



SW1002974, F/V Risa Lynn

¹ The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011.

I. PROCEDURAL HISTORY

On April 23, 2012, counsel for the National Oceanic and Atmospheric Administration (“NOAA” or the “Agency”), on behalf of the Secretary of Commerce, instituted this action by issuing a Notice of Violation and Assessment of Administrative Penalty (“NOVA”) to Jason Robinson and Shane William Robinson (“Respondents”). The NOVA charges Respondents in one count with violating the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A), and Agency regulations at 50 C.F.R. § 660.306(h)(4), by operating the fishing vessel (“F/V”) “Risa Lynn inside a Rockfish Conservation Area while having non-trawl gear on board, not being registered to a limited entry permit, while retaining groundfish, and not continuously transiting the Rockfish Conservation Area.” NOVA at 2. The NOVA proposes the assessment of a civil penalty of \$17,345 for the violation. NOVA at 3.

On May 22, 2012, Respondents, acting pro se, filed a notice of denial and hearing request, which the Agency forwarded to this Tribunal on May 29, 2012. On May 30, 2012, the undersigned issued an Assignment of Administrative Law Judge and Order to Submit Preliminary Positions on Issues and Procedures (PPIP) (“PPIP Order”). In the PPIP Order, the parties were directed to submit their PPIPs in accordance with 15 C.F.R. § 904.240 no later than June 29, 2012. By orders dated June 26, 2012, and August 24, 2012, the filing deadline was subsequently extended twice at the request of the parties. The parties then completed the PPIP process and on October 16, 2012, a Hearing Order was issued setting forth deadlines for the filing of any additional discovery motions, joint stipulations, or prehearing briefs, and scheduling the hearing for February 5, 2013.

On October 16, 2012, the Agency filed a Motion for Issuance of Subpoena for Matthew Heasley (“Subpoena Motion”), requesting that the undersigned order Mr. Heasley to appear for a telephonic deposition. Respondents had identified Mr. Heasley, the operations manager at Faria Watchdog, Inc., as a potential witness in their PPIP filed on August 23, 2012. Respondents did not oppose the request, and by order dated November 1, 2012, the Subpoena Motion was granted in part, allowing Mr. Heasley’s deposition to be taken, and denied in part as to the issuance of a subpoena. Also on November 1, 2012, attorney Robert L. Brace of Hillister & Brace, filed a Notice of Appearance on Respondents’ behalf.

On December 6, 2012, the Agency filed a Notice of Amendment to Agency Pleading amending “the NOVA to specify that the Respondents’ actions on the date of violation included the retention or possession of groundfish within the U.S. Exclusive Economic Zone (EEZ),” and to provide the complete language of the relevant regulatory prohibition at 50 C.F.R. § 660.306(h)(4). Notice of Am. to Agency Pleading at 1.

By order dated January 10, 2013, the parties’ Joint Motion Requesting a Change of Hearing Date was granted and the hearing in this matter was postponed and rescheduled to begin on April 9, 2013. The parties subsequently filed a Joint Motion for Additional Discovery requesting leave to take a second deposition of Matthew Heasley, as well as the telephonic deposition of Joseph Albert, whom the Agency had listed in its PPIP as a potential witness on the “structure and operation of the VMS [Vessel Monitoring System] program.” Agency PPIP at 12. By order dated January 30, 2013, the Joint Motion for Additional Discovery was granted.

Respondents filed a Pre-Hearing Brief on March 22, 2013. On March 25, 2013, the parties filed a Joint Stipulation to Facts and Admission of Evidence (“Stipulations” or “Stips.”). A Protective Order was issued, sua sponte, by this Tribunal on April 19, 2013, in regard to the disclosure of certain sensitive personal information relating to one of the named Respondents in a proposed hearing exhibit. The parties were given until April 29, 2013 to set aside or revise the Protective Order for cause, but neither party did so.

The hearing of this matter was held in Ventura, California, on April 9, 2013. A copy of the transcript of the hearing was received on April 23, 2013.² At the hearing, the Agency offered the testimony of two witnesses, William Struble and Joseph Albert, and the Respondents offered the testimony of two witnesses, Jason Robinson and Don Radon. A total of thirty-two exhibits were admitted into the record, consisting of two Court Exhibits, twenty-seven Joint Exhibits, and two Agency exhibits.³ Tr. 6–7, 9, 74, 301, 305–06.

On April 26, 2013, this Tribunal issued an Order Scheduling Post-Hearing Briefs. Thereafter, on May 15, 2013, the parties filed a Joint Motion to Conform Hearing Transcript to Testimony, which was granted by order dated May 20, 2013. The parties filed their initial post-hearing briefs on May 31, 2013. The Agency filed its reply brief on June 17, 2013, and Respondents filed their reply brief one day later on June 18, 2013. With those filings, the record closed.

II. THE LAW AND REGULATIONS APPLICABLE TO LIABILITY

Finding that a “national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, to facilitate long-term protection of essential fish habitats, and to realize the full potential of the Nation’s fishery resources,” in 1976, Congress enacted the Fishery Conservation and Management Act (“the Act”) (later amended and renamed the Magnuson-Stevens Fishery Conservation and Management Act) (codified as amended at 16 U.S.C. § 1801–1891d). 16 U.S.C. § 1801(a)(6); *see* Pub. L. No. 94-265, 90 Stat. 331 (1976); Pub. L. No. 96-561, 94 Stat. 3275 (1980); Pub. L. No. 104-297, 110 Stat. 3559 (1996); Pub. L. No. 109-479, 120 Stat. 3575 (2007) (reauthorization). The purpose of the Act is “to promote domestic commercial and recreational fishing under sound conservation and management principles” and “to provide for the preparation and implementation, in accordance with national standards, of fishery

² Citations to the transcript are hereinafter abbreviated “Tr.”

³ The parties’ Stipulations filed on March 25, 2013 were marked and admitted at hearing as Court Exhibit 1. Tr. 5. Court Exhibit 2 is a list of common acronyms and terms prepared by the Agency for the court reporter. Tr. 8–9. The Court’s Exhibits are hereinafter cited as Ct. Ex. 1 and Ct. Ex. 2. The parties’ twenty-eight Joint Exhibits and the Agency’s two additional exhibits admitted into the record at hearing are hereinafter cited as “Jt. Ex.” and “Agency Ex.,” respectively.

management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery.” 16 U.S.C. § 1801(b)(3)–(4); *see also* Jt. Ex. 13. Under the Act, “[i]t is unlawful . . . for any person. . . to violate any provision of [the Act] or any regulation or permit issued pursuant to this [Act].”⁴ 16 U.S.C. § 1857.

The Pacific Coast Groundfish Fishery regulations that were issued pursuant to the Act,⁵ were in effect in May 2010, and were set forth in 50 C.F.R. Part 660 (2009),⁶ provided in pertinent part as follows:

[I]t is unlawful for any person to:

....

(4) Operate any vessel in an applicable GCA [(Groundfish Conservation Area)] (as defined at § 660.383(c)) that has non-trawl gear onboard and is not registered to a limited entry permit on a trip in which the vessel is used to take and retain or possess groundfish in the EEZ [(Exclusive Economic Zone)] . . . except for

⁴ The Act provides, in pertinent part, that “[a]ny person who is found . . . to have committed an act prohibited by section 1857 of this title shall be liable to the United States for a civil penalty.” 16 U.S.C. § 1858(a). At the time of the alleged violation, the maximum civil penalty for each violation was \$130,000, as adjusted for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990), as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996). 15 C.F.R. § 6.4(e)(14).

⁵ The Pacific Coast Groundfish Fishery extends 200 miles into the Pacific Ocean (the U.S. “Exclusive Economic Zone” (“EEZ”)), from the coasts of California, Oregon, and Washington, and includes more than ninety species of “groundfish,” i.e. those that dwell near the sea floor. *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Blank*, 693 F.3d 1084, 1088 (9th Cir. 2012); 18 U.S.C. § 1602(11); 50 C.F.R. §§ 660.301, 660.302; Jt. Ex. 12 at 2 (defining “Fishery management area”); Tr. 35; Ct Ex. 2.

⁶ The violation at issue here is alleged to have occurred on May 17, 2010, and the Agency’s Prehearing Exchange cites to the 2010 edition of the Code of Federal Regulations in regard to the provision allegedly violated (50 C.F.R. § 660.306). However, section 50 C.F.R. § 660.306 does not appear in the 2010 edition of the Code, perhaps due to the fact that at that point in time NOAA was in the process of restructuring the entire Pacific Ground Coast regulations at 50 C.F.R. Part 660, including distributing the prohibitions in section 660.306 among five new regulatory provisions (50 C.F.R. §§ 660.12, 660.112, 660.212, 660.312, and 660.352). *See*, Pacific Coast Groundfish Fishery Management Plan, 75 Fed. Reg. 32,994, 33,016 (Jun. 10, 2010) (proposed rule); Pacific Coast Groundfish Fishery Management Plan, 75 Fed. Reg. 60,868 (Oct. 1, 2010) (Final Rule effective Nov. 1, 2010). In the interim, the section at issue here, 50 C.F.R. § 660.306, remained in effect as set forth in the 2009 edition of the Code. Therefore, all citations to the Code in this memorandum refer to the 2009 edition, unless otherwise noted.

purposes of continuous transiting, with all groundfish non-trawl gear stowed

50 C.F.R. § 660.306(h)(4); Ct. Ex. 2.

As defined in § 660.383(c), Groundfish Conservation Areas include—

The non-trawl RCAs [(Rockfish Conservation Areas)] . . . defined by specific latitude and longitude coordinates (specified at §§ 660.390 through 660.394) designed to approximate specific depth contours, where fishing for groundfish with non-trawl gear is prohibited. Boundaries for the non-trawl RCA throughout the year are provided in the open access trip limit tables, Table 5 (North) and Table 5(South) of this subpart and may be modified by NMFS inseason pursuant to § 660.370(c).⁷

(i) It is unlawful to operate a vessel in the non-trawl RCA that has non-trawl gear onboard and is not registered to a limited entry permit on a trip in which the vessel is used to take and retain or possess groundfish in the EEZ, or land groundfish taken in the EEZ, except for the purpose of continuous transiting

50 C.F.R. § 660.383(c)(12);⁸ *see also* Jt. Ex. 13 at 1; Tr. 175; Ct. Ex. 2.

⁷ The latitude and longitude coordinates for the RCA around the Northern Channel Islands relevant here were established by regulation in 2009. Jt. Ex. 12 at 4 (Pacific Coast Groundfish Fishery 2009–2010 Biennial Specifications, 74 Fed. Reg. 9874, 9911 (Mar. 6, 2009)); Jt. Ex. 14 at 3; Tr. 97.

⁸ The term “Groundfish Conservation Area is also defined at 50 C.F.R. § 660.302, which states:

Groundfish Conservation Area or GCA means a geographic area defined by coordinates expressed in degrees latitude and longitude, wherein fishing by a particular gear type or types may be prohibited. GCAs are created and enforced for the purpose of contributing to the rebuilding of overfished West Coast groundfish species. Regulations at § 660.390 define coordinates for these polygonal GCAs. . . . GCAs also include Rockfish Conservation Areas or RCAs, which are areas closed to fishing by particular gear types, bounded by lines approximating particular depth contours. RCA boundaries may and do change seasonally according to the different conservation needs of the different overfished species. Regulations at §§ 660.390 through 660.394 define RCA boundary lines with latitude/longitude coordinates; regulations at Tables 3 5 of Part 660 set RCA seasonal boundaries. . . .

