UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:	)	**DOCKET NUMBER**
	)	
Kristi Chiodo,	)	**SE1104372FM, F/V C Power**
Anthony Paul Chiodo, Jr., and	)	
John A. Tinsley,	)	
	)	
Respondents.	)	

INITIAL DECISION AND ORDER

Date: January 28, 2014

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

Appearances: For the Agency:

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For Respondents Kristi Chiodo & Anthony Paul Chiodo, Jr.:

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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 January 19, 2012, counsel for the National Oceanic and Atmospheric Administration ("NOAA" or "Agency"), on behalf of the Secretary of Commerce, initiated this action by issuing a Notice of Violation and Assessment of Administrative Penalty ("NOVA") to Kristi Chiodo, Anthony Paul Chiodo, Jr., and John A. Tinsley ("Respondents"). The NOVA charges Respondents, jointly and severally, with two counts of violating the Magnuson-Stevens Fishery Conservation and Management Act ("the Act"), as amended, at 16 U.S.C. § 1857(1)(A) and certain regulations implementing the Act. NOVA at 1. Specifically, Count 1 charges that, on or about July 18, 2011, Respondents fished with bandit gear in the restricted Steamboat Lumps area in violation of the Act and regulatory provision codified as 50 C.F.R. § 622.7(*l*). *Id.* Count 2 charges Respondents with failing to comply with the Vessel Monitoring System ("VMS") requirements while operating the fishing vessel ("F/V") C Power on or about July 18, 2011, in violation of the Act and the regulatory provision currently codified as 50 C.F.R. § 622.7(ee). *Id.* at 1–2. The NOVA alleges that Kristi and Anthony Chiodo were co-owners of the F/V C Power and John Tinsley was the vessel operator at the time of the violations. *Id.* at 1. The Agency proposes a penalty for Count 1 of $12,747.50 and a penalty for Count 2 of $2,000, for a total penalty of $14,747.50. *Id.* at 2. The NOVA advised the Respondents of their right to respond and request a hearing before an Administrative Law Judge ("ALJ") within thirty days of receiving the notice. *Id.* at 3.

On January 19, 2012, NOAA sent the NOVA by certified mail to Respondents Kristi Chiodo and Anthony Paul Chiodo, Jr. (the "Chiodos") at their address of record in Panama City, Florida, and to Respondent John A. Tinsley at his address of record at 1629 McKenzie Road, Southport, Florida. *Id.* at 1. Acting through counsel, the Chiodos requested a hearing on the charges by letter dated May 18, 2012.[2] In the hearing request, their counsel Russell R. Stewart, Esq., expressly stated that "I do not represent John A. Tinsley."[3]

On July 5, 2012, NOAA Special Agent Elizabeth Nelson personally served the NOVA upon Respondent John A. Tinsley at a pier in Parker, Florida. Mem. of Individual Service filed October 25, 2012; Hearing Transcript ("Tr.") at 10–12. Nevertheless, Mr. Tinsley never responded to the NOVA or this action in any way.

On July 10, 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 August 10, 2012. PPIP Order at 3. The Agency and the Chiodos filed

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[2] Because the Agency did not file a motion in opposition, this request was considered timely filed. *See* 15 C.F.R. §§ 904.102(d), 904.201(b).

[3] Nevertheless, under the applicable rules of procedure, "[a] hearing request by one joint and several respondent is considered a request by the other joint and several respondent(s)." 15 C.F.R. § 904.107(b).

their respective PPIPs on August 9, 2012.[4] The PPIP Order sent to Mr. Tinsley by certified mail to his address of record in Southport, Florida, was returned as undeliverable. The PPIP Order was re-sent to Mr. Tinsley at an address (1629 McKenzie Road) in Panama City, Florida on October 22, 2012. This PPIP Order was again returned as undeliverable on November 2, 2012. Mr. Tinsely did not file a PPIP or otherwise respond to the PPIP Order.

On November 19, 2012, a Hearing Order was issued setting forth deadlines for the filing of any additional discovery motions, joint stipulations, or prehearing briefs, and scheduled the hearing to begin on January 22, 2013. The Hearing Order was mailed to Mr. Tinsley at his address of record in Southport, Florida.

On December 4, 2012, the Agency filed a Request to Change Hearing Date and Convene Conference Call to Re-Set to Mutually Convenient Date ("Request") because an essential witness for the Agency would be unavailable on the set hearing date. The undersigned granted the Agency's Request by Order dated December 28, 2012.

On February 11, 2013, the undersigned issued a Notice of Hearing rescheduling the hearing to begin on April 17, 2013. The Notice of Hearing was mailed by certified and by regular mail to Mr. Tinsley at the addresses in Southport, Florida, on February 11, 2013, and in Panama City, Florida, on February 12, 2013. Both the certified and uncertified Notices sent to Southport were returned as "undeliverable" on February 25, 2013, and the certified Notice sent to Panama City was returned as "undeliverable" on March 11, 2013.[5]

The Chiodos amended their PPIP on April 10, 2013, to include a VMS printout for the F/V C Power during the period in question as it pertains to Count 2.[6]

The hearing in this matter was held on April 17, 2013 in Panama City, Florida. A copy of the transcript of the hearing was received on May 13, 2013. At the hearing, the Agency offered the testimony of four witnesses: Elizabeth Nelson, Paige Casey, Douglas DeVries, and Patrick O'Shaughnessy. Tr. 26–146. Respondents, Kristi Chiodo and Anthony Paul Chiodo, Jr. each testified on their own behalf. Tr. 147–60. One joint exhibit consisting of the parties' Joint Stipulations ("Jt. Ex. 1") and 18 Agency exhibits (nos. 1-18) were admitted into the record. Tr. 5, 18, 21, 31, 35, 37–39, 41, 62, 67, 73, 77, 86, 88, 98, 102, 105. Further, at the Agency's request, without objection, the undersigned took administrative notice of the Federal Register notice (76 Fed. Reg. 20959-60 (Apr. 14, 2011)) and March 16, 2011 Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions marked as Agency Exhibit 19. Tr. 146.

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[4] The Office of Administrative Law Judges received the Chiodos' PPIP by facsimile on August 9, 2012, but the PPIP was not stamped as received until August 14, 2012.

[5] The record does not indicate whether the Notice sent by regular mail was delivered or returned.

[6] The Office of Administrative Law Judges received the Chiodos' Amendment to the PPIP by facsimile on April 10, 2013, but the Amendment was not stamped as received until April 29, 2013.

Neither party subpoenaed Mr. Tinsley to appear at the hearing, nor did he voluntarily appear. Tr. 14.

On May 8, 2013, this Tribunal issued an Order Scheduling Post-Hearing Briefs. A copy of this Order, enclosing therewith the transcript of the hearing, was mailed to Mr. Tinsley at both his Southport address and a second address (1205 Clay Road) in Panama City, Florida.[7] Thereafter, on June 7, 2013, the Agency filed its Post Hearing Brief and Proposed Findings of Fact and Conclusions of Law ("Agency's Brief" or "Agency Br."). The Chiodos filed their Reply Brief ("Respondents' Reply Brief" or "Rs.' Reply Br.") on June 18, 2013. Mr. Tinsley did not make any post-hearing filings. With the filing of the Respondents' Reply Brief, the record closed.

II. 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," 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 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). Under the Act, "[i]t is unlawful . . . for any person . . . to violate any provision of this Act or any regulation or permit issued pursuant to this Act."[8] 16 U.S.C. § 1857(1)(A).

The regulations issued pursuant to the Act pertaining to the fisheries of the Caribbean, Gulf, and South Atlantic waters are set forth in 50 C.F.R. Part 622 (2011).[9] In July 2011, when

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[7] This second Panama City address reflects the location at which NOAA Special Agent Nelson interviewed Mr. Tinsley on July 18, 2011. Agency Ex. 9.

