UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:	**DOCKET NUMBER**
Dowdy Joe Simmons, and Lester L. Hodges, Jr., Respondents.	SE1104779, F/V River Rat

INITIAL DECISION AND ORDER

Date: August 30, 2013

Before: Susan L. Biro, Chief Administrative Law Judge, U.S. EPA[1]

Appearances: For the Agency:

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[1] Pursuant to 5 U.S.C. § 3344 and 5 C.F.R. § 930.208, the U.S. Office of Personnel Management approved an Interagency Agreement authorizing the Administrative Law Judges of the United States Environmental Protection Agency to hear cases pending before the National Oceanic and Atmospheric Administration, effective for a period beginning September 8, 2011.

I. PROCEDURAL HISTORY

On February 27, 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 Dowdy Joe Simmons and Lester L. Hodges, Jr. ("Respondents"). The NOVA charges Respondents with two counts of violating the Endangered Species Act ("ESA" or the "Act"), 16 U.S.C. §§ 1531–1543, and the regulations found at 50 C.F.R. §§ 223.205(b)(1) and 223.206(d). The NOVA charges one violation in regard to the turtle excluder device ("TED") in the port net and one violation in regard to the TED in the starboard net on the F/V River Rat on October 5, 2011. The Agency proposes a penalty of $5,750 per count, for a total penalty of $11,500. The NOVA advised Respondents of their right to respond and request a hearing before an Administrative Law Judge (ALJ) within thirty days of receiving the notice.

On June 18, 2012, the Agency filed a memorandum with this Tribunal stating that it had received a request for a hearing from Respondents' counsel on April 18, 2012, and that the Agency preferred the hearing be held in Jacksonville, Florida. The Agency submitted a copy of Respondents' hearing request and a copy of the Agency's NOVA with its memorandum.

On June 21, 2012, the undersigned issued an order styled "Assignment of Administrative Law Judge and Order to Submit Preliminary Positions on Issues and Procedures," directing each party to file, no later than July 27, 2012, a Preliminary Position on Issues and Procedures ("PPIP") in accordance with 15 C.F.R. § 904.240(a). The Order was served on Agency counsel and counsel for Respondents by regular mail. The Order advised the parties that a "[f]ailure to comply with these PPIP requirements may result in the exclusion of the non-compliant party's evidence and/or the issuance of an adverse ruling against the non-compliant party." The Agency timely filed a PPIP on July 26, 2012, the Respondents did not.

On July 19, 2012, the undersigned issued a Hearing Order which scheduled the hearing for September 18, 2012, and set deadlines for the submission of a status report, discovery motions, joint stipulations, and prehearing briefs. On August 10, 2012, the Agency filed a statement that the parties were not then pursuing settlement negotiations. On August 15, 2012, the Docket Clerk of this Tribunal issued a Notice of Hearing Location informing the parties of the time and place for hearing.

On August 21, 2012, pursuant to the Agency's motion, the undersigned rescheduled the hearing for October 11, 2012. The Order on Motion for Change in Hearing Date specifically stated that "[a]ll other deadlines established in the July 19, 2012 Hearing Order remain unchanged." On August 31, 2012, the parties filed a Joint Set of Stipulated Facts, Exhibits, and Testimony.

On September 24, 2012, Respondents filed a PPIP. The Agency filed a Motion in Limine on September 28, 2012, seeking to preclude Respondents from introducing evidence on certain defenses raised in their PPIP. Respondents filed a Response to Agency's Motion in Limine on October 3, 2012. On October 10, 2012, the undersigned issued an Order on the Agency's Motion in Limine, which precluded the Respondents from introducing evidence regarding its

defenses of void for vagueness and substantial reliance on the Agency's interpretation of its regulations. The Order also precluded the Respondents' from introducing the testimony of Janie Thomas and Lindsey Parker in its case in chief, to the extent that their testimony was relevant to the Respondents' vagueness and substantial reliance defenses.

In accordance with the Notice of Hearing Location, the hearing in this matter was held beginning on October 11, 2012 in Jacksonville, Florida. A copy of the hearing transcript ("Tr.") was received and provided to the parties on October 29, 2012. At hearing, the Agency offered the testimony of four witnesses: Richard M. Chesler, Officer Aaron O'Reilly, Investigator Jill Izsak, and Robert Dale Stevens. Respondents offered the testimony of three witnesses: Leslie Hodges, Lester Hodges, Jr., and Dowdy Simmons.[2] A total of seven exhibits were admitted into the record consisting of six exhibits offered by the Agency ("AX") 1-6 and one Joint Exhibit ("JX 1") being the parties' Joint Set of Stipulated Facts, Exhibits and Testimony previously filed.

On November 19, 2012, the undersigned issued a Post-Hearing Scheduling Order, which *inter alia*, set forth a series of deadlines for the submission of post-hearing briefs. The Agency filed a Motion to Conform Transcript to Actual Testimony on December 7, 2012, to which Respondents filed no response. By Order dated June 18, 2912, the undersigned ruled on the Motion to Conform the Transcript to the Actual Testimony.

The Agency timely filed its Initial Post-Hearing Brief on December 21, 2012. Respondents filed their Initial Post-Hearing Brief on February 19, 2013 ("Resp. Brf."), two weeks past the established deadline. The Agency then timely filed its Reply to Respondents' Initial Post-Hearing Brief on February 19, 2013. Respondents did not file a Reply Brief.

II. FACTUAL BACKGROUND

On October 5, 2011, Officers Aaron O'Reilly and Jill Iszak[3] from the Florida Fish and Wildlife Conservation Commission (FWCC) conducted a patrol on the St. John's River in the port of Jacksonville, Florida, looking for violations of living marine resources laws. JX1; AX5; Tr. at 29-31. In the course of their patrol, they boarded the fishing vessel River Rat, owned by Respondent Simmons and operated by Respondent Hodges. JX 1 ¶¶ 3, 4; AX 1–2, 5; Tr. at 30–31. At the time of the boarding, the River Rat was actively fishing for shrimp with two nets and had approximately 400 lbs of shrimp on board. JX 1 ¶¶ 10, 12; AX 5; Tr. at 31, 129. During the boarding, the officers requested Respondent Hodges haul the vessel's nets on board so they could inspect them for required equipment. An inspection of the nets' "Turtle Excluder Devices" ("TEDs") revealed that both of the TEDs installed had significant discrepancies that would be likely to capture and kill any turtles encountered by the vessel's nets. JX 1 ¶¶ 13, 14;

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[2] At hearing, Respondents' counsel also made an offer of proof regarding the proposed testimony of Janie Thomas and Lindsey Parker, the witnesses excluded by Order dated October 10, 2012. Tr. 147-150.

[3] Subsequent to the October 5, 2011 boarding of the River Rat, Jill Izsak was promoted from Officer to Investigator. Tr. at 61.

AX 4–6; Tr. at 20, 42–43, 76–81. Specifically, the TEDs in both the port net and starboard net had a double cover flap overlap of 24 inches, as opposed to the maximum legal overlap of 15 inches. JX 1 ¶ 13; AX 5, 6; Tr. at 33. The port net TED also had several three- to five-inch holes in the webbing as well as illegal modifications including an additional flap on top of the two double-cover flaps and one side of the double-cover flaps was sewn down the side. JX 1 ¶ 13; AX 5, 6; Tr. at 33–34. The TED in the starboard net also had illegal modifications because the panels were tied to the body of the TED grating in several places. JX 1 ¶ 13; AX 5, 6; Tr. at 43–44.