50 C.F.R. § 660.302.

“Non-trawl gear” is defined as “[a]ll legal commercial groundfish gear other than trawl gear,” and includes longlines, traps, pots, set nets, and stationary hook-and-line gear.⁹ 50 C.F.R. § 660.302 (defining “fishing gear”); Jt. Ex. 12 at 2 (same). A “limited entry permit” is a Federal permit that allows commercial fishing in the Pacific Coast groundfish limited entry areas, and includes any gear, size, or species endorsements affixed to the permit. 50 C.F.R. §§ 660.302, 660.333(a); Tr. 36. Absent a limited access permit, commercial fishing is lawful only in the “open access” fishery areas. *See* 50 C.F.R. §§ 660.333, 660.383. Groundfish include sharks, skates, ratfish, morids, grenadiers, roundfish and rockfish. 50 C.F.R. §§ 660.301, 660.302; Jt. Ex. 12 at 1; Tr. 35–36. Most significantly here, “[c]ontinuous transiting or transit through means that a fishing vessel crosses a groundfish conservation area . . . on a constant heading, along a continuous straight line course, while making way by means of a source of power at all times, other than drifting by means of the prevailing water current or weather conditions.” 50 C.F.R. § 660.302; Jt. Ex. 12 at 2.

The regulations further provide that vessels that take species managed under the Pacific Coast Groundfish Fishing Management Plan must have on board an approved “vessel monitoring system” (“VMS”). 50 C.F.R. §§ 660.302, 606.312(b); Ct. Ex. 2. A VMS consists of a mobile transceiver unit that uses the government-maintained satellite global positioning system (“GPS”) to automatically determine a vessel’s position, which it transmits to an approved mobile communications service provider, which then relays the position to NOAA’s National Marine Fisheries Service (“NMFS”), Office of Law Enforcement (“OLE”), Northwest Division. 50 C.F.R. §§ 660.312(a), 660.302; Jt. Ex. 19 at 12–13, 18; Tr. 179–80; Ct. Ex. 2. Vessels are required to maintain their mobile transceiver unit in good working order and the unit “must transmit a signal accurately indicating the vessel’s position at least once every hour, 24 hours a day, throughout the year”¹⁰ 50 C.F.R. § 660.312(d)(3); Tr. 181, 183. NMFS mandates that the location tolerance for VMS systems be accurate to within a hundred meters. Jt. Ex. 19 at 19; Tr. 185–86.

To prevail on its claim that Respondents violated the Act and the regulation, the Agency must prove the alleged violation by the preponderance of the evidence. *Cuong Vo*, NOAA Docket No. SE010091FM, 2001 WL 1085351, at *6 (ALJ Aug. 17, 2001) (citing 5 U.S.C. § 556(d); *Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100–03 (1981)). “Preponderance of the evidence means the Agency must show it is more likely than not a respondent committed the charged violation.” *Tommy Nguyen*, NOAA Docket No. SE0801361FM, 2012 WL 1497024, at *4 (ALJ Jan. 18, 2012) (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983)). A sanction may not be imposed “except on consideration of the whole record,” and must be “supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. § 556(d); *see also* 15 C.F.R. § 904.251

⁹ “Trawl gear” are nets towed through the water, and groundfish trawl gear may only be used “under the authority of a valid[ly issued] limited entry permit” endorsed for trawl gear. 50 C.F.R. § 660.302(11); Jt. Ex. 12 at 1.

¹⁰ Vessel operators are unaware as to when the signal is transmitted and it appears that the time of transmission periodically changes. Tr. 92; Jt. Ex. 5.

(“All evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing.”); 15 C.F.R. § 904.270 (stating that the exclusive record of decision consists of the official transcript of testimony; exhibits admitted into evidence; briefs; pleadings; documents filed in the proceeding; and descriptions or copies of matters, facts, or documents officially noticed in the proceeding). Direct and circumstantial evidence may establish the facts constituting a violation of law. *Cuong Vo*, 2001 WL 1085351, at *6 (citation omitted).

III. FACTUAL BACKGROUND

Respondents, Jason and Shane William Robinson, are brothers and commercial fishermen operating out of Santa Barbara, California. Tr. 226; Jt. Ex. 1 at 8–9; Jt. Ex. 7 at 1. They own or operate the F/V Risa Lynn, a 29-foot long, 9-foot wide, single engine Radon boat. Stips. 3, 4; Tr. 227–29, 285, 289; Jt. Ex. 2; Jt. Ex. 7 at 1. The Risa Lynn is equipped with a Faria Watchdog, Inc. VMS. Stip. 10.

Beginning in August 2009, Respondents started to longline for sablefish (black cod), a groundfish, primarily in a deep (300–400 fathom)¹¹ area of the open access fishery located approximately fifty-five miles south and west of Santa Barbara Harbor, around the back or ocean side of San Miguel Island, the westernmost channel island off the Santa Barbara Coast. Tr. 227–29, 233, 235–36; Jt. Ex. 7 at 2; Jt. Ex. 14a. Also along the back side of the Island, running west to east, between the Island and Respondents’ fishing area, lay a two-mile wide stretch of the Nontrawl RCA within the Pacific Groundfish Fishery.¹² Stip. 8; Tr. 90, 235; Jt. Ex. 14a. At all relevant times, Respondents did not possess a valid Pacific Coast Groundfish Limited Entry Permit that would have allowed them to fish in the RCA. Stip. 5.

On the day at issue, May 17, 2010, Respondents set out to fish from Santa Barbara Harbor between 3:00 a.m. and 4:00 a.m., and caught and retained approximately \$3,190.00 worth of federally-managed groundfish and other fish species. Stips. 15, 30, 31; Tr. 230; Jt. Ex. 2 at 7; Jt. Ex. 3 at 1; Jt. Ex. 14 at 4. During the course of that fishing trip, their VMS provided hourly transmission reports of their location to the NMFS. Stips. 13, 14. The transmission reports sent

¹¹ A fathom is six feet. Stip. 7.

¹² The RCA around the San Miguel Island is designated as an area within a series of straight lines drawn between sets of latitude and longitude coordinates. Jt. Ex. 14(a), Stip. 7; Jt. Ex. 14 at 3; Tr. 97, 130, 167–68. The eastern contour line of the RCA (i.e. the one closest to the Island) generally marks the point where the water is approximately 60 fathoms deep and the western seaward contour line is the point where the water reaches 150 fathoms in depth, but within the RCA itself there are points of deeper and shallower water. Stips. 7, 8; Tr. 72–73, 97, 160–61.

at 6:57 a.m., 8:57 a.m., and 9:57 a.m.¹³ reported Respondents' vessel as being located within the RCA, with a speed of "0" knots¹⁴ and a heading of "0" degrees. Stips. 19, 21, 22.

On November 3, 2010, approximately six months after this particular fishing trip occurred, the NMFS issued an incident report to the OLE regarding a possible Nontrawl RCA violation by the Risa Lynn. Stip. 32. About four months later, on March 16, 2011, an NMFS Special Agent interviewed Jason Robinson regarding the alleged violation. Jt. Ex. 7. A year later, on April 23, 2012, the Agency instituted this action against Respondents. Jt. Ex. 23.

IV. ISSUES IN DISPUTE

The NOVA, as amended, alleges that on or about May 17, 2010, Respondents violated Section 307(1)(A) of the Act, 16 U.S.C. § 1857, and the regulation at 50 C.F.R. § 660.306(h)(4), by operating their fishing vessel inside an RCA while having non-trawl gear on board, not being registered to a limited entry permit, retaining or possessing groundfish in the EEZ, and not continuously transiting the RCA. *See* Notice of Am. to Agency Pleading, Dec. 6, 2012.

The parties have stipulated that Respondents are "persons" subject to the jurisdiction of the Act. Stips. 1, 2. They further stipulate that on May 17, 2010, Respondents were fishing using a longline, a type of non-trawl gear, they did not possess a limited entry permit authorizing them to fish in the RCA, and they possessed and retained federally managed groundfish in the EEZ of the United States. Stips. 5–6, 30. There is no dispute that on the day at issue Respondents were at times in the RCA near San Miguel Island. Stips. 7, 19, 21–24, 27; Jt. Ex. 12 at 4, 5. As such, the parties have stipulated to all elements of the alleged violation save one—whether Respondents were "continuously transiting" while they were in the RCA that day.¹⁵ Agency's Post-Hearing Brief (May 31, 2013) ("Agency's Br.") at 10.

In support of its claim that Respondents were in violation, the Agency begins its Brief by explaining that the prohibition on operating any vessel in a GCA/RCA is broad and "goes beyond just barring fishing." Agency's Br. at 6 (citing 50 C.F.R. § 660.306(h)(4)). "However, because [the Agency recognizes that] fishing vessels must be able to cross the RCA in order to access fishing grounds in deeper depths, the regulation includes a single exception—vessel operation for purposes of 'continuous transiting' across the RCA." *Id.* "Continuous transiting," it reiterates, has been defined by regulation to mean "a fishing vessel crosses a groundfish

¹³ The time indicated here is Pacific Standard Time, which on the day at issue here was seven hours earlier than the Coordinated Universal or Greenwich Mean Time, in which the VMS information was recorded and transmitted. Jt. Ex. 18; Jt. Ex. 19 at 35, 68–69.

¹⁴ A "knot" is a unit of speed equal to one nautical mile (1,852 meters or 6,076.12 feet) per hour, or approximately 1.151 land miles (1,609.347 meters or 5,280 feet) per hour. Tr. 25, 228.

¹⁵ The NOVA does not allege and the Agency did not specifically claim in this action that Respondents fished in the RCA or that their gear was not stored while they were in the RCA. Tr. 20.

conservation area . . . on a constant heading, along a continuous straight line course, while making way by means of a source of power at all times, other than drifting by means of the prevailing water current or weather conditions.” *Id.* (citing Pacific Coast Groundfish Fishery Vessel Monitoring System, 72 Fed. Reg. 69,162, 69,168 (Dec. 7, 2007) (codified at 50 C.F.R. § 660.11)).

Based upon this definition, the Agency makes a two-pronged legal argument. First, it asserts that the Risa Lynn was not “making way” within the RCA on the day in question. *Id.* at 10. The Agency claims “the only logical interpretation of the VMS data,” specifically the transmissions at 6:57 a.m., 8:57 a.m., and 9:57 a.m., reporting a speed of 0.0 knots and a heading of 0.0 degrees for positions “well within the RCA,” is “that on three occasions the vessel was stopped within the RCA.” *Id.* at 10–11 (citing Stips. 19, 21, 22). In support of this conclusion, the Agency cites the deposition testimony of Matthew Heasley, Faria’s Operations Manager, to the effect that such reports of “0/0” are “indicative of a vessel that is either stationary or traveling at less than 1 knot along a true north heading (0.0–0.9 degrees),” and cautions that “[o]nly the former option is credible given the facts of the case.” *Id.* at 11 (citing Jt. Ex. 21 at 122–24; Stip. 12). Those facts are that the 0/0 position report was given for one hourly report when the vessel “was tied up at the dock prior to departing on the fishing trip, . . . and for two hourly reports when the vessel was outside the RCA” at the end of its fishing trip. *Id.* (citing Jt. Ex. 20 at 71–75; Stips 25, 26). The Agency contends the alternative explanation for each of the three VMS reports, that the vessel was going less than 1 knot (0.0–0.9) and true north (0.0–0.9 degrees), “strains credulity” because San Miguel Island, where Respondents claim they waited while their fishing gear was soaking, “is not true north from the fishing grounds, but north northeast.” *Id.* at 11–12 (citing Jt. Ex. 14(a); Tr. 269). Further, the Agency claims it is “exceptionally unlikely” that Respondents’ autopilot would have taken their vessel on a true north heading “by mere happenstance on three separate occasions, while also maintaining a speed less than 1 knot each time.” *Id.* at 12. Relying on the testimony of Agent Struble, the Agency adds that the “alignment of timing, speed, heading, position and vessel activity,” which would have allowed it to exit and enter the RCA and be back within the half-mile circle at each polling hour, “approaches the impossible.” *Id.* (citing Tr. 50–51).

Moreover, the Agency suggests, “[e]ven if one could conceive that scenario playing out for the 8:57a.m. and 9:57a.m. position reports when the vessel might have been heading toward San Miguel Island, Respondents provide no valid explanation as to why they would have been traveling in that manner at 6:57 a.m.—prior to their claimed arrival at their fishing grounds.” *Id.* (citing Tr. 259–61). Rather, the Agency asserts, “[i]t is far more likely than not that the Risa Lynn was simply dead in the water at 6:57 a.m., 8:57 a.m., and 9:57 a.m., while in the RCA, and therefore not making way as required by the regulation.” *Id.*

Relying on the same three position reports, the Agency introduces the second prong of its legal argument by stating: “There is no reasonable argument that a stationary vessel is somehow also operating on a continuous straight line course,” as required by the regulation. *Id.* at 13. In support of this point, the Agency cites to chart plotting, described by Agent Struble at hearing, that shows the “extraordinary journey” the vessel would have had to undertaken to travel in a straight line course from its position reported at 9:57 a.m. in order to arrive at its position at 10:58 a.m., and then to its position at 11:58 a.m. *Id.* at 13–14 (citing Jt. Ex. 14a; Tr. 79–80).