[8] The Act provides, in pertinent part, that "[a]ny person who is found . . . to have committed an act prohibited by section 301 [16 U.S.C. § 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 $140,000, 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) (2011).

[9] The regulations pertaining to the Caribbean, Gulf, and South Atlantic fisheries have been amended numerous times since July 2011, when the actions at issue in the matter allegedly took

the violations allegedly occurred, those regulations made it unlawful to "[f]ish in violation of the prohibitions, restrictions, and requirements applicable to seasonal and/or area closures, including but not limited to: . . . gear restrictions . . . ." 50 C.F.R. § 622.7(*l*). With regard to the Gulf Exclusive Economic Zone,[10] the Seasonal and/or Area Closure requirements then in effect provided in pertinent part that:

> Within the . . . Steamboat Lumps,[11] during May through October, surface trolling is the only allowable fishing activity. For the purpose of this paragraph . . . , surface trolling is defined as fishing with lines trailing behind a vessel which is in constant motion at speeds in excess of four knots with a visible wake. Such trolling may not involve the use of down riggers, wire lines, planers, or similar devices.

50 C.F.R. § 622.34(k)(5).

Additionally, the Caribbean, Gulf, and South Atlantic fisheries regulations in effect in July 2011, made it unlawful to:

> Fail to comply with any provision related to a vessel monitoring system (VMS) . . . , including but not limited to, requirements for use, . . . access to data, procedures related to interruption of VMS operation, and prohibitions on interference with the VMS.

50 C.F.R. § 622.7(ee). At the relevant time, the VMS requirements throughout the Gulf of Mexico mandated, in pertinent part, that "[a]n owner or operator of a vessel . . . must ensure that the required VMS unit transmits a signal indicating the vessel's accurate position at least once an hour, 24 hours a day every day . . . ."[12] 50 C.F.R. § 622.9(a)(2)(ii).[13]

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place. Unless otherwise noted, the citations used in this decision pertaining to 50 C.F.R. Part 622 refer to the regulations in effect in July 2011.

[10] The Exclusive Economic Zone is "that area adjacent to the United States which, except where modified to accommodate international boundaries, encompasses all waters from the seaward boundary of each of the coastal states to . . . 200 nautical miles [out from shore] . . . ." 50 C.F.R. § 600.10.

[11] "Steamboat Lumps" is a square area in the Gulf of Mexico off the coast of northern Florida. It is bounded by rhumb lines connecting the following points: From point A at 28°14′ North latitude ("N. lat."), 84°48′ West longitude ("W. long."), to point B at 28°14′ N. lat., 84°37′ W. long., to point C at 28°03′ N. lat., 84°37′ W. long., to point D at 28°03′ N. lat., 84°48′ W. long., to point A at 28°14′ N. lat., 84°48′ W. long. 50 C.F.R. § 622.34(k)(ii); Agency Ex. 2.

[12] This hourly reporting requirement includes exemptions for vessels in port and for vessels in port or out of water for more than seventy-two consecutive hours. These exemptions are not at issue in this case and, therefore, have not been included in the legal analysis.

III. FACTUAL BACKGROUND

At all time relevant hereto, Respondent Kristi Chiodo and her husband, Respondent Anthony Paul Chiodo, Jr., were the co-owners of the F/V C Power, as well as other fishing vessels. Jt. Ex. 1 ¶ 3; Agency Ex. 5, Tr. 148, 153. The C Power is a bandit boat used to catch bottom fish, such as grouper, snapper and porgies. Tr. 149. It routinely operates with a crew of three, including the captain. *Id.* The Chiodos purchased the vessel in 2009, equipped with a Thrane & Thrane VMS unit. Tr. 148; Agency Exs. 14, 15.

In or about July 2011, the Chiodos authorized Respondent John A. Tinsley to captain the C Power and fish aboard the vessel pursuant to their commercial Federal Fisheries Permit for Gulf of Mexico Reef Fish. Jt. Ex. 1 ¶¶ 4–5; Agency Ex. 6 at 10. On July 15, 2011, Mr. Tinsley, his girlfriend, and deckhands Russell Bruce and Jeffrey Taylor, departed Apalachicola, Florida, in the C Power and travelled to the forty-fathom demarcation line off the coast, which they followed down into, and through, the Steamboat Lumps area, and back around to Apalachicola. Tr. 19, 150, 153-54; Agency Exs. 8–9. During the entirety of the fishing trip, which ended on July 22, 2011, Mr. Tinsley and his crew used bandit gear— vertical gear that is used to drop a line with hooks attached straight down into the water column—to harvest fish including gag grouper, red grouper, and red porgy. Jt. Ex. 1 ¶¶ 6, 8; Tr. 45.

During the eight-day fishing trip, NOAA VMS technicians detected the vessel's position on a number of consecutive hourly VMS reports stationed inside the Steamboat Lumps area and at other times noted that the vessel's VMS unit had reporting gaps. Tr. 73–74; Agency Exs. 1, 2, 17. On July 18 and 19, 2011, while the ship was still at sea, NOAA Special Agent Paige Casey notified Respondent Kristi Chiodo by telephone and e-mail, of the VMS technician's observations and the applicable regulations governing the Steamboat Lumps closed area and seasonal fishing restrictions. Jt. Ex. 1 ¶¶ 9, 12; Tr. 29–30, 150, 153; Agency Exs. 1-3. A VMS technician also sent an e-mail directly to the vessel's VMS unit to tell the operator, Mr. Tinsley, that the vessel was reported as located within the Steamboat Lumps protected area. Tr. 104, 110.

On July 22, 2011, the C Power returned to Apalachicola and was met upon its return by Respondent Anthony Chiodo. Tr. 153–54, 156–57. The Respondents sold the catch from the trip for $4,755.90, including $782.50 worth (626 lbs.) of red porgy, but Mr. Chiodo declined to pay the crew their share of the proceeds citing the pendency of the issues raised by NOAA. Jt. Ex. 1 ¶¶ 6–7; Agency Ex. 4; Tr. 37–38. A few days after the trip, on July 26, 2011, NOAA Special Agent Elizabeth Nelson and her supervisor, Assistant Special Agent in Charge Houghaboom interviewed Mr. Tinsley in Panama City, Florida, and obtained a written statement from him concerning the trip. Agency Exs. 1, 8, 9; Tr. 15-21. Approximately a month later, NOAA Special Agent Paige Casey was twice contacted by telephone by a person representing himself to be trip crew member Russell Bruce. Agency Ex. 1.

In or about September 2011, NOAA requested information in regard to the Thrane & Thrane VMS unit on-board the C Power from GMPCS Personal Communications ("GMPCS"), the unit's satellite services provider. Agency Ex. 13. In response, GMPCS provided data reports

[13] 50 C.F.R. § 622.9(a)(2)(ii) (2011) is now codified at 50 C.F.R. § 622.28(b) (2013).

confirming the location information NOAA had contemporaneously received regarding the vessel during the trip. Agency Ex. 14. GMPCS also confirmed the existence of reporting gaps from the on-board VMS unit and advised that "[t]here were no anomalies preventing the VMS transceiver from logging onto the satellite or any cause for data to stop being transmitted from the VMS on board F/V C Power July 15, 2011 thru July 21, 2011." *Id.* In addition, it reported that the unit "has no maintenance history since it was activated on 12/21/2009." *Id.*

IV. DISCUSSION OF EVIDENCE

As indicated above, regulations promulgated pursuant to the Magnuson-Stevens Act in effect in July 2011, made it unlawful to fish in violation of requirements applicable to seasonal and area closures and to fail to comply with any provision related to the vessel monitoring system (VMS). 50 C.F.R. § 622.7(*l*), (ee). The Agency contends that Respondents violated the Magnuson-Stevens Act, as amended, at 16 U.S.C. § 1857(1)(A), when Mr. Tinsley: (1) fished with bandit gear in the restricted Steamboat Lumps area (Count 1); and (2) fished while not in compliance with the Act's VMS requirements during a fishing trip from July 15, 2011 to July 22, 2011 (Count 2). 50 C.F.R. § 622.7(*l*), (ee); Agency PPIP at 1.

