UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	)	Docket Number:
James McCune, Jr.,	)	**SE1200785**
	)	**F/V My Way II**
Respondent.	)	

INITIAL DECISION AND ORDER

Date: July 21, 2014

Before: Christine D. Coughlin, Administrative Law Judge, U.S. EPA[1]

Appearances: For the Agency:

Duane R. Smith, Esq.
Office of the General Counsel, Enforcement Section
U.S. Department of Commerce, National Oceanic and Atmospheric Administration, 1845 Wasp Blvd., Building 176
Honolulu, HI 96818

For Respondent:

James McCune, Jr. (Pro Se)

[1] The Administrative Law Judges of the United States Environmental Protection Agency ("U.S. EPA") are authorized to hear cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011. *See* 5 U.S.C. § 3344; 5 C.F.R. § 930.208.

I. STATEMENT OF THE CASE

The National Oceanic and Atmospheric Administration ("NOAA" or "Agency") issued a Notice of Violation and Assessment of Administrative Penalty ("NOVA"), dated May 10, 2013, to James McCune, Jr. ("Respondent"). In the NOVA, the Agency alleged one count in which Respondent violated Section 9 of the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. § 1538, and regulations promulgated under the Act at 50 C.F.R. §§ 223.205(b)(1) and 223.206(d),[2] and sought to impose a total penalty of $8,000 against Respondent for this violation. By letter dated June 12, 2013, Respondent requested a hearing before an Administrative Law Judge.

By letter dated July 10, 2013, the parties were invited to participate in mediation for settlement of the case through an Alternative Dispute Resolution ("ADR") process offered by this office. While the Agency agreed to participate in ADR, Respondent did not respond to the invitation. Consequently, this matter proceeded to litigation. By Order of Designation issued on July 31, 2013, Chief Administrative Law Judge Susan Biro ("Chief Judge Biro") was designated to preside over the hearing in this case. On August 8, 2013, Chief Judge Biro issued an Order to Submit Preliminary Positions on Issues and Procedures (PPIP) ("PPIP Scheduling Order") to the parties, setting forth various prehearing filing deadlines and procedures. Pursuant to the PPIP Scheduling Order, the Agency was required to file its PPIP on or before September 13, 2013, and Respondent was required to file his PPIP on or before September 27, 2013.

On August 27, 2013, Chief Judge Biro issued an Order of Redesignation, in which I was designated to preside over this matter. On September 11, 2013, this office received a Notice of Serious Settlement Discussions, which triggered an automatic extension of the PPIP filing deadlines by 14 days. As a consequence, the new filing deadline for the Agency to file its PPIP became September 27, 2013, and the new filing deadline for Respondent to file his PPIP became October 11, 2013. On September 26, 2013, the Agency filed its PPIP. Respondent, on the other hand, did not file a PPIP. As a courtesy, a staff attorney from this office attempted to reach Respondent by telephone on three occasions (October 31, 2013, November 4, 2013, and November 7, 2013) to inquire about filing a PPIP, leaving a voice mail message for Respondent on the last two attempts. Respondent did not respond to these messages.

On November 6, 2013, I issued a Hearing Order, scheduling the hearing to begin in this matter on January 14, 2014, in or around Gulfport, Mississippi.[3] On November 8, 2013, I issued an Order to Show Cause ordering Respondent to file, no later than November 22, 2013, a document explaining why good cause existed for his failure to file a PPIP as had been directed by the PPIP Scheduling Order, and for Respondent to offer an explanation as to why an order

---

[2] Given the date of the charged violation, the 2011 edition of the Code of Federal Regulations (C.F.R.) is applicable to this case and is the edition used for citations herein, unless otherwise specified.

[3] Specific hearing location details were subsequently provided to the parties in a Notice of Hearing Location issued on December 16, 2013. This Notice was sent by regular and certified mail to Respondent and received by an agent for Respondent on December 19, 2013.

adverse to his interests should not be issued. The Order to Show Cause was sent by both regular and certified mail, and was received by Respondent on November 15, 2013. Respondent did not respond to the Order to Show Cause.

On December 17, 2013, a staff attorney from this office sent Respondent a letter requesting that he contact the staff attorney so that arrangements could be made with the parties to participate in a pre-hearing conference call to prepare for the hearing. This letter was sent to Respondent by regular and certified mail, and was received by an agent for Respondent on December 20, 2013. Respondent did not respond to this letter.

In response to a subsequent motion filed by the Agency seeking additional discovery in the form of a written request for admissions, on December 23, 2013, I issued an Order on Motion Seeking Additional Discovery granting the Agency's request to serve upon Respondent its written request for admissions. In this Order, I advised Respondent that his failure to respond to the written request for admissions and specifically deny a statement therein would be deemed an admission. The Order was sent to Respondent by regular and certified mail, and was received by an agent for Respondent on December 30, 2013. On December 24, 2013, the Agency sent Respondent its Written Request for Admissions by expedited delivery (namely, "2nd day air"), which was delivered to Respondent on December 27, 2013.[4] Respondent did not respond to the Agency's Written Request for Admissions.