The Agency decries that “[s]uch navigational acrobatics” are “simply not plausible” and that “[i]t is more likely than not that the vessel either never left the RCA and was just driving or drifting around to the various nearby positions at each VMS polling interval, or the vessel otherwise deviated from a straight course transit on several occasions within the RCA.” *Id.* at 14. Based upon these two arguments, the Agency asserts that it has established the violation “by a preponderance of the evidence.” *Id.*

Respondents counter in their Post-Hearing Brief, albeit a bit inartfully, that “it is impossible . . . to maintain a constant course in wind and waves,” i.e., to technically comply with the regulatory requirement to transit on a “constant heading along a continuous straight line course,” citing the testimony of Agent Struble for support. Respondents’ Post-Hearing Brief (May 31, 2013) (“Rs’ Br.”) at 1, 4, 8 (citing Tr. 77–83). Additionally, Respondents alternatively argue that the Agency has failed to meet its burden of proof, asserting that “NOAA’s only evidence . . . is six *hourly* VMS transmission reports . . . which recorded a total of 30 seconds of Respondents’ activities while in the RCA,” and which does not show they were drifting, stationary, or turning in the RCA. *Id.* at 2 (emphasis in original). “Without any eyewitnesses,” Respondents argue that the Agency “has failed to prove its case,” claiming further that the “lack of direct evidence is NOAA’s fault because it could have flipped the VMS transmission frequency switch to five-minute increments to see the actual course of travel” of the vessel. *Id.*

In an effort to further undermine the Agency’s case, Respondents note in their defense that there is no regulatory prohibition on being in the RCA, nor a limit on the number of times one may transit the RCA, nor a minimum or maximum speed requirement for transiting, nor a requirement to maintain a constant speed while transiting. *Id.* at 2, 4 (citing Tr. 40, 88–90, 93, 209, 211). As such they could “cross and re-cross the RCA as many times and on any constant course they choose.” *Id.* (citing Tr. 90, 209). Respondents claim that in this case, in a fishing boat with a cruising speed of 16 knots and a maximum speed of 20 knots, they fished adjacent to the RCA and crossed it to seek the safety of San Miguel Island, re-crossing several times during the day to check on their gear, and “[t]his is not illegal behavior.” *Id.* at 2–5 (citing Tr. 92, 270–71). Moreover, “Respondents do not have to prove they were on a constant course or provide explanations for the six hourly VMS transmission reports. NOAA must prove by evidence that Respondents are guilty of some activity other than driving their boat through the RCA, which they must do in order to fish,” and “the Government has no idea what was occurring on the [F/V Risa Lynn] on May 17, 2010.” *Id.* at 2–3, 9.

Nevertheless, Respondents specifically affirmatively deny in their Brief that they were “drifting” in the RCA on the day in question as concluded by Agent Struble in his investigation report, and assert that there is no evidence in the record that they were. *Id.* at 3, 9 (citing Jt. Ex. 1). Respondents argue the VMS transmission reports “prove nothing,” and Agent Struble’s opinion at hearing, that drifting was one of many “possible” scenarios supported by the evidence, was refuted by the Agency’s witness Joseph Albert, and Respondents’ witness Don Radon, and does not satisfy the Agency’s burden of proof. *Id.* at 3, 6, 8, 10–11 (citing Tr. 116, 119, 122, 131–32, 134–35, 141–43, 218–19, 241). More specifically, Respondents cite the testimony of Don Radon, the builder of their boat, to the effect that “drifting without power on May 17, 2010 would be dangerous, uncomfortable and serve no known purpose,” and Respondent Jason Robinson’s testimony to the same effect. *Id.* at 3, 6 (citing 241–43, 286–88).

Further, Respondents argue they also were not “stopped or stationary” in the RCA on the day in question. *Id.* at 12. In support they cite the evidence in the record that in the early morning on May 17, 2010, the winds in the RCA were blowing in the 19–22 knot range, decreasing thereafter down to 10 knots by 4 p.m. *Id.* at 5 (citing Tr. 108; Jt. Ex. 10). Under such conditions, they note, Mr. Radon testified that it would be “impossible” to keep the vessel stationary or stopped for five seconds against such wind and seas. *Id.* at 3–7, 12 (quoting Tr. 288–89). Thus, Respondents conclude, “the VMS transmissions showing ‘0’ knots at a ‘0’ heading meant the Robinson brothers must have been heading north [toward San Miguel Island for safety] at up to .9 knots,” as testified to by Jason Robinson. *Id.* at 3, 6, 12 (citing Stips. 11–12). While the Agency may argue that it is statistically unlikely they “could hit a due north heading at a speed of less than 1 knot on three separate occasions,” Respondents assert, it has not offered a statistician or other competent witness on this issue. *Id.* at 12. As an alternative explanation for the same 0/0 hourly transmissions inside the RCA, Respondents claim they “transit the RCA using autopilot, which tries to keep them on a constant course,” and they return repeatedly to the same GPS location for their gear and then head north toward San Miguel Island. *Id.* at 3–4. In addition, they note they frequently steer the boat into the wind and waves, turn on the autopilot and travel at slow speeds to conserve fuel and perform work on the boat, including preparing themselves and the vessel for fishing. *Id.* at 7 (citing Tr. 270–71, 277–79).

Moreover, Respondents argue they were not “turning” their boat in the RCA, noting the VMS transmissions provide no information regarding the vessel’s activities during the other 59 minutes and 55 seconds between the hourly transmissions, and that they can change the speed of their vessel “at any time, and often do.” *Id.* at 5, 12–13 (citing Tr. 92, 138, 212, 214; Stips. 10, 13). Based upon the wind and the waves, Respondents challenge the validity of Agent Struble extrapolating the vessel’s constant course from the individual VMS hourly heading readings of 157 degrees and 211 degrees, noting Jason Robinson testified that the straight lines drawn by Agent Struble at hearing to reflect those headings did not accurately describe the course of his vessel’s travel on the day in question, and advising that the wind and the waves can swing even a boat on autopilot 15 degrees off course. *Id.* at 8, 13 (citing Tr. 77–80, 275; Jt. Ex. 14). Explicitly, Respondents deny they traveled around in circles in the RCA on the day in question, or that they fished or had any reason or capability to fish in the RCA on that day, noting they had only one set of fishing gear on the boat. *Id.* at 9, 12 (citing Tr. 236–37, 249).

In its Reply Brief, the Agency reiterates its argument that the evidence of record supports a finding that the vessel was “stopped” in the RCA, characterizing Respondents’ focus on whether the vessel was “drifting” as “misplaced.” Agency’s Post-Hearing Reply Brief (June 17, 2013) (“Agency’s Reply Br.”) at 2. The Agency contends drifting is only one of “a myriad of possib[le]” activities Respondents were engaged in that day while in the RCA, and “what matters . . . is not what Respondents were or could have been doing in the RCA, but what they were *not* doing.” *Id.* (citing Tr. 119, 121) (emphasis in original). The Agency suggests the VMS data, which it characterizes as “accurate” and “reliable” even at hourly intervals, “provides more than sufficient evidence” to support a finding that Respondents were not continuously transiting, as required by the regulation. *Id.* at 2, 5 (citing 50 C.F.R. 660.306(h)(4); Stips. 19–26). Moreover, the Agency argues Respondents’ claim that their vessel was not stationary “is simply wrong,” noting that the 0/0 VMS reports “make it clear that on at least three occasions the vessel was

stationary in the RCA.” *Id.* at 2–3 (citing Stips. 14, 19, 21, 22; Tr. 187). The argument that the vessel was captured by the VMS three times alternatively traveling below 1 knot and true north is “simply not persuasive,” the Agency further asserts. *Id.* at 3. The Agency suggests that in evaluating the likelihood of that scenario the Court should consider that Respondents “had no reason to travel true north,” because San Miguel Island is “north-northeast” of their fishing grounds and that Jason Robinson never testified to steering “with th[e] level of accuracy or attention required for a true north heading.” *Id.* (citing Jt. Ex. 14(a); Tr. 269). The Agency further suggests that Mr. Radon’s testimony regarding it being “impossible” to be stationary was not absolute, noting he qualified the opinion by stating it was “almost impossible” and “pretty close to impossible,” and he had no knowledge of the actual weather conditions the vessel was subject to that day. *Id.* at 4 (citing Tr. 289, 291). In fact the weather that day allowed for the vessel to be stationary, the Agency implies, citing a U.S. Coast Guard analysis of drifting patterns which concluded that on the day “environmental factors were light.” *Id.* (citing Jt. Ex. 16 at 1).

Additionally, the Agency counters that a statistician is not necessary to infer from the record that Respondents’ scenario is not plausible “when common sense dictates such an interpretation,” noting that judges are permitted to rely on their common sense and experience to reach their decision. *Id.* (citing *Firestone Pac. Foods, Inc.*, EPA Docket No. EPCRA-10-2007-0204, 2009 WL 5326309 (ALJ, Mar. 24, 2009)). The Agency further reiterates its point that a stationary vessel cannot be on a “constant heading” and asserts that “[t]he dizzying array of speed and headings required” to find the vessel on a constant course between 9:57 a.m. and 11:58 a.m. “is just not believable.” *Id.* at 5 (citing Agency Br. at 13–14; Jt. Ex. 14(a); Tr. 79–80). The Agency concludes by stating that “Respondents were obligated to transit the RCA in an uninterrupted manner, in as straight a line as possible, but failed to do so” as evidenced by the VMS data. *Id.* at 5–6.

Respondents’ Reply Brief declares in response that “‘possible’ speeds and heading of the Robinsons’ boat do not establish a violation,” and that “NOAA has failed to prove anything but six 5-second VMS transmissions and the landing of regulated fish at the harbor,” reiterating the claim that the Agency has not fulfilled its “burden of persuasion” to “show that it is more likely than not that Respondents were [unlawfully] operating in the RCA.” Respondents’ Reply to Agency’s Post-Hearing Brief (June 18, 2013) (“Rs’ Reply Br.”) at 1. Specifically, in reply to the Agency’s argument that the vessel was not “making way,” Respondents point out that the Agency admits the VMS 0/0 reports can mean the vessel was illegally stationary or that “the vessel was headed north at up to .9 knots” which “is legal.” *Id.* at 2. They quip “this is not a coin toss competition.” *Id.* Moreover, they ask that the evidence comparing the weather at Santa Barbara Harbor with the seas around San Miguel Island be “rejected,” and while acknowledging that they cannot state they were headed due north during each five-second VMS transmission, “Respondents can honestly say they were never ‘stationary’ on May 17, 2010 and they headed in a northerly direction to San Miguel Island for safety.” *Id.*

Further, Respondents complain that “NOAA did not make a claim against Respondents about the 6:57 a.m. 0/0 Position Report in Agent Struble’s charging report,” and “[n]ow this 6:57 a.m. 0/0 Position Report appears to be NOAA’s only claim.” Rs’ Reply Br. at 2 (citing Jt. Ex. 1). They suggest Agent Struble did not raise any issue with the 6:57 a.m. report because he

“knew that Respondents set their fishing gear outside the RCA, which is shown in the 7:57 a.m. transmission.” *Id.* at 2–3. They recall, without citation, Jason Robinson’s hearing testimony that this particular transmission “was most likely caused by slowing the boat down (after three hours of transit) in order to put on foul-weather gear in preparation for fishing outside the RCA.” *Id.* at 3.