To prevail on its claim that Respondents violated the Act and corresponding regulations, the Agency must prove the alleged violations by a preponderance of the evidence. *Cuong Vo*, Docket No. SE010091FM, 2001 NOAA LEXIS 11, at *16–17 (ALJ, Aug. 17, 2001) (citing 5 U.S.C. § 556(d); *Dep't of Labor v. Greenwich Colleries*, 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*, 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 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(a)(2) ("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(a) (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 NOAA LEXIS 11, at *17 (citation omitted). Further, "hearsay evidence is not inadmissible as such." 15 C.F.R. § 904.251(a)(2); *see also Veg-Mix, Inc. v. U.S. Dep't of Agriculture*, 832 F.2d 601, 606 (D.C. Cir. 1987) ("[I]f hearsay evidence meets the standards of the Administrative Procedure Act by being relevant, material, and unrepetitious, . . . agencies are entitled to weigh it according to its 'truthfulness, reasonableness, and credibility.'" (citations omitted)).

A. Count 1

To establish that Respondents violated the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A) and 50 C.F.R. §§ 622.7(*l*) and 622.34(k)(5), by fishing with bandit gear in the Steamboat Lumps area at a time when the area only allowed for surface trolling, as alleged in

Count 1, the Agency must prove: (1) Respondents are "persons;" (2) each Respondent engaged in or authorized an agent to engage in fishing activities; (3) the fishing activities were not "surface trolling;" (4) the fishing activities took place within "Steamboat Lumps;" and (5) the fishing activities took place between the months of May and October.

Several elements of this alleged violation are uncontested. The parties have stipulated that Respondents are "persons" subject to the jurisdiction of the Act; that the Chiodos were the co-owners and Mr. Tinsley the operator of the F/V C Power; and that the Chiodos authorized Mr. Tinsley to fish aboard the vessel pursuant to their commercial Federal Fisheries Permit for Gulf of Mexico Reef Fish for the fishing trip beginning on July 15, 2011 and ending on July 22, 2011. Jt. Ex. 1 ¶¶ 2–5. Moreover, there is no dispute that Mr. Tinsley solely used bandit gear to fish during the trip. *Id.* ¶ 8. Bandit gear uses a hooked line that is dropped straight down into the water column, whereas surface trolling—the type of permissible fishing activity in Steamboat Lumps—uses troll gear, which maintains the line at the very top of the water column, away from protected species. Tr. 45–46. Further, fishing with bandit gear involves a vessel remaining anchored for extended periods, whereas in permissible surface trolling the gear is pulled behind a vessel, which is in constant motion in excess of 4 knots (12 mph). Tr. 46; 50 C.F.R. § 622.34(k)(5). Expert testimony introduced at hearing indicated that red porgies can be caught using bandit gear but not by surface trolling. Tr. 64–67.

The only element of this alleged violation apparently in dispute is whether the vessel's fishing activity took place within the Steamboat Lumps area. The Agency argues in its post-hearing Brief that the F/V C Power was fishing with bandit gear within the Steamboat Lumps area in violation of 50 C.F.R. § 622.7(ee) based on information provided by Mr. Tinsley and his deckhand, Russell Bruce, as well as VMS unit reporting data. Agency Br. at 7–8. According to the Agency, Mr. Tinsley admitted to the NOAA investigator to fishing in the Steamboat Lumps area when he stated that it was difficult to catch any fish in the area, and if he caught any fish there during the fishing trip, it was probably around 150 to 200 pounds of porgies. *Id.* Furthermore, the Agency asserts that Mr. Bruce told NOAA Agent Paige Casey in a phone conversation that the vessel fished within the Steamboat Lumps area for five to six hours, catching about 100 pounds of porgies. *Id.* at 8. The Agency posits that both Mr. Tinsley and Mr. Bruce stated independently that neither knew that bandit gear was prohibited for use in the area, implying that they had indeed fished using bandit gear in the area. *Id.* Mr. Tinsley allegedly stated that had he known he could not use bandit gear inside the Steamboat Lumps area, he would not have. *Id.* at 7. The Agency further maintains that VMS unit reporting data indicates the F/V C Power was inside the Steamboat Lumps area for twelve hours or more. *Id.* at 8. The VMS data included reporting gaps of twelve hours that are bookended with reports in or near the Steamboat Lumps area, as defined in 50 C.F.R. § 622.34(k)(1)(ii). *Id.*

The Chiodos, on the other hand, deny the Agency has offered sufficient evidence to meet its burden of proof. In support thereof, they contend that Mr. Tinsley did not in fact "admit or acknowledge that he fished in the [Steamboat Lumps] area," in his written statement and that the NOAA agent who took Mr. Tinsley's statement admitted that Mr. Tinsley never explicitly said he caught any fish in the Steamboat Lumps area. Rs' Reply Br. at 1, citing Agency Ex. 8 and Tr. 22. Further, the Chiodos claim that the only other evidence offered by the Agency is "rank hearsay" concerning a telephone call Agent Casey received from "someone," which was

admitted into evidence over their objection, and should not be considered proof that the violation was committed because these statements do not explain how the person could accurately verify that the vessel actually fished in the Steamboat Lumps area during the trip. *Id.* at 1–2. Further, Mr. Chiodo affirmatively testified that Mr. Bruce, as one of the deckhands, told him that he did not know if they fished aboard the F/V C Power in the Steamboat Lumps area and that Mr. Tinsley never admitted he fished in the area. *Id.* at 2; Tr. 154.

Upon consideration of the record, this Tribunal finds that the Agency has met its burden of proof with respect to Respondents' liability on Count 1 for the following reasons:

First, while immediately upon docking, Mr. Tinsley may have denied to Mr. Chiodo that he bandit fished within the Steamboat Lumps area (tr. 154, 157), he did not maintain his claim of innocence when officially interviewed just a few days later by NOAA. Rather, when interviewed by NOAA Special Agent Nelson, Mr. Tinsley instead asserted that he "did not know that he could not bandit fish in the Steamboat Lumps," and that "it was difficult to catch fish inside Steamboat Lumps and that if he caught anything inside the area it was most likely 200 or 150 lbs of pogies [sic]," according to Special Agent Nelson. Agency Ex. 8; Tr. 19–20. Further, he confirmed some of his oral admissions in his sworn and signed written statement subsequently provided to NOAA, wherein he explicitly admitted that his course took him "through Steamboat Lumps," and that he "[d]idn't know [he] couldn't bandit fish" in the area and that "if I knew I couldn't fish in there, I wouldn't." Agency Ex. 8; Tr. 16–17. A fair reading of Mr. Tinsley's statements to NOAA strongly suggests that, in fact, he did engage in bandit fishing in the Steamboat Lumps area in July 2011.