I conducted a hearing in this matter on Tuesday, January 14, 2014, in Gulfport, Mississippi. The Agency presented Agency's Exhibits ("AE") 1 through 10, which were admitted into evidence. The Agency also presented the testimony of three witnesses: Officer Dwayne Armes ("Officer Armes"), Mississippi Department of Marine Resources ("MDMR"); Officer Leo DeGeorge ("Officer DeGeorge"), MDMR; and Robert Dale Stevens ("Stevens"), NOAA Harvesting Systems and Engineering Division of the National Marine Fisheries Service laboratory in Pascagoula, Mississippi, who was qualified as an expert at the hearing with respect to Turtle Excluder Devices ("TEDs"). Respondent appeared for the hearing and was represented by his wife, Regina McCune, a non-attorney representative. Both Respondent and Regina McCune testified at the hearing. Respondent did not offer for submission any documentary evidence.

The Hearing Clerk of this office received the certified transcript of the hearing on January 31, 2014. An electronic copy of the transcript was served on the Agency on February 4, 2014, and on the same date, a paper copy of the transcript was served on Respondent by regular and certified mail.[5] An agent for Respondent received the transcript on February 11, 2014. On February 5, 2014, I issued an Order Scheduling Post-Hearing Briefs, which set the following filing deadlines: February 21, 2014, as the deadline for any motions to conform the transcript to the actual testimony; March 7, 2014, as the deadline for the Agency's Initial Post-Hearing Brief; March 21, 2014, as the deadline for Respondent's Initial Post-Hearing Brief; April 7, 2014, as the deadline for the Agency's Reply Post-Hearing Brief; and April 21, 2014, as the deadline for

---

[4] *See* Agency Exhibits 6 through 10, which were admitted into evidence at the hearing.

[5] Citations herein to the transcript are made in the following format: "Tr. [page]."

Respondent's Reply Post-Hearing Brief. This Order was served on Respondent by certified mail and received by an agent for Respondent on February 10, 2014.

On March 6, 2014, counsel for the Agency filed a Motion to File Out of Time and Motion to Conform Transcript to Actual Testimony, explaining that he had inadvertently missed the filing deadline for a motion to conform the transcript to the actual testimony and only realized his mistake as he was preparing the Agency's Initial Post-Hearing Brief, but that he sought to improve the accuracy of the record by filing such a motion. Also on March 6, 2014, the Agency timely filed its Initial Post-Hearing Brief ("Agency's Initial Br."). By Order dated April 3, 2014, I granted the Agency's Motion to File Out of Time and Motion to Conform Transcript to Actual Testimony. Respondent did not file an Initial Post-Hearing Brief. Consequently, no reply briefs were filed.

II. STATEMENT OF THE ISSUES

A. Liability

The issue presented in this proceeding is whether Respondent, as owner and operator of the F/V My Way II, violated the Act and regulations promulgated under the Act, which require any shrimp trawler in the Gulf Area to have an approved TED installed in each net that is rigged for fishing. Respondent does not dispute that he violated this requirement on October 15, 2011, when he trawled for shrimp without an approved TED installed on his fishing net. Thus, liability for the alleged violation of the Act and implementing regulations is not contested. Rather, Respondent challenges the amount of the penalty proposed by NOAA for the violation.

B. Civil Penalty

Once liability for a charged violation is established, I must then determine the amount of any imposed civil penalty that is appropriate. To this end, I may evaluate certain factors, including the nature, circumstances, extent, and gravity of the violation; Respondent's degree of culpability and any history of prior violations; and such other matters as justice may require.[6]

III. FACTUAL BACKGROUND

The following is a recitation of the facts that I have found in this matter based on a careful and thorough review of the evidentiary record. Where material conflict(s) existed in the evidence, I found facts based on the evidence I deemed credible, with the rationale for any material conflict resolution articulated in the Analysis section of this decision.

All species of sea turtles found in United States waters are either threatened or endangered. AE 2. The incidental capture of sea turtles in shrimp trawls has been found to be a greater threat to the survival of sea turtles in the United States than any other human activity

[6] While "ability to pay" is another factor that may be considered when determining penalty, Respondent did not timely raise such a claim in this case. Consequently, and as explained more fully below, this factor was not considered in rendering my decision. *See* 15 C.F.R. § 904.108.

combined. AE 2. TEDs were thus designed to be installed in shrimp trawl nets and allow for the escape of sea turtles that are incidentally captured while trawling for shrimp. Tr. 80; AE 2. To facilitate such an escape, TEDs incorporate a metal grate with an escape opening, typically (though not necessarily) covered by a "webbing flap," that allows sea turtles to escape from trawl nets. Tr. 90-96; AE 2. More specifically, while shrimp captured by the trawl net are able to pass through the metal grate of the TED and collect in the trawl bag, a sea turtle captured by the net is released back into the open water after reaching the TED's metal grate, which acts as a barrier to the turtle and forces it to pass through the escape opening that is positioned near the metal grate on either the top or bottom of the device. Tr. 90-96; AE 2. In order to be approved for use, a TED must be shown to exclude sea turtles from trawl nets 97 percent of the time. Tr. 80, 101-02; AE 2.