III. APPLICABLE LAW AND REGULATIONS

A. Liability under the Endangered Species Act

In 1973, Congress enacted the ESA, 16 U.S.C. §§ 1531-1544, as amended, "[t]o provide for the conservation of endangered and threatened species of fish, wildlife, and plants" that are "of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." Pub. L. No. 93-205, pmbl., § 2, 87 Stat. 884, 884 (1973). Section 4 of the ESA directs the Secretary of Commerce, in coordination with the Secretary of the Interior, to determine any species that are endangered or threatened using certain criteria and to list any such species in the Federal Register. 16 U.S.C. § 1533. In turn, Section 9 of the ESA provides, in pertinent part:

> [W]ith respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to –
>
> * * *
>
> (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.

16 U.S.C. § 1538(a)(1)(G).

All species of sea turtle found in waters of the United States, including the Loggerhead, Kemp's ridley, Leatherback, and Green, are listed as either threatened or endangered under the ESA. 50 C.F.R. §§ 223.102(b), 224.101(c). While the ESA and its implementing regulations prohibit the "taking" of these turtles,[4] as that term is defined by Section 3 of the ESA, 16 U.S.C. § 1532(19), "[t]he incidental taking of turtles by shrimp trawlers in the Atlantic Ocean off the

[4] The regulations promulgated at 50 C.F.R. § 223.205 provide that "[t]he prohibitions of section 9 of the Act (16 U.S.C. § 1538) relating to endangered species apply to threatened species of sea turtle . . . ." 50 C.F.R. § 223.205(a). Thus, the "taking" of both threatened and endangered species of sea turtle is prohibited.

coast of the southeastern United States and in the Gulf of Mexico is exempted from the prohibition if trawlers employ specified sea turtle conservation measures." Threatened Fish and Wildlife; Threatened Marine Reptiles; Revisions to Enhance and Facilitate Compliance with Sea Turtle Conservation Requirements Applicable to Shrimp Trawlers; Restrictions Applicable to Shrimp Trawlers and Other Fisheries, 57 Fed. Reg. 57,348, 57,349 (Dec. 4, 1992).

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

> (b) Except as provided in § 223.206, it is unlawful for any person subject to the jurisdiction of the United States to do any of the following:
>
> > (1) Own, operate, or be on board a vessel, except if that vessel is in compliance with all applicable provisions of § 223.206(d).

50 C.F.R. § 223.205(b)(1). The term "vessel" is defined by the regulations as "a vehicle used, or capable of being used, as a means of transportation on water which includes every description of watercraft, including nondisplacement craft and seaplanes." 50 C.F.R. § 222.102.

Section 223.206(d) establishes the standards with which shrimp trawlers are required to comply in order to be exempt from the prohibitions against the incidental taking of threatened species of sea turtle. Of particular relevance in the present proceeding, section 223.206(d)(2)(i) requires certain shrimp trawlers to install an approved turtle excluder device ("TED") in each net rigged for fishing, subject to exceptions not applicable here:

> (i) TED requirement for shrimp trawlers. Any shrimp trawler that is in the Atlantic Area or Gulf Area must have an approved TED installed in each net that is rigged for fishing. A net is rigged for fishing if it is in the water, or if it is shackled, tied, or otherwise connected to any trawl door or board, or to any tow rope, cable, pole or extension, either on board or attached in any manner to the shrimp trawler. Exceptions to the TED requirement for shrimp trawlers are provided in paragraph (d)(2)(ii) of this section.

50 C.F.R. § 223.206(d)(2)(i). The phrase "shrimp trawler" is defined by the regulations, in pertinent part, as "any vessel that is equipped with one or more trawl nets and that is capable of, or used for, fishing for shrimp." 50 C.F.R. § 222.102. In turn, the phrase "Atlantic Area" is defined as "all waters of the Atlantic Ocean south of 36°33′00.8″ N. Lat. (the line of the North Carolina/Virginia border) and adjacent seas, other than waters of the Gulf Area, and all waters shoreward thereof (including ports)." 50 C.F.R. § 222.102.

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

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

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

* * *

(6) Position of the escape opening. The escape opening must be made by removing a rectangular section of webbing from the trawl, except for a TED with an escape opening size described at paragraph (a)(7)(ii)(A) for which the escape opening may alternatively be made by making a horizontal cut along the same plane as the TED. The escape opening must be centered on and immediately forward of the frame at either the top or bottom of the net when the net is in the deployed position. The escape opening must be at the top of the net when the slope of the deflector bars from forward to aft is upward, and must be at the bottom when such slope is downward. The passage from the mouth of the trawl through the escape opening must be completely clear of any obstruction or modification, other than those specified in paragraph (d) of this section.

(7) Size of escape opening

* * *

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

* * *

(C) Double cover offshore opening. The two forward cuts of the escape opening must not be less than 20 inches (51 cm) long from the points of the cut immediately forward of the TED frame. The resultant length of the leading edge of the escape opening cut must be no less than 56 inches (142 cm)(Figure 16 to this part illustrates the dimensions of these cuts). **A webbing flap, as described in paragraph (d)(3)(iii) of this section, may be used with this escape hole**. Either this opening or the one described in paragraph (a)(7)(ii)(B) of this section must be used in all offshore

waters but also in all inshore waters in Georgia and South Carolina, **and may be used in other inshore waters.**

50 C.F.R. § 223.207(a)(6), (a)(7)(ii)(C) (emphasis added). The term "inshore" is defined by the regulations as "marine and tidal waters landward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by [NOAA] . . . and as described in 33 CFR part 80." 50 C.F.R. § 222.102.

The allowable modifications to hard TEDs that are relevant in this proceeding are as follows:

> (d) Allowable modifications to hard TEDs and special hard TEDs. Unless otherwise prohibited in paragraph (b) of this section, only the following modifications may be made to an approved hard TED or an approved special hard TED:
>
> * * *
>
> (3) Webbing flap. **A webbing flap may be used to cover the escape opening under the following conditions: No device holds it closed or otherwise restricts the opening**; it is constructed of webbing with a stretched mesh size no larger than 2 inches (5.1 cm); it lies on the outside of the trawl; it is attached along its entire forward edge forward of the escape opening; it is not attached on the sides beyond the row of meshes that lies 6 inches (15.2 cm) behind the posterior edge of the grid; the sides of the flap are sewn on the same row of meshes fore and aft; and the flap does not overlap the escape hole cut by more than 5 inches (12.7 cm) on either side.
>
> * * *
>
> (iii) Double cover offshore TED flap. This flap must be composed of two equal size rectangular panels of webbing. Each panel must be no less than 58 inches (147.3 cm) wide and **may overlap each other no more than 15 inches** (38.1 cm). The panels may only be sewn together along the leading edge of the cut. The trailing edge of each panel must not extend more than 24 inches (61 cm) past the posterior edge of the grid (Figure 16 to this part). Each panel may be sewn down the entire length of the outside edge of each panel. Paragraph (d)(3) of this section notwithstanding, this flap may be installed on either the outside or inside of the TED extension. For interior installation, the flap may be sewn to the interior of the TED

> extension along the leading edge and sides to a point intersecting the TED frame; however, the flap must be sewn to the exterior of the TED extension from the point at which it intersects the TED frame to the trailing edge of the flap. **Chafing webbing described in paragraph (d)(4) of this section may not be used with this type of flap.**

50 C.F.R. § 223.207(d)(3)(iii) (emphasis added).

Finally, the regulations at 50 C.F.R. § 224.104(a) provide that "[s]hrimp fishermen in the southeastern United States and the Gulf of Mexico who comply with rules for threatened sea turtles specified in § 223.206 of this chapter will not be subject to civil penalties under the Act for incidental captures of endangered sea turtles by shrimp trawl gear."