Moreover, the statements made by Mr. Tinsley to NOAA are entitled to greater weight than those allegedly made to Mr. Chiodo. The NOAA statements are admissions against interest, made to a government agent conducting an official investigation, and some are sworn and signed. Further, at the time of the interview, Mr. Tinsley was likely aware that NOAA was in possession of the VMS data on his vessel's location during the trip, encouraging him to be more forthright in the statements made to the agent. In addition, Mr. Chiodo testified at hearing that he had allowed Mr. Tinsley to take out his boat while his usual captain was on a two week vacation because Tinsley "begged [Mr. Chiodo] to let him run the boat" and that Mr. Tinsley "needed the money real bad." Tr. 158–59. Mr. Chiodo also admitted that he was quite "angry" when he met the boat at the dock and "wanted to get to the bottom of it and find out the truth that they had fished in the area that I was being accused of . . . ." Tr. 154, 157. Facing a boat owner under such circumstances, as well as having a strong desire to get immediately paid, it is not surprising that Mr. Tinsley did not readily admit to having engaged in illegal activity. Moreover, the record suggests that Mr. Tinsley generally lacked integrity in his dealings with Mr. Chiodo. Specifically, Mr. Chiodo testified that he had authorized Mr. Tinsley to take the vessel out only a single time in July, and that without notifying him or asking his permission, Mr. Tinsley nevertheless took the vessel out again on the subject trip, to which Mr. Chiodo acquiesced due to Mr. Tinsley's financial circumstances. Tr. 158 Mr. Tinsley also appears to have been a fisherman willing to take risks, in that Mr. Chiodo testified that he went in the small boat "far down the line" to Steamboats Lumps which is "a long way from Panama City," and not normally where the crew of the boat usually fishes. Tr. 159. All in all, the circumstances suggest that Mr. Tinsley's alleged initial denial of wrongdoing to Mr. Chiodo is not worthy of substantial weight.

Second, Mr. Tinsley's crewmate on the trip, Russell Bruce, did explicitly admit to bandit fishing within the Steamboat Lumps area. The testimony and records in evidence document that on August 22, 2011, about a month after the trip, a person who identified himself as Russell Bruce, on his own initiative, telephoned NOAA Special Agent Casey. Agency Ex. 1 at 3–4; Tr. 32–34, 42. Mr. Bruce instigated this contact and another call to the Agent a few days later, in an apparent effort to determine the status of the investigation, because, as he told the Agent, the owners had not paid him for the trip with Tinsley because they "were waiting to see if they had received a fine." Tr. 32–33; Agency Ex. 1 at 4. During the first conversation, Mr. Bruce represented to the Agent that he "was one of the mates on the F/V C Power when it fished in the Steamboat Lumps," and that "[t]hey fished inside the area for about five or six hours and caught 2 baskets of porgies/pink snapper, which is about 100 pounds." Agency Ex. 1 at 3–4; Tr. 32–33. However, Mr. Bruce asserted that, while he knew he could not longline fish, he "thought it was okay to bandit" fish in the Steamboat Lumps area, and claimed he was unaware they had been in the closed area until they landed. Tr. 32–33; Agency Ex. 1 at 4.

While Respondents are correct that the statements made by Mr. Bruce are hearsay, "hearsay evidence is not inadmissible as such" in this proceeding. 15 C.F.R. § 904.251(a)(2). Moreover, Mr. Bruce's statements are relevant, material, reliable, and probative, and neither unduly repetitious nor cumulative, and so entitled to both admission and weight in this proceeding.[14] 15 C.F.R. § 904.251(a)(2). In regard to the weight to which the statements are entitled, while as Respondents note Mr. Bruce did not state a specific date on which the alleged violative fishing took place or explain how he came to know that they fished in the closed area, the statements he did make in terms of their proximity in time to the event, the identity of Mr. Tinsley, his representations to the Agent as to the fact and reason for not getting paid (consistent with Respondent Anthony Chiodo's testimony), the specifics of the time and catch amounts (consistent with Mr. Tinsley's statements), all provide more than sufficient indicia of truthfulness, reasonableness and credibility to make the statements worthy of significant weight.

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[14] In addition to hearsay, in their Reply Brief the Respondents appear to challenge that a sufficient foundation was laid for the admission of the telephone calls purportedly made by Russell Bruce, but offer no legal citations in support thereof. Rs.' Reply Br. at 1; Tr. 31. It is noted that Respondents made no such objection at hearing. Further, the foundation laid by the Agency for admission of the telephone calls meets the requirements of Fed. R. Evid. 901(a) ("To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."). Under such rule, "while a mere assertion of identity by a person talking on the telephone is not in itself sufficient to authenticate that person's identity, some additional evidence, which 'need not fall into any set pattern,' may provide the necessary foundation." *United States v. Khan*, 53 F.3d 507, 516 (2nd Cir. 1995) (quoting Fed. R. Evid. 901(b)(6), Advisory Committee notes, ex. 6). For example, a "telephone conversation may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him." Fed. R. Evid. 901 Advisory Committee notes3, ex. 4. Here the person who made the telephone call to NOAA Agent Casey knew the details of the trip under investigation, including the names of the crew, the fish caught, etc., as well as the fact that the crew had not been paid, all of which was sufficient circumstantial evidence to authenticate the person making the call was a mate on the ship, Russell Bruce.

Moreover, such weight is not materially undermined by Mr. Chiodo's assertions that when he met the boat at the dock, the two deckhands denied knowing where they fished, that generally "most deckhands don't understand coordinates on commercial fishing boats," they are not in the cabin, and most captains keep their readings covered so the deckhands "don't tell other people where they have been." Tr. 154. Consistent with the deckhands' statements to Mr. Chiodo, Mr. Bruce told the Agent he was unaware that he had fished illegally until after he returned. Further, while it is true Mr. Bruce did not state how he came to have such knowledge, it is also true that Respondents did not choose to acquire a statement or subpoena him to appear at hearing to provide such information. Moreover, it is significant that Mr. Chiodo did not give much weight to either the portside denials of wrongdoing made by Mr. Tinsley or the deckhands' claimed lack of knowledge because he testified that he "immediately" thereafter fired the captain and the crew, and refused to pay them for the trip. Tr. 155, 157.

Third, the vessel monitoring system (VMS) hourly data clearly places the vessel within the Steamboat Lumps area for an extended period of time during the fishing trip. Agency Exs. 3, 17. At hearing the Agency offered documentary evidence of the VMS data on the trip as well as the testimony in regard thereto of Patrick O'Shaughnessy, who retired as a Commander after 24 years of service from the Coast Guard and who for the 5.5 years has been NOAA's VMS Program Manager for the Southeast United States. Tr. 69, 73; Agency Exs. 12, 16, 17. Without objection, Cdr. O'Shaughnessy was qualified at hearing as an expert in NOAA's VMS system and navigation. Tr. 73. The Commander explained that a VMS system consists of a computer device placed onboard a commercial vessel in accordance with NOAA regulations, which contains a GPS (Global Positioning System) unit and a transmitter. Tr. 70. The on-board unit records (or "polls") the vessel's GPS position from geosynchronous satellites and transmits it once an hour to another satellite, which transmits it down to a land earth station operated by the unit's communications service provider, which then relays the information to NOAA, which can access the data via computer using Vtrack software.[15] Tr. 70–71, 74, 119, 121, 137–38. The GPS data obtained on a vessel's location is accurate to within 100 meters. Tr. 74, 140.

Cdr. O'Shaughnessy testified that the subject fishing trip first came to NOAA's attention on or about July 19, 2011, after VMS data detected the vessel repeatedly polling in the closed Steamboat Lumps area. Tr. 73–74, 106. At the request of NOAA's counsel, he reviewed the VMS data for the vessel's entire trip from July 15–22, 2011. Tr. 98–99. The trip data reflected the vessel's activities as being consistent with normal bandit fishing practices which, Cdr. O'Shaughnessy explained, involves anchoring for a period of hours at a particular spot to fish, and then moving on and anchoring and fishing in another spot. Tr. 97, 99; Agency Ex. 17. Specifically, as relevant here, it showed the vessel for a period of time essentially stopped ("0" speed) on July 17, roughly 10 nautical miles northwest of the Steamboat Lumps area, as it had stopped numerous times before during the trip. Tr. 99–100: Agency Exs. 16, 17. Then the VMS data reported the vessel as heading south (at 163 degrees at 2 knots (2.3 mph)) towards the

[15] The record indicates that the Chiodos were also able to contemporaneously access the VMS data electronically on their vessels through "Lockpoint" software provided by GMPCS, their VMS satellite service provider. Agency Ex. 1 at 3; Tr. 115, 134.