Respondent is a United States citizen residing in the State of Mississippi, and he owns and operates the F/V My Way II. AE 7. Respondent has engaged in shrimp trawler activities (commonly referred to as "shrimping") for over thirty years. Tr. 151. He has been a shrimp fisherman (or "shrimper") in a commercial capacity for many years, working with his father for the majority of that time and then on his own in the year preceding the hearing. Tr. 156-57. As a shrimper, Respondent is familiar with the legal requirements related to the use of TEDs when shrimping and, in particular, the requirement that the escape opening of the TED not be tied shut. Tr. 135-37, 142, 145, 151-52; AE 7.

On October 15, 2011, Respondent was actively fishing for shrimp in the Mississippi Sound using one trawl net. Tr. 28-29; AE 1, pages 7, 9-12, 39, 41; AE 7. For purposes of the regulations governing TEDs, Respondent was shrimping in the Gulf Area on this occasion. Tr. 31-32; AE 1, pages 9-10, 21-22; AE 7. About a week prior to October 15, 2011, Respondent had lost his trawl net, including an installed and fully functioning TED, after becoming "hung [on] a wreck." Tr. 141-42; *see also* Tr. 135. Respondent subsequently obtained a replacement net, including an installed TED, from a client in exchange for welding services that Respondent performed for the client. Tr. 135-36, 141-42, 154-55. Respondent physically received the net and the installed TED from the client on the morning of October 15, 2011, but did not inspect the gear before testing it later that morning while shrimping. Tr. 135-37; AE 1, pages 11-12, 39. According to Respondent, he did not inspect the gear before using it to trawl for shrimp on October 15, 2011, because he was "in a hurry" to test the gear in preparation for a shrimping trip that he had planned with a friend for the following morning. Tr. 135-37, 142-43, 147-48, 151-52, 160.

While shrimping aboard the F/V My Way II in the Gulf Area on October 15, 2011, Respondent was stopped by law enforcement officers of the MDMR, and Officer Armes began to perform an inspection of Respondent's TED. Tr. 28-30, 32; AE 1, pages 9-12, 21-22, 39; AE 7. The inspection revealed that Respondent had approximately three pounds of shrimp on board the vessel. Tr. 167; AE 1, pages 11, 34, 39, 40. As the trawl gear was retrieved from the water, the attached TED surfaced, and Officer Armes observed that the TED's "flap wasn't opened." Tr. 29-30. Due to space limitations aboard the F/V My Way II, Officer Armes escorted Respondent to a nearby public dock to complete the inspection, where he was met and assisted by Officer DeGeorge. Tr. 30, 62-63. While at the dock, the inspection of the TED revealed that the webbing flap covering the escape opening of Respondent's TED was fastened shut.

Specifically, plastic zip ties had been used to close the webbing flap of the escape opening in three different places on the TED, rendering the TED ineffective in allowing sea turtles a means of escape from within the trawl net. Tr. 42-50, 62-66, 101-06, 109-10, 113-21, 129-31, 137, 145; AE 1, pages 11-12, 15, 28-32, 37, 39, 44; AE 7. Based on the condition of the TED, namely with respect to the webbing flap fastened shut in three places, the largest opening that remained in the webbing flap to the escape opening was 13 inches by 13 inches. Tr. 30, 45-50, 63, 69; AE 1, pages 28-32, 37, 44. According to Stevens, the Agency's expert witness with respect to TEDs, the size of such an escape opening "would capture most, if not all, turtles that encountered that TED." Tr. 106. Indeed, given the restricted size of the escape opening and the size of Respondent's TED, Stevens opined that the altered TED "would in effect drown any sea turtle that it would encounter." Tr. 109-10. Since 2010, more sea turtles have been observed in the Mississippi Sound region than anywhere else in the Gulf of Mexico. Tr. 106-07. Likewise, the Mississippi Sound region has had more sea turtle deaths than anywhere else in the Gulf of Mexico since that year, and the deaths have been attributed to "forced submerges," or drowning, from shrimp trawling activity. Tr. 106-07.

Officers Armes and DeGeorge took photographs of Respondent's TED, documenting what they had seen during the inspection. These photographs, along with other forms completed during the inspection, were included in the case package for this incident. Tr. 30; AE 1; AE 7.

At various points throughout the evidentiary hearing, Respondent conceded that the TED in question was tied closed and, thus, that he was liabile for the charged violation in this matter. Tr. 135-37, 142-43, 145-47, 151-53, 158-59, 162, 168. Respondent asserted, however, that he had obtained the TED in the violative condition found during the inspection and that he was not aware of its condition until the inspection. AE 1, pages 11-12, 39; AE 7; Tr. 135, 137. Respondent also challenged the amount of the penalty proposed by the Agency. Tr. 14-15, 145-47.