As to the second prong of the Agency’s argument, which Respondents characterize as not being “on [a] [c]onstant [c]ourse [u]nder [p]ower,” Respondents suggest that “NOAA is stuck with Agent Struble’s conclusion that Respondents were drifting at 10:58 a.m. and 11:58 a.m.,” which at hearing they proved “would be insane,” a conclusion with which “NOAA’s expert witness Joe Albert agreed.” Rs’ Reply Br. at 3. Then when “[c]onfronted with an improbable and unsupportable argument, NOAA shifted course to say that Respondents had to be driving under power and making turns in the RCA,” the evidence of which consisted of two straight lines drawn through the RCA by Agent Struble at headings of 157 degrees and 211 degrees, and the argument that Respondents “would have had to make an ‘extraordinary journey’ into and out of the RCA to avoid turning in the RCA.” *Id.* Respondents suggest “there was no ‘extraordinary journey’ on May 17, 2010, or they would have remembered it when Agent Struble interviewed them ten months later.” *Id.* Rather, they declare “drawing straight lines backwards and forwards based on two 5-second position reports (as Agent Struble did) does not establish Respondents’ actual course of travel on the day in question,” claiming without citation that even Agent Struble testified “it is impossible to drive a small boat in rough seas on an absolute constant course.” *Id.* at 3–4. Respondents suggest that from the evidence “it is impossible to decide what Respondents’ actual course of travel was at 9:58 a.m. and 10:58 a.m.” *Id.* at 4. Their Reply Brief concludes with the assertion that “NOAA has failed to prove that Respondents were drifting, stationary, or turning inside the RCA on May 17, 2010.” *Id.*

V. IMPOSSIBILITY DEFENSE

As indicated above, the Act makes it unlawful to “[o]perate any vessel in an applicable GCA . . . except for purposes of continuous transiting.” 50 C.F.R. § 660.306(h)(4) (2009). “Continuous transiting” is defined by regulation to mean “that a fishing vessel crosses a groundfish conservation area . . . on a constant heading, along a continuous straight line course, while making way by means of a source of power at all times . . .” 50 C.F.R. § 660.302. Respondents have raised in their post-hearing briefs the argument that compliance with this regulatory requirement was “impossible” i.e., they could not cross the RCA on the back side of San Miguel Island “on a constant heading, along a continuous straight line course.” Rs’ Br. at 1, 4, 8 (citing Tr. 82–84); Rs’ Reply Br. at 3.

It has long been generally held that “the law does not require the performance of impossibilities . . . and if a statute requires performance of something which cannot be performed, the court may hold it inoperative.” *Ivaran Lines, Inc. v. Waicman*, 461 So. 2d 123, 125 (Fla. 1984) (citing *Gigliotti v. New York, Chicago & St. Louis R. Co.*, 157 N.E.2d 447, 452 (Ohio 1958)) (holding “with the prevailing law that violation of a statute or regulation . . . is excused where it appears without dispute that compliance with the statute is impossible even in the exercise of reasonable diligence”); see *Int’l Bank v. Faber*, 79 F. 919 (C.C.D.N.Y. 1897)

(“The law does not require performance of impossibilities.”); *Hoopes v. N. Nat’l Bank*, 102 F. 448 (3d Cir. 1900) (“The law does not require performance of impossibilities.”); *Johnson v. Troy*, 24 A.D. 602 (N.Y. App. Div. 1898) (same); *Power v. Hamilton*, 22 N.D. 177 (N.D. 1911) (same); *Artukovich v. Astendorf*, 131 P.2d 831 (Cal. 1942) (same); *Tolbert v. Birmingham*, 81 So. 2d 336 (Ala. 1955) (same); *McCleary v. Mowery*, 231 N.E.2d 165 (Ind. App. 1967) (same); *FTC v. Baine*, 308 F. Supp. 932 (N.D. Ga. 1970) (same); *Arlington Seating Co. v. New Philadelphia School District*, 176 A. 221 (Pa. 1935) (same); *Willing v. United States*, 30 F. Cas. 46 (3d Cir. 1804) (same); see also Restatement (Second) of Torts § 288A(2)(c) (1965) (“Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when . . . [the actor] is unable after reasonable diligence or care to comply . . .”).

Such a defense has been recently addressed in a NOAA enforcement action. See *Frontier Fishing Corp. v. Evans*, 429 F. Supp. 2d 316, 330–34 (D. Mass. 2006) (remanding decision for reconsideration of plaintiff’s impossibility theory), *rev’d sub nom. Frontier Fishing Corp. v. Locke*, 2013 U.S. Dist. LEXIS 67704 (D. Mass. 2013) (finding impossibility defense not sufficiently supported by the facts); cf. *Earth Island Inst. v. Evans*, No. C 03-0007 TEH, 2004 U.S. Dist. LEXIS 15729 *29–30 (D. Cal. 2004) (addressing NMFS’s proffered excuse of “not achievable” mandatory sampling in relation to impossibility defense) *aff’d*, 136 Fed. App’x 34, 2005 (9th Cir. 2005).

Thus, Respondents’ “impossibility” defense will be considered here. In that regard, however, it is noted that “impossibility” of compliance is an *affirmative* defense as to which Respondents bear the burden of proof. See *Cleveland Consol., Inc. v. Occupational Safety & Health Review Comm’n*, 649 F.2d 1160, 1167 (5th Cir. 1981); *1833 Nostrand Ave. Corp.*, Docket No. II-RCRA-93-0205, 1995 EPA ALJ LEXIS 48, at *20 (ALJ, Aug. 10, 1995).

In support of the defense that it is “impossible” for them to have crossed the RCA “on a constant heading, along a continuous straight line course,” Respondents cite in their briefs primarily the testimony of Agency witness William Struble. Rs’ Br. at 4–5, 8 (citing Tr. at 77–80, 82–84); Rs’ Reply Br. at 3. Mr. Struble testified at hearing that he is a NOAA “Special Agent” stationed in Santa Maria, California, and has been for the past five years. Tr. 31–32. His duties include investigating and enforcing the rules and regulations of the Act in the Pacific Coast groundfish fisheries, including in the waters off Southern California’s Channel Islands, and he was the investigator on this case. Tr. 31–33, 41. Agent Struble indicated that he was already familiar with the waters of the Channel Islands prior to joining NOAA, as a result of a previous five-year stint with the National Park Service where he was tasked with conducting marine patrols in the waters encompassing the Channel Islands National Park.¹⁶ Tr. 33–34, 59. In total, Agent Struble estimated he had 3000 hours of experience with small vessel operation in the waters around the Channel Islands. Tr. 34. This experience was in addition to the other marine experience he had gathered from prior positions with the U.S. Fish and Wildlife Service in Alaska and Florida. Tr. 34–35.

¹⁶ Those waters make up the Channel Islands National Marine Sanctuary, an underwater national park consisting of the waters up to six nautical miles of the four northern Channel Islands (Anacapa, Santa Cruz, Santa Rosa, and San Miguel islands) and Santa Barbara Island. Tr. 59.

Regarding the weather and water around San Miguel Island where the alleged violation occurred, Agent Struble testified that “San Miguel [I]sland often has very harsh weather” and he agreed that the channel waters can be “very, very rough ocean . . . on certain days.” Tr. 63, 81. However, he said “that doesn’t mean that the weather is horrible every day,” and based upon the buoy data and Coast Guard analysis, he thought the weather on May 17, 2010, was “fairly mild for San Miguel [I]sland.” Tr. 63. Nevertheless, when asked whether, based upon his maritime experience, he had ever been able to “go on a constant course for a continuous amount of time” in those waters, Agent Struble replied: “You can maintain, depending upon weather conditions[,] a fairly steady course. It’s not going to be an exact course because the ocean’s moving, the wind’s blowing, the motors maybe countering each other a little bit.” Tr. 82. Following up on this response, Respondents’ counsel and Agent Struble had the following exchange at hearing—

Q: So the answer is you cannot go on a constant course for a continuous period of time on the ocean?

A: As far as an absolute perfect straight line—

Q: That’s correct.

A: No, but you can come pretty close to it.

Q: Thank you. So is [the] reality that you cannot go on an absolute constant course included in the parameters of the statute?

A: I think on interpreting the statute we’re going to be looking at what would be an approximate line, what would be a reasonable attempt to stay on a continuous course.

Q: And who’s making that decision? You?

A: The vessel operators are.

Q: No, I know but I mean the statute says constant course under power. Correct?

A: The statute is strict liability and then I’m going to have discretion in enforcement on what’s the bigger picture here on is this something I want to move forward with as an enforcement case or not?

Q: I got you. So you agree with me that it is literally physically impossible to comply with the statute?

A: As far as an absolute razor sharp straight line from A to B, yes.

Q: And then as a result of that, as a result of the impossibility of complying with that statute and the enforcement of that statute is subject to the discretion of you and people like you, is that correct?

A: Correct.

Tr. 82–84.¹⁷

¹⁷ In addition to the issue of the “impossibility” of literally complying with the regulation, Agent Struble’s testimony appears to potentially raise an issue of “fair notice” or the corollary doctrine of “vagueness,” specifically whether the regulation, which cannot be technically complied with, provides vessel owners with fair notice of what variance is lawful, or whether it is too vague and

In addition, Jason Robinson testified without contradiction at hearing in response to questioning by Agency counsel that even when utilizing autopilot to direct his vessel on a straight course, the system is “constantly correcting” due to the wind and the waves, and “it could be within 10 or 15 degrees [of the set course] at any time.” Tr. 275.

A fair reading of the foregoing hearing testimony supports Respondents’ assertion that, even exercising due diligence, e.g., using autopilot, it would still have been literally impossible for them to have transited the RCA on the day in question “on a constant heading” or a “straight line course,” as required by the regulation. Thus, to the extent that evidence shows Respondents exercised due diligence and still failed to maintain a “constant heading” or “straight course,” such violation would be excusable. However, to the extent that evidence shows that Respondents were not “crossing” the RCA or “making way” under power, but were stopped or “drifting” without power as the Agency alleges in its briefs, such impossibility defense would not be relevant.¹⁸

such determination is left to the unfettered discretion of NOAA enforcement. As the Supreme Court recently stated:

A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. . . . This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. . . . It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”

. . . .
[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.

FCC v. Fox TV Stations, Inc., 132 S. Ct. 2307, 2317 (2012) (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972)). However, as Respondents did not specifically raise a fair notice or vagueness argument in this action, the issues are not addressed herein.

¹⁸ Interestingly, there is also testimony in the record discussed further herein that it would be “impossible” for Respondents to have been stopped in the waters around the Channel Islands. As such, this evidence raises a very similar “impossibility” claim to that made in *Frontier*

VI. DISCUSSION OF THE EVIDENCE

In an effort to meet its burden of proof on the violation alleged, the Agency's case relies heavily, if not exclusively, on the VMS data reporting the position of Respondents' vessel on the date in question at 6:57 a.m., 8:57 a.m., and 9:57 a.m. (PST) as being within the RCA and having a 0 degree heading and a 0 knots per hour speed, which it refers to as the "0/0 position reports." Agency's Br. at 10–11 (citing Stips. 19, 21, 22); see Jt. Ex. 4 at 3; Jt. Ex. 18; Jt. Ex. 19 at 158. The Agency suggests this data proves that on May 17, 2010, Respondents' "vessel was stopped within the RCA," "simply dead in the water," "never left the RCA and was just driving or drifting around," "was not reporting a speed over ground or a course over ground," and was thus in violation of the requirement of continuous transiting—crossing the RCA "on a constant heading, along a continuous straight line course, while making way by means of a source of power." Agency's Br. at 10–14.

To explain the significance of these 0/0 position reports, the Agency offered at hearing the testimony of Joe Albert, its VMS Program Manager for the NOAA Northwest Regional Office in Seattle, Washington, which monitors the groundfish fishery areas in California. Tr. 171–72, 174. Mr. Albert explained that since 2004, NOAA has used a VMS system to monitor vessels in support of its law enforcement program regarding limited access fisheries. Tr. 172–73. Under the system, every commercial fishing vessel is affixed with a transponder, essentially an "electronic box with a GPS chip and [a] computer chip and some software that runs an antenna." Tr. 178–79. Once every hour, 24 hours a day, 365 days per year, the transponder takes a GPS reading of a vessel's geographic coordinates, i.e. latitude and longitude, and transmits that data to a satellite, which sends it on to a mobile communications service provider's land station, which ultimately transmits the information to the NOAA fisheries database. Tr. 179–81, 183, 221–22. Through this system, NMFS is able to monitor the location of the approximately 1000 commercial fishing boats operating in the Pacific groundfish fishery area, 700 of which are active on a daily basis. Tr. 180–81.