Steamboat Lumps area at 14:56 UTC (10:56 a.m. local time).[16] Tr. 100; Agency Exs. 16, 17. He noted the VMS data contained a 12 hour non-reporting gap between July 17 at 14:56 UTC and July 18 at 3:54 UTC (11:54 p.m.), when the vessel started reporting again and its location was sited as being inside the closed Steamboat Lumps area. Tr. 99-100; Agency Ex. 17. Following this report, the vessel was polled 11 times within the Steamboat Lumps area, including six consecutive hourly polling reports "on top of one another" on July 18, indicative of the vessel being "at anchor," the Commander opined. Tr. 94–95, 99–100, 124; Agency Exs. 16, 17. Included among those six reports were those for July 18 at 6:54 UTC and 7:54 UTC as to which the VMS data reflected the vessel at the exact same location (by latitude and longitude) in the Steamboat Lumps area a "0" course and "0" speed.[17] Agency Ex. 16 at 5. The next hourly reading at 8:54 UTC had the vessel again at "0" course and 0.1 speed, at the same longitude, but 0.1 second of a degree of latitude different (*i.e.*, about 10 feet) from its prior polling location. *Id.* The next reading at 9:54 UTC showed the vessel at a course at 180 degrees (headed due south) at 0.1 speed in the exact location it was at both at 6:54 and 7:54. *Id.* Then at 10:54 UTC it was polled at "0" course and 0.1 speed again at that same the location it was polled at 8:54, 0.1 degree from its prior location at 9:54. *Id.* In total, from the last hourly report before the vessel was recorded as first being in the Steamboat Lumps area to the next hourly report after exiting the Steamboat Lumps area, consists of "roughly just under a 25-hour period."[18] Tr. 92.

Based upon his extensive navigational experience, Cdr. O'Shaughnessy opined that with the wind and the current, it "would be very, very difficult" for a vessel to leave an area by boat and return to the exact same place an hour later and "highly unlikely that they [the F/V C Power] moved."[19] Tr. 96, 142. Thus, based upon that experience and the data, he offered his expert

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[16] The hours are reported to NOAA in Coordinated Universal Time (UTC), Greenwich Mean Time, the international standard, which was four hours ahead of local standard time for Apalachicola, Florida in July 2011. Tr. 82, 123.

[17] Cdr. O'Shaughnessy testified that the course and speed were not taken in "real time" by the vessel's VMS unit but are averages of polling data from point to point performed by NOAA's Vtrack software. Tr. 140–44. Moreover, the speed data, rather than course, is indicative of whether the vessel is stationary or moving. Tr. 143.

[18] At hearing, Respondent raised an issue with Cdr. O'Shaughnessy to the effect that the vessel was polled in the closed area was at night and that bandit boats do not fish at night. Tr. 124. However, the VMS data reflects that the vessel was first polled in the Steamboat Lumps area after a 12-hour period of non-reporting, at 3:54 UTC (close to midnight local time on July 18) and was polled 11 times thereafter in the area, until 14:54 UTC that day (close to 11 a.m. local time). This suggests that the vessel had been in the closed area for a significant number of daylight hours, during which time it was likely that the captain and crew used the fishing vessel and bandit gear for their intended purpose: to bandit fish

[19] On cross-examination, Cdr. O'Shaughnessy acknowledged that if the vessel had thrown a buoy and "you put up the same line, and the wind is the same, and the current is the same, you could come back to the same position." Tr. 145. There is no evidence, however, of those conditions being in existence in this case.

opinion it was "[m]ore likely they were at anchor sitting [with] the wind and the current . . . in one particular location and . . . polled consistently on an hourly basis for those six positions in that location." Tr. 96–97. Buttressing this conclusion, the Commander noted that he had requested and obtained a report from GMPCS, the satellite communications company that is responsible for the vessel's Thrane & Thrane VMS unit, indicating there were no anomalies unique to the system preventing the units from properly reporting their positions from July 15–21, 2011. Tr. 75–81, 114; Agency Exs. 13, 14.

Fourth, the Agency offered at hearing the expert testimony of Dr. Douglas DeVries, a research fisheries biologist with NOAA with 26 years of experience. Tr. 59-60; Agency Ex. 10. Without objection, Dr. DeVries was qualified as an expert in reef fish, including red porgies. Tr. 62. Dr. DeVries offered a clear rationale for the vessel being particularly desirous of fishing in the Steamboat Lumps area during the trip at issue here. Specifically, he stated that vermillion snapper and red snapper spawn, aggregate, and so are easily caught in large numbers in the Steamboat Lumps area in July. Tr. 66. He also explained that red porgies are winter spawners and hard bottom fish, not caught by surface trolling, and are a bycatch of target reef fish such as vermillion snapper, gray triggerfish and grouper. Tr. 65.

Finally, as noted above, Respondent Tinley did not voluntarily appear at hearing to testify as to what occurred and defend himself against the claims of the Agency. This suggests that his testimony if offered would have supported the charge. *Burgess v. United States*, 440 F.2d 226, 232-233 (D.C. Cir. 1970) ("when pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he can offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to support the charge.") (quoting *Graves v. United States*, 150 U.S. 118, 120-21 (1893)).

Therefore, considering all the evidence of record, it is hereby found that it is more likely than not that Mr. Tinsley and the F/V C Power fished using bandit gear within the boundaries of Steamboat Lumps area in July 2011, when it was illegal to do so as alleged in Count 1 of the NOVA. Consequently, the Agency has proven by a preponderance of the evidence that Respondents violated the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A) and 50 C.F.R. §§ 622.7(*l*) and 622.34(k).

B. Count 2

To establish that Respondents violated the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A) and 50 C.F.R. §§ 622.7(ee) and 622.9(a)(2)(ii), by having VMS unit reporting gaps from the F/V C Power during the fishing trip as alleged in Count 2, the Agency must prove: (1) Respondents are "persons;" (2) each Respondent was the owner or operator of a vessel located in the Gulf of Mexico; and (3) the vessel's VMS unit did not transmit a signal indicating the vessel's accurate position at least once an hour, 24 hours a day, every day.

As noted above, the parties have stipulated that Respondents are "persons" subject to the jurisdiction of the Act; that the Chiodos were the co-owners and Mr. Tinsley the operator of the

F/V C Power; and that the Chiodos authorized Mr. Tinsley to fish aboard the vessel pursuant to a federal fisheries permit for the Gulf of Mexico Reef Fish Fishery for the fishing trip beginning on July 15, 2011 and ending on July 22, 2011. Jt. Ex. 1 ¶¶ 2-5.

With respect to the third element of this alleged violation, the Agency also contends that the VMS unit aboard the C Power had multiple reporting gaps that ranged from two hours to twelve hours during the fishing trip. Agency's Br. at 13. The Agency contends that the written and testimonial evidence underscores that there were no anomalies preventing the VMS unit aboard the vessel from properly reporting during the fishing trip. *Id.* at 3. Additionally, the Agency maintains that violating the regulations of the Magnuson-Stevens Act is a strict liability offense and all Respondents are jointly and severally liable for the violations regardless of whether they knowingly violated the regulations. *Id.* at 9–11.

For their part, while not explicitly conceding liability, the Chiodos do not appear to contest that the VMS unit did not operate as required by regulation, stating "[t]he issue in this case is not whether the VMS unit was operational but rather were the Respondents, Anthony Chiodo and Kristi Chiodo somehow at fault for what could best be described as intermittent lack of recorded 'pings' from the VMS unit." Rs.' Reply Br. at 2. They suggest that vendor or design related problems could have caused the lack of pings asserting that Thrane & Thrane have had reporting problems on a systems-wide basis and VMS personnel were unable to locate other vessels with the same VMS system close by the C Power at the time of the gaps. *Id.* citing Tr. 116–20, 122. The Chiodos maintain that when the Agency informed Ms. Chiodo of VMS reporting problems, Ms. Chiodo had the unit serviced, and the Agency never requested any corroboration of that servicing. *Id.* citing Tr. 150–51.