B. The Agency's Burden of Proof

To prevail on its claims that Respondents Dowdy Joe Simmons and Lester L. Hodges, Jr. violated the Act and the TED regulations, the Agency must prove by a preponderance of evidence the facts constituting the violations. 5 U.S.C. § 556(d); *Watson*, NOAA Docket No. PI0900579, 2010 NOAA LEXIS 8 (ALJ, July 17, 2010) (citing *Cuong Vo*, NOAA Docket No. SE010091FM, 2001 WL 1085351 (ALJ, Aug. 17, 2001)). "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 NOAA LEXIS 2, at *10 (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 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 ("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 and 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. *Watson*, NOAA Docket No. PI0900579, 2010 NOAA LEXIS 8, at *10 (ALJ, July 17, 2010) (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764–765 (1984)).

C. Penalty

Regarding penalties, the Act provides that violations of certain enumerated ESA regulations (not at issue in this case) may be assessed a civil penalty up to $25,000. 16 U.S.C. § 1540(a)(1). It then provides that:

> Any person who knowingly violates . . . any provision of any other regulation issued under this chapter may be assessed a civil penalty by the Secretary of not more than $12,000 for each such violation. Any person who otherwise violates any provision of this Act, or any regulation,

> permit, or certificate issued hereunder, may be assessed a civil penalty by the Secretary of not more than $500 for each such violation.

Id. The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended by the Debt Collection and Improvement Act of 1996, Pub. L. 104-134, resulted in the Secretary increasing the maximum civil penalty for an "[o]ther knowing violation" and an "[o]therwise violation" to $13,200 and $650 per violation, respectively. 15 C.F.R. § 6.4(f)(13)(ii), (iii); 73 Fed. Reg. 75321 (Dec. 11, 2008).

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

The ESA does not specify any factors to consider in determining the appropriate amount of civil penalty to assess. However, the applicable regulations provide in pertinent part:

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

15 C.F.R. § 904.108(a).

D. Legal Standard Governing Mental State

The civil penalty scheme of the Endangered Species Act incorporates both knowing and strict liability provisions. Penalties exceeding $650 are authorized only for violations committed "knowingly." 16 U.S.C. § 1540(a)(1); 15 C.F.R. § 6.4(f)(13)(iii). "The term 'knowingly' has been construed . . . to require only the commission of voluntary acts which cause or result in the violation." *Huber*, NOAA Docket No. 133-285, 1994 NOAA LEXIS 35, at *9 (ALJ, April 12, 1994) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 588 (1971) (holding that "knowingly" related to knowledge of the facts not the law.); accord *United States v. Jonas Bros. of Seattle*, Inc., 368 F. Supp. 783 (D. Alaska 1974) (requiring only a showing that the acts involved were voluntary and intentional)); see also *Kuhn*, 5 O.R.W. 408, 1988 NOAA LEXIS 29 (ALJ, Dec. 16, 1988). Thus, if Respondents voluntarily intended to cause the acts that constitute the violation, they may be found liable for a civil penalty greater than $650 under the ESA. For violations not committed knowingly, the ESA authorizes a civil penalty no greater than $650.

IV. DETERMINATION OF LIABILITY

In the NOVA, the Agency alleges, in two counts (one for each net), that:

> On or about October 5, 2011, Dowdy Joe Simmons (owner) and Lester L. Hodges, Jr. (operator) of the F/V RIVER RAT, did own, operate, or be on board a vessel which was not in compliance with all applicable provisions of 50 C.F.R. 223.206(d), in violation of the Endangered Species Act, 16 USC 1531 et seq. and 50 C.F.R. 223.205(b)(1).

NOVA at 1. In order for the Agency to make a prima facie case proving the violation it must show: (1) the Respondents are persons within the meaning of the ESA; (2) the F/V River Rat is a "vessel;" (3) the Respondents owned or operated the F/V River Rat; (4) the nets on the F/V River Rat were "rigged for fishing" in the "Atlantic Area;" and (5) the vessel did not have approved TEDs installed in its trawl nets. 16 U.S.C. § 1538(a)(1)(G); 50 C.F.R. §§ 223.205-223.207.

At the hearing on October 11, 2012, the parties submitted in the record as Joint Exhibit 1 their Joint Set of Stipulated Facts, Exhibits, and Testimony. Therein, the parties stipulated to the following facts as true for the purposes of this case:

1. Respondent Dowdy Joe Simmons is a "person" as defined by 16 USC 1532(13) and subject to the jurisdiction of the United States.

2. Respondent Lester L. Hodges, Jr. is a "person" as defined by 16 USC 1532(13) and subject to the jurisdiction of the United States.

3. At all times relevant herein, the F/V RIVER RAT was and is a registered and flagged vessel of the United States, documentation number 608314.

4. At all times relevant herein, the F/V RIVER RAT was and is owned by Respondent Dowdy Joe Simmons.

5. At all times relevant herein, the F/V RIVER RAT was operated by Respondent Lester L. Hodges, Jr.

6. At all times relevant herein, it was and is unlawful for any person to violate any provision of the Endangered Species Act, or any regulations promulgated thereunder. 16 USC § 1538(a)(1)(G).

7. At all times relevant herein, the "Atlantic Area" was and is defined as all waters of the Atlantic Ocean south of 36°33′00.8″ N. Lat. (the line of the North Carolina/Virginia border) and adjacent seas, other than waters of the Gulf Area, and all waters shoreward thereof (including ports). 50 C.F.R. 222.102[.]

8. At all times relevant herein, any shrimp trawler in the Gulf Area was and is required to have an approved Turtle Excluder Device (TED) in each net rigged for fishing. 50 CFR §223.203(d)(2)[.]

9. At all times relevant herein, requirements for Turtle Excluder Devices (TEDs) were/are set forth at 50 CFR 223.207.

10. On or about October 5, 2011, the F/V RIVER RAT was engaged in fishing operations targeting shrimp and was located in "inshore" waters as defined in 50 CFR 222.102.

11. On or about October 5, 2011, law enforcement personnel from the Florida Fish and Wildlife Conservation Commission (FWCC) boarded the F/V RIVER RAT in the Atlantic Area.

12. At the time of the boarding, the F/V RIVER RAT was actively fishing for shrimp with two nets when the vessel was boarded on October 5, 2011.

13. During the course of the boarding, FWCC personnel inspected both of the F/V RIVER RAT's TEDs and found that two of the vessel's TEDs did not comply with the requirements of the regulations for Double-Cover TEDs. Specifically, the TED in the port net (Net 1) had a double-cover flap overlap of 24 inches as opposed to the maximum legal overlap of 15 inches. In addition, that TED had holes in the webbing and illegal modifications including an additional flap on top of the two double-cover flaps and one side of the double-cover flaps were [*sic*] sewn down the side. The TED in the starboard net (Net 2) had a double-cover flap overlap of 24 inches as opposed to the maximum legal overlap of 15 inches. In addition, that TED had illegal modifications because the panels were tied to the body of the TED grating in several places.