At the time relevant to this case, Respondents' fishing vessel, the Risa Lynn, was equipped with a Faria WatchDog 750 VMS transponder, in good working order. Tr. 179, 183–84, 196–97; Stip. 10; Jt. Ex. 15. The Faria transponder system uses the Iridium satellite network which gives it the ability to transmit not only location information, purportedly within two and one half meter accuracy range, but also hourly data on a vessel's speed and heading.¹⁹ Tr. 183, 187, 200–01; Stip. 10. Mr. Albert explained that since vessels without limited access permits, such as the Risa Lynn, are without exception required to continuously transit through RCAs, his Office considers VMS data received reflecting 0 to 4 or 5 knots per hour "fishing speeds," i.e. suspicious, and "something you'd be looking at." Tr. 176, 178, 201–11.

Fishing Corp. v. Evans, 429 F. Supp. 2d 316, 330–34 (D. Mass. 2006), which is the only NOAA enforcement case found addressing an impossibility defense.

¹⁹ From the hourly speed and hourly data reported, NOAA's V-track system also calculates a theoretical "average" course and speed between the data reported for the successive hourly points. Tr. 198–99.

In or about mid-September 2010, two recent dates of “incursion” by the Risa Lynn into an RCA at low speeds came to his Office’s attention. Jt. Ex. 1 at 4. A review of VMS data traced back to a third, earlier incursion date of May 17, 2010, which had not previously caught the Office’s attention. Tr. 205. On that May day, three of the hourly VMS data reports received by NOAA, specifically those at 6:57 a.m., 8:57 a.m., and 9:57 a.m., placed the Risa Lynn in the Non-trawl RCA off the coast of California with both a course heading and speed of “0.” Jt. Ex. 4 at 3, 4; Stips. 19–22. In response, a VMS technician put together an informational packet of the incursions, which was forwarded to NOAA’s OLE for assignment to an agent for investigation. Tr. 206–08; Jt. Ex. 1 at 4, 5. As part of the investigation, the VMS Office prepared charts with straight track lines “connecting the dots” of hourly VMS data for the vessel for that day, and the two other days in September. Tr. 197–98; Jt. Ex. 1 at 6; Jt. Ex. 4 at 1–2; Jt. Ex. 5; Jt. Ex. 6; Jt. Ex. 8. Mr. Albert implied in his testimony that he considered Respondents’ incursions into the RCA on those days to have been clandestine, explaining that fishermen frequently call into his office upon returning from trip to provide an exculpatory declaration if they have had an issue regarding non-continuous transit in the RCA, and suggesting that a review of a contacts log showed no such call from Respondents in regard to those days. Tr. 177, 208–09, 217–18; Jt. Ex. 2.

Approximately six months after the VMS Office’s referral, on March 1, 2011, Respondents’ case was assigned for investigation to Special Agent William Struble, whose testimony the Agency also offered at hearing as indicated above. Tr. 31–32, 41; Jt. Ex. 1 at 5. Agent Struble testified that as part of the investigation, he reviewed the vessel’s VMS data and landing reports. Tr. 42; Jt. Ex. 1 at 5; Jt. Ex. 17. The data revealed that six of the hourly incursion points into the RCA on three of the days investigated (May 17th, September 2nd, and September 12th) seemed to be “in a very small circle over a unique bottom feature.” Tr. 50–52; Jt. Ex. 4 at 1; Jt. Ex. 8. Specifically, while the majority of the RCA is 60 to 150 fathoms deep, charting indicated that four of the six incursion points “were on top of [a] 200 fathom line,” reflecting a “canyon with deeper water that goes inside of the RCA.” Tr. 53–55, 94–95, 97, 160, 162; Jt. Ex. 14 at 7; *see* Jt. Ex. 8 at 3. Some of the VMS data points in the RCA were close to a 300-fathom line. Tr. 163. Knowing that Respondents landed sablefish caught in depths of 200 fathoms and deeper, he found the idea that they had fished in the RCA on the dates in question was a “potential reasonable conclusion,” but admitted he realized that “[i]t may not be *the* conclusion,” since he had no specific evidence of exactly what Respondents were doing in the RCA on those days. Tr. 86–87 (emphasis in original). Agent Struble said he just knew that “there’s activity that was occurring in that location,” and though he did not “know what the activity was, . . . typically . . . there’s a reason for somebody to be there, that people don’t randomly end up in the same spot all the time.” Tr. 55–56. He analogized his suspicions to hunters in Yellowstone National Park where he said elk are protected from hunting until they crossed the Park boundary line and then they are fair game. He suggested “some hunters would want to come inside the park to get an early chance at the biggest buck.” Tr. 96.

On March 16, 2010, Agent Struble interviewed Respondent Jason Robinson at the vessel’s slip at the Santa Barbara Harbor. Tr. 44–45; Jt. Ex. 1 at 8; Jt. Ex. 7 at 1. Respondent Shane Robinson was present during part of the interview. Jt. Ex. 7 at 1. This appears to be the first time Respondents were made aware that NOAA had any qualms regarding certain fishing trips they had made six to ten months earlier. As part of the interview, Respondent Jason

Robinson was shown the plotted VMS points of the three trips and asked about his fishing activities generally, and on numerous dates of interest to Agent Struble. Tr. 139; Jt. Ex. 1 at 8, 10; Jt. Ex. 7 at 1, 3; Jt. Ex. 10. In response, Agent Struble testified that Jason Robinson explained to him that it takes Respondents three to four hours to transit from the Santa Barbara to their fishing spot in the vicinity of San Miguel Island. Jt. Ex. 7 at 2; Tr. 45. Then they spend fifteen minutes getting their fishing gear ready and twenty minutes setting it, after which it soaks for about four hours. Tr. 45; Jt. Ex. 1 at 9, 10; Jt. Ex. 7 at 2. Jason Robinson told the Agent that he decides where to set his gear after checking the currents, and marks where he sets his gear in his GPS. Tr. 46; Jt. Ex. 1 at 9, 10; Jt. Ex. 7 at 2. He fishes at 300 to 400 fathoms for sablefish. Jt. Ex. 1 at 10. Further he asserted to Agent Struble that while the RCA coordinates are no longer in his plotter, they used to be and so he knows where the boundary is and tries to stay at least one quarter mile from it. Tr. 46–47; Ex. 1 at 10; Jt. Ex. 7 at 2. As to why he may have been in the RCA at slow speeds during his fishing trip on May 17, 2010, some ten months earlier, Jason Robinson said he was not “100 percent” sure, which Agent Struble accepted as fair “given that it had been several months prior,” but thought that was the trip where he had needed to secure some items on the deck of his boat before returning to Santa Barbara Harbor due to bad weather conditions. Tr. 48, 56, 140–41; Jt. Ex. 1 at 10. Mr. Robinson also provided explanations for the other days of incursion, some of which Agent Struble found upon further investigation to be truthful or reasonable. Tr. 49–50. For example, Mr. Robinson advised the Agent that on one of the dates his vessel had broken down and, as a result, he was left drifting in the RCA until a friend came to tow him in. Tr. 49. After the interview, Agent Struble stated that he went into the VMS program and plotted the activities of both vessels and found “the tracks for both vessels lined up exactly with what his explanation was” and he “didn’t see any need to pursue that incursion any further.” Tr. 49

After concluding his investigation, on May 16, 2011, Agent Struble put together a “Case Package” including a written Investigation Report dated April 13, 2011, recommending the case be forwarded to NOAA General Counsel for civil prosecution on a violation of 50 C.F.R. § 660.306(h)(4) regarding three fishing trips, only one of which, the May 17, 2010 trip, Agency Counsel has pursued through the instant action. Tr. 43, 88, 100; Jt. Ex. 1 at 14; NOVA at 2. As explanation for recommending referral for the May fishing trip, Agent Struble wrote in his Report that “VMS records indicate that the [F/V Risa Lynn] had 5 points of low speed activity ranging from 0.0 to 1.6 knots within the non-trawl RCA.” Jt. Ex. 1 at 6. Further:

I reviewed . . . the VMS track location and times, and found they differ from the explanation given by ROBINSON. . . . VMS tracks show the F/V Risa Lynn first stopping in the RCA, as shown under the ‘speed’ column . . . which records actual vessel speed at time of VMS point transmission. The F/V Risa Lynn then departed and returned . . . back to the RCA in a stopped position very close to the initial stop. The VMS tracks have [a] pattern consistent with drifting from 1057 hours to 1357 hours with the first two points being in the RCA and the last two being outside and west of the RCA before the VMS tracks show return travel to port at speeds of approximately 16 knots.

Jt. Ex. 1 at 11–12. At hearing, Agent Struble softened his opinion regarding the VMS data based upon weather information he subsequently acquired from two sources, suggesting that the vessel “may have been going in a different direction but it’s not absolute. . . . [I]t’s possible that it was drifting but it may have been doing another activity.”²⁰ Tr. 103–04, 115–16; Jt. Ex. 9. The other activities he suggested Respondents could have been engaged while in the RCA was “working gear off the boat” or “working on the deck of the boat.” Tr. 104, 121.

At hearing, Agent Struble also defended his opinion that the vessel could have been essentially “stopped” in the RCA for hours on May 17th, relying upon data set forth in his Supplemental Investigation Report of August 2, 2011. Jt. Ex. 9. Specifically, based upon buoy and coast guard records, he claimed that during the time of Respondents’ fishing trip, the winds ranged from 13 knots to 5 knots. Tr. 63–64; Jt. Ex. 16. Agent Struble opined that those wind speeds would not have required the boat to “attack the sea” to be stable. Tr. 123. Moreover, he implied that the Risa Lynn could well withstand such winds, describing it as a heavy, well-built boat, with an enclosed cabin. Tr. 113–14, 124. He noted such boats are used by fire rescue companies and California Fish and Game authorities for patrol. Tr. 124.

To encapsulate the Agency’s VMS evidence in support of the violation, Agent Struble testified in detail to a chart he created of the ocean area exhibiting sixteen dots for the data points from the vessel’s hourly VMS reports for May 17, 2010, relying upon his training in both navigation and plotting nautical charts. Tr. 67–69, 76, 128–29, 131, 133; Jt. Ex. 14; Jt. Ex. 14a. He explained that the VMS reports from 2:57 a.m. and earlier locate the vessel in Santa Barbara Harbor at 0.0 knots and a 0.0 heading, consistent with the vessel being tied up at the dock. Tr. 67; Jt. Ex. 6 at 3; Jt. Ex. 14; Jt. Ex. 14a. Points identified as 1 through 3 (at 3:57, 4:57, and 5:57 a.m.) on the chart track the vessel departing the harbor and traveling south/southwest at 13 to 18 knots toward San Miguel Island. Tr. 68–69; Jt. Ex. 14; Jt. Ex. 14a. Then points 4 through 11 (6:57 a.m.–1:58 p.m.) generally put the vessel at “the fishing ground.” Tr. 69; Jt. Ex. 14 Jt. Ex. 14a. The return trip back to the harbor is covered by points 12 through 16 (2:58 p.m.–6:58 p.m.).

