UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:	)	**DOCKET NUMBERS**
	)	
David W. Gregory, and	)	SE1002966, F/V Sea Ghost
Michael Byrd,	)	SE1102223, F/V Holly G
	)	
Respondents	)	

INITIAL DECISION AND ORDER

Date: February 28, 2013

Before: Susan L. Biro, Chief Administrative Law Judge
United States Environmental Protection Agency[1]

Appearances: Duane R. Smith, Esq.
Charles L. Green, 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

Mark V. Knighten, Esq.
Pascagoula, Mississippi, 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

On October 5, 2011, 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"), issued two Notices of Violation and Assessment of Administrative Penalty ("NOVAs") against David W. Gregory and Michael Byrd ("Respondents"). The first NOVA (Docket Number 1002966) charges Respondents with one count of violating Section 307(1)(A) of the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), 16 U.S.C. § 1857(1)(A), and the regulations found at 50 C.F.R. § 622.7(a), and seeks to impose a civil administrative penalty in the amount of $17,500 jointly and severally against Respondents. By letter dated October 22, 2011, Respondent Gregory requested a hearing before an Administrative Law Judge regarding this alleged violation.

The second NOVA (Docket Number 1102223) charges Respondents with two counts of violating Section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538, and the regulations found at 50 C.F.R. § 223.205(b)(1),[2] and seeks to impose a civil administrative penalty in the aggregate amount of $2,500 jointly and severally against Respondents. By letter dated October 22, 2011, Respondent Gregory requested a hearing before an Administrative Law Judge regarding these alleged violations.

Pursuant to 15 C.F.R. § 904.107(b), "[a] hearing request by one joint and several respondent is considered a request by the other joint and several respondent(s)." Thus, Respondent Byrd was deemed to have requested a hearing on the charged violations, along with Respondent Gregory.

On November 4, 2011, the Agency notified this Tribunal by letter that it had received the requests for hearing. Notices of Transfer and Assignment of Administrative Law Judge and Orders Requiring Preliminary Positions on Issues and Procedures (PPIP) ("PPIP Scheduling Orders") were subsequently issued, wherein the undersigned was designated to preside in each proceeding and the parties were directed to file PPIPs on or before December 10, 2011. The

[2] In the section of the NOVA entitled "Facts Constituting Violation," the Agency alleges in two counts that Respondents owned, operated, or were on board a vessel that failed to comply with the applicable provisions of 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). On April 9, 2012, the Agency filed a Notice of Amendment One to Agency's Pleadings ("Notice of Amendment"), in which the Agency amended the foregoing section of the NOVA to allege that Respondents owned, operated, or were on board a vessel that failed to comply with the applicable provisions of 50 C.F.R. § *223.206(d)* and that this failure constituted a violation of the Endangered Species Act, 16 U.S.C. § *1531 et seq.*, and 50 C.F.R. § *223.205(b)(1)*. The Agency cites 15 C.F.R. § 904.207 as the legal authority for the Notice of Amendment. That provision states, in pertinent part, that "[a] party may amend its pleading as a matter of course at least 20 days prior to the hearing." 15 C.F.R. § 904.207(a). As the hearing in this proceeding was conducted on May 7, 2012, the Agency satisfied the requirement set forth at 15 C.F.R. § 904.207 by filing the Notice of Amendment 28 days prior to the hearing.

Agency timely filed its PPIPs on December 9, 2011. Prompted by Respondents' failure to file a PPIP in either proceeding, the undersigned issued Orders to Show Cause on December 20, 2011, directing Respondents to show good cause for their failure to comply with the PPIP Scheduling Orders. Through counsel, Respondents jointly filed a PPIP in each proceeding on December 21, 2011, followed by Responses to the Orders to Show Cause on January 9, 2012.

The undersigned subsequently issued a Decision on Order to Show Cause and Hearing Order in each proceeding, wherein the undersigned scheduled the hearing, established deadlines for certain prehearing procedures, and ruled not to impose any of the sanctions authorized by 15 C.F.R. § 904.212 against Respondents for their failure to comply with the PPIP Scheduling Order. At the request of the parties, the undersigned rescheduled the hearings by Order dated February 1, 2012. The February 1, 2012 Order also consolidated the proceedings into a single administrative proceeding pursuant to 15 C.F.R. § 904.215 on the grounds that each proceeding involved the same parties and counsel and that consolidation would not prejudice any party but, rather, ease the burden of adjudication on the parties, witnesses, and judicial resources.

As previously noted, the Agency filed a Notice of Amendment on April 9, 2012. Pursuant to an extension of the filing deadline, the parties filed a Joint Set of Stipulated Facts, Exhibits, and Testimony ("Stip.") on April 20, 2012. Finally, the parties filed supplements to their respective PPIPs.

The hearing was subsequently held on May 7, 2012, in Gulfport, Mississippi. The Agency presented the testimony of four witnesses at the hearing: William D. Freeman, Jr., John F. Ewing, Jr., Earl Anthony O'Gradey, and Dale Stevens. In addition, the Agency proffered 11 exhibits that were received into evidence and marked as Agency Exhibits ("AX") 1-11. Respondents presented the testimony of two witnesses, Michael C. Byrd and David W. Gregory. Respondents proffered two exhibits that were received into evidence and marked as Respondents Exhibits ("RX") 1 and 2.

Upon receipt of the transcript of the hearing, the undersigned established a schedule for filing post-hearing briefs and reply briefs. On June 25, 2012, the Agency timely filed its Initial Post-Hearing Brief ("A's Br."). At the request of Respondents, the deadlines for the remaining briefs were then extended. Respondents subsequently filed their Initial Post-Hearing Brief ("Rs' Br.") on August 24, 2012, and the Agency filed its Reply to Respondents' Post-Hearing Brief ("A's Reply") on September 10, 2012. Pursuant to another extension of the filing deadline, Respondents filed a Post-Hearing Rebuttal Brief ("Rs' Reply") on October 11, 2012.

II. BURDEN OF PROOF

In order to prevail on its claims against Respondents, 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). This standard requires the Agency to demonstrate that the facts it seeks to establish

are more likely than not to be true. *Fernandez & Strickler*, NOAA Docket No. NE970052FM/V, 1999 WL 1417462 (ALJ, Aug. 23, 1999). The Agency may rely upon either direct or circumstantial evidence to satisfy this burden of proof. *Cuong Vo*, 2001 WL 1085351 (citing *Steadman*, 450 U.S. at 101). Only after the Agency satisfies its burden does the burden of producing evidence to rebut or discredit the Agency's evidence shift to Respondents. *Id.*

III. DOCKET NUMBER 1002966: CHARGED VIOLATION OF THE MAGNUSON-STEVENS ACT

A. STATUTORY AND REGULATORY BACKGROUND

1) Liability

In 1976, Congress enacted the Magnuson-Stevens Act, 16 U.S.C. §§ 1801-1883, as amended, "to conserve and manage the fishery resources found off the coasts of the United States, and the Anadromous species and Continental Shelf fishery resources of the United States, by exercising sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish, within the exclusive economic zone." Pub. L. No. 94-265, § 2, 90 Stat. 331 (1976). In order to achieve this purpose, Congress empowered the Secretary of Commerce to assess a civil penalty against any person found to have committed an act prohibited by Section 307 of the Act. 16 U.S.C. § 1858(a). Section 307 provides, in pertinent part:

> It is unlawful—
>
> (1) for any person—
>
> (A) to violate any provision of this Act or any regulation or permit issued pursuant to this Act . . . .

16 U.S.C. § 1857(1)(A).

One such regulation, 50 C.F.R. § 622.7(a)(1), prohibits any person from engaging in an activity for which a valid Federal permit, license, or endorsement is required under 50 C.F.R. § 622.4 without such permit, license, or endorsement. In turn, the regulations at 50 C.F.R. § 622.4 provide, in pertinent part:

> (a) Permits required. To conduct activities in fisheries governed in this part, valid permits, licenses, and endorsements are required as follows:
>
> * * *
>
> (2) Commercial vessel permits, licenses, and endorsements—
>
> * * *
>
> (xi) Gulf shrimp fisheries – (A) Gulf shrimp permit. For a person aboard a vessel to fish for shrimp in the Gulf EEZ or possess

shrimp in or from the Gulf EEZ, a commercial vessel permit for Gulf shrimp must have been issued to the vessel and must be on board. See paragraph (s) of this section regarding a moratorium on commercial vessel permits for Gulf shrimp and the associated provisions.

* * *

(s) Moratorium on commercial vessel permits for Gulf shrimp. The provisions of this paragraph (s) are applicable through October 26, 2016.

(1) Date moratorium permits are required. Beginning March 26, 2007, the only valid commercial vessel permits for Gulf shrimp are those issued under the moratorium criteria in this paragraph (s).

50 C.F.R. § 622.4(a)(2)(xi), (s).

The term "person" is defined by the Magnuson-Stevens Act to include "any individual (whether or not a citizen or national of the United States), any corporation, partnership, association or other entity (whether or not organized or existing under the laws of any State)." 16 U.S.C. § 1802(36). The phrase "exclusive economic zone" or "EEZ" is defined by statute as "the zone established by Proclamation Numbered 5030, dated March 10, 1983. For purposes of applying this Act, the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States." 16 U.S.C. § 1802(11). Consistent with the statutory definition, the regulations define the EEZ as "the zone established by Presidential Proclamation 5030, 3 CFR part 22, dated March 10, 1983, and is that area adjacent to the United States which, except where modified to accommodate international boundaries, encompasses all waters from the seaward boundary of each of the coastal states to a line on which each point is 200 nautical miles (370.40 km) from the baseline from which the territorial sea of the United States is measured." 50 C.F.R. § 600.10.

Pursuant to the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1356(a), "[t]he seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line . . . ." 43 U.S.C. § 1312. Thus, for purposes of this proceeding, the EEZ, or federal waters, begins three geographical miles, or nautical miles,[3] from the Mississippi coast line.

Finally, the regulations define the term "fishing" as any activity that involves:

(1) The catching, taking, or harvesting of fish;

[3] The terms "geographical mile" and "nautical mile" appear to be used interchangeably by the Agency in describing the seaward boundaries of coastal states under the Submerged Lands Act. *See* NOAA Office of the General Counsel, Maritime Zones and Boundaries, http://www.gc.noaa.gov/gcil_maritime.html#eez (last visited Feb. 15, 2013) ("Under the Submerged Lands Act, the seaward boundary of each of the coastal states is generally three nautical (or geographic) miles from the coast line.").

(2) The attempted catching, taking, or harvesting of fish;

(3) Any other activity that can reasonably be expected to result in the catching, taking, or harvesting of fish; or

(4) Any operations at sea in support of, or in preparation for, any activity described in paragraphs (1), (2), or (3) of this definition.

50 C.F.R. § 600.10.

2) Civil Penalty

The Magnuson-Stevens Act provides that "[a]ny person who is found by the Secretary . . . to have committed an act prohibited by section 307 . . . shall be liable to the United States for a civil penalty." 16 U.S.C. § 1858(a). Similarly, the regulations at 50 C.F.R. § 600.735 provide that "[a]ny person committing, or fishing vessel used in the commission of a violation of the Magnuson-Stevens Act . . . and/or any regulation issued under the Magnuson-Stevens Act, is subject to the civil and criminal penalty provisions and civil forfeiture provisions of the Magnuson-Stevens Act, to this section, to 15 CFR part 904 (Civil Procedures), and to other applicable law."

The procedural rules governing this proceeding, found at 15 C.F.R. part 904 ("Rules of Practice"), authorize the assessment of a civil penalty "against two or more respondents jointly and severally. Each joint and several respondent is liable for the entire penalty but, in total, no more than the amount finally assessed may be collected from the respondents." 15 C.F.R. § 904.107(a).

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

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

16 U.S.C. § 1858(a). In turn, the Rules of Practice provide:

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

15 C.F.R. § 904.108(a).

Effective June 23, 2010, NOAA modified the Rules of Practice to remove any presumption in favor of the Agency's proposed sanction and the requirement that the presiding Administrative Law Judge state good reasons for departing from the Agency's analysis. 75 Fed. Reg. 35,631 (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).

B. FACTUAL BACKGROUND

At all times relevant to the charges in the NOVA, Respondent Gregory was the owner and Respondent Byrd was the operator of the Fishing Vessel ("F/V") Sea Ghost, a registered and flagged vessel of the United States, Official Number 1080063. Stip. ¶¶ 3-5; AX 1. At approximately 8:40 a.m. on January 19, 2010, the F/V Sea Ghost was observed retrieving its fishing gear from the water in the Gulf of Mexico by William Freeman, Jr., John Ewing, Jr., Paul Grote, and Patrick Webb, law enforcement officers employed by the Mississippi Department of Marine Resources Marine Patrol and deputized by the National Marine Fisheries Service ("NMFS"), who were conducting a patrol of the area. Stip. ¶ 8, 9; AX 10; Tr. at 10, 12. At the hearing in this matter, Officer Ewing testified that he recorded the position of the F/V Sea Ghost from the GPS unit onboard the officers' patrol vessel as their vessel approached the rear of the F/V Sea Ghost.[4] Tr. at 64. Officer Freeman and Officer Ewing subsequently boarded the F/V Sea Ghost. Stip. ¶ 8; AX 10; Tr. at 11-12.