IV. PRINCIPLES OF LAW

A. Liability

In 1973, Congress enacted the ESA, 16 U.S.C. §§ 1531-1544, as amended, "[t]o provide for the conservation of endangered and threatened species of fish, wildlife, and plants" that are "of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." Endangered Species Act of 1973, 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 identify any species that are endangered or threatened by 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, that "it is unlawful for any person subject to the jurisdiction of the United States to . . . 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). "Person" is defined by the statute, in pertinent part, to mean "an individual." 16 U.S.C. § 1532(13); *see also* 50 C.F.R. § 222.102.

Six species of sea turtle found in waters of the United States are listed as either threatened or endangered under the ESA. 50 C.F.R. §§ 223.102(e), 224.101(h). Implementing regulations of the Act, as pertaining to sea turtles, provide that "it is unlawful for any person subject to the jurisdiction of the United States to . . . [o]wn, 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). In turn, the provisions of 50 C.F.R. § 223.206(d)(2)(i) require the following:

> 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.

50 C.F.R. § 223.206(d)(2)(i). Although exceptions to this requirement are identified in 50 C.F.R. § 223.206(d)(2)(ii), these exceptions are not applicable in this case.

"Vessel" means "a vehicle used, or capable of being used, as a means of transportation on water which includes every description of watercraft." 50 C.F.R. § 222.102. "Shrimp trawler" "means 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. "Gulf Area" means "all waters of the Gulf of Mexico west of 81 [degrees] W. long. (the line at which the Gulf Area meets the Atlantic Area) and all waters shoreward thereof (including ports)." 50 C.F.R. § 222.102. An approved TED means "a device designed to be installed in a trawl net forward of the cod end for the purpose of excluding sea turtles from the net, as described in 50 CFR 223.207." 50 C.F.R. § 222.102.

As set out in the regulations, design criteria differ based upon the type of TED used by the shrimp trawler (e.g. hard TEDs, special hard TEDs, soft TEDs). *See generally* 50 C.F.R. § 223.207. However, regardless of the type, all TEDs are required to have an escape opening with certain dimensions to enable turtles to exit the trawl net. *See, e.g.*, 50 C.F.R. § 223.207(a)(7), (b)(1)-(4), (c)(1)(iv). The regulations also describe allowable modifications to certain types of approved TEDs, including the use of a webbing flap to cover the escape opening of the TED. 50 C.F.R. § 223.207(d)(3). Nevertheless, the regulations also specify that an escape opening cannot be restricted or closed in any manner. *See* 50 C.F.R. § 223.207(c)(1)(iv)(A) (stating that the escape opening of an inshore Parker soft TED "must not be covered or closed in any manner"); 50 C.F.R. § 223.207(d)(3) (allowing the use of a webbing flap to cover the escape opening of a hard TED or special hard TED as long as "[n]o device holds it closed or otherwise restricts the opening").

B. Standard of Proof

To prevail on its claims that Respondents violated the Act and the regulations, the Agency must prove facts constituting the violations by a preponderance of reliable, probative, substantial, and credible evidence. 5 U.S.C. § 556(d); *Cuong Vo*, 2001 NOAA LEXIS 11, at *17 (NOAA Aug. 17, 2001) (citing *Dep't of Labor v. Greenwich Colleries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100-03 (1981)); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). This standard requires the Agency to demonstrate that the facts it seeks to establish are more likely

than not to be true. *John Fernandez III & Dean V. Strickler*, 1999 NOAA LEXIS 9, at *8-9 (NOAA Aug. 23, 1999) (citing *Herman & MacClean v. Huddleston* (459 U.S. 375, 390 (1983)). To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence. *Cuong Vo*, 2001 NOAA LEXIS 11, at *17 (citing *Reuben Paris, Jr.*, 4 O.R.W. 1058 (NOAA 1987)).

There is no presumption in favor of the penalty proposed by the Agency, and an Administrative Law Judge is not "required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document." *Tommy Nguyen & William J. Harper*, 2012 NOAA LEXIS 2, at *21 (NOAA Jan. 18, 2012) ("*Nguyen & Harper*"); see 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631 (June 23, 2010). The Administrative Law Judge must independently determine an appropriate penalty "taking into account all of the factors required by applicable law." 15 C.F.R. § 904.204(m); see 15 C.F.R. § 904.108 (enumerating factors that may be considered in assessing a penalty).

C. Civil Penalty

The Act provides:

> Any person who knowingly violates . . . any provision of this Act, . . . or any regulation issued in order to implement [16 U.S.C. § 1538(a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d), (f), or (g)], may be assessed a civil penalty by the Secretary of not more than $25,000 for each violation. Any person who knowingly violates . . . any provision of any other regulation issued under this Act 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.[7]

16 U.S.C. § 1540(a)(1). Although the Act does not set forth any factors to be considered when assessing a penalty, the procedural rules governing this proceeding, set forth at 15 C.F.R. part 904 ("Rules of Practice") provide, in pertinent part:

> Factors to be taken into account in assessing a civil penalty, depending upon the statute in question, may include the nature, circumstances, extent, and gravity of

[7] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, the Secretary increased the maximum civil penalty available under the ESA to $32,500 for a "knowing violation of Section 1538," to $13,200 for an "other knowing violation," and to $650 for an "otherwise violation." Civil Monetary Penalties; Adjustment for Inflation, 73 Fed. Reg. 75,321, 75,322 (Dec. 11, 2008) (codified at 15 C.F.R. § 6.4(f)(13)).