²⁰ Agent Struble’s Supplemental Investigation Report, dated August 12, 2011, indicates he obtained weather data for the vicinity of San Miguel Island from two sources. Jt. Ex. 9 at 1. The first was a NOAA weather buoy located in western Santa Barbara Channel, fifteen miles north of San Miguel Island. *Id.*; Jt. Ex. 10; Jt. Ex. 11 at 2. The second was from a land based “Remote Automated Weather Station” on Santa Rosa Island, about twenty miles east of San Miguel. Jt. Ex. 9 at 1; Jt. Ex. 11. The later data shows that on May 17, 2010, at 10:00 a.m. and 11:00 a.m., the wind was blowing at 11 mph and then 7 mph, in a northeast, east northeasterly direction (61° and 40°), but at noon it had changed course and was blowing northwest (317°) at 9 mph, and by 1:00 p.m. had changed course back and was blowing exactly north, north east at 23 degrees. Jt. Ex. 11 at 2, 4; *see* Jt. Ex. 16 at 3; Jt. Ex. 21 at 32; Tr. 119–20. A Drift Calculation for the vessel was prepared by the U.S. Coast Guard in 2012, with an analysis beginning at 12:00 p.m. local time, which appears to show the vessel would initially drift in a northerly (353°) direction, and then northwest (318°) at 3:00 p.m. Jt. Ex. 16 at 1–5. However, Mr. Struble testified at hearing that to the extent the VMS reports are indicative of Respondents “drifting” during those hours, they indicate the vessel moving in a “slow westerly direction,” i.e. against the current. *See* Tr. 103–04, Jt. Ex. 14a points 8–12.

Tr. 69; Jt. Ex. 14; Jt. Ex. 14a. He emphasized the significance of point 4, the 6:57 a.m. VMS data report locating the vessel in the RCA at a speed of 0.0 knots and a heading of 0.0, when it was purportedly headed out to Respondents' fishing grounds south and west of the RCA. Tr. 70; Jt. Ex. 14; Jt. Ex. 14a; Jt. Ex. 18. He acknowledged that the next hourly report at 7:57 a.m. did locate the vessel outside the RCA traveling at 5 knots with an eastward heading of 91 degrees. Tr. 71; Jt. Ex. 14 Jt. Ex. 14a. However, again at 8:57 a.m. the VMS transmission point located the boat within the RCA with a speed of 0.0 knots and a heading of 0.0. Tr. 72; Jt. Ex. 14; Jt. Ex. 14a. Similarly, at 9:57 a.m. the boat was again located in the RCA, "a little bit to the left of the 8:57 [point] . . . [with a] speed of 0.0 knots and a heading of 0.0." Tr. 72; Jt. Ex. 14; Jt. Ex. 14a. At 10:57 a.m., the data also shows the vessel in the RCA but now moving at 5.0 knots on a south southeast heading of 157.0 degrees. Tr. 72, 76; Jt. Ex. 14; Jt. Ex. 14a. The 11:57 a.m. report shows the vessel again in the RCA travelling slowly at 1.0 knot, south southwest at a 211.0 degrees heading. Tr. 73, 77; Jt. Ex. 14; Jt. Ex. 14a; Jt. Ex. 18. Agent Struble alleged that by using the hourly directional headings at each point and time, he could plot where the vessel would have had to enter and exit the RCA to have been continuously transiting on a continuous course, as required by the regulation. Tr. 78–80.

In response to questioning by the Tribunal, Agent Struble summed up his investigation stating that he considered the foregoing data and looked at data from other dates, in an effort to get the "bigger picture" and try to "figure out exactly what's going on and if it's a recurring problem," noting that Respondents had a prior history of violation.²¹ Tr. 167. He even spoke to Jason Robinson "to find out if there's some reason that . . . would make sense for me maybe to give them a verbal warning." Tr. 167. However, he found no "reasonable explanation" for the course of Respondents activities that day, and so referred the case for civil enforcement. Tr. 86.

At hearing, Respondents proffered testimony and evidence in support of their claim that there was an alternative reasonable explanation for their activities on the day in question and the VMS 0/0 position reports upon which the Agency's case relies. As background, Respondent Jason Robinson explained that a typical fishing day for them at the relevant time generally involved them baiting their gear in port and leaving Santa Barbara Harbor between 3:00 a.m and 4:00 a.m. Tr. 230–31, 233–34, 244, 259. Then, using their autopilot, they would make way on a constant course without stopping for about three to four hours at 16 knots out to their fishing spot past the island and the RCA, spend about twenty minutes setting their gear in the water, wait four to four and a half hours for it to "soak," retrieve it, and then head home, returning at about 8:30 p.m. Tr. 227, 229–31, 233–34, 244, 263, 267.

During the four to four and a half hours their gear is soaking, Mr. Robinson indicated he and his brother do not keep their vessel circling around or "drifting" in neutral in the open ocean as the Agency claims, stating if they did their "boat would be throwing things from rail to rail."

²¹ The prior violations to which Agent Struble refers occurred in March of 2008 and involved Respondents fishing with bottom contact gear (sablefish traps) in an Essential Fishing Habitat. Jt. Ex. 25; Jt. Ex. 27; Tr. 250–56. In 2009, Respondents admitted the violations and agreed to pay half of the proposed penalty pursuant to a settlement, although they claimed at the hearing that the violation was the result of "entrapment." Jt. Ex. 26; Jt. Ex. 27; Tr. 250–56.

Tr. 230, 242. He noted “[i]n general the weather on the west end of San Miguel is rough, windy, lot of swell, lot of current.” Tr. 239. In 15 knot winds, the ride on the boat is bumpy, which can be made “a lot worse” by the current, requiring them to hold onto something for safety. Tr. 241. Thus, when out on the water they keep the boat moving “pointed either into [the wind] or going down with it.” Tr. 242. During the four hours their gear takes to soak, they head north northeast through the RCA towards the calmer waters near San Miguel Island, explaining that “[o]nce you get past that edge out there you’re just getting further away from land, further away from anyone that could help you if you had a problem.” Tr. 245–48, 269. The Risa Lynn has only one engine and that engine has failed in the past. Tr. 228–29, 247. Mr. Robinson explained: “We’d be in trouble” if it failed again. Tr. 228–29, 247. If the engine did fail, Respondents would have to paddle to shore, and Mr. Robinson noted that they keep a surfboard and wet suits on board in case this occurs. Tr. 247.

Moreover, Mr. Robinson stated, they do not generally go all the way to the Island, nor do they stay close to it all day. Tr. 248, 269, 272–73. Instead, it is their practice to periodically travel back out to check on their gear, since it can move with the current.²² Tr. 245. Mr. Robinson explained that at the time of the alleged violation, he and his brother were new to longlining sablefish and had only been doing it for eight or nine months. Tr. 233. As such, they felt a particularly strong need to keep tabs on their gear and so he believed that, at the time in question, they were traveling back through the RCA to check the gear on an hourly basis. Tr. 245, 267, 269. During such checks, he would “hit,” or check, each flag on his gear as marked in his GPS, and then circle back up using his autopilot towards the Island. Tr. 267–68, 248.

Mr. Robinson claimed at hearing that at the time of the alleged violation he was aware of the RCA coordinates, that he has a “Farino [sic] Navnet” navigational system with a ten or twelve-inch screen, which has a plotter that tells him when he’s reached his fishing grounds, radar, and a depth sounder that “shows [them] the bottom.” Tr. 237–38, 262–63, 273–74. Further, he understood they had to “keep [their] gear out of the [RCA] area” and “need[ed] to transit through there on a constant course and maintain that course and not stop or turn around.” Tr. 238–39. He testified he believed that “as long as my boat was in gear and my pilot was set and I was going, I was fine” in traveling back and forth through the RCA to check on his gear. Tr. 248. There was no way he could make a mistake and not realize he was in the RCA, he said.

²² The Robinsons’ gear consists of two anchors separating a horizontal set of lines a mile and a half long with 3000 hooks on them, and weights to keep the lines on the ocean floor. Tr. 263–64. At each end of the lines is a down line about 420 fathoms long which goes up to two 2-foot high rubber or plastic buoys at the surface, tied to which are 8-foot high poles that sit upright in the water with radar reflectors. Tr. 264–66. Mr. Robinson testified that this is the length of the buoy line he uses to fish in 300 to 400 fathoms, and when he fishes in lesser depths he puts on a shorter buoy line to avoid “too much scope . . . because it gets tangled on the bottom.” Tr. 265. On a clear day, Mr. Robinson says he can locate his gear though visual sighting of the poles, but in fog or swell conditions he needs to use his radar to locate it. Tr. 266, 268. Mr. Robinson noted that on occasions when the weather is very bad, he has not been able to locate the gear at all, and has had to come back for it at a later time. Tr. 268.

Tr. 238. Mr. Robinson characterized himself as an environmentalist, and testified that he honors the fishing rules and has never “poached fish” in the RCA. Tr. 249–50.

As such, Mr. Robinson said he was surprised and confused by Agent Struble’s chart with track lines allegedly showing him drifting in the RCA or going around in circles, testifying there was no legitimate reason to put a boat in neutral and “I’m thinking I don’t go around in circles in the RCA.” Tr. 242–43, 249. Mr. Robinson also testified that it did not make sense to him that the chart would have him traveling sideways to the sea from 8:57 a.m. to 9:57 a.m., stating he would never do that because it would be “unsafe and uncomfortable.” Tr. 242–44.

As to the first 0/0 position report showing him inside the RCA at 6:57 a.m. on May 17th, Mr. Robinson guessed from the time that he was likely “going out to his fishing grounds,” as he thought he was likely finishing setting up his gear by the time of the next VMS transmission at 7:57 a.m. Tr. 260, 276. He disagreed with VMS data at 6:57 a.m. to the extent the Agency interpreted it as showing that he was not moving, stating that at the time he “wouldn’t be going zero speed.” Tr. 260–61. Instead, he thought he might be going under 1 knot at the time. Tr. 261. As explanation for the slow speed, he offered a variety of suggestions. First, he said he might have been washing something down, using his deck hose. Tr. 270–71. He explained the deck hose requires the hydraulic system, which “means that I have to be at a slower or low rpm to use it.” Tr. 271. As such, he thought he might have throttled down the engine transmission to “one click in gear idling,” with the propeller still turning, resulting in him traveling at less than 1 knot per hour. Tr. 269–71, 278. Alternatively, he suggested that the wind and the waves can “slow you down significantly.” Tr. 277. In addition, he noted that at the time of the 6:45 a.m. VMS report he was about a “mile and a half” away from where he fished, or five minutes out. Tr. 279. Mr. Robinson suggested that “I might [have] need[ed] time to get things squared away so that I can just go up and make my set and not have to bob around out there and wait and get ready.” Tr. 279. Thus, “[I]f I was approaching my area . . . I would drop my speed,” noting that “[w]e’re kind of getting ready, I’m dropping my speed and I’m getting my foul weather gear out.” Tr. 277. This was true on May 17, 2010, he said, when the winds had been blowing at 20 knots the previous night but were declining, making it an appropriate day for him to go out fishing. Tr. 240–41.

For other times during May 17th when the VMS data showed him in the RCA at 0 speed, 0 heading, or traveling slowly, Mr. Robinson testified that he normally throttles down, that is, sets the engine transmission “one click in gear idling” on the way back to the island and surmised from the data that “I think I entered in the RCA going at low speeds. That’s what I think. I found my gear, came down on it[,] turned back towards the island and just pressed auto, or turned and just pressed the pilot again. That’s what the data shows me.” Tr. 270, 280–81. Mr. Robinson testified that his fuel costs “a lot,” as he uses over 100 gallons of diesel on each fishing trip. Tr. 280–81. Therefore, like many fisherman, Mr. Robinson explained, he throttles down and transits slowly to save fuel, claiming “[y]ou don’t burn any fuel there when you’ve got a really low rpm.” Tr. 280–81. He also said he goes at such a slow speed for comfort, noting “I’ve got no reason really to be in a big hurry. I’ve got four hours.” Tr. 270–71.

Further, as to the VMS reporting a zero degree or true north heading, Mr. Robinson noted that San Miguel Island is in a “north direction” from his fishing ground. Tr. 272–73. Further, he

explained that a VMS report at a certain moment is not reflective of the entire direction in which a vessel is going. Tr. 275. Autopilot, he testified, takes the boat in the direction it is headed at the time the button starting the system is pushed. Tr. 262, 272. However, the system is “constantly correcting” to stay on the course and “could be within 10 or 15 degrees at any time.” Tr. 275. Also, he could have hit “the back of a wave and” been pushed in a different direction when the VMS transmission occurred. Tr. 275.