During his testimony, Respondent Byrd confirmed that he had been "dragging outside Dog Key Pass" on the day in question, and that the crew of the F/V Sea Ghost was "picking up" the nets at the time the officers approached and boarded the vessel. Tr. at 148-49. Upon boarding, Officer Ewing conducted an interview of Respondent Byrd. AX 10; Tr. at 63-64. According to Officer Freeman, they first discussed the catch onboard the F/V Sea Ghost, which consisted primarily of shrimp. Tr. at 12; AX 10. Based upon the officers' determination that the F/V Sea Ghost had been conducting its fishing operations in the Gulf EEZ, Officer Ewing next asked to view Respondents' permit for those operations. AX 10; Tr. at 12. In response, Respondent Byrd admitted that Respondents did not possess such a permit.[5] Tr. at 12, 149; AX 10. He denied, however, that the F/V Sea Ghost had fished for shrimp in the Gulf EEZ, as alleged. Tr. at 12, 65, 149; AX 10. Respondent Byrd testified that he subsequently argued with Officer Ewing regarding the position of the F/V Sea Ghost "probably for 35, 45 minutes" and that Officer Ewing recorded the vessel's position from the GPS unit onboard as he was disembarking. Tr. at 150-51.

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[4] Officer Freeman described in general terms how GPS units, or chart plotters, are used for navigational purposes in the maritime industry, explaining that they serve as "digital nautical chart[s]" that depict the positions of the given vessel, bodies of land, and other markers, "similar to the car GPS units but way more advanced." Tr. at 56-57.

[5] Respondent Gregory obtained the requisite permit allowing the F/V Sea Ghost to fish for shrimp in the Gulf EEZ on May 28, 2010, after purchasing an existing permit from a valid permit holder and transferring it to the F/V Sea Ghost. Stip. ¶ 14; AX 2; Tr. at 167.

Following the boarding, Officer Freeman prepared a "case package" to submit to the Agency's Office of Law Enforcement ("OLE") for review. Tr. at 15 (referring to AX 10). This package consisted of a Mississippi Marine Patrol Report ("Patrol Report"), Fisheries Contact/Boarding Report ("Boarding Report"), Mississippi Department of Marine Resources Marine Patrol GPS Verification Form ("GPS Verification Form"), and photographs taken by Officer Freeman of the F/V Sea Ghost on January 19, 2010, among other materials. AX 10.

C. LIABILITY

In the NOVA, the Agency alleges that "[o]n or about January 19, 2010, David W. Gregory, owner, and Michael Byrd, operator, of the F/V Sea Ghost . . . did engage in an activity for which a valid Federal permit, license, or endorsement is required under 50 C.F.R. 622.4, to wit: fish for shrimp in the EEZ, without such permit, license, or endorsement, in violation of 50 C.F.R. 622.7(a)." As discussed above, the regulations at 50 C.F.R. § 622.7(a)(1) prohibit any person from engaging in an activity for which a valid Federal permit, license, or endorsement is required under 50 C.F.R. § 622.4 without such permit, license, or endorsement. Fishing for shrimp in the Gulf EEZ is one such activity. Pursuant to 50 C.F.R. § 622.4(a)(2)(xi), a person aboard a vessel may fish for shrimp in the Gulf EEZ only if a commercial vessel permit for Gulf shrimp has been issued to and is onboard the vessel.

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 January 19, 2010:

1) Each Respondent constituted a "person," as that term is defined by 16 U.S.C. § 1802(36);

2) Respondent Byrd was "fishing" for shrimp from the F/V Sea Ghost, as that term is defined by 50 C.F.R. § 600.10;

3) Respondent Byrd was conducting this activity in the Gulf "EEZ," as that term is defined by 16 U.S.C. § 1802(11) and 50 C.F.R. § 600.10; and

4) No valid commercial vessel permit for Gulf shrimp had been issued to the F/V Sea Ghost.

Prior to the hearing in this matter, the parties entered into stipulations supporting the first, second, and fourth elements of the Agency's *prima facie* case. In particular, the parties agree that Respondent Gregory and Respondent Byrd are "persons," as that term is defined by 16 U.S.C. § 1802(36). Stip. ¶¶ 1, 2. Further, the parties agree that Respondent Byrd was operating the F/V Sea Ghost, and that the vessel was actively fishing for shrimp, at the time the law enforcement officers boarded it on January 19, 2010. Stip. ¶ 9. Finally, the parties agree that neither Respondent Gregory nor Respondent Byrd possessed a federal permit authorizing the F/V Sea Ghost to fish for shrimp in the Gulf EEZ on that date. Stip. ¶ 12.

While the foregoing issues are uncontested, the parties dispute the third element of the Agency's *prima facie* case: where the F/V Sea Ghost fished for shrimp on January 19, 2010. As the parties agree that the F/V Sea Ghost was fishing for shrimp at the time the law enforcement

officers boarded the vessel, Respondents' liability for the charged violation turns on the location of the vessel at the time the boarding occurred.

1) Arguments of the Parties

a. The Agency's arguments

Relying upon the testimony of Officer Freeman and Officer Ewing, the materials prepared by Officer Freeman following the boarding, and an official nautical chart depicting the position of the F/V Sea Ghost on January 19, 2010, the Agency contends that the F/V Sea Ghost was located in the Gulf EEZ at the time the law enforcement officers boarded the vessel. A's Br. at 4 (citing Tr. at 10-29, 57-59, 64-65; AX 8, 10). The Agency maintains that the position of the F/V Sea Ghost was determined by using the GPS unit onboard the officers' patrol vessel, the accuracy of which was confirmed at the outset and conclusion of the patrol, and that this position was confirmed using the GPS unit onboard the F/V Sea Ghost. A's Br. at 4 (citing Tr. at 11-14, 18-24, 58-59; AX 7, 9, 10).

b. Respondents' arguments

Respondents counter that the evidence proffered by the Agency fails to establish that the F/V Sea Ghost fished for shrimp in the Gulf EEZ on the date in question, claiming that "the exact location of [the] vessel at the time [it] was boarded is speculative at best." Rs' Br. at physical page 8.[6] Among other objections, Respondents cite the uncertainty of Officer Freeman and Officer Ewing as to the make or model of the GPS unit onboard the officers' patrol vessel and claim that it "mak[es] it impossible to determine the margin of error, or deviation of that particular GPS unit." Rs' Br. at physical page 4-5 (citing Tr. at 49, 69). Respondents also note the testimony of Officer Freeman that he did not independently verify the position of the F/V Sea Ghost. Rs' Br. at physical page 5 (citing Tr. at 51). Respondents next note that Officer Ewing recorded the coordinates of the vessel by hand on a form that the Agency did not offer into evidence, arguing that the coordinates "could've been transposed in the typed document" admitted into the record, a point that Officer Ewing conceded. Rs' Br. at physical page 5 (citing Tr. at 67-69). Respondents next cite the testimony of Officer Ewing that he was "not paying attention" when the officers' patrol vessel crossed the line of demarcation separating state waters from the Gulf EEZ. Rs' Br. at physical page 7 (citing Tr. at 64-65). Finally, Respondents cite the testimony of Respondent Byrd that he and Officer Ewing argued for 35 to 45 minutes before Officer Ewing ever recorded the position of the F/V Sea Ghost, that the vessel had drifted approximately half a mile in a southeasterly direction during that time, and that the GPS unit onboard the F/V Sea Ghost depicted the line of demarcation as a broken line in the same fashion as a commercially-produced laminated chart proffered by Respondents at the hearing. Rs' Br. at physical page 7 (citing Tr. at 149-52; RX 1).

In addition to disputing the accuracy of the position of the F/V Sea Ghost as alleged by the Agency, Respondents also object to the veracity of Officer Freeman's account of the boarding at the hearing and in the Patrol Report that he prepared, in which Officer Freeman

[6] Respondents' Brief is not paginated. Therefore, any reference to this document will cite the physical page number.

recorded that Respondent Byrd produced a commercially-produced laminated chart during the boarding, that he and Respondent Byrd compared the chart to the GPS unit onboard the F/V Sea Ghost, that the vessel was located in federal waters according to its own GPS unit, and that Respondent Byrd ultimately agreed with that determination. Rs' Br. at physical page 4-6 (citing Tr. at 13-14; AX 10). Claiming that Respondent Byrd denied producing any such chart during the boarding, Respondents maintain that "Mr. Byrd would not have admitted to being in federal waters . . . based on the use of a 'commercially produced laminated chart' as asserted by Ofc. Freeman because the 'commercially produced laminated chart' has a broken line at the exact location that Ofc. Freeman claims he stopped Mr. Byrd and it would be impossible for anybody to tell if they were in state or federal waters," a point that Officer Freeman conceded at the hearing. Rs' Br. at physical page 5-6 (citing Tr. at 43-45).

2) Discussion

Upon consideration of the evidentiary record and the arguments of the parties, the undersigned finds that a preponderance of the evidence shows that the F/V Sea Ghost was located in the Gulf EEZ at the time the law enforcement officers boarded the vessel on January 19, 2010, as alleged by the Agency. First, Officer Freeman testified that the officers began their patrol on the day in question by traveling on their vessel from the Biloxi Small Craft Harbor, through the Biloxi Channel, Mississippi Sound, and Dog Keys Pass, and into the Gulf EEZ, where the officers observed the F/V Sea Ghost retrieving its fishing gear from the water. Tr. at 10, 12. Officer Freeman explained that he knew the officers' patrol vessel had entered the Gulf EEZ because he observed on the GPS unit onboard the vessel that it had crossed the line of demarcation separating state waters from the Gulf EEZ, referred to as the Three Nautical Mile Line ("Three Mile Line"). Tr. at 10-11; *see also* Tr. at 58. Testimony elicited from Officer Freeman describes the position of the F/V Sea Ghost relative to the officers' patrol vessel and the Three Mile Line:

> Q: [D]id you look at the GPS as your vessel was transitioning toward [the F/V Sea Ghost]?
>
> A: Yes.
>
> Q: Did you observe on your vessel when your vessel crossed the Three Nautical Mile Line?
>
> A: Yes.
>
> Q: When your vessel crossed the Three Nautical Mile Line, what was the relationship of your vessel to that vessel? Where was -- where was the Sea Ghost in relationship to the patrol vessel?
>
> A: South.
>
> Q: So if you were south of the line and the Sea Ghost was south of you, was the Sea Ghost in federal waters or state waters?

A: Federal waters.

Tr. at 58-59.

An employee of the office of law enforcement at the Mississippi Department of Marine Resources for nearly seven years, Officer Freeman testified that he has had "a lot" of training in navigational practices, including the instruction he received as part of the marine law enforcement training program at the Federal Law Enforcement Training Center in 2006 and a course to obtain his U.S. Coast Guard license to operate an uninspected passenger vessel in 2009. Tr. at 10-11. He later elaborated that the marine law enforcement training program focuses heavily on the subject of navigation. Tr. at 33. Given this experience, Officer Freeman's interpretation of the information displayed by the GPS unit onboard the patrol vessel is deemed to be credible.

Additionally, as noted above, Officer Ewing testified that he recorded the coordinates of the F/V Sea Ghost from the patrol vessel's GPS unit as the vessel drew up to the rear of the F/V Sea Ghost. Tr. at 64. He explained that he wrote the coordinates by hand on a "JEA contact sheet," which contains "a place . . . to jot them down before [officers] get onboard the other boats." Tr. at 66-67. While the handwritten notes of Officer Ewing were not produced by the Agency at the hearing, Officer Ewing testified that the coordinates contained in the package of typewritten materials prepared by Officer Freeman following the boarding were transcribed from his notes. Tr. at 64-68. Admitted into evidence as Agency Exhibit 10, these materials list the coordinates of 30°11.125 North and 088°47.012 West as the position of the F/V Sea Ghost at the time the officers boarded the vessel. AX 10.

Officer Freeman testified that he used these coordinates to plot and mark the position of the F/V Sea Ghost on an official nautical chart, which was admitted into evidence as Agency Exhibit 8.[7] Tr. at 26-29. The chart depicts the "Mississippi Sound and Approaches: Dauphin Island to Cat Island" and contains markings denoting the position of the F/V Sea Ghost, as well as the Three Mile Line. AX 8; *see also* Tr. at 27-29. These markings clearly show that the F/V Sea Ghost was located south of the Three Mile Line inside the Gulf EEZ at the time Officer Ewing recorded the coordinates. Tr. at 28-29; AX 8. More specifically, Officer Freeman testified that the coordinates point to a position located approximately one half mile inside federal waters. Tr. at 14; *see also* AX 10 (variously describing the position as 0.6, 0.65, and 0.7 miles inside federal waters).