14. The discrepancies documented for both of the RIVER RAT's TEDs are classified as level IV violations in accordance with the Agency's penalty policy because they would result in the likely capture and subsequent drowning of all turtles encountered.

15. Respondents did not commit these violations intentionally and were merely negligent in failing to comply with the regulations.

16. The information contained in NOAA exhibit 3 below is stipulated to as fact.

JX 1.

These stipulations are accepted and are binding on the parties. 15 C.F.R. § 904.251(f). Upon consideration of the foregoing and the testimony and other evidence offered at hearing, the undersigned finds that the Agency has proven by a preponderance of the evidence the allegations in the NOVA regarding the liability of both Respondents on both counts of violation.

V. PENALTY ASSESSMENT

A. Knowing violation of the ESA

As liability for the charged violation has been established, the undersigned must now determine the appropriate amount of civil penalty to assess against Respondents. As a preliminary matter it must be determined whether the Respondents committed a "knowing" violation or "otherwise" violated the law, because of the differences in the maximum penalty, as previously discussed. The Respondents were not charged as joint and several violators. As such, each Respondent's culpability for the violations on October 5, 2011 will be separately examined below.

As discussed above, "[t]he term 'knowingly' has been construed . . . to require only the commission of voluntary acts which cause or result in the violation." *Huber*, NOAA Docket No. 133-285, 1994 NOAA LEXIS 35, at *9 (ALJ, April 12, 1994) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 588 (1971) (holding that "knowingly" related to knowledge of the facts not the law.); accord *United States v. Jonas Bros. of Seattle, Inc.*, 368 F. Supp. 783 (D. Alaska 1974) (requiring only a showing that the acts involved were voluntary and intentional)); see also *Kuhn*, 5 O.R.W. 408, 1988 NOAA LEXIS 29 (ALJ, Dec. 16, 1988).

At hearing, Respondents offered the testimony of Leslie Hodges, brother of Respondent Lester L. Hodges, Jr., and the cousin of Respondent Dowdy Joe Simmons. Tr. at 111, 114. Mr. Leslie Hodges testified that he works for a professional net manufacturer and installer (Ricky's Coast to Coast Net Shop) and has been a fisherman for 40 years. Tr. 101, 103, 110. Leslie Hodges testified that he built the TEDs at issue in this case and installed them in the nets. Tr. 102. He implied that he did not perform this work on behalf of his employer, but on his own time, and only charged his brother $60 for the work, noting that he only provided the labor, not the materials, and that professional net shops charge $450 for ocean TEDs . Tr. 102, 110-11. At the time he was hired to build and install these TEDs for use in the river, Leslie Hodges said his experience was with mostly with single-flap ocean TEDs, as his shop has only manufactured a couple of the double-cover river TEDs. Tr. 103, 110, 111, 117. He claimed he was not attempting to evade the law and that he "actually did all kind of research trying to find out all the information [he] needed to know so we could be in compliance with the law" before installing the TEDs in the nets. Tr. 102. Specifically, he said he looked for information on "on the internet and on the FWC website," but admitted he "wasn't really computer literate at that point" and "the information was hard to find on the website for me anyway." Tr. 102, 117. He claimed he found a diagram with measurements of a one-piece flap, which indicated it could be sewn down "six meshes on each side." Tr. 102. He also said he "asked around everybody else and they had

a similar type and we kind of copied them." Tr. 103. Leslie Hodges further testified that he didn't intend to violate the law, but that he "didn't actually know how much to overlap" the double-cover flaps and didn't think the overlap was critical in allowing the turtles to escape. Tr. at 102, 106. He believed that his TEDs would exclude turtles because crab traps the size of large turtles have passed through them. Tr. at 104.

At hearing, Leslie Hodges specifically denied installing the twine or ties (depicted on page 2 of Agency Exhibit 6) that Robert Stevens, the Agency's TED expert, testified rendered the flap useless. Tr. at 77–80, 107–08, 114-15. He asserted "[t]hat's something that's done after what I do," and that he "would assume it might be" illegal. Tr. 107-09. He also denied installing the additional flap ("chaffing gear") which covered the double-covered flaps on the port net, stating "I've never seen it on the net." Tr. at 116; AX6 at 4. When asked how he knew that these TEDs were the ones that he made, Mr. Hodges testified that, approximately one week after the Respondents were cited for these TED violations, Respondent Simmons had shown him the TEDs and represented that they were the ones used when the F/V RIVER RAT was boarded. Tr. at 114–15. The TEDs shown to him at that time "didn't have any strings in them or anything like that," and appeared to him to be the same ones that he had built for the Respondents. Tr. at 115. Since being shown the non-compliant TEDs, he has re-designed them to comply with the law. Tr. at 115. When asked whether "there is a common perception that meshings equal inches" in his industry, he responded "[n]o. I wouldn't compare meshings to inches, because . . . you can have different size meshings."[5] Tr. at 106.

Respondent Lester L. Hodges, Jr., also testified at hearing. He stated he was 80 years old, has difficulty seeing and hearing, and has been a commercial fisherman "all my life." Tr. 136, 40. He explained that he owns ten to twelve different sets of nets, "nets to use in the ocean," "nets to use in the river, and "nets to use when the shrimp was small." Tr. 137. Three of his sets of nets use the same type of string that were used to construct the nets at issue here, and he asserted he bought the nets that were in use on the vessel on October 5, 2011 for the webbing that was used to construct them so that, if needed, he could patch his other nets. Tr. at 133-37. These particular nets did not have TEDs installed in them at the time he purchased them, he recalled. Tr. 137-38. Lester Hodges initially testified that his brother Leslie Hodges probably built the TEDs that were installed in those nets. Tr. at 119. After cross-examination by Agency counsel, re-direct examination by his attorney, and questioning by the undersigned, he testified that he was not sure who installed the TEDs. Tr. at 136, 138. At the time the TEDs were built, Lester Hodges said he believed that the maximum allowable flap overlap was 14 "meshes," because every fisherman that he knew of used that standard. Tr. at 124, 128. He admitted he had the additional chaffing gear installed on the port net to protect the webbing from being ripped by rocks. Tr. at 123-24, 130, 132. On the night before he went fishing, Mr. Hodges said he picked these particular trawl nets to use from a barrel in his shed because "[t]hey was closest to the door," installed them in the dark, and did not look at them before putting them in the water. Tr. at 119-20, 129, 138, 140.

[5] At hearing, the testimony of the witnesses indicated that the term "mesh" referred to the open spaces in the netting. Tr. 157.

Respondent Dowdy Joe Simmons testified that he owns the F/V River Rat, shares in the profits, and pays for the vessel's equipment. Tr. at 144-45. He also testified that his cousin, Leslie Hodges, installs the TEDs in the nets used on the boat, because his cousin works for a professional net shop. Tr. at 142-43. He was not aware that the nets on the ship were not in compliance with the law. Tr. 143. He believed that the maximum allowable flap overlap was 14 "meshes," because other people who had purchased nets from net shops around Jacksonville, Florida all had an overlap of 14 meshes, which was more than 15 inches. Tr. at 143-44. He testified that he was not aware of how long the violative nets were on the F/V River Rat, because he does not keep up with the changing of nets. Tr. at 142.