At hearing, Mr. Robinson explicitly denied ever having “poached fish in the RCA[.]” Tr. 249. While he admitted being aware of points of unusual depth in the RCA, including a point that is 1400 feet deep (about 233 fathoms), he testified that he fishes for sablefish at the bottom of the ocean at a target depth range of 300 to 400 fathoms, or 1800 to 2400 feet, stating “we get bigger fish out deeper and we don’t fish under 300 fathoms.” Tr. 235–36, 282. Further, he asserted he has only one set of fishing gear, thus implying that he could not have simultaneously fished in his spot and in the RCA. Tr. 237.

Mr. Robinson buttressed his testimony by offering that of Don Radon, the Santa Barbara commercial boat builder who built the Risa Lynn. Tr. 283, 285. Mr. Radon testified that he is familiar with San Miguel Island having grown up the child of a commercial fisherman, and had “spent a lot of time out there as a kid,” adding “I go out there for sport fishing now.” Tr. 284. As to Respondents’ claim regarding the rough weather on the far side of San Miguel Island where Respondents fish, Mr. Radon confirmed “it’s fully exposed to the northwest kind of trade winds that run down the coast and the swells are pretty [big]—you know there’s nothing that slows them down, it’s wide open ocean. And there’s a big up-welling which creates a lot of current.” Tr. 285. Winds of 15 knots and swells of three to four feet, “[t]hat’s a normal day out there,” Mr. Radon contended, and characterized the water in the channel as “one of the roughest in the world.” Tr. 284, 286.

Mr. Radon explained he builds boats “so they work for the Santa Barbara [C]hannel [I]slands really well and they’re designed to handle the rough water.” Tr. 284. He touted that “[o]ur boats work pretty much everywhere because they work here.” Tr. 284. Still, he said, boats in rough seas are rocky, and even on a normal weather day out in the waters around San Miguel, the Risa Lynn “would feel small probably.” Tr. 285–86. Confirming Mr. Robinson’s testimony, Mr. Radon suggested that as long as the boat was under power, going with or against the wind, the occupants would be “fine.” Tr. 286–88. However, as to Mr. Struble’s suggestion that Respondents idly drifted for hours around in the RCA, Mr. Radon stated that would not be “normal[.]” and he would not know why anybody would do it in those weather conditions as the boat would “get a little bit unstable, uncomfortable.” Tr. 286–87. He explained that if you were under power “you’re using the stability of the [length] instead of [the] width because you have 29 feet of [length] to use the stability . . . and if you’re quartered with it then you’re using the width.” Tr. 287. That way you would be “much more comfortable and stable and safe.” Tr. 288. Mr. Radon agreed with Mr. Robinson’s claim as to how he operated his boat, just putting the throttle up “one click” so “you just get it so you have steerage. Once you give it a little throttle then the autopilot can steer the boat and keep it straight.” Tr. 293.

Further, as to the claim that Respondents stayed and fished in one small area of a deep canyon in the RCA, Mr. Radon opined that in the seas around San Miguel Island “[i]t’s pretty

close to impossible to stay in one spot.” Tr. 289, 291. The “wind it blows you off pretty quick.” Tr. 291. He said he has tried on occasion to fish and stay on one spot, and found “it’s almost impossible to stay in one spot. I mean it’s literally almost impossible . . . in those kinds of seas it is impossible, I mean you just can’t do it in my experience.” Tr. 289, 291. At best he suggested that if the boat’s “speed was close to equal to what the force was trying to push you back then you could . . . keep within 100 or 200 yards maybe.” Tr. 292. He said he “can’t imagine” staying within about two and a half meters. Tr. 292. Even as winds died down during the day, he said “you still have residual swells from the past 12 hours that will still keep pushing you around.” Tr. 292.

Most significantly, Mr. Radon testified with regard to the accuracy of the VMS speed data reports, stating the speed in the boat over water and speed on ground “are totally two different speeds.” Tr. 294. He explained that in a boat “you could be going 4 knots over a current and still read 1 knot over the ground” or less “if you’re going against a 5 knot current and the wind too and the swell. Sometimes you have to go pretty hard just to barely creep along.” Tr. 294–95. Thus, he suggested that the VMS reports as to Respondents’ speed may not have reflected how fast the boat was actually intending to go, but rather its net speed against the current.

In addition to the foregoing testimony introduced live at hearing, the parties offered into the record Matthew Heasley’s dual deposition testimony and affidavit. Jt. Ex. 19; Jt. Ex. 21; Jt. Ex. 22. Mr. Heasley is the Operations Manager at Faria Watchdog, Inc., the maker of the VMS system on the Risa Lynn. Jt. Ex. 19 at 10, 17. Mr. Heasley confirmed the testimony given by Agent Struble regarding the general method of operation for the system and stated that the data being gathered on an hourly basis is that of the vessel’s location, speed, and heading as of five seconds before transmission. Jt. Ex. 21 at 13. In terms of location, he said the Faria system was more accurate than the 100-yard minimum accuracy standard NMFS requires of such systems. Jt. Ex. 19 at 19, 42.

As to speed, Mr. Heasley explained that the figure reported as the vessel’s “speed” is truncated after the decimal point, not rounded, so speeds up to 0.9 knots are reported as zero. Jt. Ex. 21 at 15–17, 29–30; Jt. Ex. 22 at 2. Further, he stated that the system reports a “course over ground” value. Jt. Ex. 21 at 14; Jt. Ex. 22 at 2. This means that if a vessel’s engine is operating and it is being propelled forward at 5 knots against a 4 knot current, the speed reported by the system would be 1 knot. Jt. Ex. 21 at 15, 28. Alternatively, if the boat’s engine is idling and current is carrying it 4 knots per hour, the system would still report a speed of 4 knots. Jt. Ex. 21 at 31; Jt. Ex. 19 at 80. He opined that if the system retrieved a zero speed reading for a boat on the ocean when there was a substantial current, one knows the boat was under power at the time, and could have been traveling up to 0.9 knots. Jt. Ex. 21 at 31–33.

In terms of heading, Mr. Heasley suggested that the degree reported is the direction that the boat is going at the moment the data was gathered. Jt. Ex. 19 at 38, 43; Jt. Ex. 21 at 12, 19. Thus, the heading does not indicate if the boat is going in forward or reverse. Jt. Ex. 21 at 19. Further, the decimal for heading is also truncated, not rounded, so a heading of up to 0.9 degrees would be reported as zero. Jt. Ex. 22 at 2. Zero is also the default value for a vessel that is idle. Jt. Ex. 21 at 21–22. Thus, a zero heading report could mean the vessel was going “true north”

(0.0°), almost true north (up to 0.9°), or not moving (no course over ground), and from the heading data alone one would not tell which was true. Jt. Ex. 21 at 20–23, 30–31; Jt. Ex. 22 at 2.

Further, Mr. Heasley averred that the chart the Agency created by drawing straight track lines in chronological order from one VMS hourly data report to another for the vessel on May 17, 2010, does not provide any information at all regarding where the vessel went or how fast it moved within the intervening hours. In such periods of time, the Risa Lynn could have turned around and went the other way, and then turned around again. Jt. Ex. 19 at 76. It could have gone right, left, sped up, slowed down or stopped. Jt. Ex. 19 at 76–77, 87–89, 92. Further, he implicitly acknowledged that the chart was misleading in that to connect the dots in chronological order the chart reflected lines that, on occasion, depicted the vessel on a heading different from that reported for the point by the VMS data for the particular point in time. Jt. Ex. 19 at 91–93, 96–98. Moreover, to the extent that the straight track lines on the chart showed the vessel as having travelled through or been portaged over the land that is San Miguel Island, they were also misleading. Jt. Ex. 19 at 77–78. In sum, he suggested that the “average” courses and speed data used by the Agency to create the chart was meaningless given that the vessel could have changed course and speed at any time. Jt. Ex. 19 at 98.

After considering all the evidence in the record, I find the Agency has not met its burden of proof regarding the violation. Specifically, I do not find sufficient evidence showing that it is “more likely than not” that Respondents failed to “continuously transit” through the RCA on May 17, 2010, as alleged by the Agency.

First, while the VMS readings did report both the vessel’s heading and speed as “0” on three hourly occasions while located within the RCA on May 17, 2010, the evidence adduced at hearing indicates that such readings are not definitive proof that the vessel was, in fact, stopped or stationary at those times. Rather, the testimony given by Mr. Heasley, Mr. Albert, and Agent Struble was that while a “0” heading report could be indicative of a vessel not moving at all, such as when it is tied up at a dock, it could equally indicate that at that particular five-second transmission interval the vessel was traveling in the direction of “true north” or close thereto (0°–0.9°), which would be about the general direction the vessel would be headed in if Respondents were transiting back from their fishing grounds to San Miguel Island for cover as they allege. Tr. 194, 203–04, 269; Jt. Ex. 14a. It is recognized that “true north” is not the exact direction from Respondents’ fishing spot to the Island, that the direction is really “northeast”; however, Mr. Robinson testified without contradiction, and consistent with the evidence as to the rough waters around the Island, that even using autopilot to maintain a constant course, the system is correcting constantly and the course of the vessel can vary 10 to 15 degrees as a result of the wind and the current.²³ Tr. 269, 275; Jt. Ex. 14a. Thus, it would be possible for the VMS in a

²³ In addition to the report from the weather station situated on Santa Rosa Island, the channel island east of San Miguel, the parties also introduced in to the record a weather report from NOAA Buoy Station 46054, which is situated in the waters of Santa Barbara Channel. Jt. Ex. 10. That weather report indicated that at 6:50 a.m., 8:50 a.m., and 9:50 a.m. (almost the exact times Respondent was supposedly found by the VMS reports to be stopped in place) the winds out on the water blowing at 14.8, 14.3 and 12.1 miles per hour, respectively, a moderate breeze consistent with the Buoy Report. Jt. Ex. 9 at 2; Jt. Ex. 10 at 2; *see also* Tr. 109–10.

five-second interval to read the vessel's heading as true north or close thereto while it was generally transiting in a northeast direction back to the Island at 8:57 a.m. and 9:57 a.m., as alleged by Mr. Robinson. Further, with regard to the "0" heading reading at 6:57 a.m., when the vessel was purportedly headed in the opposite direction (southwest) out to the Island, Mr. Heasley testified that the heading does not reflect if a vessel is moving in forward or reverse. Thus at that time, if the vessel had been slowed to "one click" as Mr. Robinson alleged in anticipation of shortly reaching his fishing location, with the winds and currents pushing against in a northeasterly direction as the evidence indicates, it could have been read by the VMS to have no heading or a true north or close to true north heading for a five-second interval. *See* Jt. Ex. 10.

Similarly, in terms of speed, Mr. Heasley indicated that the VMS speed reading is that of the "course over ground," meaning that it is the speed of the vessel relative to the fluid in which it is traveling, i.e. the boat speed as affected by the water currents, or net speed. Thus, the "0" speed reading at 6:57 a.m. might reflect the vessel was not moving, but could equally reflect that Respondents were traveling "under power," even at a significant intended rate of speed, but against an almost equal opposing current, resulting in a net speed of less than 1 knot per hour. Jt. Ex. 21 at 31–33. Alternatively, with regard to the 8:57 a.m. and 9:57 a.m. VMS reports, such a "0" reading could reflect that Respondents were merely transiting back very slowly to the safety of the Island, as they have alleged. As acknowledged by Agent Struble at hearing, the relevant regulatory provision does not contain any minimum speed in regard to vessel's transiting the RCA. Tr. 88–89. Therefore, as long as Respondents were not stopped, but moving, even very, very slowly, under power, they would not be in violation.