When questioned about the reliability of this information, Officer Freeman explained the officers' practice of verifying the accuracy of GPS units onboard their vessels by positioning the vessels alongside a fixed object, referred to as an "aid to navigation," and comparing the known position of the aid to navigation with the coordinates displayed by the given GPS unit. Tr. at 17-19. Officer Freeman further explained, "As long as the numbers -- the positions are close, we assume that the GPS is running accurate." Tr. at 18. In the present proceeding, the record reflects that the officers used an aid to navigation located in Biloxi Channel and designated as "Daybeacon 35" by the U.S. Coast Guard in a 2010 document entitled "Light List," which was

[7] This chart is the 48th edition of NOAA Chart 11373. AX 8.

admitted into evidence as Agency Exhibit 9. Tr. at 19-20, 22-24; AX 7, 9, 10. As explained by Officer Freeman and reflected in the GPS Verification Form contained in Agency Exhibit 10, the coordinates displayed by the GPS unit onboard the patrol vessel differed from the position of the aid to navigation published in the Light List by only a few feet when the officers checked it at both the outset and conclusion of their patrol on January 19, 2010. Tr. at 20; AX 9, 10. The accuracy of these readings supports a finding that the coordinates recorded by Officer Ewing from the GPS unit just prior to boarding the F/V Sea Ghost were also accurate and that the GPS unit accurately depicted the patrol vessel crossing the Three Mile Line into the Gulf EEZ, as observed by Officer Freeman.

Finally, Officer Freeman explained that the GPS unit onboard the F/V Sea Ghost confirmed that the vessel was in the Gulf EEZ. Tr. at 14, 58; AX 10. According to Officer Freeman, he subsequently asked Respondent Byrd for a paper nautical chart for the purpose of verifying the vessel's position, and Respondent Byrd provided the officers with a commercially-produced laminated chart, which the officers used to show him the approximate position of the vessel based upon the coordinates obtained from the GPS units onboard the patrol vessel and the F/V Sea Ghost. Tr. at 13-14, 44; AX 10. Officer Freeman explained that in response, Respondent Byrd acknowledged that the F/V Sea Ghost was in federal waters. Tr. at 14; AX 10.

The foregoing evidence strongly supports a finding that the F/V Sea Ghost was located in the Gulf EEZ at the time the law enforcement officers boarded the vessel on January 19, 2010. On the other hand, Respondents' attempts to discredit the evidence presented by the Agency are unpersuasive. First, as correctly pointed out by Respondents, neither Officer Freeman nor Officer Ewing were able to identify the brand of the GPS unit onboard the patrol vessel with certainty. Tr. at 32, 49, 69. As a result, Respondents claim, "it [is] impossible to determine the margin of error, or deviation of that particular GPS unit." Rs' Br. at physical page 4-5. This argument is unfounded, as Officer Freeman described in detail how the officers confirmed at the outset and conclusion of their patrol that the information displayed by the GPS unit was accurate within a few feet.

Respondents also correctly note that Officer Freeman acknowledged that he did not independently verify the coordinates recorded by Officer Ewing, Tr. at 51, and that Officer Ewing affirmed that he was "not paying attention" at the time the patrol vessel crossed the Three Mile Line, even though he testified that he was observing the GPS unit as the vessel transited towards the F/V Sea Ghost, Tr. at 65. This testimony fails to cast sufficient doubt on the weight of the evidence demonstrating that the F/V Sea Ghost was located in the Gulf EEZ on the date in question. Further, while the coordinates recorded by Officer Ewing could have been copied incorrectly from his handwritten notes into the materials prepared by Officer Freeman after the boarding, as Officer Ewing conceded, Tr. at 67-69, such an argument is merely speculative and not supported by any evidence in the record.

Respondents next point to the testimony of Respondent Byrd that Officer Ewing recorded the coordinates of the F/V Sea Ghost only after they had argued about the location of the vessel for at least 35 minutes, during which time the vessel drifted approximately half a mile. Tr. at 150-51. Respondent Byrd further testified that the wind "was . . . blowing out of the northwest" and "the tide was running to the east." *Id.* Clearly, this testimony seeks to imply that the

coordinates recorded by Officer Ewing and listed in Agency Exhibit 10 reflect the location of the F/V Sea Ghost not at the outset of the boarding but at its conclusion, by which time the vessel had drifted the half a mile into the Gulf EEZ. Respondents failed to produce any evidence to substantiate Respondent Byrd's testimony, however. Moreover, even if Respondent Byrd did observe Officer Ewing recording the position of F/V Sea Ghost at the conclusion of the boarding, as claimed, such an observation does not persuasively indicate that Officer Ewing did not record the position of the F/V Sea Ghost prior to boarding the vessel as well.

Respondent Byrd also testified that the GPS unit onboard the F/V Sea Ghost depicted the Three Mile Line in the same fashion as a commercially-produced laminated chart proffered by Respondents at the hearing and admitted into evidence as Respondents Exhibit 1. Tr. at 152, 161-63. Entitled "Captain Segull's Sportfishing Chart," the proffered chart shows the Three Mile Line as a continuous line bisecting the chart, with the exception of a gap south of Dog Keys Pass where 11 lines of text are superimposed on the Three Mile Line. RX 1. Officer Freeman affirmed that the boarding occurred in that particular area and that the proffered chart was similar to the one provided by Respondent Byrd during the boarding. Tr. at 38, 41. By citing the testimony of Respondent Byrd that the GPS unit onboard the F/V Sea Ghost portrayed the Three Mile Line with the same gap as this chart, Respondents seemingly seek to discredit the reliance of the officers on the GPS unit as confirmation of the vessel's position in the Gulf EEZ. Respondents failed to offer any evidence to substantiate Respondent Byrd's testimony, however. Moreover, testimony elicited from Officer Freeman reflects that the position of the F/V Sea Ghost relative to the Three Mile Line was evident from the GPS unit, regardless of whether it depicted the line in the manner claimed by Respondent Byrd:

Q: Did his chart plotter show the Three Nautical Mile Line?

A: Yes.

Q: Was it broken?

A: I don't remember.

Q: But you were able to see the Three Nautical Mile Line on the chart plotter?

A: Yes.

Q: And you were able to see his position on his own GPS relative to the Three Nautical Mile Line?

A: Yes.

Q: And was he in state waters or federal waters?

A: Federal waters.

Q: Because he was which direction from the line, north or south?

A: He was south.

Tr. at 57-58. Further, even if the depiction of the Three Mile Line by this particular GPS unit was marred by a gap at the location where the boarding occurred, the information obtained by the officers from the GPS unit onboard their patrol vessel sufficiently supports a finding that the F/V Sea Ghost was in the Gulf EEZ at the time of the boarding.

Finally, Respondents seek to discredit Officer Freeman's account of the boarding by arguing that "Mr. Byrd would not have admitted to being in federal waters . . . based on the use of a 'commercially produced laminated chart' as asserted by Ofc. Freeman [in the Patrol Report] because the 'commercially produced laminated chart' has a broken line at the exact location that Ofc. Freeman claims he stopped Mr. Byrd and it would be impossible for anybody to tell if they were in state or federal waters," a point that Officer Freeman conceded at the hearing. Rs' Br. at physical page 5-6 (citing Tr. at 43-45). This argument is unpersuasive. Officer Freeman's account of the boarding was credible, and even if, contrary to that account, Respondent Byrd never agreed with the officers' determination that the F/V Sea Ghost was in federal waters at the time it was boarded, the weight of the evidence still compels that conclusion.

While the testimonial and documentary evidence proffered by the Agency describes in detail the manner in which the officers determined that the F/V Sea Ghost was located in the Gulf EEZ at the time of the boarding, Respondents offer little to support their claim that the vessel was located in state waters. Respondent Byrd repeatedly denied at the hearing that he conducted fishing operations south of the Three Mile Line on January 19, 2010. Tr. at 148-51, 154. However, Respondents failed to produce any evidence that corroborates this testimony. By themselves, the bald denials offered by Respondent Byrd are insufficient to rebut the evidence in the record supporting the alleged violation.

Furthermore, Respondents' claim that the F/V Sea Ghost was located in state waters is undermined by the arguments raised by Respondents in their attempt to discredit the evidence presented by the Agency. In particular, assuming, *arguendo*, that the GPS unit onboard the F/V Sea Ghost depicted the Three Mile Line with a gap at the location where the boarding occurred and thereby hindered the ability of the officers to determine whether the vessel was located in the Gulf EEZ, it would have also hindered the ability of Respondent Byrd to determine the precise location of the vessel. Respondents themselves argued that "it would be impossible for anybody to tell if they were in state or federal waters" from such a depiction. Rs' Br. at physical page 5-6. Moreover, testimonial and documentary evidence in the record reflects that Respondent Byrd expressed uncertainty as to the operation of the GPS unit and the interpretation of the information displayed by the device. Tr. at 13, 73-75, 84, 13; AX 10. While the parties do not dispute that the F/V Sea Ghost was also equipped with radar technology, Respondent Byrd claimed that this technology was not an effective means of navigation in the particular area where the F/V Sea Ghost was located: "[T]he radar, it don't work. It works sometimes, but like on the west end of Horn Island ain't nothing but sand, and it won't pick up just sand." Tr. at 150. Thus, Respondent Byrd ostensibly lacked any reliable means of determining the position of

the F/V Sea Ghost at the time the officers boarded the vessel[8] and, in turn, any basis for his claim that the vessel was located in state waters.

For the reasons set forth above, the undersigned finds that the Agency demonstrated by a preponderance of the evidence that the F/V Sea Ghost was located in the Gulf EEZ at the time the law enforcement officers boarded the vessel on January 19, 2010, and that Respondents failed to discredit or rebut this evidence. Accordingly, the Agency has established each element of its *prima facie* case with respect to Respondent Byrd. As for Respondent Gregory, the doctrine of *respondeat superior* is well-recognized in NOAA jurisprudence, and tribunals have consistently held that the owner of a vessel may be found liable for violations committed by the vessel's operator in the scope of his or her employment. *See, e.g.*, *Callais & Davis*, NOAA Docket No. SE0803490FM, 2011 WL 7030848 (ALJ, Dec. 1, 2011) ("When an individual owns a vessel, it acquires a share of the vessel's proceeds from the fishing trip and thus, the individual benefits financially from the illegal acts of the vessel's captain during the fishing trip. Therefore, the vessel owner should not be allowed to escape responsibility for the transgressions of the captain . . . ."); *Amy N., Inc., & Hauck*, NOAA Docket No. SE0900879, 2010 WL 3524742 (ALJ, July 19, 2010) ("The owner or operator of the vessel may be held liable for the actions of a crewmember that violates the Magnuson-Stevens Act or its underlying regulations under the legal doctrine of respondeat superior."). Nothing in the record supports a deviation from this doctrine. Moreover, Respondents entered into stipulations prior to the hearing that on or about January 19, 2010, Respondent Gregory was responsible for the actions of his vessel's operator, Respondent Byrd. Stip. ¶ 11. Accordingly, as the owner of the F/V Sea Ghost, Respondent Gregory is jointly and severally liable for the actions of Respondent Byrd.

3) Conclusion

In accordance with the foregoing discussion, the undersigned finds that a preponderance of reliable, probative, substantial and credible evidence establishes that "[o]n or about January 19, 2010, David W. Gregory, owner, and Michael Byrd, operator, of the F/V Sea Ghost . . . did engage in an activity for which a valid Federal permit, license, or endorsement is required under 50 C.F.R. 622.4, to wit: fish for shrimp in the EEZ, without such permit, license, or endorsement, in violation of 50 C.F.R. 622.7(a)." This activity constitutes a violation of Section 307(1)(A) of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A), for which Respondents are jointly and severally liable.

D. CIVIL PENALTY

As liability for the charged violation has been established, the undersigned must now determine the appropriate amount of civil penalty to assess against Respondents. The Magnuson-Stevens Act requires the undersigned to consider certain factors as part of this determination:

[8] The particular means of navigation relied upon by Respondent Byrd was unclear from the record. Respondent Byrd testified first about the GPS unit and then the radar technology onboard the F/V Sea Ghost, before explaining, "And then I told [Officer Ewing], I said, 'That's what I'm going by.'" Tr. at 150. Arguably, that assertion could apply to either the GPS unit or the radar technology.

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

16 U.S.C. § 1858(a). The parties' arguments with respect to these factors are set forth below.

1) Arguments of the Parties

a. The Agency's arguments

As noted above, the NOVA seeks to assess a civil administrative penalty in the amount of $17,500 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 . . . ."[9] A's Br. at 5.