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

Having decided the operator's liability, the undersigned now turns to whether Respondent Simmons, the owner of the F/V River Rat, is liable for a "knowing" violation or just the strict liability provision under the Act. There is no direct evidence that Respondent Simmons, as the owner, knew that these specific nets were in use at that specific time. This is not to say that Respondent Simmons may not be held liable for a knowing violation of the Act. "The law is clear that under the Endangered Species Act, the knowledge and actions of the master of a vessel can be imputed to the owner of the vessel." *Domingo*, Docket No. SE960297ES, 2000 NOAA LEXIS 1, at *7, n.2 (NOAA App. 2000) (quoting *Blue Horizon, Inc. v. United States*, C.A. No. 92-0249-T-M (S.D. Ala. July 1, 1993) Order at 2–3). The owner of a vessel may be held vicariously liable for the actions of its captains under the theory of respondeat superior, where there is an employer-employee relationship, or where there is evidence of a joint venture between the owner and operator. *Charles P. Peterson and James D. Weber*, 6 O.R.W. 486, 491, 1991 NOAA LEXIS 34, at *10–13 (ALJ, July 19, 1991)(vessel operator and owner both held liable for fishing violations under the Magnuson Fishery Conservation and Management Act where business relationship was characterized as "in the nature of a joint venture"); *Bluefin Fisheries, Inc.*, NOAA Docket No. SE 1000062FM, 2011 NOAA LEXIS 6, at *22–24 (ALJ, July 28, 2011); *Shulterbrandt*, 7 O.R.W. 185, 1993 NOAA LEXIS 26, at *6–7 (ALJ, May 28, 1993). Under NOAA case law, "[i]t is not necessary that the owner exercise detailed control over the operations of the vessel in order for it to be held liable for the illegal activities of its master and crew," under the theory of respondeat superior. *Jimguy Trawling & Supply Co.*, 6 O.R.W. 662, 1992 NOAA LEXIS 3, at *14 (ALJ, Jan. 28, 1992) (citations omitted). The owner and operator of a vessel may be found to be engaged in a joint venture if there is the "intention of the parties to carry out a single business undertaking, a contribution by each of the parties to the venture, an inferred right of control, and a right to participate in the profits. Generally, the test used to determine whether the [respondeat superior] doctrine applies is whether the vessel owner had, at the time of the violation, the right to control the actions of the wrongdoer." *Gonzalez Fisheries, Inc.*, NOAA Docket No. SE050027FM, 2006 NOAA LEXIS 36, at *18 (ALJ, Dec. 5, 2006)(citations omitted) (quoting *Shulterbrandt*, 7 O.R.W. 185, NOAA LEXIS 26, at *6–7); *Peterson & Weber*, 6 O.R.W. 486, 491, 1991 NOAA LEXIS 34, at *10-13 (ALJ, July 19, 1991).

Here, there is no evidence that Respondent Simmons was Respondent Hodges' employer. However, there is sufficient evidence to find that the Respondents' relationship was in the nature of a joint venture, because the Respondents worked cooperatively to fish for shrimp and share in the profits. Tr. at 144–45. Respondent Hodges contributed to the joint venture by operating the vessel and, in this case, by purchasing the shrimping nets at issue.[6] Tr. at 133–135, 137. Respondent Simmons testified that he owns the F/V River Rat, pays for the vessel's equipment and shares in the profits. Tr. at 141, 144–45. He testified he was aware of the installation of the TEDs in the nets used on the vessel by his cousin. Tr. 142–43. Because Respondent Simmons owns the F/V River Rat and holds the federal fishing permit, it can be inferred that he retained a right of control in this instance. Tr. at 141, 144; AX 1, 2.

> Owners of vessels who are the beneficiaries of its operation have consistently been held responsible for illegal activity. Since the owner is entitled to a share of the vessel's production, so must he bear responsibility for its unlawful use. The fact that the owner was the permit holder also ties him to, and makes him responsible for, fishing activities conducted under the permit.

Peterson & Weber, 6 O.R.W. 486, 491, 1991 NOAA LEXIS 34, at *11–12 (citation omitted). Thus, Respondent Simmons is vicariously liable for Respondent Hodges' knowing violation of the Act. Because of the severity of the violations, the undersigned finds that Respondent Simmons should be liable for a penalty for a "knowing" violation rather than the more lenient penalty for a strict liability violation.[7]

Therefore, it is concluded that both Respondents "knowingly" violated the ESA and its implementing regulations within the meaning of that term, and a civil penalty may be assessed against them under Section 11 of the Act, 16 U.S.C. § 1540(a)(1).

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[6] Respondent Hodges' testimony regarding who purchased which nets is not crystal clear, as he repeatedly switched between saying "I" and "we," but there is adequate evidence to find that Respondent Hodges was at least involved in arranging for the purchase the nets used on board on the day at issue, although he may not have paid for them. Tr. at 133–135, 137. Further, the testimony of Respondent Hodges' brother, Leslie Hodges, was clear that Respondent Hodges paid him for his labor to make the TEDs. Tr. at 111.

[7] Significantly, like Lester Hodges, Respondent Simmons also testified that "when we switched from one-piece flap to the two-piece flap" he "went on-line, but I'm not too up on computers either. I looked the best I could, and all I could find was one-piece diagrams for the one-piece flap. So we went with other people's nets . . . and they was 14 meshes overlap . . . [s] we figured, you know, if everybody else was using that, that must be right." Tr. 143–44. Under cross-examination, Mr. Simmons admitted that he failed to call any of several possible government agencies that could have provided authoritative information on TED designs. Tr. at 145–46. "When one engages in a highly regulated industry, that person bears the responsibility of knowing and interpreting the regulations governing the industry." *Peterson and Weber*, 6 O.R.W. 486, 1991 NOAA LEXIS 34, at *9.

The undersigned now turns to the task of determining the appropriate amount of civil penalty to assess for the violations found in this proceeding. As previously discussed, the Rules of Practice identify "[f]actors to be taken into account in assessing a civil penalty, depending upon the statute in question." 15 C.F.R. § 904.108(a). While the ESA does not specify any such factors, the undersigned does not see any reason to depart from the factors described by the Rules of Practice, which are "the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior violations, and ability to pay; and such other matters as justice may require." 15 C.F.R. § 904.108(a). The parties' arguments with respect to these factors are outlined below.

B. Arguments of the Parties

In its Initial Post-Hearing Brief, the Agency explains that it "considered the factors enumerated in 15 C.F.R. 904.108, and the internal policy guidance contained in the NOAA Penalty Policy and Penalty Schedules . . . ." Agency's Initial Brief ("AIB") at 3–4.

In describing its consideration of the Penalty Policy, the Agency cites the testimony of Mr. Stevens as support for the proposition that the noncompliant TEDs used by Respondents were likely to capture and kill all endangered and threatened sea turtles that enter the Respondents' nets. AIB at 3 (citing Tr. at 77–82). The Agency points out that the Penalty Policy characterizes fishing with TEDs that contain discrepancies "likely to kill all turtles encountered" as a Gravity Offence Level IV violation. *Id.* at 4 (citing Penalty Policy at 50). The Agency also notes that "TEDs are required because it was found that shrimp trawling killed more turtles than all other human activity combined." *Id.* (citing AX 3).

Turning to Respondents' culpability at the time of the violation, the Agency contends in its Brief that "Respondents' failure to obey the Agency's regulations was at a minimum negligent conduct and Respondents admitted to such," and further that "Respondents participate in a pervasively regulated activity and are charged with knowing and abiding by the requirements of the regulations governing their business." AIB at 3 (citing JX 1).

