)(iii).

14) On or about August 19, 2011, the TED installed in the outboard net on the starboard side of the F/V Miss Pauline failed to comply with 50 C.F.R. § 223.207(d)(3)(iii) and, therefore, was not an "approved TED."

15) On or about August 19, 2011, Respondents Frenier and Rotoli owned, operated, or were on board a vessel not in compliance with all applicable provisions of 50 C.F.R. § 223.206(d), in violation of 50 C.F.R. § 223.205(b)(1).

16) On or about August 19, 2011, Respondents Frenier and Rotoli violated Section 9 of the Endangered Species Act, 16 U.S.C. § 1528(a)(1)(G), by failing to comply with regulations pertaining to species of sea turtles listed as endangered or threatened under Section 4 of the Act and promulgated pursuant to authority provided by the Act.

17) On or about August 19, 2011, the nets onboard the F/V Miss Pauline were rigged for fishing and the non-compliant TED was installed in the outboard net on the starboard side of the vessel with the knowledge of Respondents Frenier and Rotoli.

18) Respondents Frenier and Rotoli "knowingly" violated the Act and the implementing regulations within the meaning of that term.

19) Because Respondents Frenier and Rotoli knowingly violated the Act and the implementing regulations, a civil penalty may be assessed against them under Section 11 of the Act, 16 U.S.C. § 1540(a)(1).

20) Species of sea turtles listed as either endangered or threatened under the Endangered Species Act occur in Atlantic waters of the United States.

21) The non-compliant TED on the F/V Miss Pauline would likely capture and kill all of the sea turtles encountered by the net in which it was installed.

22) Neither Respondent Frenier nor Respondent Rotoli proffered any evidence concerning an ability to pay the proposed civil penalty.

23) Neither Respondent Frenier nor Respondent Rotoli has been cited for any violations of fishery regulations before or after the violation committed on August 19, 2011.

24) The TED installed in the outboard net on the starboard side of the F/V Miss Pauline had not been used in the trawling operations of that vessel.

25) Respondent Rotoli was negligent in failing to inspect the TED and remedy the deficiency in a timely manner.

26) Respondent Rotoli was cooperative during the boarding on August 19, 2011, offered to correct the deficiency immediately upon being informed by law enforcement personnel that a violation had occurred, and did so without their assistance.

27) A civil penalty in the amount of $1,750 is appropriate for the violation committed by Respondents.

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

ORDER

A civil penalty in the amount of $1,750 is hereby **IMPOSED** jointly and severally on Respondents Pauline Marie Frenier and Daniel Joseph Rotoli.

PLEASE TAKE NOTICE, that this Initial Decision becomes effective as the final Agency action **60 days** after service on **November 26, 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 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 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 Agency 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.

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

Dated: September 27, 2012
Washington, D.C.