In describing its consideration of the Penalty Policy, the Agency argues that Respondents' conduct in this proceeding falls within, or is analogous to, three categories of offenses, each of which is characterized by the Penalty Policy as a level III violation in terms of the gravity of the offense: 1) fishing for, receiving, processing, or possessing limited entry or catch share species without holding a valid permit if ineligible for a permit; 2) fishing in a closed area or during a closed season; and 3) fishing illegally in the EEZ by a U.S. vessel. A's Br. at 5-6 (citing Penalty Policy at 35-36). Noting that the Gulf Shrimp fishery is a limited access fishery, the Agency maintains that "[f]ishing without a permit in a limited access fishery undermines the Agency's ability to manage the fishery effectively and places law-abiding fisherman at a competitive disadvantage when compared to those who would poach in an area where they have no legal right to fish." A's Br. at 5-6 (citing 50 C.F.R. § 622.4(xi) and 71 Fed. Reg. 56,039).

The Agency next contends that Respondent Byrd's conduct was reckless. A's Br. at 6. As support for its characterization of Respondent Byrd's level of culpability at the time of the violation, the Agency cites the testimony of Earl Anthony O'Gradey, a law enforcement officer who explained at the hearing that he boarded the F/V Sea Ghost in state waters on January 14, 2010, warned Respondent Byrd of the vessel's proximity to the EEZ, and advised him not to

[9] According to the Agency's Brief, the NOAA Penalty Policy and Penalty Schedules ("Penalty Policy" or "Policy") is accessible to the public at http://www.gc.noaa.gov/enforce-office3.html. The Agency did not submit a copy of this document for admission into the record at any stage of this proceeding or specify where the document could be accessed by Respondents until the Agency's reference to the document in its Brief. Being beyond the record, the Penalty Policy is considered here only to the extent that the Agency references the document in its arguments.

conduct any fishing operations in the EEZ because the F/V Sea Ghost lacked a permit to do so. A's Br. at 6 (citing Tr. at 73-74).

Referring again to the Penalty Policy, the Agency points out that a level III violation committed recklessly corresponds to a civil penalty range of $15,000 to $20,000 per violation. A's Br. at 6 (citing Penalty Policy at 25). In the present proceeding, the NOVA seeks to assess a penalty in the amount of $17,500, which is the midpoint of the penalty range advocated by the Agency. Finally, the Agency concludes:

> Penalties in [these] instances need to be high enough to provide not only specific, but general deterrence, and must provide an economic disincentive to anyone thinking about engaging in such conduct; otherwise respect for the law itself is eroded and penalties, for those few who are caught, become simply the cost-of-doing business.

A's Br. at 6.

b. Respondents' arguments

While Respondents vigorously denied the allegations regarding their liability for the charged violation, they presented no legal or factual arguments to counter those presented by the Agency regarding the appropriate penalty to assess in this proceeding.

2) Discussion

a. Nature, circumstances, extent, and gravity of the charged violation

The first set of factors that the Magnuson-Stevens Act requires the undersigned to consider in determining the appropriate amount of civil penalty to assess is "the nature, circumstances, extent, and gravity of the prohibited acts committed." 16 U.S.C. § 1858(a).

As noted by the Agency in its Brief, the National Marine Fisheries Service ("NMFS") established a moratorium on the issuance of new permits for the Gulf shrimp fishery effective on October 26, 2006. 71 Fed. Reg. 56,039 (Sept. 26, 2006) (codified at 50 C.F.R. § 622.4(a)(2)(xi), (s)). The implementing regulations at 50 C.F.R. § 622.4(s) provide that "[b]eginning March 26, 2007, the only valid commercial vessel permits for Gulf shrimp are those issued under the moratorium criteria in this paragraph (s)." 50 C.F.R. § 622.4(s)(1). In turn, the regulations at 50 C.F.R. § 622.4(s)(2) provide that the initial eligibility for a commercial vessel moratorium permit for Gulf shrimp is limited to those who satisfy the following criteria:

> (i) Owns a vessel that was issued a Federal commercial vessel permit for Gulf shrimp on or before December 6, 2003; or
>
> (ii) On or before December 6, 2003, owned a vessel that was issued a Federal commercial vessel permit for Gulf shrimp and, prior to September 26, 2006, owns a vessel with a Federal commercial permit for Gulf shrimp that is equipped for

> offshore shrimp fishing, is at least 5 net tons (4.54 metric tons), is documented by the Coast Guard, and is the vessel for which the commercial vessel moratorium permit is being applied.

50 C.F.R. § 622.4(s)(2)(i), (ii).

The preamble to the proposed rule establishing the moratorium explains the purpose of this measure:

> There is excess harvesting capacity in the shrimp fishery in the Gulf of Mexico, and fewer vessels could harvest the available shrimp resources at a more profitable level. The Gulf shrimp fishery has recently experienced economic losses leading to an exodus of vessels from the fishery. The number of vessels in the offshore shrimp fleet is expected to continue declining, but, at some point, the fishery will again become profitable for the remaining participants. There is a need to prevent new effort from then entering the fishery and negating or at least lessening profitability in the future.

71 Fed. Reg. 17,062, 17,063 (Apr. 5, 2006). In response to a public comment on the proposed rule that the purpose of the moratorium appeared to be based solely on economics, rather than any biological reason, the preamble to the final rule explains:

> NMFS disagrees there is no biological reason to establish a moratorium in the Gulf shrimp fishery. Although shrimp stocks are not overfished or undergoing overfishing, shrimp effort directly impacts bycatch species, such as the overfished red snapper stock. The intent of the moratorium is to cap the fishery at its recent level of participants and reduce the possibility of future entry into the fishery should the currently poor economic situation change. Capping participation in the fishery reduces the potential for future increases in red snapper bycatch and improves the probability of rebuilding this overfished stock.

71 Fed. Reg. at 56,040.

Thus, the Agency determined that the most effective means of regulating the Gulf shrimp fishery was to limit the number of participants. This objective is undoubtedly frustrated by participation in the fishery without the requisite permit, particularly by those who were ineligible for the permit based upon the criteria set forth in the regulations. Nothing in the record supports a finding that Respondents met these criteria. In addition, as explained by the preamble to the final rule, such unauthorized operations undermine the Agency's efforts to regulate not only the Gulf shrimp fishery but also other species impacted by the harvesting of shrimp. According to this guidance, while the target of Respondents' unauthorized operations is not overfished or undergoing overfishing, such operations directly impact the overfished red snapper stock by increasing the potential for red snapper bycatch and reducing the probability of that stock's recovery. Finally, the Agency persuasively argues that fishing for shrimp in the Gulf EEZ without the requisite permit unfairly disadvantages those fishermen striving to abide by the regulations restricting participation in the fishery. The undersigned finds that the foregoing

considerations, when viewed together, demonstrate the serious nature of the charged violation and weigh in favor of a sizeable penalty.

b. Respondents' degree of culpability, any history of prior violations, and ability to pay

The next set of factors that the Magnuson-Stevens Act requires the undersigned to consider in determining the appropriate amount of civil penalty to assess is Respondents' degree of culpability, history of prior offenses, and ability to pay a civil penalty. 16 U.S.C. § 1858(a).

As previously discussed, the Agency contends that Respondent Byrd's conduct was reckless. A's Br. at 6. To support its characterization of Respondent Byrd's conduct, the Agency cites the testimony of Earl Anthony O'Gradey as evidence that Respondent Byrd had been notified only five days prior to the incident at issue in this proceeding that he was conducting the fishing operations of the F/V Sea Ghost close to the Three Mile Line and that fishing for shrimp south of the Three Mile Line boundary required a federal permit. A's Br. at 6 (citing Tr. at 73-74).

Upon consideration, the undersigned agrees with the Agency that the evidentiary record supports a finding that Respondent Byrd acted recklessly in fishing for shrimp in the Gulf EEZ on January 19, 2010, without the requisite permit. The testimony of Officer O'Gradey and the Patrol Report prepared by Officer Freeman reflect Respondent Byrd's practice of conducting the operations of the F/V Sea Ghost in close proximity to the Three Mile Line. In particular, Officer O'Gradey testified that based upon the documentation available to him, he boarded the F/V Sea Ghost on at least two occasions in his five years of employment with the Mississippi Department of Marine Resources. Tr. at 72-73, 77-78. Admitted into evidence as Respondents Exhibit 2, this documentation reflects that Officer O'Gradey boarded the F/V Sea Ghost first on December 22, 2009, and again on January 14, 2010. RX 2; Tr. at 83. Officer O'Gradey explained that the F/V Sea Ghost was located in state waters and found to be compliant with all applicable requirements on both of these occasions. Tr. at 73, 76-77, 83-84. He testified, however, that the boarding of January 14 occurred extremely close to the Three Mile Line. Tr. at 73. In turn, the Patrol Report prepared by Officer Freeman notes that the GPS unit onboard the F/V Sea Ghost "showed repeating track lines running east and west along the Three Mile Line" just five days later on January 19, 2010. AX 10.

Undoubtedly, Respondent Byrd was entitled to conduct the fishing operations of the F/V Sea Ghost as close to the Three Mile Line as he wished as long as the vessel remained north of the line in state waters. *See* Tr. 84-85. However, by operating the F/V Sea Ghost in this manner, Respondent Byrd created a foreseeable risk of crossing the Three Mile Line during the course of operations in violation of the applicable law. He knew or should have known of this risk. Respondents acknowledged that as the operator of the F/V Sea Ghost, Respondent Byrd bore the responsibility of navigating the vessel. Stip. ¶ 10. Officer O'Gradey testified that he informed Respondent Byrd of the vessel's proximity to the Three Mile Line during the boarding of January 14: "[I] explained to him that, you know, to be aware of, you know, that he had to have a permit to cross the federal line, which I've spoken to him before, never had a problem out of him, just warn him about the federal line." Tr. at 73. While Respondent Byrd claimed that

Officer O'Gradey "never warned me of nothing," Tr. at 153, the testimony of Officer O'Gradey is deemed to be credible. Finally, Respondents acknowledged that they "were aware that a federal permit was required to fish for shrimp in the Gulf EEZ" on January 19, 2010. Stip. ¶ 12. Nevertheless, a number of considerations suggest that Respondent Byrd consciously disregarded the risk of violating this requirement by failing to take reasonable precautions against crossing the Three Mile Line into the Gulf EEZ.

For example, as noted above, the record contains ample evidence that Respondent Byrd was not proficient at operating the GPS unit onboard the F/V Sea Ghost or interpreting the information displayed by the device, despite his years of experience in the commercial fishing industry. Respondent Byrd testified that he has been the operator of a shrimp trawler intermittently for 25 to 30 years, and he affirmed that he is familiar with the use of GPS for navigational purposes. Tr. at 148, 158, 161. Officer O'Gradey testified, however, that Respondent Byrd expressed uncertainty about the operation of the GPS unit onboard the F/V Sea Ghost during both of the boardings he performed. Tr. at 74-75, 84. He further testified that he explained to Respondent Byrd during the boarding of January 14 how to adjust the display of the GPS unit to show the Three Mile Line, which would enable him to navigate properly while operating the F/V Sea Ghost in the vicinity of the line. Tr. at 73-75. When questioned by Respondents' counsel, Officer O'Gradey admitted that he did not document the professed uncertainty of Respondent Byrd during the boardings he performed. Tr. at 84, 86-87. Officer Freeman confirmed, however, that Respondent Byrd had difficulty interpreting the information displayed by the GPS unit during the boarding of January 19. Tr. at 13; AX 10. Specifically, Officer Freeman testified that Respondent Byrd erroneously identified a "contour line," or a line depicting water depth, as the Three Mile Line on the device. Tr. at 13. Respondents did not dispute this evidence.

According to Officer O'Gradey, Respondent Byrd is "probably not the only captain" to request his assistance with a vessel's GPS unit during his five years of employment. Tr. at 86. While such uncertainty may not be uncommon, it is alarming given Respondent Byrd's practice of conducting the operations of the F/V Sea Ghost so close to a limited access fishery for which he lacked a permit. Even if Respondent Byrd had demonstrated a higher level of competency in operating the GPS unit and interpreting the information displayed by the device, he still claimed that the means of navigation available on the F/V Sea Ghost were deficient in some manner, as previously discussed. Thus, according to Respondents, Respondent Byrd lacked any reliable means of navigating the vessel and ensuring that it remained north of the Three Mile Line. Under such circumstances, a reasonable precaution would have been to obtain another means of navigation or refrain from conducting any fishing operations in that particular area of the Gulf.