Referring again to the Penalty Policy, the Agency points out that the alleged gravity and culpability levels correspond to a civil penalty range of $4,500 to $7,000 per violation. AIB at 3 (citing Penalty Policy at 28). In the present proceeding, the NOVA seeks to assess a penalty in the amount of $5,750 for each violation, which is the midpoint of the penalty range advocated by the Agency in its Brief.

Finally, the Agency contends:

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

AIB at 4–5.

In response, in their post-hearing brief, Respondent's state they "do not dispute that at the time of inspection the nets were not in compliance with the current law." Respondents' Brief ("RB") at 2. However, Respondents argue that they were operating in "substantial compliance with the law as it was stated at the time or with a reasonable interpretation of the law at the time." *Id.* Respondents point out that "[o]n several occasions prior to the incident in question, the subject TEDS were inspected by the Coast Guard and the FL FWCC and each inspection yielded passing results." *Id.* Further, while acknowledging that all sea turtles in the Atlantic are endangered or threatened, Respondents state in mitigation of their violation that Mr. Hodges has received "full training to rescue any turtle that may be caught in the nets." *Id.*

Respondents further assert that they did not willfully violate the law, but they are "of average intelligence and were unable based on the available information provided by the Agency to interpret the law and act in compliance therewith," suggesting that "it is easy for an average person to confuse this [the requirement that nets must not have a double-cover flap overlap of greater than 15 inches] to mean 15 meshes, or to confuse the double cover regulation with the double reference." RB at 3. Respondents assert they "made a good faith attempt to act in compliance with the laws," noting that they searched the internet to find a proper diagram for a two flap net, "to no avail." *Id.* As a result, they "were forced to try and interpret the diagram for the once-piece flap . . . and observe the nets of others," leading them to erroneously believe the lawful overlap was "14 meshes." *Id.*

Additionally, they argue that the law is vague and as such the burden of non- compliance should not fall on an "innocent fisher who made a reasonable attempt to comply." RB at 3.

Finally, they claim that, for several years, "there have been no reported sightings of sea turtles in this area" and the Agency has failed to show that turtles still inhabit the area where Respondents were found fishing. RB at 4. Respondents further claim that "each officer that testified admitted that he or she had never even observed a sea turtle in the water where this boat was located." *Id.* Thus, Respondents' state "there is little possibility that the issues with Respondents[']s TED[s] would have actually caused any harm to the sea turtles in this water." *Id.*

In Reply to these assertions, the Agency in its Reply Brief argues that Respondents' claim that it was confused between "meshes" and "inches" should not be considered as a mitigating factor in determining the penalty because even in their mistaken belief that the maximum overlap was 14 meshes, the evidence shows that the overlap in their nets were 34-35 meshes. Agency's Reply Brief ("ARB") at 1–2 (citing Tr. at 157–61). The fact that the overlap was found to be more than twice what Respondents say they thought the legal limit was is an aggravating factor, the Agency argues. *Id.* at 2.

In response to Respondents' argument that the Agency has failed to show that sea turtles inhabit the area where the F/V River Rat was found, the Agency points to the evidence in the record that "turtles are regularly found, both dead and alive, in the St. John's River near where Respondents were fishing." ARB at 2 (citing Tr. 21–22, 46-47, 49, 105). Even if Respondents

were correct, this would have no bearing on Respondents' responsibility to comply with the law. *Id.*

C. Discussion

In their Joint Exhibit, the parties stipulated that "[t]he discrepancies documented for both of the RIVER RAT's TEDs are classified as level IV violations in accordance with the Agency's penalty policy because they would result in the likely capture and subsequent drowning of all turtles." JX 1. Implicit in that stipulation is the acknowledgement by both parties that NOAA's Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions ("Penalty Policy")[8] may be used as a guide in determining an appropriate penalty. The Penalty Policy, dated March 16, 2011, was designed to help NOAA attorneys determine fair, consistent and appropriate penalties that would serve as a deterrent to potential violators and eliminate economic incentives for noncompliance. Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions, 76 Fed. Reg. 20959, 20959 (Apr. 14, 2011).

The Agency's penalty analysis is not presumed accurate and its proposed penalty is not presumed appropriate. Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35631, 35631 (June 23, 2010); *Nguyen*, NOAA Docket No. SE0801361FM, 2012 NOAA LEXIS 2, at *21 (ALJ, Jan. 18, 2012); 15 C.F.R. § 904.204(m). Further, the presiding judge need not state good reasons for departing from the Agency's analysis or the guidelines set forth in the Penalty Policy materials. *Id.* However, in determining the appropriate penalty, the undersigned has considered the regulations at 15 C.F.R. § 904.108(a) and the Endangered Species Act Schedule and Penalty Matrix found in the Penalty Policy.

i. Nature, Circumstances, Extent, and Gravity

The Penalty Matrix's first calculation is the gravity-of-offense level. The parties have stipulated to a gravity of level IV in the Endangered Species Act Schedule, which takes into account TED "[d]iscrepancies likely to kill all turtles encountered, including" TEDs which have been sewn shut and double cover TEDs that have a flap overlap of greater than twenty inches when stretched. JX 1 ¶ 14; Penalty Policy at 50. This is the highest gravity level in the penalty matrix. The parties' stipulation to this gravity level is accepted and supported by substantial evidence in the record as indicated as follows:

The Agency's TED expert, Mr. Stevens, has been working with NOAA fisheries as a "fisheries method and equipment specialist primarily working exclusively with TEDs" since 1987. Tr. at 71. Mr. Stevens testified that he has tested TEDs with overlaps of twenty inches and found that "it caught 100 percent of the turtles that was entered into the trawl." Tr. at 76. He further testified that when he tested a fifteen-inch overlap, the TEDs excluded about ninety-eight percent of some 570 turtles of varying sizes that were placed into the trawls. Tr. at 76. After extensive testing of the double-cover design over a period of two years, the fifteen-inch maximum overlap became law in 2003 and has not changed. Tr. at 77. Based upon his

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

experience, Mr. Stevens' opinion is that he would expect the 24-inch flap overlap in the Respondents TEDs to "[c]apture 100 percent of the turtles," resulting in death by drowning. Tr. at 77. Referring to Agency's Exhibit 6, page 2 (depicting the string tying the flaps closed in the port net), he testified that the string tied the opening of the TEDs shut so as to render the inside flap useless. Tr. at 80. Referring to the Agency's Exhibit 6, page 4 (depicting the chaffing gear installed on the port net), Mr. Steven's testified that it is "yet another barrier that the turtle would have to pass through and it's just not going to do it." Tr. at 81. Mr. Stevens testified that the multiple violations in the net combined to make the effect on the turtles even worse. Tr. 88-89.

Special Agent Chesler's opinion, based on his training, expertise and experience is that Respondents' "flaps were tied in certain places . . . that would render the [TEDs] on the River Rat almost completely useless." Tr. at 20. While he could not recall a specific circumstance where he has observed sea turtles on the St. Johns River, he is "aware of reports along the entrance of the St. Johns River." Tr. at 21.