This Tribunal finds the Agency's arguments with respect to Count 2 persuasive. Applicable law required that the vessel's VMS unit transmit "a signal indicating the vessel's accurate position at least *once an hour, 24 hours a day every day . . . .*" 50 C.F.R. § 622.9(a)(2)(ii) (2010) (emphasis added); Tr. 102. Nothing in the regulatory text suggests that intermittent reporting gaps are allowed. The documentary and testimonial evidence clearly indicate that the VMS unit aboard the F/V C Power did not meet the regulatory requirements between July 15–22, 2011. As indicated above, Cdr. O'Shaughnessy, NOAA's VMS program manager for the southeast United States, provided his expert testimony at hearing. Tr. 69, 73. Specifically, he stated that during the subject trip "there was at least five instances where there were gaps ranging from five hours of missing reporting up to two instances of 12 hours where they had no reporting." Tr. 81. The documentary evidence received by NOAA and confirmed by the VMS units satellite service provider both match and confirm this to be the case. Tr. 82–83. Specifically, the data shows for July 15, 2011, two missed hourly reports between 20:02 and 23:02; for July 16, 2011, two missed hourly reports between 16:58 and 19:58; for July 17, 2011, one missed hourly report between 6:56 and 8:56, twelve missed hourly reports between 10:56 and 23:24, as well as one missed hourly report between 23:54 on July 17, 2011 and 1:54 on July 18, 2011; for July 18, 2011, one missed hourly report between 11:54 and 13:50, five missed hourly reports between 13:50 and 19:50, and one missed hourly report between 19:50 and 21:50; for July 19, 2011, twelve missed hourly reports between 1:50 and 14:48, and four missed hourly reports between 18:48 and 23:48; for July 20, 2011, one missed hourly report between 1:48 and 3:48; for July 21, 2011, four missed hourly reports between 7:48 and 12:46. Agency Ex. 14

(satellite provider data report); Tr. 84–85, 123–24; *see also* Agency Exs. 16, 17 (NOAA data reports); Tr. 100–02. This is an aggregate total of 46 hourly location reports not transmitted between July 15–22, 2011.

Moreover, there is no persuasive evidence in the record supporting the fact that the VMS unit itself or the satellite service provider's communication system was not capable of taking and/or transmitting hourly signals during the trip at issue. Respondents argue that the satellite provider's report reflects in certain instances duplicate hourly reports being sent, a delay between the time a report was sent and the time it was received, and the term "input" rather than the more common term "Request/Timecycle" on the reports. Rs.' Reply Br. at 2; Tr. 116–22; *see also* Agency Ex. 14.[20] To the extent that he could, Cdr. O'Shaughnessy explained that these notations in the report were normal and did not reflect that the VMS on-board unit or communication system was inoperable. Tr. 116–22. Specifically, he stated that the Thrane & Thrane VMS unit is designed such that, on those occasions when the on-board VMS unit takes a GPS position reading but is unable to immediately connect to the satellite to send it, it stores the reading and then transmits the reading and the time it was taken when a connection can be made. Tr. 119–20. Further, when eventually received by the satellite, the readings will show in the proper order, reflecting the original time taken and so the owner is not responsible for the delay caused by the lack of an immediate satellite connection. Tr. 120. Moreover, the Commander indicated that those delays are not what is at issue here, but rather what is at issue here is the gap in reporting by the VMS unit on the vessel itself. Tr. 120–21. His testimony as to the insignificance of the notations mentioned by Respondents is fully buttressed by the written report of GMPCS, the satellite service provider itself, which states that "[t]here were no anomalies preventing the VMS transceiver from logging onto the satellite or any cause for data to stop being transmitted from the VMS on board F/V C Power July 15, 2011 thru July 21, 2011." Agency Ex. 14; Tr. 114.

In further support of the claim that the non-reporting errors were due to faulty machinery, Respondents offered testimonial evidence to suggest that the vessel's VMS unit had had a series of reporting problems in the past. Specifically, Ms. Chiodo testified that prior to the subject trip she had been contacted by NOAA and GMPCS regarding VMS reporting problems on the C Power, in response to which she claimed she contacted GMPCS and that they "instruct[ed] me to do a few things. And after that I called the technician out that works in this town that's been here for years." Tr. 149. She asserted that on each such occasion the technician came out to the boat and checked the system, but was unable to find any malfunction. Tr. 150. Similarly, she stated, after the July trip at issue here, she had the technician check out the VMS system and again he was unable to find anything wrong with the unit. Tr. 151. Then again, in December 2011, six months after the trip at issue here, in response to a certified letter sent to her by Cdr. O'Shaughnessy of yet another reporting problem, she had the technician come out and take yet another look at the unit. *Id.* Ms. Chiodo claimed that in response the technician "checked everything on it from front to back, nothing wrong, no shorts in my lines. He checked everything and gave me a clean bill of health on it . . . ." *Id.* Nevertheless, Ms. Chiodo asserted

[20] Cdr. O'Shaughnessy testified that the first column of the satellite provider's records reflects the date and time the vessel's VMS system sent the location report to the satellite, the next column reports when the information was received by the satellite. Tr. 83–84, 114–15; Agency Ex. 14.

that since then she has not been notified of any additional reporting problems. Tr. 152. Further, she asserted that NOAA never asked her to have GMPCS or the technician send any reports on this prior servicing. Tr. 150.

E-mails in the record dated March 21, 2011, and May 2, 2011, confirm that NOAA notified Ms. Chiodo on or around those dates of VMS reporting gaps. Agency Ex. 18. Moreover, the documents show that in response to the March 2011 contact, NOAA was advised by Ms. Chiodo that "they have been having issues with the VMS unit and would have it looked at when they get back to port." *Id.* However, there is no documentary evidence in the record whatsoever supporting Ms. Chiodo's claim that she repeatedly had a technician out to service the unit.[21] Tr. 152. To the contrary, GMPCS, the Chiodos' satellite provider who supports the VMS unit, reported in its letter sent in September 2011 that the VMS unit aboard the F/V C Power vessel had "no maintenance history since it was activated on 12/21/2009." Agency Ex. 14. In addition, Cdr. O'Shaughnessy testified at hearing that NOAA also had no record of any technician inspecting the F/V C Power after the earlier VMS reporting gap incidents in March, April, and May of 2011.[22] Tr. 125–27, 135. More significantly perhaps, there is evidence in the record which suggests that "operator error," rather than unit error, may have been responsible for the intermittent failure of the VMS system to consistently transmit at least during the trip at issue here. Specifically, Mr. Chiodo testified at hearing that he witnessed Mr. Tinsley stepped off the F/V C Power at the end of the trip with a large fan or air conditioner. Tr. 156. At hearing, Commander O'Shaughnessy testified that a VMS unit not receiving enough battery power will not be able to operate as intended. Tr. 128–30, 132–33.

In sum, the evidence adduced at hearing fails to persuasively establish that the VMS non-reporting was caused by a mechanical or system-wide problem beyond the control of the operator/owner of a type which might be a basis for excusing liability for the incidences of non-reporting.

As such, based upon all the foregoing, it is hereby found that it is more likely than not that the VMS unit in Respondent's vessel did not transmit a signal indicating the vessel's accurate position at least once an hour, 24 hours a day, every day during the fishing trip, thus resulting in Respondents' violation of the Act as alleged in Count 2 of the NOVA.

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[21] In response to the undersigned's inquiry regarding the reason for the lack of documentary evidence of what would likely be tax deductible business expenses, Ms. Chiodo claimed that while she sometimes writes the technician checks, "sometimes I pay him cash," and that whatever documentation the technician creates regarding the work gets left on the boat and "my captains, they're kind of hard about getting their paperwork." Tr. 152.

