UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:	)	**DOCKET NUMBER:**
Khiem Diep, and H-N Fishery, Inc.,	)	**PI1201802, F/V Sapphire III**
Respondents.	)	

INITIAL DECISION AND ORDER

Date: June 5, 2015

Before: Christine Donelian Coughlin, Administrative Law Judge,
U.S. Environmental Protection Agency[1]

Appearances: For the Agency:

Paul A. Ortiz, Esq.
Enforcement Attorney
NOAA Office of General Counsel
Enforcement Section (Southwest)
501 W. Ocean Blvd., Rm. 4470
Long Beach, CA 90802

For Respondents:

Bryan Y.Y. Ho, Esq.
Attorney at Law, A Law Corporation
Davies Pacific Center
841 Bishop St., Suite 909
Honolulu, HI 96813

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

I. PROCEDURAL HISTORY

The National Oceanic and Atmospheric Administration ("NOAA" or "Agency") initiated this proceeding by issuing a Notice of Violation and Assessment of Administrative Penalty ("NOVA"), dated July 25, 2013, to H-N Fishery Inc., owner of the F/V Sapphire III, and Khiem Diep, operator of the F/V Sapphire III (collectively, "Respondents," or respectively, "Respondent H-N Fishery" and "Respondent Diep"). The NOVA charges Respondents, jointly and severally, with three counts of violating Section 307(1)(A) of the Magnuson-Stevens Fishery Management and Conservation Act ("Magnuson-Stevens Act" or "Act"), 16 U.S.C. § 1857(1)(A), and the regulations at 50 C.F.R. § 404.7(a) governing the Papahānaumokuākea Marine National Monument ("PMNM" or "Monument"). More specifically, the NOVA alleges that Respondents removed, harvested, or possessed, or attempted to remove, harvest, or possess, living or nonliving Monument resources without a valid permit by fishing in the Monument and catching, or attempting to catch, swordfish and other fish species on or about April 30, May 1, and May 2, 2012. The NOVA sought to impose a total penalty of $59,616.48 against Respondents for the charged violations. Through joint counsel, Respondents timely requested a hearing before an Administrative Law Judge by letter dated August 15, 2013.

On September 5, 2013, Chief Administrative Law Judge Susan L. Biro issued an Order of Designation in which I was designated to preside over this proceeding. I subsequently issued an Order to Submit Preliminary Positions on Issues and Procedures (PPIP) ("PPIP Scheduling Order") on September 16, 2013. In the PPIP Scheduling Order, I set forth various prehearing filing deadlines and procedures, including ordering the Agency to file its PPIP on or before October 18, 2013, and ordering Respondents to file their PPIP on or before November 1, 2013. On October 17, 2013, the Agency filed a Motion for Extension of Time to File Preliminary Positions on Issues and Procedures, which I granted on October 21, 2013, thereby changing the filing deadlines for the Agency's PPIP to November 1, 2013, and the filing deadline for Respondents' PPIP to November 15, 2013. The Agency timely filed its PPIP on October 31, 2013, and Respondents timely filed their PPIP on November 15, 2013.

On February 28, 2014, I issued a Hearing Order setting filing deadlines and scheduling the hearing for April 28, 2014, in Kaneohe, Hawaii. On April 14, 2014, the Agency filed a First Supplement to Agency's Preliminary Position on Issues and Procedures, which stated the Agency's intention to remove two individuals, David Swatland and Bob Harman, from their proposed witness list.

Thereafter, on April 17, 2014, the Agency and Respondents submitted a Joint Motion for Initial Decision Based on the Stipulated Record. On April 21, 2014, I issued an Order Granting Joint Motion for Initial Decision Based on the Stipulated Record, thereby canceling the hearing and keeping the record of decision open until April 30, 2014. This Order also set forth various filing deadlines for the parties to file initial and reply briefs.

On April 29, 2014, the Agency filed a Notice of Amendment to Agency Pleading, in which the Agency reduced the proposed penalty for each of the three counts alleged in the NOVA by $1,000 because the Agency had "incorrectly attributed a verbal warning of a possible violation as a record of a charged violation" in calculating the proposed penalties. The Agency

and Respondents simultaneously filed a Joint Motion for Extension of Deadline to File Stipulated Record on April 29, 2014, requesting that the record of decision remain open until May 7, 2014, but noting that the original briefing deadlines set forth in the Order of April 21, 2014, need not be altered. I granted this request by Order dated April 30, 2014.