Officer O'Reilly testified that he has conducted approximately fifty boardings and has inspected at least twice as many TEDs. Tr. at 30. On October 5, 2011, he boarded the F/V River Rat along with Investigator Izsak. Tr. at 30–31. Just before the boarding, the F/V River Rat was actively engaged in fishing. Tr. at 31. Upon seeing the nets hauled from the water, it was immediately apparent to Officer O'Reilly that there would be a violation, because he observed "a couple ties from the actual flap to the net" which usually renders the TED ineffective. Tr. at 32. Referring to Agency Exhibit 6, page 3 (the port net), Officer O'Reilly pointed out a couple of holes that could snag a turtle's appendage on the way out of the net. Tr. at 39. In Officer O'Reilly's opinion, based upon his training and experience, he has "never seen one that was actually tied all the way shut completely restricting the opening" like the ones on the F/V River Rat and he believed that "any turtle that were to be caught in there would definitely be caught and then drown." Tr. at 42–43. Referring to the Agency Exhibit 6, page 4 (the starboard net), Officer O'Reilly, indicated where one of the panels was tied to restrict the movement of the flap, rendering the TED ineffective. Tr. at 43–44. Although he testified that he has not seen any turtles in the specific area where the F/V River Rat was fishing, he has personally observed sea turtles all the way up the river and has personally observed dead sea turtles on the St. Johns River. Tr. at 45–46. He further testified that the prominent cause of death for sea turtles is "strandings from nets . . . from getting caught inside of the shrimp net." Tr. at 47.

Investigator Izsak testified that, in the past couple years, she has conducted 20 TED boardings and inspected approximately 40 TEDs. Tr. at 63. Based upon Investigator Izsak's experience with TEDs, she testified that the instant case was "one of the worst that I have seen." Tr. at 63.

The nature, circumstances, extent and gravity of these violations of the ESA and the TED requirements are significant and substantial, as Respondents' actions would be likely to kill virtually all sea turtles that entered their nets. As such, the characterization of the violations as falling under Gravity Offense Level IV in the penalty policy is well-founded.

ii. Culpability

The second metric is the violator's culpability level. The Penalty Matrix indicates that there are four categories: intentional, recklessness, negligence, and unintentional (including accident, mistake, and strict liability). Penalty Policy at 28. The Agency asserts in its Initial Brief that "testimony at hearing would support a finding that Respondents intentionally modified the TEDs after manufacture" in violation of the law. AIB at 4. Respondents claim in their Brief that they are "innocent fisher[men]" who acted in "good faith," and "made a reasonable attempt to comply," and "it was not their intention in installing these nets to willfully violate the law." RB at 3. The parties have stipulated in regard to Respondents' having a "negligent" level of culpability in this action. JX 1 ¶ 15. As the evidence of record supports that the violations were at least committed negligently, that characterization of Respondents' culpability is found appropriate.

Respondents' mitigation of their culpability is based in large measure on their claim that their TEDs were non-compliant in regard to flap size because they were honestly confused as to appropriate unit of measure; alleging they thought that it was 14 or 15 "meshes" instead of "inches" based upon what they perceived other fishermen were doing with their nets and the lack of clarity or difficulty in locating the applicable regulations on-line. R'a Br. at 3. There is simply no support in the record for this claim. First, testimony at hearing revealed that the flaps on the nets were "34-35 meshes," not 14 or 15. Tr. 157–61. Thus, even if the Respondents used the erroneous unit of measure they claimed, their flaps size was at least twice what they, themselves, thought it should be. Second, Respondents' own witness and the designer/builder of these specific TEDs, Mr. Leslie Hodges, testified that he "wouldn't compare meshings to inches, because . . . you can have different size meshings." Tr. at 106. This suggests that the actual TED builder could not have reasonably been under the misimpression regarding "meshes" being the unit of measure for the size of net flaps designated by law. It also suggests that contrary to Respondents' claim other fishermen and TED builders were not likely be using the variable unit of "meshes" to determine compliance of their nets either. Third, the regulations governing the double-cover flap overlap, 50 C.F.R. § 223.207(d)(3)(iii), have been in existence since 2003, are published in the Federal Register. Tr. at 77; Endangered and Threatened Wildlife; Sea Turtle Conservation Requirements, 68 Fed. Reg. 8456, 8469 (Feb. 21, 2003). Fourth, Mr. Chesler testified that NOAA has held "untold numbers of fisherman workshops, workshops for net makers, [and] training sessions for law enforcement." Tr. at 83. Several witnesses, including Mr. Chesler, Mr. Stevens, and Investigator Izsak, testified that they have done courtesy inspections to help the fisherman comply with the law. Tr. at 65, 67, 84–85, 151. To get a courtesy inspection, all it would have taken was a phone call. Tr. at 65. When asked if he called the FWC, Lindsey Parker, NOAA, or the Coast Guard for help after he could not find the regulation that pertained to double cover TEDs, Respondent Simmons replied "no." Tr. at 145–46.

On the other hand, in aggravation of their culpability, the evidence shows Respondents hired Mr. Leslie Hodges to build and install the devices although at the time he had little experience with double-flap river TEDs, and they paid substantially less for the TEDs than they would have if they bought them from a professional net shop which likely have been familiar with the regulatory requirements. Moreover, after Mr. Hodges erroneously built the TEDs,

Respondents modified them further adding the ties and additional flap (chaffing gear) in contravention of the TED regulations. Tr. at 81. These additions were not inadvertent; Respondent Hodges admitted at hearing to installing the chaffing gear purportedly because he needed to protect the nets from being torn when he would fish near the rocks. Tr. at 123, 124, 130, 132. There is no evidence that Respondents made any effort to determine the legality of these modifications to the TED prior to installation.

The foregoing facts support a finding that the Respondents were at least negligent. Viewing the gravity level ("IV") and culpability level ("Negligent") as they relate on the Agency's Penalty Matrix for the Endangered Species Act ("Matrix"), the base penalty range available for this violation is $4,500-$7,000.

iii. Prior History

There was no evidence presented at hearing that Respondents have had any previous such violations. Both Respondents Hodges and Simmons testified that this was the first time the F/V River Rat was cited for this type of non-compliance. Tr. at 105, 143.

iv. Ability to Pay

The violator's ability to pay is to be considered if raised and supported by the alleged violator. 15 C.F.R. § 904.108. No evidence of the Respondents' inability or ability to pay was submitted at any time in this proceeding and the Agency did not adjust its proposed penalty based on this factor.

v. Other Matters as Justice May Require

The Agency offers as an aggravating factor the overlap on their TEDs being 34 meshes wide, more than double what even the Respondents claim they thought was the appropriate overlap measurement. Tr. at 158. In addition thereto there is the subsequent addition of the chaffing gear over the double flaps of the TED. The applicable regulation regarding chaffing gear on double cover TEDs provides in pertinent part that "[c]hafing webbing described in paragraph (d)(4) of this section ***may not*** be used with this type of flap." 50 C.F.R. § 223.207(d)(3)(iii) (emphasis added). Plus, there are the ties on the nets, also prohibited by the regulations. 50 C.F.R. § 223.207(d)(3) ("[a] webbing flap may be used to cover the escape opening under the following conditions: No device holds it closed or otherwise restricts the opening."). I agree all of the foregoing are facts in aggravation and evidence the lack of merit to Respondents claims that they acted in good faith, consistent with a "reasonable interpretation of the law," and/or were in "substantial compliance with the law."