[22] NOAA also asserted that it regularly corresponds with and aids in the VMS troubleshooting process for owners who provide NOAA some indication of what a marine electrician found upon inspecting the system—assistance the Chiodos had ample opportunity to take advantage of but did not. Tr. 135.

IV. PENALTY

Any person found to have committed an act made unlawful by the Magnuson-Stevens Act "shall be liable to the United States for a civil penalty" not to exceed $140,000 per violation. 16 U.S.C. § 1858(a); 15 C.F.R. § 6.4(e)(14) (maximum penalty amount increased as authorized by the Inflation Adjustment Act). When assessing a civil penalty under the Magnuson-Stevens Act, the presiding Judge must account for "the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require." 16 U.S.C. § 1858(a). "[A]ny information provided by the violator relating to the ability of the violator to pay" may be considered, but only if "the information [was] served . . . at least 30 days prior to [the] administrative hearing." *Id.*; *see* 15 C.F.R. § 904.108(b)–(h) (concerning respondents' ability to pay). There is no presumption in favor of the penalty proposed by the Agency. 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631 (June 23, 2010). Rather, "the presiding Administrative Law Judge may assess a civil penalty *de novo*, 'taking into account all of the factors required by applicable law.'" *Pauline Marie Frenier*, NOAA Docket No. SE1103883, 2012 NOAA LEXIS 11, at *11 (ALJ, Sept. 27, 2012) (quoting 15 C.F.R. § 904.204(m)).

As noted above, the NOVA seeks to assess a civil administrative penalty in the amount of $12,747.50 for Count 1 and $2,000.00 for Count 2, jointly and severally, against Respondents. The NOVA does not contain any rationale for this figure. *See* NOVA at 2. The Agency only notes that it assessed the penalties using the NOAA Policy for Assessment of Penalties and Permit Sanctions ("Penalty Policy") (Agency Ex. 19). Agency PPIP at 2.

The Chiodos also rely on the NOAA Penalty Policy. They contend that the Count 1 violation amounts to a level III violation with a level of culpability of "unintentional," making the maximum penalty for Count 1 $10,000.00. Rs.' Reply Br. at 3. The Chiodos reason that the level of culpability should be "unintentional" because they have no prior offenses and cooperated with NOAA Agents. *Id.* They further contend that they should receive a written warning for the Count 2 violation as a level II violation with an "unintentional" level of culpability because the VMS unit worked sufficiently well for NOAA to observe the vessel was even in the closed area as alleged in Count 1, and the VMS unit has had no problems reporting subsequent to the July 2011 fishing trip. *Id.*

A. NOAA's Penalty Policy[23]

Under the Penalty Policy, a civil penalty is calculated as follows:

> (1) A "base penalty," which represents the seriousness of the violation, calculated by:
>
> (a) an initial base penalty amount reflecting:
>
> (i) the gravity of the violation and
>
> (ii) the culpability of the violator, and

[23] The undersigned took judicial notice of the Agency's exhibit comprising NOAA's Penalty Policy. Tr. 145–46.

(b) adjustments upward or downward to reflect:
(i) history of non-compliance,
(ii) commercial or recreational activity, and
(iii) good faith efforts to comply after the violation, cooperation/non-cooperation;

(2) plus an amount to recoup the proceeds of any unlawful activity and any additional economic benefit of noncompliance.

See Penalty Policy at 4–5. To determine the gravity component of an initial base penalty, a search is made for the particular violation on the schedules in Appendix 3 of the Penalty Policy. The schedules assign an "offense level" to the most common violations charged by the Agency, which levels under the Magnuson-Stevens Act range from least significant ("I") to most significant ("VI") and are designed to reflect the nature, circumstances, and extent of the violations. *Id.* at 4–5, 7–8.

Next, the culpability of the alleged violator is assessed as one of four levels in increasing order of severity: (A) unintentional, including accident, mistake, and strict liability; (B) negligence; (C) recklessness; and (D) intentional. *Id.* at 8–9. The Penalty Policy lists factors to be considered when assigning culpability, including whether the alleged violator took reasonable precautions against the events constituting the violation, the level of control the alleged violator had over these events, whether the alleged violator knew or should have known of the potential harm associated with the conduct, and "other similar factors as appropriate." *Id.* at 9.

The gravity component and culpability component form the two axes of penalty matrices for each of the statutes, set out in Appendix 2 of the Penalty Policy. A range of penalties appears in each box on the matrix. A penalty range is thus determined by selecting the appropriate level for gravity and culpability on the axes. The initial base penalty is the midpoint of the penalty range within that box. *Id.* at 5.

The adjustment factors provide a basis to increase or decrease a penalty from the midpoint of the penalty range within a box, or to select a different penalty box in the matrix. *Id.* at 10. The Penalty Policy states that a prior violation of natural resource protection laws are evidence of intentional disregard for them, or reckless or negligent attitude toward compliance, and may indicate that the prior enforcement response was insufficient to deter violations. *Id.* Therefore, the Penalty Policy provides that a penalty may be increased where a respondent had a prior violation based on the similarity and number of prior violations as well as how recently the prior violation occurred and whether the alleged violator made efforts to correct any prior violations. *Id.* A second adjustment factor in the Penalty Policy provides for a decrease in the penalty in certain circumstances where the violation arises from non-commercial activity. *Id.* at 11.

The final adjustment takes into account the alleged violator's good or bad faith activities after the violation occurs. *Id.* at 12. The Penalty Policy lists the following examples of good faith factors to decrease a penalty: self-reporting, providing helpful information to investigators,

and cooperating with investigators. *Id.* Bad faith factors include: attempting to avoid detection, destroying evidence, intimidating or threatening witnesses, or lying. *Id.* The Penalty Policy states that no downward adjustments are made for efforts primarily consisting of coming into compliance, or for self-reporting where discovery of the violation was inevitable. *Id.*

Finally, added to the base penalty is any value of proceeds gained from unlawful activity and any economic benefit of noncompliance to the violator. The Penalty Policy provides that proceeds are likely recouped and for purposes of penalty assessment will typically be zero where the illegal catch or product was seized and forfeited by NOAA or voluntarily abandoned by the violator. *Id.* at 13.

B. Penalty Analysis

While both parties rely on the Penalty Policy in their arguments, and the Penalty Policy attempts to incorporate the regulatory factors, the presiding Administrative Law Judge may still assess a civil penalty *de novo* and must take into account "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. None of the Respondents have a history of prior violations and no increase in the penalty is claimed thereon. Agency Post Hr'g Br. at 15. Further, none of the Respondents have claimed an inability to pay the proposed penalty. *Id.* They are therefore "presumed to have the ability to pay the civil penalty." 15 C.F.R. § 904.108(c); *see Tommy Nguyen*, Docket No. SE0801361FM, 2012 NOAA LEXIS 2, at *21 (ALJ, Jan. 18, 2012).

With regard to the "nature, circumstances, extent, and gravity" of the violation set forth in Count 1, the NOAA regulations allow only surface trolling in Steamboat Lumps from May through October. The evidence establishes that the F/V C Power may have spent as many as 25 hours within the boundaries of Steamboat Lumps in July 2011 and likely caught upwards of 100 pounds of fish there by means of bandit fishing. Tr. 18; Agency Ex. 1. The gravity of this violation is significant in that the Steamboats Lumps area was closed to fishing during the May-October period under the Act explicitly to protect the spawning bottom-dwelling fish species in the area, to prevent overfishing, and to aid in evaluating the effectiveness of the marine reserves as a management tool. Agency Ex. 7 at 2. The purpose of such restrictions issued under the auspices of the Act is to protect the nation's food supply and the on-going viability of the fishing industry. *See* 16 U.S.C. § 1801. By fishing in the closed area, Respondents not only threatened those goals of the Act, but engaged in unfair competition in that they caught fish in an area where law-abiding fishing vessels and fishermen could not.