> 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).

For enforcement cases charged on or after March 16, 2011, the Agency utilizes the "Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions" ("Penalty Policy") to calculate a civil penalty.[8] 76 Fed. Reg. 20,959 (Apr. 14, 2011), *available at* http://www.gc.noaa.gov/ documents/031611_penalty_policy.pdf. Under the Penalty Policy, penalties are based on two criteria:

> (1) A "base penalty" calculated by adding (a) an initial base penalty amount . . . reflective of the gravity of the violation and the culpability of the violator and (b) adjustments to the initial base penalty . . . upward or downward to reflect the particular circumstances of a specific violation; and (2) an additional amount added to the base penalty to recoup the proceeds of any unlawful activity and any additional economic benefit of noncompliance.

Penalty Policy at 4. As mentioned above, the "initial base penalty" amount consists of two factors, collectively constituting the seriousness of the violation: "(1) the gravity of the prohibited act that was committed; and (2) the alleged violator's degree of culpability" (assessing the mental culpability in committing the violation). *Id.* The "gravity" factor (also referred to as "gravity of the violation" or "gravity-of-offense level") is comprised of four or six (depending upon the particular statute at issue) different offense levels, reflective of a continuum of increasing gravity, taking into consideration the nature, circumstances, and extent of a violation.[9] *Id.* at 6-8. Thus, offense level I represents the least significant offense level and offense level VI represents the most significant offense level. *Id.*

The "culpability" factor (also referred to as "degree of culpability") is comprised of four levels of increasing mental culpability: unintentional activity (such as an act that is inadvertent, unplanned, and the result of accident or mistake); negligence (such as carelessness or a lack of diligence); recklessness (such as a conscious disregard of substantial risk of violating conservation measures); or an intentional act (such as a violation that is committed deliberately, voluntarily, or willfully). Penalty Policy at 6, 8-9.

These factors are depicted in a penalty matrix, with the "gravity" factor represented by the vertical axis of the matrix and the "culpability" factor represented by the horizontal axis of the matrix. Penalty Policy at 6. The intersection point from the levels used in each factor then

---

[8] The Agency's Penalty Policy was admitted into evidence as AE 5.

[9] Where a violation and corresponding offense level are not listed in the Penalty Policy, the offense level is determined by using the offense level of an analogous violation or by independently determining the offense level after consideration of the factors outlined in the Penalty Policy. Penalty Policy at 7-8.

identifies a penalty range on the matrix. *Id.* at 7. The midpoint of this penalty range determines the "initial base penalty" amount. *Id.* Once an "initial base penalty" amount is determined, "adjustment factors" are considered in order to move up or down (or not at all) from the midpoint of the penalty range, or to move to an altogether different penalty range. *Id.* at 10. The "adjustment factors" are as follows: an alleged violator's history of non-compliance; whether the alleged violator's conduct involves commercial or recreational activity; and the alleged violator's conduct after the violation. *Id.* After the application of any adjustment factors, the resulting figure constitutes the "base penalty." *Id.* at 5. Next, the proceeds gained from unlawful activity and any additional economic benefit of non-compliance to an alleged violator are considered and factored into the penalty calculation (such as the gross value of fish, fish product, or other product illegally caught, or revenues received; delayed costs; and avoided costs). *Id.* at 12-13.

V. ANALYSIS

A. Parties' Arguments

In its Initial Post-Hearing Brief, the Agency first recites the facts relevant to the elements of the charged violation, which have been admitted by Respondent. Agency's Initial Br. at 2-3. As to penalty, the Agency argues that it relied on both the regulatory factors set out in 15 C.F.R. § 904.108 and its Penalty Policy in proposing a penalty in this case. Agency's Initial Br. at 3. First citing evidence in the record that the particular condition of Respondent's TED "would result in the likely capture and subsequent drowning of all turtles encountered," Agency's Initial Br. at 3 (citing AE 7, Tr. 50-53, 64-65, 106-07, 109-10), the Agency notes that the Penalty Policy classifies TED violations that are likely to kill all turtles encountered as gravity-of-offense level IV violations, Agency's Initial Br. at 4 (citing AE 4, page 50). As to Respondent's level of culpability, the Agency questions the claims of Respondent that "he bought the TED in the condition in which it was found on the day of the boarding rather than intentionally modifying the TED by tying it in a way to prevent it from opening as designed" and argues that "the idea that a shrimper with over 30 years experience would not notice the escape opening on a TED was tied shut with wire-ties strains credulity." Agency's Initial Br. at 4. Assuming that Respondent's argument is accepted as true, the Agency contends that his actions were reckless. Agency's Initial Br. at 4. The Agency argues that his recklessness was demonstrated when he "made no effort whatsoever to check his gear to insure it was legal before deploying it on his vessel." Agency's Initial Br. at 4. Referring to the Penalty Policy, the Agency observes that a level IV violation committed recklessly corresponds to a penalty range of $7,000 to $9,000 per violation. Agency's Initial Br. at 4 (citing AE 4, page 28).