Respondents also claim in mitigation of the penalty that "[o]n several prior occasions, the subject TEDs were inspected by the Coast Guard and the FL FWCC and each inspection yielded passing results." RB at 2. Specifically, at hearing Respondent Hodges testified as follows:

> [T]he TEDs that we used I was stopped ten times. Five times by the Coast Guard – six times by the Coast Guard, and four times by the Marine

> Patrol. They never – nobody ever found any problems with the nets that we was dragging. I thought everything was okay. No matter what net we was dragging, they come on and check them and we was trying[9] to 14 meshes, not inches. Of course, that 14 meshes could be – I think they measured 19 [inches]. They stretched them real hard . . . .
>
> So they never – we never had any citations never.

Tr. at 138–39.

In light of the obvious and substantial deviations in the nets found during the inspection at issue here, including the fact that the parties stipulated these net flaps measured 24 inches and/or 34-35 meshes, it is impossible to give any credit to this claim made by Respondents.[10] Even if proven true, in light of the other acts of this case, no reduction in the penalty on this basis would be warranted.

Respondents also raise in mitigation a claim based upon lack of harm stating that "each officer that testified admitted that he or she had never even observed a sea turtle in the water where this boat was located." RB at 4. However, as the Agency observes, Respondents' misstate the evidence. ARB at 2. There was substantial hearing testimony of sea turtle sightings on the St. Johns River where Respondents were fishing. Tr. at 21–22, 46, 48, 105. Thus, Respondents' violations could have resulted in actual turtle deaths.

In sum, these violations were particularly egregious in that by virtue of their actions, Respondents' TEDs were rendered utterly useless for their intended purpose. Such egregiousness would normally warrant the imposition of a high, if not the highest, penalty allowed by law. However, under the circumstances of this case, to a certain nominal extent the egregiousness of the violations is offset by facts supporting mitigation of the penalty, specifically, the Respondents' lack of prior violations, cooperation during the boarding and inspection, and quick correction of the discrepancies in their TEDs. Tr. at 64, 115, 121-22, 138; *see Greg Abrams Seafood, Inc.*, NOAA Docket No. SE1100895, 2012 NOAA LEXIS 9, at *53–58 (discussing penalty mitigation factors in the context of the Magnuson-Stevens Fishery Conservation and Management Act, which have the same statutory penalty factors as the Endangered Species Act). Therefore, upon consideration of all the foregoing, it is determined that for these two violations a civil penalty in the aggregate amount of $11,500 is appropriate. Moreover, it is found that because Respondent Hodges was the person who purchased these

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[9] Most likely this is a transcription error and the witness actually said "tying."

[10] The record suggests that Respondents had 10–12 sets of nets. Tr. 137. Perhaps, these passing inspections were of other net sets and not those in the water on the date of the subject inspection, or were of these nets before they were further modified by Respondents after initial construction. *See Eli Tobias Bruce, Sr.*, NOAA Docket No. SE1102622, 2012 NOAA LEXIS 10, at *43–44 (ALJ, Aug. 14, 2012) (held no penalty adjustment was appropriate where facts of prior inspection were unclear).

TEDs, installed the chaffing gear on the port net, and actually fished with those nets, he bears more responsibility for this penalty than Respondent Simmons. Tr. at 111, 130, 132.

E. Ultimate Findings of Fact and Conclusions of Law

1. Respondent Dowdy Joe Simmons is a "person" as defined by 16 U.S.C. § 1532(13) and subject to the jurisdiction of the United States. JX 1.

2. Respondent Lester L. Hodges, Jr. is a "person" as defined by 16 U.S.C. § 1532(13) and subject to the jurisdiction of the United States. JX 1.

3. At all times relevant herein, the F/V RIVER RAT was and is a registered and flagged vessel of the United States, documentation number 608314. JX 1; AX 1, 2; Tr. at 11

4. At all times relevant herein, the F/V RIVER RAT was and is owned by Respondent Dowdy Joe Simmons. JX 1; AX 1, 2; Tr. at 11.

5. At all times relevant herein, the F/V RIVER RAT was operated by Respondent Lester L. Hodges, Jr. JX 1;

6. At all times relevant herein, it was and is unlawful for any person to violate any provision of the Endangered Species Act, or any regulations promulgated thereunder. 16 U.S.C. § 1538(a)(1)(G).

7. At all times relevant herein, the "Atlantic Area" was and is defined as all waters of the Atlantic Ocean south of 36°33′00.8″ N. Lat. (the line of the North Carolina/Virginia border) and adjacent seas, other than waters of the Gulf Area, and all waters shoreward thereof (including ports). 50 C.F.R. § 222.102. JX 1; AX 5; Tr. at 14.

8. At all times relevant herein, any shrimp trawler in the Gulf Area was and is required to have an approved Turtle Excluder Device (TED) in each net rigged for fishing. 50 CFR § 223.203(d)(2).

9. At all times relevant herein, requirements for Turtle Excluder Devices (TEDs) were/are set forth at 50 C.F.R. § 223.207.

10. On or about October 5, 2011, the F/V RIVER RAT was engaged in fishing operations targeting shrimp and was located in "inshore" waters as defined in 50 C.F.R. § 222.102. JX 1; AX 5

11. On or about October 5, 2011, law enforcement personnel from the Florida Fish and Wildlife Conservation Commission (FWCC) boarded the F/V RIVER RAT in the Atlantic Area. JX 1; AX 5.

12. At the time of the boarding, the F/V RIVER RAT was actively fishing for shrimp with two nets when the vessel was boarded on October 5, 2011. JX 1; AX 5.

13. During the course of the boarding, FWCC personnel inspected both of the F/V RIVER RAT's TEDs and found that two of the vessel's TEDs did not comply with the requirements of the regulations for Double-Cover TEDs. Specifically, the TED in the port net (Net 1) had a double-cover flap overlap of 15 inches. In addition, that TED had holes in the webbing and illegal modifications including an additional flap on top of the two double-cover flaps and one side of the double-cover flaps was sewn down the side. The TED in the starboard net (Net 2) had a double-cover flap overlap of 24 inches as opposed to the maximum legal overlap of 15 inches. In addition, that TED had illegal modifications because the panels were tied to the body of the TED grating in several places. JX 1; AX 5.

14. The discrepancies documented for both of the RIVER RAT's TEDs are classified as level IV violations in accordance with the Agency's penalty policy because they would result in the likely capture and subsequent drowning of all turtles encountered. JX 1.

15. Respondents did not commit these violations intentionally and were merely negligent in failing to comply with the regulations. JX 1.

16. There was no evidence of inability to pay.

ORDER

A total penalty of **$5,000**, $2,500 for each count of violation, is hereby **IMPOSED** on Respondent Dowdy Joe Simmons.

A total penalty of **$6,500**, $3,250 for each count of violation, is hereby **IMPOSED** on Respondent Lester J. Hodges, Jr.

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

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

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

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

PLEASE TAKE FURTHER NOTICE, that this Initial Decision becomes effective as the final Agency action **60 days** after service, on **September 16, 2013**, unless the undersigned grants a petition for reconsideration or the Administrator reviews the Initial Decision. 15 C.F.R. § 904.271(d).

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

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency[11]

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

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

15 CFR 904.271-273

§ 904.271 Initial decision.

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

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

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

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

(4) A statement of further right to appeal.

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

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

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

(1) Otherwise provided by statute or regulations;

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

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

§ 904.272 Petition for reconsideration.

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

§ 904.273 Administrative review of decision.

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

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

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

order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

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

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

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

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

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

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

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

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

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

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

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

(h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said

petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.

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

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

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

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

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

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

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

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