Finally, the record reflects that Respondent Byrd did not possess a reliable paper chart to use for navigational purposes. According to Officer Freeman's account of the boarding, Respondent Byrd produced a commercially-produced laminated chart in response to the officers' request to view a paper nautical chart for purposes of verifying the position of the F/V Sea Ghost. AX 10; Tr. at 13-14, 44. The chart proffered by Respondents at hearing, which Officer Freeman testified was similar to the one provided during the boarding, depicted the Three Mile Line with a gap at the location where the boarding occurred. Tr. at 38, 41; RX 1. Respondents argue that "it would be impossible for anybody to tell if they were in state or federal waters"

based upon such a depiction. Rs' Br. at physical page 5-6. In addition, the chart contains the following disclaimer: "This Chart provides approximate locations for sport fishing and is not intended for navigation. Even though this Chart is an exact reproduction of N.O.A.A. Chart #11373, 43rd Edition, please consult a current navigational chart for that purpose . . . ." RX 1. While Respondent Byrd denied producing any such chart during the boarding, Rs' Br. at physical page 5, nothing in the record indicates that any other chart was produced by Respondent Byrd in response to the officers' request. Officer Ewing testified that such a failure is at odds with common practice: "From past experience and checking shrimp boats that's fishing federal waters, I cannot remember one that did not have a NOAA map on it. They all had it when -- when asked to produce one." Tr. at 71.

As noted above, Respondents acknowledge that Respondent Byrd bore the responsibility as the operator of the F/V Sea Ghost of navigating the vessel and properly interpreting the information displayed on the vessel's GPS unit. Stip. ¶ 10. Based upon the foregoing discussion, the undersigned finds that Respondent Byrd's breach of these duties amounted to recklessness, as argued by the Agency, which warrants a sizeable penalty.

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

Conversely, the undersigned finds that an adjustment of the penalty based upon the absence of any history of prior violations is appropriate. A number of administrative tribunals have found that such a consideration can serve as a mitigating factor and support the assessment of a lower civil penalty. *See, e.g.*, *Straub & 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.").

This Tribunal similarly finds that the absence of any prior or subsequent offenses can serve as a mitigating factor and support the assessment of a lower penalty under certain circumstances, such as those of the present proceeding. In particular, Respondent Byrd testified that he has been the operator of a shrimp trawler intermittently for 25 to 30 years. Tr. at 148, 158. Respondent Gregory similarly testified that he has been participating in the shrimping industry intermittently for 25 years. Tr. at 166. The record does not contain any evidence that either Respondent Byrd or Respondent Gregory had been cited for any violations during their long careers in the maritime industry until the violation charged in this proceeding. To the contrary, Officer O'Gradey explained that he had boarded the F/V Sea Ghost on at least two earlier occasions and found that the vessel was compliant with all applicable requirements. Tr. at 73, 76-77, 83-84. He further explained that he "never had a problem out of [Respondent Byrd]."

Tr. at 73. Under these circumstances, the undersigned finds that a reduction in the penalty is warranted.[10]

c. Other matters as justice may require

Finally, the Magnuson-Stevens Act directs the undersigned to consider "such other matters as justice may require." 16 U.S.C. § 1858(a). The Agency identified one such factor in its Brief, arguing in favor of a penalty severe enough to deter not only Respondents but also the commercial fishing industry as a whole from failing to comply with the type of regulations at issue in this proceeding. A's Br. at 6. As previously discussed, the record supports a finding that neither Respondent Byrd nor Respondent Gregory had been cited for any violations during their long careers in the maritime industry until the violation charged in this proceeding. Accordingly, a less severe penalty may be effective as a specific deterrent for Respondents. The Agency's argument for a penalty large enough to serve as a general deterrent is persuasive, however. The moratorium on the issuance of new permits for the Gulf shrimp fishery is in effect through October 26, 2016, 50 C.F.R. § 622.4(s), and the assessment of a substantial penalty against Respondents would show any fishermen who are considering participating in the fishery without the requisite permit that the penalty for doing so greatly exceeds any benefit to be gained from the violative conduct, such that the fishermen do not account for the sanction as merely the cost of doing business.

Another relevant factor in determining the appropriate amount of civil penalty to assess is the size or profitability of a violator's operations. When a violator runs a relatively small scale commercial fishing operation, "it only stands to reason that . . . any sanction assessed would impact such individuals more significantly than if imposed against a larger commercial enterprise." *Churchman & Paasch*, NOAA Docket No. SW0703629, 2011 WL 7030841, at *39 (ALJ, Feb. 18, 2011). The record lacks any compelling evidence of the size or profitability of Respondents' operations, however, other than the undisputed fact that Respondent Gregory owned at least two shrimp trawlers at the time of this proceeding. Stip. ¶¶ 4, 18. The record is similarly devoid of evidence of any economic benefit that Respondents gained from the charged violation, which is another factor relevant to this analysis. Thus, these factors do not warrant any further consideration.

3) Conclusion

After weighing the factors set forth at 16 U.S.C. § 1858(a) and the particular circumstances surrounding the violation committed by Respondents, the undersigned finds that a civil penalty in the amount of $12,000 for the violation is appropriate.

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[10] Subsequent to the violation charged in this proceeding, Respondents were charged with two violations of the Endangered Species Act, described in the following section of this Initial Decision. While the undersigned finds that subsequent violations may serve as an aggravating factor in the assessment of a civil penalty, consideration of it here is deemed to be inappropriate because those alleged violations have not yet been subject to final administrative adjudication.

IV. DOCKET NUMBER 1002966: CHARGED VIOLATION OF THE ENDANGERED SPECIES ACT

A. STATUTORY AND REGULATORY BACKGROUND

1) Liability

In 1973, Congress enacted the ESA, 16 U.S.C. §§ 1531-1544, as amended, "[t]o provide for the conservation of endangered and threatened species of fish, wildlife, and plants" that are "of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." Pub. L. No. 93-205, pmbl., § 2, 87 Stat. 884, 884 (1973). Section 4 of the ESA 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 ESA 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 waters of the United States, including the Loggerhead, Kemp's ridley, Leatherback, and Green, are listed as either threatened or endangered under the ESA. AX 5; Stip. ¶ 28; *see also* 50 C.F.R. §§ 223.102(b), 224.101(c). While the ESA and its implementing regulations prohibit the "taking" of these turtles,[11] as that term is defined by

[11] The regulations promulgated at 50 C.F.R. § 223.205 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

Section 3 of the ESA, 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." 57 Fed. Reg. 57,348, 57,349 (Dec. 4, 1992).

The regulations codified at 50 C.F.R. § 223.205 provide for such measures. Specifically, these regulations prohibit certain activities relating to threatened species of sea turtle, such as the following:

> (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 the standards with which shrimp trawlers are required to comply in order to be exempt from the prohibitions against the incidental taking of threatened species of sea turtle. Of particular relevance in the present proceeding, section 223.206(d)(2)(i) requires certain shrimp 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 "Gulf Area" is defined as "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.

The regulations at section 223.207 set forth the specific design criteria for "Approved TEDs." 50 C.F.R. § 223.207. In particular, the regulations describe "Hard TEDs" as follows:

> (a) Hard TEDs. Hard TEDs are TEDs with rigid deflector grids and are categorized as "hooped hard TEDs" and "single-grid hard TEDs" such as the

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turtle . . . ." 50 C.F.R. § 223.205(a). Thus, the "taking" of both threatened and endangered species of sea turtle is prohibited.

Matagorda and Georgia TED (Figures 3 & 4 to this part). Hard TEDs complying with the following generic design criteria are approved TEDs:

* * *

(3) Angle of deflector bars.

(i) The angle of the deflector bars must be between 30° and 55° from the normal, horizontal flow through the interior of the trawl, except as provided in paragraph (a)(3)(ii) of this section.

* * *

(7) Size of escape opening

* * *

(ii) Single-grid hard TEDs. On a single-grid hard TED, the horizontal cut(s) for the escape opening may not be narrower than the outside width of the TED frame minus 4 inches (10.2 cm) on both sides of the grid, when measured as a straight line width. Fore-and-aft cuts to remove a rectangular piece of webbing must be made from the ends of the horizontal cuts along a single row of meshes along each side. The overall size of the escape opening must match one of the following specifications:

* * *

(B) The 71-inch offshore opening: The two forward cuts of the escape opening must not be less than 26 inches (66 cm) long from the points of the cut immediately forward of the TED frame. The resultant length of the leading edge of the escape opening cut must be no less than 71 inches (181 cm) with a resultant circumference of the opening being 142 inches (361 cm) (Figure 12 to this part). . . . Either this opening or the one described in paragraph (a)(7)(ii)(C) must be used in all offshore waters . . . .

50 C.F.R. § 223.207(a)(3)(i), (a)(7)(ii)(B). 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.

Finally, the regulations found at 50 C.F.R. § 224.104(a) provide that "[s]hrimp fishermen in the southeastern United States and the Gulf of Mexico who comply with rules for threatened

sea turtles specified in § 223.206 of this chapter will not be subject to civil penalties under the Act for incidental captures of endangered sea turtles by shrimp trawl gear."

2) Civil Penalty

"Any person who knowingly violates" the ESA and its 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 ESA does not specify any factors to consider in determining the appropriate amount of civil penalty to assess. However, as noted above, 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). Also as previously discussed, 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).

B. FACTUAL BACKGROUND

At all times relevant to the charges in the amended NOVA, Respondent Gregory was the owner and Respondent Byrd was the operator of the F/V Holly G, a registered and flagged vessel of the United States, Official Number 580171. Stip. ¶¶ 17-19; AX 3, 4. At all times relevant to the charges in the amended NOVA, Respondent Gregory held a Federal Fisheries Permit for Gulf of Mexico Shrimp (Moratorium) for the F/V Holly G. AX 4.

On May 6, 2011, the F/V Holly G was engaged in fishing operations targeting shrimp in an area south of Mississippi that falls within the regulatory definition of the term "offshore" waters. AX 11; Stip. ¶ 24. At approximately 2:00 p.m. that day, law enforcement officers from OLE boarded the F/V Holly G in the course of a patrol they were conducting for the purpose of inspecting TEDs. AX 11; Stip. ¶ 25. At the time of their boarding, the F/V Holly G was anchored in the Gulf Area with each of its four nets rigged for fishing. Stip. ¶¶ 24, 25.

Respondent Byrd explained at the hearing that his crew was asleep at the time of the boarding because they had conducted their trawling operations throughout the night and he had told the crew in the morning to "anchor up, and they could get some sleep" before resuming those operations that evening.[12] Tr. at 155. He further explained that he was "already mad" at the outset of the boarding because the law enforcement officers entered the wheelhouse, where

[12] The Investigation Report of the boarding notes that "[i]t is not unusual for shrimpers to shrimp at night and sleep during the day." AX 11.

Respondent Byrd was positioned, without knocking first on the wheelhouse door. Tr. at 154-55; *see also* AX 11.

Nevertheless, Respondent Byrd proceeded to assist the law enforcement officers in moving the vessel's nets into the proper position for the officers to perform their inspection of the attached TEDs. AX 11; Tr. 130, 155. Following the officers' inspection, Robert Dale Stevens, a Fisheries Methods and Equipment Specialist for the Agency who had accompanied the officers on their patrol, boarded the F/V Holly G. AX 11; Tr. at 93, 113, 155-56. At the hearing, Mr. Stevens testified that he boarded the vessel because the officers had identified one of the TEDs onboard as having been manufactured by "a local net maker . . . that we had had issues with in the past."[13] Tr. at 114. Upon boarding the vessel, Mr. Stevens and one of the law enforcement officers inspected each of the TEDs again. AX 11; Tr. at 114.

The law enforcement officers and Mr. Stevens found that two of the four TEDs onboard the F/V Holly G did not comply with applicable regulations. Stip. ¶ 27; AX 11; Tr. at 105-12, 114. Specifically, they found that the TED attached to one of the nets on the port side of the vessel ("TED #2") had an undersized escape opening and that the TED attached to one of the nets on the starboard side of the vessel ("TED #3") had a grid angle of 60 degrees, which exceeded the regulatory limit of 55 degrees. AX 11; Tr. at 107-12. After issuing an Enforcement Action Report to Respondent Byrd for these violations, the law enforcement officers and Mr. Stevens departed. AX 11.

C. LIABILITY

In the NOVA, as amended by the Notice of Amendment dated April 9, 2012, the Agency alleges in two counts that on or about May 6, 2011, Respondent Gregory and Respondent Byrd 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. § 223.205(b)(1). As discussed above, the regulations at 50 C.F.R. § 223.205(b)(1) prohibit any person subject to the jurisdiction of the United States from owning, operating, or being on board a vessel unless the vessel complies with all applicable provisions of 50 C.F.R. § 223.206(d). In turn, the regulations at 50 C.F.R. § 223.206(d)(2)(i) require any shrimp trawler that is in the Atlantic Area or Gulf Area to have an approved TED installed in each net onboard the vessel that is rigged for fishing.

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 May 6, 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;

[13] Mr. Stevens later identified the net manufacturer as a "Mr. Wesley." Tr. at 116. During their testimony, Respondents confirmed that they obtained the TEDs onboard the F/V Holly G from this individual. Tr. at 156, 163, 169-71, 174.