As further support for the proposed penalty, the Agency explains that the use of TEDs is required "because it was found that shrimp trawling killed more turtles than all other human activity combined." Agency's Initial Br. at 4 (citing AE 2). The Agency contends that vessel owners and operators are jointly responsible for ensuring that the TEDs used on their vessels "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." Agency's Initial Br. at 4-5. Noting that "[e]xtinction is forever," the Agency urges that "this simple but

fundamental truth should serve as the court's lodestar in its deliberation on an appropriate penalty." Agency's Initial Br. at 3.

As previously mentioned, Respondent did not submit a post-hearing brief in this matter. At the hearing, however, he acknowledged that he was negligent in failing to first check his gear before using it to trawl for shrimp but argued that the penalty proposed by the Agency was excessive. Tr. 147.

B. Liability

The preponderance of the evidence presented in this matter, which is unrefuted, establishes the elements of liability. Specifically, within the meaning of the Act and/or implementing regulations, the evidence establishes that on October 15, 2011, Respondent was a "person"; Respondent owned and operated a "vessel" used as a "shrimp trawler," the F/V My Way II; the F/V My Way II was actively trawling for shrimp with one net "rigged for fishing" and was located in the Mississippi Sound, which is considered inshore waters and located within the "Gulf Area"; and an "approved TED" was not installed on the vessel's net that was rigged for fishing. As previously discussed, Respondent does not challenge liability and has acknowledged violating the Act and implementing regulations.

C. Civil Penalty Assessment

Having determined that Respondent is liable for the charged violation, I must next determine the appropriate amount, if any, to impose as a civil penalty for his violative behavior. As previously stated, there is no presumption in favor of the penalty proposed by the Agency, and as the Administrative Law Judge presiding in this matter, I am not "required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document." *Nguyen & Harper*, 2012 NOAA LEXIS 2, at *21; *see* 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631 (June 23, 2010). Rather, I must independently determine an appropriate penalty "taking into account all of the factors required by applicable law." 15 C.F.R. § 904.204(m); *see* 15 C.F.R. § 904.108 (enumerating factors that may be considered in assessing a penalty). Thus, in assessing a penalty, I have considered the factors set forth in Agency regulations at 15 C.F.R. § 904.108(a).[10] These factors include the nature, circumstances, extent, and gravity of the violation(s); the respondent's degree of culpability, history of prior violations, and ability to pay; and such other matters as justice may require.

i. Nature, Circumstances, Extent, and Gravity of the Alleged Violation

The record contains ample evidence pertaining to the nature, circumstances, extent, and gravity of the violation in this matter. For example, according to a document proffered by the Agency entitled "The Turtle Excluder Device (T.E.D.)," all species of sea turtles found in waters of the United States are either threatened or endangered. AE 2; *see also* 50 C.F.R. §§

[10] The Act does not specify factors to be considered when assessing a civil penalty.

223.102(e), 224.101(h). The document also states that the incidental capture of sea turtles in shrimp trawls has been found to be a greater threat to the survival of sea turtles in the United States than any other human activity combined. AE 2. This threat appears to be particularly tangible in the area where the violation at issue occurred. Officer DeGeorge testified based upon his personal observations and experience that sea turtles are abundant in that area. Tr. 64. Stevens, the Agency's expert with respect to TEDs, confirmed this assertion, explaining that more sea turtles have been observed in the Mississippi Sound region since 2010 than anywhere else in the Gulf of Mexico. Tr. 106-07. He further testified that the Mississippi Sound region has also had more sea turtle deaths than anywhere else in the Gulf of Mexico since that year, and that necropsies performed on those turtles revealed that their deaths were due to "forced submerges," or drowning, resulting from shrimp trawling activity. Tr. 106-07. Respondent disputed this testimony, arguing that "you can't blame all that on shrimping, because people catch them on fishing poles and they die and other things. You can't blame everything on shrimpers." Tr. 147. Given the vast experience of Stevens with respect to these issues, however, his testimony is deemed to be credible. Consequently, the importance of adhering to the requirement to install an approved TED on any shrimp trawl net used in the Gulf Area is found to be of particular significance. Even with the use of an approved and properly installed TED, exclusion of sea turtles from trawl nets is only successful 97 percent of the time.

The severity of the violative condition of Respondent's TED is also well-established. As admitted by Respondent, the TED that he utilized during shrimp trawling activity on October 15, 2011, was altered such that the webbing flap that covered the escape opening was tied shut in three places. The largest opening that remained in the webbing flap to the escape opening was 13 inches by 13 inches, which, according to Stevens, would have captured most, if not all, of the turtles that encountered Respondent's TED. Tr. 106. In fact, given the restricted size of the escape opening and the size of Respondent's TED, Stevens opined that Respondent's non-compliant TED "would in effect drown any sea turtle that it would encounter." Tr. 109-10. Again, the testimony of Stevens on this subject is found to be compelling, and Respondent did not offer any persuasive evidence to rebut it. Recognizing that the Mississippi Sound region has had more sea turtle deaths than anywhere else in the Gulf of Mexico since 2010 due to "forced submerges," or drowning, from shrimp trawling activity, the use of Respondent's TED could have contributed to the existing problems affecting the area had an inspection of Respondent's vessel not been performed by law enforcement on the date in question. Thus, the extent of this violation is especially grave given the risk of harm the TED posed to the marine resource. Accordingly, the Agency has demonstrated that the gravity of the offense in this case—a non-compliant TED likely to kill all turtles encountered—is consistent with a level IV designation under the Agency's Penalty Policy.