On May 7, 2014, the Agency and Respondents filed their Joint Stipulation to Facts and Admission of Evidence ("Joint Stipulations" or "Jt. Stip."),[2] to which they attached Joint Exhibits ("JE") 1-22. Together, these Joint Stipulations of facts and Joint Exhibits constitute the stipulated record of evidence upon which I have relied in deciding this matter. The Agency and Respondents subsequently filed a Joint Motion for Amendment to the Stipulated Record of Decision, wherein they sought to amend the Joint Stipulations to include an additional stipulated fact. By Order dated August 7, 2014, I granted their request.

On May 30, 2014, the Agency filed its Post-Hearing Brief ("Agency's Initial Brief" or "Agency's Initial Br."), and on June 30, 2014, Respondents filed their Submission of Written Argument in Lieu of Hearing ("Respondents' Initial Brief" or "Respondents' Initial Br."). The Agency then filed their Post-Hearing Reply Brief ("Agency's Reply Brief" or Agency's Reply Br.") on July 14, 2014. Respondents filed their Reply Brief ("Respondents' Reply Br.") on July 30, 2014.

II. STATEMENT OF THE ISSUES

A. LIABILITY

The first issue presented is whether Respondents did remove, harvest, or possess, or attempt to remove, harvest, or possess, living or nonliving Monument resources without a valid permit on April 30, May 1, and May 2, 2012, in violation of the regulations at 50 C.F.R. § 404.7(a) and Section 307(1)(A) of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A), as alleged in the NOVA. As reflected in the parties' Joint Stipulations, Respondents do not contest that they engaged in fishing activities inside the boundaries of the Monument on the three dates at issue and that these activities resulted in the three violations charged in the NOVA. Jt. Stips. ¶¶ 19-22. Despite their acknowledgement that they had collectively engaged in the violative acts at issue here, Respondents object to Respondent H-N Fishery being held liable under the doctrine of *respondeat superior*. Thus, the liability of Respondent H-N Fishery is at issue.

B. CIVIL PENALTY

If liability for the charged violations is established, then I must then determine the amount of civil penalty to impose, if any. To this end, I must evaluate the nature, circumstances, extent, and gravity of the prohibited acts committed; Respondents' degree of culpability, any history of prior violations, and ability to pay; and such other matters as justice may require.

---

[2] The Joint Stipulations designate two stipulated facts as Stipulation ¶ 3, which the Agency explains in its Initial Brief was the result of a typographical error. Consequently, this Initial Decision and Order will refer to the former of the two stipulated facts as Stipulation ¶ 3(a) and the latter of the two stipulated facts as Stipulation ¶ 3(b).

III. FACTUAL SUMMARY

The following facts were either set forth in the parties' Joint Stipulations or contained in the parties' Joint Exhibits and deemed credible by the undersigned.

Established on June 15, 2006, the PMNM "is the single largest conservation area in the United States, and one of the largest marine conservation areas in the world." Jt. Stip. ¶ 9; *see* JE 19 at 190, JE 20 at 223. It encompasses the islands and atolls of the Northwestern Hawaiian Islands, as well as the surrounding coral reefs and deep ocean waters, by extending 1,200 miles northwest from Kaua'i and Ni'ihau, the westernmost islands of the Main Hawaiian Islands, and 50 miles on either side of the centerline of the chain of islands and atolls. JE 20 at 223. It is noted as having significant cultural importance for Native Hawaiians and providing habitat to over 7,000 marine species, some of which are threatened or endangered. Jt. Stip. ¶ 9; JE 19 at 190, JE 20. In 2008, the waters of the PMNM were designated a Particularly Sensitive Sea Area by the International Maritime Organization for the purpose of keeping vessels away from the islands, atolls, and coral reefs, and in 2010, the PMNM was declared a World Heritage Site by the United Nations Educational, Scientific and Cultural Organization ("UNESCO"). Jt. Stip. ¶ 9; JE 20.

At all times relevant to this proceeding, Respondent H-N Fishery was the owner of the F/V Sapphire III ("Vessel"), a properly documented United States longline fishing vessel, and Respondent Diep was the operator of the Vessel. Jt. Stip. ¶¶ 2, 3(a)-(b), JE 7, JE 10 at 40. Respondent H-N Fishery held a valid Hawaii Longline Limited Entry Permit registered to the Vessel, which authorized it to participate in the Western Pacific Pelagic Fishery ("WPPF"). Jt. Stip. ¶ 7, JE 6.

Respondents operate the Vessel "in the central and eastern Pacific Ocean using longline fishing gear targeting swordfish and other fish species." Jt. Stip. ¶¶ 4-5. Jt. Stip. ¶ 7; JE 5, 6. To conduct its operations:

> the Vessel deploys a mainline that is approximately 48 miles long and is suspended horizontally in the water column from a series of buoys. Approximately 1,250 baited branch lines with hooks are attached to the mainline along its length, and hang vertically in the water column. Once the longline is set in the water, the Vessel allows the gear to "soak" in the water for a period of 3-4 hours. The gear is then retrieved and stowed by the crew, and the catch is taken off the hooks and stored in the holds below deck.