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 facts stipulated to be true by the parties prior to the hearing. Stip. ¶¶ 15-19, 24-27. In addition, Respondents readily admitted to the violative conduct at the hearing and in their post-hearing briefs. Tr. at 7, 94, 145, 157-58; Rs' Brief at physical page 3, 7; Rs' Reply at physical page 1.[14] Accordingly, the undersigned finds that a preponderance of the evidence establishes that on or about May 6, 2011, Respondent David W. Gregory and Respondent Michael Byrd 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). Specifically, the F/V Holly G failed to have an approved TED installed in two of the nets rigged for fishing on or about May 6, 2011, which constitutes violations 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).

D. CIVIL PENALTY

1) Knowing Violation of the ESA

As noted above, "[a]ny person who knowingly violates" the ESA and its 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, this Tribunal must consider whether Respondents "knowingly" violated the ESA and its implementing regulations within the meaning of that term.

The term "knowingly" is not defined by the statute. *See* 16 U.S.C. § 1532. Various tribunals have construed it, however, to require only "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)). Thus, "only a showing that the acts involved were voluntary and intentional need be made. There being no specific requirement for a showing of a criminal type 'mens rea,' awareness of the particular provision of the law or regulation allegedly violated[,] or other concept of actual knowledge of wrongdoing." *Newell*, 2 O.R.W., 111, 125 (ALJ, Dec. 28, 1979), *aff'd*, 2 O.R.W. 368 (NOAA App. 1981).

[14] Respondents' Reply is not paginated. Therefore, any reference to this document will cite the physical page number.

The testimony of Respondent Byrd and Respondent Gregory reflect that they possessed the requisite knowledge of the commission of the acts constituting the violations charged in this proceeding. Specifically, Respondent Gregory testified that he engaged the services of a local net manufacturer to construct and install TEDs on the nets of the F/V Holly G. Tr. at 168-71, 174. Respondent Byrd, in turn, testified that he was present at the time Respondent Gregory engaged the net manufacturer's services, and he concurred that the net manufacturer constructed and installed the TEDs in question. Tr. at 156, 163. Further, both Respondent Gregory and Respondent Byrd acknowledged that the TEDs had been used in the fishing operations of the F/V Holly G.[15] Tr. at 157, 168, 175. In addition, Respondent Byrd's description at the hearing of the events of May 6, 2011, demonstrates that he exercised control over the activities performed on the vessel that day. *See* Tr. at 155. Thus, the undersigned may reasonably assume that the nets on which the noncompliant TEDs were installed were rigged for fishing on May 6, 2011, with the knowledge of Respondents.

In accordance with foregoing discussion, the undersigned finds that Respondents knew that the TEDs in question were installed on the nets of the F/V Holly G and that these nets were rigged for fishing on the date of the violation. The commission of these acts resulted in the charged violations. Therefore, Respondents "knowingly" violated the ESA and its implementing regulations within the meaning of that term, and a civil penalty may be assessed against them under Section 11 of the Act, 16 U.S.C. § 1540(a)(1).

The undersigned now turns to the task of determining the appropriate amount of civil penalty to assess for the violations found in this proceeding. As previously discussed, the Rules of Practice identify "[f]actors to be taken into account in assessing a civil penalty, depending upon the statute in question." 15 C.F.R. § 904.108(a). While the ESA does not specify any such factors, the undersigned does not see any reason to depart from the considerations described by the Rules of Practice, which consist of the "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). The parties' arguments with respect to these factors are outlined below.

2) Arguments of the Parties

a. The Agency's arguments

The NOVA seeks to assess a civil administrative penalty in the amount of $1,250 jointly and severally against Respondents for each of the charged violations, for an aggregate amount of $2,500. 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 . . . ." A's Brief at 8.

[15] Specifically, Respondent Gregory explained at the hearing that the TEDs in question had been used since at least January of 2011, when the F/V Holly G began trawling with four nets instead of two and Respondents brought the nets to the local net manufacturer for the installation of the TEDs. Tr. at 168, 174-75.

In describing its consideration of the Penalty Policy, the Agency cites the testimony of Mr. Stevens as support for the view that the noncompliant TEDs used by Respondents likely killed some endangered and threatened sea turtles. A's Br. at 9 (citing Tr. at 108, 112). The Agency points out that the Penalty Policy characterizes fishing with TEDs that contain discrepancies "likely to kill some turtles encountered" as a level II violation. A's Br. at 9 (citing Penalty Policy at 50). The Agency also notes that "TEDs are required because it was found that shrimp trawling killed more turtles than all other human activity combined." A's Br. at 9 (citing AX 5).

Turning to Respondents' culpability at the time of the violation, the Agency contends 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." A's Br. at 9.

Referring again to the Penalty Policy, the Agency points out that the alleged gravity and culpability levels correspond to a civil penalty range of $1,000 to $1,500 per violation. A's Br. at 9 (citing Penalty Policy at 28). In the present proceeding, the NOVA seeks to assess a penalty in the amount of $1,250 for each violation, which is the midpoint of the penalty range advocated by the Agency in its Brief. Finally, the Agency contends:

> [P]enalties must provide economic disincentives sufficient to force vessel owners and operators to pay the kind of close attention to their TEDs that is warranted for such important conservation devices. It is the owner's and the operator's joint responsibility to ensure their vessel's TEDs are in full compliance and penalties must adequately reflect the reality that non-compliance means an increased number of endangered and threatened sea turtles killed.

A's Br. at 9.

b. Respondents' arguments

Respondents contend that any penalty assessed for the charged violations "should be the minimum fine" and "suspended." Rs' Br. at physical page 4, 7-8. Respondents point to a number of mitigating circumstances, summarized below, as support for their position.[16]

First, Respondents claim that the regulations governing the construction and use of TEDs are so "precise and exacting" that they are "well beyond the understanding of a cabinet maker and a homebuilder with a sixth-grade education[,] as were David Gregory and Michael Byrd

[16] In addition to those arguments, Respondents also claim that "[t]here was no testimony or evidence from the Government to indicate the improper TED's were ever used." Rs' Reply at physical page 1. As previously discussed, both Respondent Gregory and Respondent Byrd acknowledged that the TEDs had been used in the fishing operations of the F/V Holly G. Tr. at 157, 168, 175. Accordingly, Respondents' claim does not merit any further discussion and is hereby rejected.

respectively." Rs' Br. at physical page 2, 7. Consequently, Respondents contend, they relied upon the experience and expertise of a local net manufacturer to construct and install TEDs in their nets that complied with applicable regulations. *Id.* at physical page 2-3, 7. Respondents claim, however, that the net manufacturer erroneously installed a "bay TED," which complied with the regulations governing the use of TEDs in inshore waters[17] rather than the offshore waters in which Respondents conducted their fishing operations. *Id.* at physical page 3. This error, according to Respondents, accounted for the undersized escape opening found on TED #2. *Id.* Respondents further argue that the excessive grid angle found on TED #3 was remedied simply by cutting a rope sewn into the TED by the net manufacturer. *Id.*

As another mitigating factor, Respondents point out that Respondent Gregory immediately contacted Mr. Stevens upon learning of the violations and asked that he explain the deficiencies with the TEDs in an effort to remedy them. Rs' Br. at physical page 3.

Respondents also contend that they lacked any intent to violate the regulations governing the use of TEDs. Rs' Br. at physical page 3-4. According to Respondents, "[h]ad they intended to violate the law, all four of their shrimp nets would have been noncompliant with the regulations espoused by the government." *Id.* at physical page 7.

Finally, Respondents argue that "neither before this incident, nor since this incident[,] has either Michael Byrd or David Gregory been cited for improper TEDS." Rs' Br. at physical page 4.

2) Discussion

a. Nature, circumstances, extent, and gravity of the charged violation

The first set of factors to consider in determining the appropriate amount of civil penalty to assess is "the nature, circumstances, extent, and gravity of the alleged violation." 15 C.F.R. § 904.108(a). At the hearing, the Agency presented ample evidence pertaining to these factors. In particular, the Agency proffered an undated document entitled "The Turtle Excluder Device (T.E.D.)," which was admitted into evidence as Agency Exhibit 5 and explains that all species of sea turtles that occur in United States waters are listed as either threatened or endangered under the ESA. AX 5; *see also* 50 C.F.R. §§ 223.102(b), 224.101(c). The document further explains that a 1990 study conducted by the National Research Council found that the incidental capture of sea turtles in shrimp trawls was a greater source of turtle mortality than all other human activity combined, resulting in an estimated 44,000 deaths per year in United States waters. AX 5. Finally, the document highlights the Kemp's ridley and Green species of sea turtles, which are specifically found in the Gulf of Mexico and have suffered drastic declines in population due to the incidental capture of turtles in fishing gear such as shrimp trawls. *Id.* The parties stipulated to the contents of this document prior to the hearing. Stip. ¶ 28.

[17] The term "inshore" is defined by the regulations as "marine and tidal waters landward 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.

The Agency also presented the testimony of Mr. Stevens as evidence of the dangers posed to sea turtles by noncompliant TEDs such as those found on the F/V Holly G. Qualified as an expert as to TEDs, Mr. Stevens testified that he has been responsible for the research and development of TEDs for most of his 25 years of employment at the Agency and that he has conducted training exercises for fishermen on the use of TEDs for the last 10 years. Tr. at 93-94. Mr. Stevens further testified that he served as a crewmember on a shrimp trawler, and then owned and operated his own vessel, prior to his employment at the Agency. Tr. at 178.

When questioned about the manner in which TEDs operate, Mr. Stevens explained the function of the metal grate (variously referred to as the "grid" or "frame") within the TED and the impact of a grid angle that is steeper than the regulatory limit, such as the grid angle found on TED #3 on the F/V Holy G:

> [The grid] forms a barrier in the [trawl]. Large objects such as sea turtles are deflected out of the net where shrimp and smaller objects pass through the grid bars and into the bag.
>
> * * *
>
> [G]rid angles are very important . . . . If these grid angles were too steep, . . . a turtle would become entrapped on the face of the grid and would not be -- it would not be able to escape. The water flow, the water pressure coming through the [trawl] would keep him pinned against the grid . . . .

Tr. at 96. Mr. Stevens explained that the Agency set the regulatory limit for grid angles at 55 degrees after performing extensive testing on this aspect of the design of TEDs:

> We've tested them extensively for years, tested different TED angles, different degrees of angles. We've come up with -- or through the -- the testing, and again it's been very extensive, 55 degrees would be the maximum angle that a TED could be in the [trawl] and still exclude sea turtles from the [trawl].
>
> * * *
>
> Once this -- this angle exceeds 55 degrees, that's where turtles start having a problem, especially small turtles. They're just not strong enough to -- to swim off the face of the grid.

Tr. at 96-97. Mr. Stevens later testified, however, that the grid angle of 60 degrees found on TED #3 would "impact all size turtles." Tr. at 140. He also opined that it would "very likely . . . capture turtles," resulting in their drowning. Tr. at 108.

Turning to the violation found on TED #2, Mr. Stevens explained that the dimensions of the escape opening were undersized in three respects. Tr. at 108-12; *see also* AX 11; Agency's PPIP at 1. When questioned about the impact of these deficiencies, Mr. Stevens testified that it "would be somewhat dependent on the size of the turtle encountered, but on larger turtles, it

would . . . impede a turtle escaping the device." Tr. at 112. Significantly, he noted that the sea turtles present in the offshore waters where the F/V Holly G conducted its fishing operations are generally larger than those found in inshore waters, which the regulations account for by requiring the escape openings of "offshore TEDs" to be larger than those required for "bay TEDs." Tr. at 138-39, 140-41. Finally, the following testimony was elicited from Mr. Stevens:

> Q: In -- terms of breeding population, which turtles breed, the larger ones or the smaller ones?
>
> A: The large turtles.
>
> * * *
>
> Q: What happens if you kill the breeders?
>
> A: That's -- I guess that's why the turtles are on the endangered species list.

Tr. at 112.

Relying upon the foregoing evidence, the Agency characterized the charged violations as level II violations, or discrepancies "likely to kill some turtles encountered." A's Br. at 9 (citing Penalty Policy at 50). Respondents did not dispute this characterization or the evidence presented by the Agency, elicit any conflicting testimony from Mr. Stevens, or produce any evidence in rebuttal. For example, when Respondents' counsel questioned Mr. Stevens about the gravity of the violations based upon the number of discrepancies found on each TED, Mr. Stevens acknowledged that TED #2 contained a higher number of discrepancies than TED #3. Tr. at 115-16. He maintained, however, that both sets of violations were "significant," testifying that Respondents "had three violations on net two, but really, net three, I mean, I guess when you take the totality of the circumstances with each net, that's where it becomes significant on . . . both net two and three."[18] Tr. at 115.