ii. Respondent's Degree of Culpability, Any History of Prior Violations, and Ability to Pay

With respect to the degree of culpability shown by Respondent, the Agency argues that his actions were reckless. Under the Penalty Policy, "[r]ecklessness occurs where someone does not intend a certain result, but nonetheless foresees the possibility that his or her actions will have that result and consciously takes that risk." AE 4, page 9. In support of its characterization of Respondent's behavior, the Agency refers to his failure "to even attempt to check his TED to

see if it was compliant." Agency's Initial Br. at 4. The Agency also questions Respondent's failure to notice that the escape opening on the TED was tied shut, especially in light of his many years of experience as a shrimper.

Respondent has admitted that he was at fault for failing to check his gear before using it on October 15, 2011, but has argued that his actions were negligent. Under the Penalty Policy, "[n]egligence is the failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances. Negligence denotes a lack of diligence, a disregard of the consequences likely to result from one's actions, or carelessness." AE 4, page 9. Respondent consistently maintained at the hearing that he did not realize, prior to the inspection by law enforcement, that the TED's webbing flap covering the escape opening had been tied closed because of the manner in which his vessel his rigged. Tr. 137, 152-54. Further, he maintained that he did not personally alter the TED, but had, unknowingly, received it in that condition. Tr. 135-37, 141, 147, 154-55. The undisputed evidence shows that Respondent did not have the TED in his possession for very long and that he had only just obtained it the same morning he planned to test the gear. Tr. 136-37. He repeatedly testified that he was "in a hurry" to test the TED on October 15, 2011, because he had plans to "go shrimping . . . early the next morning" and described his failure to check the TED as an "oversight." Tr. 135-37, 142-43, 147-48, 151-52, 160. While Respondent's explanation is perplexing—that he was hurrying to test his gear, including the TED, given his plans to go shrimping early the next morning, but failed to actually inspect the very gear he was "testing"—he was also very candid and consistent in acknowledging his fault in this case. In spite of his puzzling justifications, I have found his testimony to be sincere and convincing. His actions, by his own admission, demonstrate carelessness and a lack of due diligence; however, they do not exemplify a deliberate disregard of the conservation measures intended by the use of TEDs, such that his actions rise to the level of recklessness as the Agency suggests. Further, the undisputed evidence shows that the TED Respondent had previously been using was legally compliant and that he promptly discarded the non-compliant TED that is the subject of this action. Tr. 136, 141-42, 148, 155-56. Accordingly, I have concluded that Respondent's level of culpability is consistent with that of "negligence" as defined by the Agency's Penalty Policy.

Turning to Respondent's history of violations, it is undisputed that Respondent has never before been cited for a violation of the laws and regulations governing his shrimping operations. AE 1, page 9; AE 5; Tr. 159. While the Penalty Policy that the Agency utilizes advises that a history of non-compliance may serve as a basis to increase a penalty, a number of administrative tribunals have found, conversely, that the absence of prior offenses may support the assessment of a lower penalty. *See, e.g., Pauline Marie Frenier & Daniel Joseph Rotoli*, 2012 NOAA LEXIS 11, at *39-40 (NOAA Sept. 27, 2012) ("[T]he absence of any prior or subsequent offenses can serve as a mitigating factor and support the assessment of a lower civil penalty under certain circumstances. . . . For example, the absence of any prior or subsequent violations during an extensive career in the commercial fishing industry . . . is noteworthy."); *Michael Straub & Steven Silk*, 2012 NOAA LEXIS 1, at *24 (NOAA Feb. 1, 2012) ("The absence of prior offenses . . . tends to favor a low civil monetary penalty."); *The Fishing Co. of Alaska et al.*, 1996 NOAA LEXIS 11, at *43-44 (NOAA Apr. 17, 1996) ("In an industry that is so heavily regulated, this absence of prior violations by any of the Respondents has been taken into consideration as a mitigating factor in the penalty assessment."). The reasoning of those

tribunals is persuasive, and thus, Respondent's lack of any prior violations, particularly in light of his 30-year history as a shrimper, has been considered in my assessment of a civil penalty in this case.