In terms of culpability, Respondent Tinsley represented to NOAA that he was unaware of the closure restrictions on the Steamboat Lumps area and had he been aware he would not have fished there. Agency Exs. 1, 8, 9. He also expressed the fact that while he was familiar with longline fishing, he was new to bandit fishing. Agency Ex. 9. Evidence of record also suggests that he was not familiar with this fishing area as he usually fished out west, off Louisiana. Agency Ex. 1 at 3. However, commercial fishing is a highly regulated industry, and the responsibility to know and follow the applicable laws lies with those that participate in it. *John Hawthorne*, Docket No. SE0902348B, 2013 NOAA LEXIS 2, at *54 (ALJ, Feb. 27, 2013).

NOAA provided public notice to the fishing community of the Steamboat Lumps Marine Reserve area closure as early as May 2000, and periodically thereafter. Agency Ex. 7. Therefore, Mr. Tinsley's failure to be aware of the closure does not reduce his culpability for the violation to it being unintentional or accidental. He was at least negligent.

As to the Chiodos' culpability, the evidence adduced at hearing suggests that in allowing Mr. Tinsley to take their boat out while their usual captain was on vacation, they were attempting, at least in part, to do a good act for another, i.e., help out Mr. Tinsley who was in financial distress. Tr. 158–59. While perhaps in hindsight the Chiodos should have advised Mr. Tinsley prior to the trip of the local fishing restrictions and/or had concerns that Mr. Tinsley's fervent desire for financial rewards may motivate him to violate the fishing rules, I am convinced that the Chiodos did not affirmatively authorize or anticipate Mr. Tinsley fishing in a closed area. Nevertheless, "[s]ince its inception . . . , cases have been decided and affirmed by federal courts upholding the liability of the owner of the vessel for the Magnuson Act violations of the operator." *Tibor E. Kepecz*, 6 O.R.W. 556, 1991 NOAA LEXIS 51, at *13 (ALJ, Oct. 23, 1991). "Neither the owner nor operator can disclaim personal liability for the violations of the [Act]," and liability applies even if the owner discharges the operator after he or she is notified of the violation, as apparently occurred in this case. *Id.* at *13–14.

Thus, as the vessel owners the Chiodos are liable for the wrongful acts of Mr. Tinsley. Nevertheless, under the auspices of "other matters as justice may require," it seems appropriate to reduce the penalty in light of the evidence of record suggesting that Mr. Tinsley is likely without financial resources to pay all or part of the penalty and the Chiodos' own culpability is low. In addition, there is no evidence of any prior or subsequent similar violations by the Chiodos and it appears they were cooperative in the investigation.[24] The economic benefit of the violation to the Chiodos was also not very significant, in that the total gross value of the catch for the eight-day trip was $4,755.90, and the net value $3,869.15. Agency Ex. 4. Therefore, considering the nature, circumstances, extent, and gravity of the violation; Respondents' degree of culpability and history of prior offenses; and other matters as required by justice, a civil penalty in the amount of $6,000 for Count 1 is jointly and severally imposed on all Respondents.

As for Count 2, the nature of the violation is failing to maintain a working VMS device providing for 24/7 location reporting as required by regulation. As to the extent of the violation, the evidence adduced shows that the vessel VMS system failed to provide a total of *46* hourly reports over just a brief eight day period, with periods of non-reporting lasting as long as 12 consecutive hours. Agency Exs. 16, 17. With regard to circumstances, there is no credible evidence showing that a mechanical failure within the unit itself or any transmission issue caused the lack of reporting. In terms of gravity, the gaps in VMS reporting impeded NOAA's capacity to know the exact location of the fishing vessel out at sea both to assure compliance with its regulations and to provide assistance to the vessel in an emergency. Particularly significant here, the reporting gaps prevented NOAA from determining exactly how long the vessel was in the closed Steamboat Lumps area, in that there was a 12 hour gap between the last time it was

[24] On the other hand, the record suggests that just days before hearing Respondents refused to stipulate to numerous facts which were well supported by the documentary evidence produced by the Agency in its PPIP and introduced at hearing and which facts they did not contest at hearing. Compare, Jt. Ex. 1 ¶¶ 10- 11, 13-14, 17 with findings made above.

located outside the area and the first time it was located within the area. As to culpability, while the evidence suggests that a drawdown in the power from an air conditioning unit brought on board by Mr. Tinsley may have possibly caused the VMS unit to lose the requisite amount of power it needed to record the vessel's positions on the particular trip at issue here in July, *prior* to then the Chiodos were clearly on notice that their VMS unit was not consistently reporting as legally required. Tr. 125–27, 149-50. Specifically, the record shows that NOAA notified the Chiodos of similar reporting gap problems in March, April, and May of 2011 and thus gave them an extended period of time and multiple opportunities to fix or replace the VMS unit to ensure it reported the vessel's position in compliance with the law.[25] *See* Tr. 125–127 (testimony of Commander O'Shaughnessy). While the Chiodos alleged at hearing that in response to such notices they undertook efforts to have the unit repaired, they offered absolutely no documentary evidence in support of their claim and both the records of the Agency and the satellite service provider undermine the credibility of such claim. As such, I find the Chiodos culpability to be at least negligent, if not willfully indifferent to their obligation regarding maintaining a VMS unit capable of issuing hourly reports as required by law. On the other hand, it is difficult to determine Mr. Tinsley's specific culpability level since the record does not indicate whether he was aware of the vessel's reporting problems and/or the impact the air conditioner might have had on the system's inability to report, but as an operator he was still legally responsible generally for providing hourly VMS reports. Moreover, in terms of considering "other matters as justice may require," it is noted that Ms. Chiodo acknowledged at hearing that the VMS reporting problems at issue here were not finally resolved until after they had occurred yet again during another trip made by the vessel in December. As such, considering the nature, circumstances, extent, and gravity of the violation; Respondents' degree of culpability and history of prior offenses; and other matters as required by justice, a written warning and no penalty does not seem appropriate, nor does the nominal penalty proposed by the Agency. Rather, a civil penalty in the amount of $3,000 for Count 2 is jointly and severally imposed on all Respondents.

ORDER

IT IS HEREBY ORDERED that a civil penalty in the total amount of **$9,000** is jointly and severally **IMPOSED** on Respondents Kristi Chiodo, Anthony Paul Chiodo, Jr., and John A. Tinsley.

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

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

[25] It appears from the record that the Chiodos were not sanctioned in any way by NOAA for the alleged prior reporting lapses.

PLEASE TAKE 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.

PLEASE TAKE FURTHER NOTICE, that this Initial Decision becomes effective as the final Agency action **60 days** after service on **January 28, 2014**, unless the undersigned grants a petition for reconsideration or the Administrator reviews the Initial Decision. 15 C.F.R. § 904.271(d).

PLEASE TAKE FURTHER NOTICE, that a failure to pay the civil penalty to the Department of Commerce/NOAA within **30 days** from the date on which this decision becomes final Agency action will result in the total penalty becoming due and payable, and interest being charged at the rate specified by the U.S. Treasury regulations and an assessment of charges to cover the cost of processing and handling of the delinquent penalty. Further, in the event the penalty, or any portion thereof, becomes more than 90 days past due, Respondents may also be assessed an additional penalty charge not to exceed 6 percent per annum.

SO ORDERED.

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

Dated: January 28, 2014
Washington, DC

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

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

15 CFR 904.271-273

§ 904.271 Initial decision.

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

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

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

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

(4) A statement of further right to appeal.

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

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

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

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

(1) Otherwise provided by statute or regulations;

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

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

§ 904.272 Petition for reconsideration.

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

§ 904.273 Administrative review of decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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