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[18] The undersigned later pressed Mr. Stevens further on this subject:

> Q: You had indicated that for one of the nets there were three violations which were more in terms of number of violations –
>
> A: Correct.
>
> Q: -- but you seem to suggest that for the other net, which had the grid angle at 60 [degrees] that that -- while there was only one violation regarding that net, that that was as significant or more significant?
>
> A: I think it would -- there again, depending on the -- the size turtle that you may encounter, but I guess for the sake of argument, we have to -- to go with the larger turtles in offshore waters. Probably the more significant issue to me would be the steep TED angle, because I know that's going to capture – that's going to impact all size turtles.

The undersigned finds that the Agency's characterization of the gravity of the charged violations is well-supported by the record. Given his considerable experience with this subject matter, Mr. Stevens was particularly compelling in his testimony that both sets of violations found on the F/V Holly G were, at a minimum, "likely to kill some turtles encountered." The testimony of Respondent Gregory reflects that the noncompliant TEDs had been used on the F/V Holly G for approximately four months prior to the boarding, Tr. at 175, which is not an insignificant amount of time. In addition, the documentary evidence proffered by the Agency reflects that species of sea turtles listed as either endangered or threatened under the ESA occur in the Gulf of Mexico, where the F/V Holly G conducted its operations on the date of the charged violations, and that incidental capture by shrimp trawls poses a threat to their recovery. These factors, coupled with the likelihood that the violations would not have been detected without the scrutiny of the law enforcement officers and Mr. Stevens, sufficiently demonstrate the moderate severity of the charged violations.

b. Respondents' degree of culpability, any history of prior violations, and ability to pay

The next set of factors to consider in determining the appropriate amount of civil penalty to assess is "the respondent's degree of culpability, any history of prior violations, and ability to pay." 15 C.F.R. § 904.108(a). As previously discussed, the Agency contends that Respondents were at least negligent in failing to comply with the applicable regulations. A's Br. at 9. Respondents, in turn, claim that the regulations governing the construction and use of TEDs are so "precise and exacting" that they are "well beyond [Respondents'] understanding." Rs' Br. at physical page 2, 7. Consequently, Respondents contend, they relied upon the experience and expertise of a local net manufacturer to construct and install TEDs in their nets that complied with applicable regulations. *Id.* at physical page 2-3, 7. Respondents also contend that the absence of violations on two of the TEDs onboard the F/V Holly G demonstrates that they lacked any intent to violate the applicable regulations. *Id.* at physical page 3-4, 7.

Upon consideration, the undersigned agrees with the Agency's characterization of Respondents' degree of culpability at the time the violations occurred. The obligation of the regulated community to be aware of and comply with applicable laws and regulations is well-

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> Where TED number 2, those openings, if you're talking about a turtle that's dinner plate size, . . . that opening may not impact that turtle, but it definitely would a larger turtle that would be more likely to be encountered in offshore waters.

Tr. at 140-41. This exchange is somewhat confusing. While Mr. Stevens testified that he "probably" considered the excessively steep grid angle found on TED #3 to be more significant of an issue than the undersized escape opening found on TED #2 because the undersized escape opening would impact only larger turtles, he also acknowledged that larger turtles tend to occur in the offshore waters where the F/V Holly G conducted its fishing operations. Thus, his testimony seems to indicate that the undersized escape opening found on TED #2 was just as likely to impact the turtles it encountered as the grid angle found on TED #3, given the circumstances underlying the violations.

established. *See, e.g.*, *Alba*, 2 O.R.W. 670, 672 (NOAA App. 1982) ("[A] participant in a regulated industry . . . has a responsibility to familiarize himself with the regulations which apply to him."); *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."); *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."); *Peterson & Weber*, 6 O.R.W. 486, 490 (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."). Thus, as participants in the commercial fishing industry, Respondents bore the responsibility of understanding and complying with the regulations governing the fishing gear required for their operations, including TEDs.

Respondents clearly breached this duty. At the hearing, Respondent Gregory readily admitted to his uncertainty concerning the proper construction and use of TEDs at the time Respondents committed the violations, testifying, "[A]t the time I didn't know nothing about checking no angle, nothing about measuring it." Tr. at 171. Respondent Byrd similarly testified that he lacked the ability to check the grid angle of a TED. Tr. at 159. Mr. Stevens corroborated this testimony, explaining that Respondent Gregory appeared to be unsure of the proper construction of TEDs at the time they met to discuss the charged violations: "I was under the impression that he was just doubtful, that he -- he really wasn't sure of what the net was supposed to be or what the device, the TED was supposed to have been." Tr. at 122.

In their defense, Respondents claim that the regulations governing these devices were "well beyond [their] understanding" given the "precise and exacting" nature of the regulations and the backgrounds of Respondents. Rs' Br. at physical page 2, 7. In particular, Respondents presented testimonial evidence that Respondent Byrd lacks any schooling beyond the seventh grade, Tr. at 147-48, and that both he and Respondent Byrd are carpenters by trade, Tr. at 165-66.

Such an argument fails. The purpose of a regulatory program would be wholly undermined by a holding that a participant in the regulated industry was excused from the obligation to comply merely because the individual claimed to lack the wherewithal to understand the applicable regulations on account of their complexity, the individual's level of education, or the profession in which the individual was otherwise engaged. On the contrary, if the regulations governing the proper use of TEDs were "well beyond [their] understanding," as Respondents claim, they had an affirmative duty to seek guidance from the Agency. *See, e.g.*, *Brayton*, 4 O.R.W. 247 (NOAA App. 1985) ("If Respondent was confused about the [applicable regulations], he had an affirmative duty to clarify what the policy was, as a participant in a regulated industry."); *Fadden & Catherine F. Lobster Co., Inc.*, Docket No. NE000162FM/V, 2002 WL 414181 (ALJ, Feb. 21, 2002) ("[I]f the respondents were confused about the law or regulation, as commercial fishermen, they had an affirmative duty to seek clarification[,] for example, by writing, e-mailing, faxing or calling agency representatives."); *O'Neil*, NOAA Docket No. 315-189, 1995 WL 1311365, at *5 (ALJ, June 14, 1995) ("If a fisherman is confused about a law or regulation, that fisherman has an affirmative duty to seek clarification."). Mr.

Stevens explained at the hearing that the Agency provides such guidance in a variety of formats, including formal training courses and private sessions at the request of fishermen. Tr. at 125-26. He further testified that he distributes a document entitled "Guide for Checking 71-inch TED Opening" as a means of teaching fishermen how to properly measure the dimensions of their TEDs. Tr. at 100-01; AX 6.

Nothing in the record indicates that Respondents attempted to contact the Agency for guidance, or otherwise availed themselves of the Agency's efforts to disseminate information concerning the proper use of TEDs, before the date of the violations.[19] Nevertheless, Mr. Gregory claimed at the hearing that he had believed that the TEDs onboard the F/V Holly G complied with the applicable regulations: "I thought they was legal. I wasn't out there trying to kill turtles on purpose, you know. I was dragging what I thought was legal." Tr. at 175. The basis for this belief, Respondents contend, was that they relied upon the experience and expertise of a local net manufacturer to construct and install TEDs in their nets in accordance with the regulations. Rs' Br. at physical page 2-3, 7. As Respondent Gregory testified:

> I went to Mr. Wesley because I don't know nothing about no TED. . . . All I know is give him $400, and you know, you can get TEDs. And at the time I thought, you know, he's a net man. He's in his 70s, and you know, I figured hey, he knows how to build them.

Tr. at 170.

Respondent Gregory further testified that he specifically requested that "gulf TEDs" be installed on the nets of the F/V Holly G at the time he brought the nets to Mr. Wesley and engaged his services. Tr. at 168-70. Respondent Byrd concurred, testifying that he was present for the transaction and that Mr. Wesley understood that Respondents needed gulf TEDs:

> A: I was with him when we went over there and ordered them.
>
> Q: Did you tell him you wanted a bay TED?
>
> A: We wanted gulf TEDs, we got a gulf boat.
>
> Q: So he knew you needed gulf TEDs?
>
> A: Yeah.

[19] Respondents did not offer any evidence that either Respondent Gregory or Respondent Byrd took such action. Mr. Stevens testified that so many members of the commercial fishing industry come to his office seeking guidance on the proper construction and use of TEDs that Respondent Gregory "may have been in [his] office at some point requesting some of this information," but "[t]o the best of [his] knowledge," he had never met Respondent Gregory prior the events at issue in this proceeding. Tr. at 127-28.

Tr. at 163-64. Respondent Byrd surmised, however, that Mr. Wesley erroneously constructed and installed a bay TED on one of the nets.[20] Tr. at 157.

Upon observation at the hearing, the undersigned finds that Respondents appeared to be sincere in their testimony concerning their reliance upon the local net manufacturer to construct and install TEDs on the nets of the F/V Holly G in accordance with the applicable regulations because of their uncertainty about these devices. Notably, the Agency did not offer any evidence in rebuttal. On the contrary, the testimony of Mr. Stevens supports Respondents' claims. With respect to the excessive grid angle found on TED #3, Mr. Stevens explained that he has visited the net shop of Mr. Wesley "many, many times over the course of the last 20 years" and found that "he consistently was constructing illegal TEDs at too great . . . of an angle." Tr. at 133. In fact, Mr. Stevens testified, he visited Mr. Wesley a week prior to the hearing in this matter to inspect two TEDs that Mr. Wesley had constructed and found that both TEDs had grid angles of 60 degrees. Tr. at 133-34. This testimony suggests that Mr. Wesley constructed the excessive grid angle found on TED #3 on his own accord and not at the request of Respondents.

Additionally, Mr. Stevens explained that fishermen lack any incentive to employ excessive grid angles on their devices. When the undersigned questioned Mr. Stevens about the benefits a fisherman may gain from using a noncompliant TED, he testified that excessive grid angles are actually detrimental to a fisherman's operations "because the same water flow that comes through that net that pins a turtle to the face of the grid also pins debris," which may clog the grid and force the water flow through the escape opening of the TED, "carry[ing] the shrimp with it." Tr. at 133-36. He further testified that he believes fishermen now "see that it benefits them to have [the grid] on the proper angle to exclude the debris and allow the shrimp to pass through the device and into . . . the holding area of the net." Tr. at 136. Finally, Mr. Stevens acknowledged that fishermen typically rely upon net manufacturers to provide them with fishing gear that complies with applicable regulations. Tr. at 142.

Based upon the foregoing testimony, the undersigned finds that the weight of the evidence in the record shows that Respondents did not deliberately attempt to circumvent conservation measures for sea turtles by purchasing noncompliant TEDs to be used on the F/V Holly G. As argued by Respondents, the absence of violations on two of the TEDs onboard further supports a finding that they lacked any intent to violate the applicable regulations, a point also conceded by Mr. Stevens. Tr. at 142.

While the undersigned finds that Respondents' detrimental reliance upon the services of the net manufacturer mitigates the penalty to a very slight degree, it does not relieve Respondents of their obligation to inspect their fishing gear for themselves to ensure that it complies with applicable regulations. As held by one administrative tribunal:

> Reliance on another for understanding one's own compliance with [the laws and regulations applicable to fishing activities] is not a valid excuse. . . .To find otherwise would seriously undermine the entire regulatory regime that rests in

[20] Mr. Stevens confirmed at the hearing that TED #2 qualified as a bay TED based upon its dimensions. Tr. at 124, 143.

significant part on participants in the fishery having a nondelegable obligation to know and comply with the applicable law and regulations.

Churchman & Paasch, NOAA Docket No. SW0703629, 2011 WL 7030841, at *32-33 (ALJ, Feb. 18, 2011). Given that the regulations governing TEDs dictate the acceptable size and configuration of these devices, a reasonably prudent person could be expected to measure the devices prior to their use to verify that they conform to those regulatory requirements. Respondent Byrd acknowledged the need to take such action and his failure to do so at the hearing, testifying, "[I]t was my place. I should have checked those." Tr. at 158. Respondent Gregory similarly testified, "You would have to measure it [to determine whether it complied with the applicable regulations], and at the time, you know, it -- I mean, I thought Mr. Wesley, you know -- now I know that you've got to check behind people." Tr. at 175.

While Mr. Stevens confirmed the need to measure TEDs to ensure that they comply with applicable regulations, he also testified that an experienced fisherman should be able to determine whether a given TED is intended for use in inshore or offshore waters merely by looking at the size and configuration of the device's escape opening, which is the defining characteristic of the two types of TEDs. Tr. at 138-40, 178-79. Both Respondent Byrd and Respondent Gregory disputed this opinion, testifying that the only way to differentiate between an offshore and inshore TED is to measure the device. Tr. at 158-59, 164, 175. Neither Respondent appeared to exercise due care, however, in examining the nets in question prior to their use. Respondent Byrd testified, "You hang up four nets, and it's all in the water, and you -- it's hard to tell." Tr. at 159. Respondent Gregory similarly testified:

> A: You get them four TEDs and four nets on a trailer, and you take a double axle trailer, here to that door long, it will be just piled with nets.
>
> Q: You never took a look at them when they were installed on the vessel?
>
> A: No, huh-huh, that's -- the deckhands hook all that up. I got other businesses. I back up there, unload the nets, and you know, I -- I drop them off.
>
> Q: So you're just relying on your employees to -- to keep compliant with the law?
>
> A: That's right. Yes, sir.