As to the factor of "ability to pay," the Rules of Practice state that if the respondent wants the presiding judge to consider his inability to pay the penalty, he must submit "verifiable, complete, and accurate financial information" to the Agency in advance of the hearing. 15 C.F.R. § 904.108(c), (e). More specifically, "[n]o information regarding the respondent's ability to pay submitted by the respondent less than 30 days in advance of the hearing will be admitted at the hearing or considered in the initial decision of the Judge, unless the Judge rules otherwise." 15 C.F.R. § 904.108(e). Although remarks were made during the course of the evidentiary hearing by Respondent and his non-legal representative, Regina McCune, as to his inability to pay the penalty proposed by the Agency, no documentary evidence of Respondent's inability or ability to pay was submitted as part of the prehearing exchange of information required by the PPIP Scheduling Order.[11] In fact, as set out earlier in this decision, Respondent was largely unresponsive throughout this administrative process, save his appearance at the evidentiary hearing in this case. When, in light of such remarks, I inquired about the unresponsiveness of Respondent, Regina McCune testified that, with regard to the correspondence sent to Respondent from the Office of Administrative Law Judges prior to the hearing, "I read some of it and he read some of it," but "I really didn't pay that much attention until [Respondent] said we had to go to court. Actually I got some of them over there that weren't even opened. I'm not going to lie to you about it, some of them weren't even opened." Tr. 173-78. Thus, I found no basis to depart from the rules that otherwise require an ability to pay argument to be raised and supporting documentation to be submitted prior to hearing, and I ruled accordingly on the record. Tr. 175-78. As such, this factor was not considered in my assessment of the penalty in this case.

iii. Such Other Matters as Justice May Require

The evidence presented reflects some degree of cooperation on the part of Respondent that merits consideration. In particular, Respondent appears to have been cooperative with the law enforcement officers when they boarded his vessel and conducted the TED inspection in that he honestly answered the questions posed to him by the officers, held his gear so that photographs could be taken as part of their inspection, and readily admitted to the officers that the TED was tied shut upon their discovery of its violative condition. Tr. 64, 143; AE 1, pages 33, 37, 44. Consequently, I have considered Respondent's level of cooperation throughout the inspection process in assessing a penalty.

Upon consideration of all the foregoing and the penalty factors listed in 15 C.F.R. § 904.108(a), it is hereby determined that for the one count of violation of the Act, a civil penalty in the amount of $5,000 is appropriate.

VI. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

[11] *See* 15 C.F.R. § 904.108(e); PPIP Scheduling Order dated August 8, 2013.

Upon thorough and careful review of the evidence presented and the entire case record of this proceeding, I make the following ultimate findings of fact and draw the following conclusions of law:

1. Respondent is a "person," as defined by the Act and implementing regulations, and is subject to the jurisdiction of the United States. *See* 16 U.S.C. § 1532(13); 50 C.F.R. § 222.102.

2. Respondent owns and operates the F/V My Way II, a "vessel" that he uses as a "shrimp trawler," as defined by the implementing regulations. *See* 50 C.F.R. § 222.102.

3. On October 15, 2011, Respondent was actively trawling for shrimp in the F/V My Way II in the Mississippi Sound, using one trawl net that was "rigged for fishing," as defined by the implementing regulations. *See* 50 C.F.R. § 223.206(d)(2)(i). For purposes of the regulations governing the use of TEDs, the Mississippi Sound is considered inshore waters and part of the "Gulf Area." *See* 50 C.F.R. § 222.102.

4. All species of sea turtle found in the waters of the United States are listed as either threatened or endangered under the Act. 16 U.S.C. § 1533; 50 C.F.R. §§ 223.102(e), 224.101(h).

5. On October 15, 2011, while actively trawling for shrimp with one trawl net, Respondent did not have an "approved TED" attached to his shrimp trawl gear, as defined by the implementing regulations. *See* 50 C.F.R. § 222.102. The non-compliant TED's webbing flap that covered the escape opening had been tied shut in three places, restricting the escape opening of the TED and rendering it ineffective in providing sea turtles a means of escape from within the trawl net. *See* 50 C.F.R. §§ 223.206(d)(2)(i), 223.207.

6. Having violated the Act and implementing regulations, Respondent is liable to the United States for a civil penalty. *See* 16 U.S.C. §§ 1538(a)(1)(G), 1540(a)(1); 50 C.F.R. §§ 223.206(d)(2)(i), 223.207(c)(1)(iv)(A), 223.207(d)(3).

7. In consideration of the penalty provisions of the applicable regulations, a civil penalty in the amount of $5,000 is deemed appropriate. 16 U.S.C. § 1540(a)(1); 15 C.F.R. § 904.108(a).

VII. DECISION AND ORDER

A total penalty of $5,000 is hereby IMPOSED on Respondent James McCune, Jr., for the violation upon which he was found liable herein. Once this Initial Decision becomes final under the provisions of 15 CFR § 904.271(d), you will be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein.

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 for reconsideration 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, 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 Agency within **30 days** from the date on which this decision becomes final Agency action, the Agency 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.

Christine D. Coughlin
Administrative Law Judge
U.S. Environmental Protection Agency

Dated: July 21, 2014
Washington, DC

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

15 CFR 904.271-273

§ 904.271 Initial decision.

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

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

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

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

(4) A statement of further right to appeal.

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

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

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

(1) Otherwise provided by statute or regulations;

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

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

§ 904.272 Petition for reconsideration.

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

§ 904.273 Administrative review of decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(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.