Second, contrary to the Agency's claims, the evidence persuasively suggests that it is "impossible" for a small vessel such as Respondents' to be stopped or stationary in the waters around San Miguel Island for any meaningful period of time. All the testimony at hearing agreed with Agent Struble's statement that no one "in their right mind would deliberately turn off their engine while they're at sea in a boat like that. They're going to leave their engine idling at minimum." Tr. 116. Thus, the issue was whether even an idling vessel could remain stationary in the water around San Miguel. At hearing, Agent Struble, the Agency's lead witness in support of its theory that Respondents' vessel could be stationary, admitted he had never actually been out in a small boat to San Miguel Island. Tr. 81–82. In contrast, the Agent acknowledged that Mr. Radon has "an incredible amount of experience at sea. He's a very respected individual as far as I know in the community and he's had a long career building boats." Tr. 81–82, 124–25. Based upon his personal actual extensive experience in small vessels around San Miguel Island, Mr. Radon credibly testified at hearing that in the seas around the Island it is normally "impossible" to stay in one spot, due to the winds. Tr. 289, 291. Further, the evidence shows that there was a significant level of wind blowing on the waters that day. The May 17, 2010 report of Buoy 46054, which like Respondents' vessel at the time was out at sea to the west of Santa Barbara, indicates that at 6:50 a.m., 8:50 a.m., and 9:50 a.m. (almost the exact times Respondent was supposedly found by the VMS reports to be stopped in place), the wind was blowing at 14.8, 14.3 and 12.1 miles per hour respectively.²⁴ Jt. Ex. 10 at 2.

²⁴ The NOAA Buoy Station report erroneously indicates the date of the report as May 17, 2011 and the degree of wind direction for May 17, 2011 as "999." Jt. Ex. 10 at 2. While there was

The significant wave height was 3.1 feet. *Id.* Even Agent Struble, who downplayed the weather, had advised Respondents during their interview that given the “usual sea conditions” in the area, maintaining a quarter-mile buffer from the RCA might not be enough to ensure their vessel did not cross over the boundary line. Tr. 48; Jt. Ex. 1 at 10. Thus, the evidence suggests it was unlikely, if not impossible, for Respondents’ vessel to have been stopped or stationary for any meaningful period of time as the Agency alleges.

Third, while the VMS hourly report taken at 9:57 a.m. located the vessel in the RCA “a little bit to the left of the 8:57 a.m. point, those readings by themselves do not sufficiently establish that the vessel was “drifting” or remained in essentially the same location in the intervening hour. As indicated above, based upon the wind data subsequently obtained, upon cross-examination at hearing, Agent Struble essentially recanted the assertion in his report that the vessel was “drifting,” and the Agency’s other witness, Mr. Albert, explicitly testified at hearing that he did not see evidence of drifting. Tr. 218–19. Further, at hearing, Agent Struble acknowledged that Respondents’ fishing area is just beyond the RCA, and four and a half to six and a quarter miles from anchoring points such as Point Bennett near San Miguel Island. Tr. 152–56. He estimated that it would take Respondents thirty minutes or less to travel from their fishing spot through the RCA to the Island cove at 15 knots per hour, and that they could go from cove back and forth to their fishing spot in an hour. Tr. 154. Thus, instead of remaining stationary in the RCA, in the intervening hour between 8:57 a.m. and 9:57 a.m., as Agent Struble acknowledged was “possible,” Respondents could well have traveled closer to the Island and back out “continuously transiting” through the RCA and heading to their fishing spot, as they claim. Tr. 121, 131–32. Using autopilot to steer them in both directions would make it more likely they would have taken the same path and potentially hit about the same point in the water on each trip.

Fourth, the Agency has failed to offer a viable reason for Respondents to be stopped or stationary in the RCA. The purpose of the regulation is to prevent unlawful fishing in the RCA. Tr. 84–85; Jt. Ex. 13 at 2. The uncontroverted evidence of record is that on the day in question Respondents had only one set of longline fishing gear on their boat. Tr. 236–37, 148–50. The VMS data indicates that at 7:57 a.m. Respondents had passed through the RCA on the backside of the Island and were at their fishing grounds, heading back due east to San Miguel Island at 5 knots. Jt. Ex. 4; Tr. 134. There is no evidence in the record indicating that Respondents did not, in fact, set their fishing gear in their normal fishing spot beyond the RCA. Thus, they had no gear available to them to set in the RCA before or after that point. Moreover, while Agent Struble testified that there was a 200-fathom deep canyon in the area where the VMS reports found Respondents in the RCA, and that Respondents were near a 300-fathom line, Respondents testified they were fishing in depths greater than that and the landing records are consistent with Respondents’ testimony. Tr. 158; Jt. Ex. 3 at 1. As Agent Struble acknowledged at hearing, the

testimony at hearing that the date was a typographical error, it is uncertain as to the meaning of such directional degree reporting other than the absence of data. Tr. 126; Jt. Ex. 10 at 2. The report of the winds by the Buoy Station out in the Channel, where the vessel was, are deemed more reflective of the actual winds faced by the Risa Lynn on the day than those recorded by the station situated inland on Santa Rosa Island.

evidence is open to a world of activities Respondents could possibly have been doing in the RCA that day, but it does not support that fishing was more likely than not one of them. Tr. 104.

Fifth, the alternative explanations offered by Respondents for the VMS data reports are credible and reasonable. At hearing, as explanation for the VMS reports finding them in the RCA at 8:57 a.m. and 9:57 a.m. at 0 speed/0 heading, Respondents claimed that in an effort to monitor their fishing gear, they slowly but repeatedly traversed the RCA on an hourly basis, going from their fishing spot to a position of safety closer to San Miguel Island. Tr. 269, 280. Significantly, such explanation was consistent with what Agent Struble said his knowledge was of the common practices of fishermen in the area. Specifically, Agent Struble testified that “there’s typically two basic scenarios. They either go back to the island and wait it out for several hours or they stay . . . in kind of the greater vicinity.” Tr. 164. He suggested the choice was between “maintaining the safer ride, the smoother ride [near the island] versus sometimes being blown [on the ocean],” noting that the latter option was “going to be not a pleasant experience.” Tr. 164. He also testified that he is aware of “a cove on the island that’s a common spot . . . where they go in and anchor if they’re going in to get out of the weather while their gear soaks,” which is only four and one half miles away from Respondents’ fishing spot. Tr. 151–53. Further, on cross examination Agent Struble agreed that it was reasonable and possible that after setting their gear Respondents went toward the Island for safety and that is consistent with what Mr. Robinson told him during his initial interview. Tr. 98, 121–22, 131–32.

As to the 6:57 a.m. VMS report finding Respondents in the RCA at 0 speed/0 heading on May 17, 2010, Mr. Robinson said he likely throttled down at that point as he was only about five minutes away from his fishing spot and “might [have] need[ed] time to get things squared away so that I can just go up and make my set and not have to bob around out there.” Tr. 279. As previously discussed, it is plausible that this VMS report could have reflected the action of winds and currents pushing against the vessel. *See infra* at 26–27. However, upon his initial interview with Agent Struble, albeit ten months after the day in question, Mr. Robinson thought he may have briefly stopped to check or secure his gear. Tr. 140. While stopping in the RCA even briefly would technically be in violation of the requirement to continuously transit because the regulation provides no exception, both Mr. Albert and Agent Struble correctly noted that common sense and safety-related choices must play into a determination of whether a violation occurred. Tr. 83–86, 210–11, 215–16. Moreover, while perhaps it would have been better practice in such an event for Respondents to have called in to report their momentary violative action, as Mr. Albert suggested, their failure to do so is not itself a violation. Tr. 217.

Sixth, in his discussion of the alleged violation at hearing, Agent Struble seemed at points to be under the erroneous impression that the regulation required Respondents to maintain a “constant speed.” For example, he testified “I believe . . . the regulations state maintain a constant course of speed so that we know what those [VMS] points mean.” Tr. 93. Further, under cross-examination, in response to an inquiry as to whether Respondents were limited or prohibited from being in the RCA, Agent Struble responded: “Not if he’s transiting through and maintaining a constant course and speed under power,” and “In this case the RCA is approximately two miles wide so when you have speed of zero or less than one knot, it would take approximately two hours or more to cross the RCA at that constant speed.” Tr. 90. In fact, maintaining a constant speed is not a regulatory requirement and, as Mr. Albert testified,

Respondents could lawfully throttle up and down in RCA, changing their speed at will and not be in violation of the regulatory requirement so long as they were continuing to make way under power. Tr. 177–78, 209, 211. Moreover, there is no course limitation, and Respondents could travel laterally through the RCA if they so desired. Tr. 209. Thus, Agent Struble’s suspicion of Respondents’ activities and his opinion that Respondents’ explanation for their conduct that day was reasonable seems influenced by an erroneous impression of the regulatory requirements.

Seventh, the nautical charts created by the Agency displaying straight track lines connecting the various hourly VMS data points and purportedly representing the “navigational acrobatics” of Respondents’ constant course and continuous heading are misleading and do not provide a reliable basis for finding Respondents in violation. *See* Jt. Ex. 4 at 1–2; Agency Br. at 13–14. The evidence adduced at hearing consistently indicated that the VMS transmissions represent only five-second snap-shots of information, taken an hour apart, and no information regarding a vessel’s activity in the intervening time is captured. Tr. 138–39, 214. As such, the “average” speed and course as stated by the system are only theoretical, resulting from a mathematical calculation performed in regard to two unrelated hourly data points. Tr. 214–15. Agent Struble and Mr. Albert both acknowledged at hearing, the chart tracks drawn in reliance on such data “just connect[] the dots,” delineating one “possible course” out of many the vessel may have taken that day. Tr. 92, 132–33, 212. Moreover, Mr. Heasley delineated at least two specific instances where the course as drawn in reliance on such points was obviously erroneous, one where the chart reflected the vessel going in a direction opposite that reported by the VMS for the point and another which showed the vessel transiting directly through San Miguel Island. Jt. Ex. 19 at 76–78, 90–94, 171. Even Agent Struble admitted at hearing that a vessel could not go on a constant course in perfectly straight line as drawn on his plotting. Tr. 82–83. Thus, the Agency’s charts do not accurately reflect Respondents’ actual course of travel on the day or provide a basis for determining a violation occurred in this case.

In sum, it is certainly understandable that, based upon the VMS reports, Mr. Albert, Agent Struble, and NOAA enforcement would find the Respondents’ activities on May 17, 2010 to be suspicious, especially in light of their past history and the fact that there was no evidence of further incursions into the RCA by Respondents after the March contact with Agent Struble. Tr. 102; Jt. Ex. 16 at 33–37. Further, this Tribunal recognizes the difficulty the Agency faces in enforcing the regulations, and its responsibility to protect the groundfish fishery generally. Tr. 144. However, this Tribunal nevertheless finds that the preponderance of the evidence does not establish that it is more likely than not Respondents were not continuously transiting the RCA on May 17, 2010.²⁵

²⁵ At hearing, Respondents raised two issues which are not addressed above. These concern the ten-month delay between the date of the alleged violation and the Agency’s contact with Respondents in regard thereto, and the Agency’s failure to increase the polling time to obtain more frequent VMS transmission reports on their vessel, both arguably hampering Respondents’ access to evidence in their defense. Tr. 99–102; *see also* Jt. Ex. 19 at 63. The Agency witnesses provided credible explanations in response to both issues at hearing, and thus the issues are not deemed of significance here. Tr. 147–48, 205–07.

ORDER

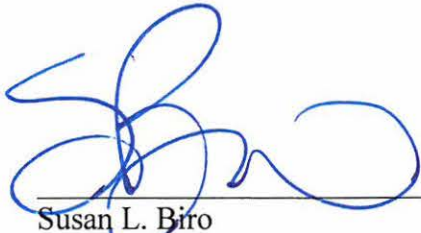
Based upon the foregoing, Respondents **Jason Robinson** and **Shane William Robinson** are hereby found **NOT LIABLE** for the violation charged in this action.

PLEASE TAKE NOTICE, that this Initial Decision becomes effective as the final Agency action **60 days** after service on **August 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 any petition for reconsideration of this Initial Decision must be filed within **20 days** after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. *Id.* Within **15 days** after a petition is filed, any other party to this proceeding may file an answer in support or in opposition. The undersigned will rule on any petition for reconsideration.

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

SO ORDERED.



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

Dated: August 29, 2013
Washington, DC

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

15 CFR 904.271-273

§ 904.271 Initial decision.

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

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

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

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

(4) A statement of further right to appeal.

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

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

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

- (1) Otherwise provided by statute or regulations;
- (2) The Judge grants a petition for reconsideration under § 904.272; or
- (3) A petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative under § 904.273.

§ 904.272 Petition for reconsideration.

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

§ 904.273 Administrative review of decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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