Tr. at 175-76.

Based upon the foregoing discussion, the undersigned finds that Respondents' actions amount to inexcusable neglect. Despite their professed uncertainty concerning the regulations governing the construction and use of TEDs, Respondents failed to seek any guidance from the Agency before engaging in their fishing operations. Further, Respondents failed to independently verify the legality of the TEDs they obtained from the local net manufacturer by either measuring or visually examining the devices prior to their use. Had Respondents performed such an inspection, they might have discovered the deficiencies found by the law

enforcement officers and Mr. Stevens. This conduct undoubtedly falls below the level of care that a reasonably prudent person would exercise in similar circumstances.

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

The undersigned finds that an adjustment of the penalty proposed by the Agency based upon any history of prior violations also is inappropriate in this proceeding. Claiming that "neither before this incident, nor since this incident[,] has either Michael Byrd or David Gregory been cited for improper TEDS," Respondents argue that this consideration is a mitigating circumstance for purposes of determining the appropriate penalty to assess in this proceeding. Rs' Br. at physical page 4. The Agency did not address this consideration at hearing or in its briefs, and appears not to have considered it in calculating the amount of civil penalty proposed in the NOVA.

As previously discussed, a number of administrative tribunals have found that the absence of prior offenses can serve as a mitigating factor and support the assessment of a lower civil penalty, as argued by Respondents. *See, e.g.*, *Straub & 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."). The circumstances of the present proceeding do not appear to warrant such a reduction, however.

In particular, Respondent Byrd testified that he has been the operator of a shrimp trawler intermittently for 25 to 30 years. Tr. at 148, 158. Respondent Gregory similarly testified that he has been participating in the shrimping industry intermittently for 25 years. Tr. at 166. While the record does not contain any evidence that either Respondent Byrd or Respondent Gregory have been cited for noncompliant TEDs during their long careers other than the violations charged in this proceeding, Respondent Gregory acknowledged at the hearing that he did not participate in the shrimping industry for the 11 years preceding his purchase of the F/V Sea Ghost in March of 2009, at which time both he and Respondent Byrd returned to the industry because "the economy was getting bad, and we knowed we could fall back on shrimping."[21] Tr. at 165-66, 173. Further, Respondent Gregory testified that he had never been required to use TEDs in his fishing operations until his purchase of the F/V Sea Ghost. Tr. at 165-66, 173. An absence of prior violations of the regulations governing TEDs during the relatively short period

[21] Respondents Gregory and Byrd are first cousins. Tr. at 167. At the hearing, Respondent Gregory described their close relationship and explained that he "bought the [F/V Sea Ghost] for Mike to run." Tr. at 166-67.

of time between Respondent Gregory's purchase of the F/V Sea Ghost in March of 2009 and the violations found on the F/V Holly G on May 6, 2011, is not especially noteworthy, and is even less so given that Respondents could have been cited for the noncompliant TEDs beginning in at least January of 2011 when, according to Respondent Gregory, the F/V Holly G began using the TEDs in its fishing operations. Under these circumstances, the undersigned finds that a reduction in the penalty based upon the absence of prior violations is unwarranted.

c. Other matters as justice may require

Finally, the Rules of Practice instruct the undersigned to consider "such other matters as justice may require" in order to determine the appropriate amount of civil penalty to assess. 15 C.F.R. § 904.108(a). Respondents identified one such factor in their Brief, pointing out that Respondent Gregory immediately contacted Mr. Stevens upon learning of the violations and asked that he explain the deficiencies with the TEDs in an effort to remedy them. Rs' Br. at physical page 3. Indeed, the record contains ample evidence of the good faith activities of Respondents. First, documentary and testimonial evidence in the record reflects that Respondent Byrd cooperated with the law enforcement officers and Mr. Stevens during their boarding of the F/V Holly G. AX 11; Tr. at 130, 155-56. For example, Mr. Stevens testified that while Respondent Byrd was "upset" during the boarding, resulting in a "very contentious atmosphere" on the vessel, he still moved the nets into the proper position for the officers to inspect the attached TEDs and complied with the officers' requests and those of Mr. Stevens. Tr. at 129-30. The record also establishes that Respondent Gregory promptly contacted Mr. Stevens upon learning of the violations and sought guidance on measuring the dimensions of TEDs and remedying the violations. Tr. at 116-20, 122, 157, 171-72. When asked whether Respondent Gregory was cooperative, Mr. Stevens responded, "Absolutely." Tr. at 130.

The Agency does not dispute either the cooperative nature of Respondents during their dealings with the law enforcement officers and Mr. Stevens or Respondent Gregory's interest in quickly and permanently coming into compliance with the applicable regulations. Nevertheless, it appears not to have considered these factors in setting the proposed penalty based upon the amount sought and the absence of any discussion of the subject in its briefs. A cooperative disposition and commitment to remedying violations should be encouraged. Therefore, the undersigned finds that these considerations support a reduction in the amount of civil penalty sought 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).

3) Conclusion

After weighing the factors set forth at 15 C.F.R. § 904.108(a) and the particular circumstances surrounding the violations committed by Respondents, the undersigned finds that a civil penalty in the amount of $1,000 for each of the two counts of violation is appropriate.

V. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1) Respondent David W. Gregory and Respondent Michael Byrd are "persons," as that term is defined by 16 U.S.C. § 1802(36).

2) At all times relevant to the NOVA for Docket Number SE1002966, the F/V Sea Ghost was a registered and flagged vessel of the United States.

3) At all times relevant to the NOVA for Docket Number SE1002966, the F/V Sea Ghost was owned by Respondent Gregory and operated by Respondent Byrd.

4) At all times relevant to the NOVA for Docket Number SE1002966, Respondent Gregory was responsible for the actions for his vessel's operator, Respondent Byrd.

5) At all times relevant to the NOVA for Docket Number SE1002966, Respondent Byrd was responsible for the navigation of the F/V Sea Ghost and for the proper interpretation of the information displayed by its GPS unit.

6) On or about January 19, 2010, law enforcement officers from the Mississippi Department of Marine Resources boarded the F/V Sea Ghost at the following position: 30°11.125 North and 088°47.012 West.

7) At the time of the boarding, the F/V Sea Ghost was located in the Gulf "EEZ," as that term is defined by 16 U.S.C. § 1802(11) and 50 C.F.R. § 600.10.

8) At the time of the boarding, the F/V Sea Ghost was retrieving its fishing gear from the water.

9) At the time of the boarding, the F/V Sea Ghost was "fishing," as that term is defined by 50 C.F.R. § 600.10.

10) At all times relevant to the NOVA for Docket Number SE1002966, a commercial vessel permit for Gulf shrimp issued to and kept onboard the F/V Sea Ghost was required for any person aboard the vessel to fish for shrimp in the Gulf EEZ, pursuant to 50 C.F.R. § 622.4(a)(2)(xi).

11) On or about January 19, 2010, Respondent Gregory and Respondent Byrd were aware that a federal permit was required to fish for shrimp in the Gulf EEZ, that neither of them possessed such a permit, and that the F/V Sea Ghost was consequently prohibited from engaging in this activity.

12) On or about January 19, 2010, Respondent Gregory and Respondent Byrd violated 50 C.F.R. § 622.7(a) by fishing for shrimp in the Gulf EEZ, an activity for which a Federal permit, license, or endorsement is required by 50 C.F.R. § 622.4, without such a permit, license, or endorsement.

13) On or about January 19, 2010, Respondent Gregory and Respondent Byrd violated Section 307(1)(A) of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A) by failing to comply with regulations issued pursuant to the Act.

14) A civil penalty in the amount of $12,000 is appropriate for the violation found in Docket Number SE1002966.

15) Respondent Gregory and Respondent Byrd are jointly and severally liable for this civil penalty.

16) Respondent Gregory and Respondent Byrd are "persons," as that term is defined by 16 U.S.C. § 1532(13), and are subject to the jurisdiction of the United States.

17) At all times relevant to the amended NOVA for Docket Number SE1102223, the F/V Holly G was a registered and flagged vessel of the United States.

18) At all times relevant to the amended NOVA for Docket Number SE1102223, Respondent Gregory held a Federal Fisheries Permit for Gulf of Mexico Shrimp (Moratorium) for the F/V Holly G.

19) At all times relevant to the amended NOVA for Docket Number SE1102223, the F/V Holly G was a "vessel" and a "shrimp trawler," as those terms are defined by 50 C.F.R. § 222.102.

20) At all times relevant to the amended NOVA for Docket Number SE1102223, the F/V Holly G was owned by Respondent Gregory and operated by Respondent Byrd.

21) On or about May 6, 2011, the F/V Holly G was engaged in fishing operations targeting shrimp while located in "offshore" waters, as that term is defined by 50 C.F.R. § 222.102.

22) On or about May 6, 2011, law enforcement officers from OLE boarded the F/V Holly G.

23) At the time of the boarding, the F/V Holly G was anchored in the "Gulf Area," as that term is defined by 50 C.F.R. § 222.102.

24) At the time of the boarding, each of four nets onboard the F/V Holly G was "rigged for fishing," as that phrase is defined by 50 C.F.R. § 223.206(d)(2)(i).

25) At all times relevant to the amended NOVA for Docket Number SE1102223, the F/V Miss Holly G 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).

26) During the course of the boarding, the law enforcement officers inspected the TEDs installed in each of the nets rigged for fishing and found that two of the four TEDs failed to comply with the design criteria for approved TEDs set forth at 50 C.F.R. § 223.207. Specifically, they found that the TED attached to one of the nets on the port side of the vessel had an undersized escape opening and that the TED attached to one of the nets on the starboard

side of the vessel had an excessively steep grid angle. Therefore, these TEDs did not constitute "approved TEDs."

27) On or about May 6, 2011, Respondent Gregory and Respondent Byrd 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).

28) On or about May 6, 2011, Respondent Gregory and Respondent Byrd 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.

29) The noncompliant TEDs were installed on the nets of the F/V Holly G and the nets were rigged for fishing on or about May 6, 2011, with the knowledge of Respondent Gregory and Respondent Byrd.

30) Respondent Gregory and Respondent Byrd "knowingly" violated the Act and the implementing regulations within the meaning of that term.

31) A civil penalty in the aggregate amount of $2,000 is appropriate for the violations found in Docket Number SE1102223.

32) Respondent Gregory and Respondent Byrd are jointly and severally liable for this civil penalty.

ORDER

Docket Number SE1002966, F/V Sea Ghost

For Count 1, a civil penalty in the amount of $12,000 is appropriate and assessed.

Docket Number SE 1102223, F/V Holly G

For Count 1, a civil penalty in the amount of $1,000 is appropriate and assessed.

For Count 2, a civil penalty in the amount of $1,000 is appropriate and assessed.

Accordingly, a total penalty of **$14,000** is hereby **IMPOSED** jointly and severally on Respondent David W. Gregory and Respondent Michael Byrd.

As provided by 15 C.F.R. § 904.105(a), payment of the penalty in full shall be made within **30 days** of the date this decision becomes final Agency action, by check or money order made payable to the Department of Commerce/NOAA, or by credit card information and authorization, provided to:

Office of General Counsel
Enforcement Section (Southeast)
263 13th Avenue South, Suite 177
St. Petersburg, FL 33701

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

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

PLEASE TAKE FURTHER NOTICE, that this Initial Decision becomes effective as the final Agency action **60 days** after service, on **April 29, 2013**, unless the undersigned grants a petition for reconsideration or the Administrator reviews the Initial Decision. 15 C.F.R. § 904.271(d).

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

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency[22]

Dated: February 28, 2013
Washington, D.C.

[22] 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.

*** This section is current through the January 31, 2013 ***
*** issue of the Federal Register ***

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

15 CFR 904.271-273

§ 904.271 Initial decision.

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

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

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

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

(4) A statement of further right to appeal.

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

(c) The Judge will serve the written decision on each of the parties, the Assistant General Counsel for Enforcement and Litigation, and the Administrator by certified mail (return

receipt requested), facsimile, electronic transmission or third party commercial carrier to an addressee's last known address or by personal delivery and upon request will promptly certify to the Administrator the record, including the original copy of the decision, as complete and accurate.

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

(1) Otherwise provided by statute or regulations;

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

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

§ 904.272 Petition for reconsideration.

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

§ 904.273 Administrative review of decision.

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

Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

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

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

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

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

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

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

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

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

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

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

additional evidence that is not a part of the record before the Judge.

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.

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

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

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

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

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

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail,

return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

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

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

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

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

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