Jt. Stip. ¶ 6. At all relevant times, the Vessel "was equipped with a mobile transceiver unit [that] communicated near real-time Global Positioning System-based location and speed data for the [V]essel to the National Marine Fisheries Services Vessel Monitoring System Program in Honolulu, Hawaii." Jt. Stip. ¶ 8.

On April 17, 2012, the Vessel departed Honolulu with Respondent Diep, four crew members, and a federal fishery observer onboard for "a WPPF fishing trip to target swordfish and other pelagic species in the Pacific Ocean northwest of the main Hawaiian Islands." Jt. Stip. ¶ 10; *see* JE 10 at 40. While Respondent Diep had worked as a crewmember on longline fishing vessels since coming to Hawaii in 1989, the trip was Respondent Diep's first voyage as a captain. JE 10 at 40, 42. Respondent Diep and the crew proceeded to conduct fishing operations on April 19, 24-26, 28, and 30, as well as on May 1 and 2 of 2012. JE 10 at 59-67.

On May 1, 2012, National Marine Fisheries Service ("NMFS") Special Agent Frank Giaretto was first notified by an enforcement technician with the NMFS Vessel Monitoring System ("VMS") that VMS data for the Vessel reflected that it was possibly conducting fishing operations inside the boundaries of the PMNM. Jt. Stip. ¶ 11; JE 14 at 96. Special Agent Giaretto subsequently attempted to contact the observer onboard the Vessel, but when that effort failed, he contacted the United States Coast Guard ("USCG" or "Coast Guard"). Jt. Stip. ¶ 13. The USCG, in turn, directed one of its C-130 aircraft (CG1717) to conduct an overflight of the Vessel on May 2, 2012, in order to determine the status of its activities.[3] Jt. Stip. ¶ 13-14; JE 14 at 96. During this overflight, the aircrew observed the Vessel actively conducting longline fishing activity within the PMNM. Jt. Stip. ¶ 14; JE 1, 14. The aircrew subsequently communicated with Respondent Diep via radio, "but communications were difficult due to [his] limited English." Jt. Stip. ¶ 15; *see* JE 1 at 2; JE 14 at 97. The aircrew informed Respondent Diep, however, that he was "'fishing near a Particularly Sensitive Sea Area (PSSA) near a closed area.'" Jt. Stip. ¶ 15; *see* JE 1 at 2; JE 14 at 98. In response, Respondent Diep stated that he had been informed by other vessels that fishing in the area was permissible. Jt. Stip. ¶ 15; JE 1 at 2;

---

[3] According to the parties' Joint Stipulations, the USCG conducted the overflight on May 2, 2012. *See* Jt. Stip. ¶¶ 13, 14. In describing the facts underlying the alleged violations in its Initial Brief, however, the Agency explained that the USCG conducted the overflight not on May 2 but on May 1. According to the Agency, the discrepancy is the result of the USCG's practice of recording events in "zulu time," otherwise known as Greenwich Mean Time, which "can lead to confusion when, as here, Agency counsel fails to make the conversion to the local time used in Vessel's logbooks and the investigating agent's report." Agency's Initial Br. at 7 fn. 4. Records of the overflight do indeed refer to the aircrew's observations of the Vessel on "02 May 2012 Zulu" and the timing of events related to the overflight as "___Z." JE 1. Nevertheless, the USCG still appears to have performed the overflight on May 2, 2012, because the aircraft first observed the Vessel at approximately 2320 Z on that date. JE 1 at 2. One may reasonably assume that the local time used by the Vessel was either Hawaii-Aleutian Standard Time ("HAST") or Samoa Standard Time ("SST"), which trails Zulu time by 10 or 11 hours respectively. *See* Time Zone Abbreviations, http://www.timeanddate.com/library/abbreviations/timezones. Thus, the aircraft seemingly began its surveillance of the Vessel at 1:20 p.m. HAST or 12:20 p.m. SST on May 2, 2012. These times are consistent with a written statement dated May 9, 2012, from the observer onboard the Vessel, Dylan Ewing, who recalled that a USCG aircraft orbited the Vessel and then communicated with him and Respondent Diep "[o]n May 2, 2012, from the hours of 1200-1400 hrs." JE 11 at 72. Further, this is consistent with the reports of various USCG personnel directly involved in the aerial surveillance. JE 1.

JE 14 at 98. When Respondent Diep requested the coordinates of the boundaries of the PMNM, the aircrew told him that he needed to contact the owner of the Vessel or NMFS for that information. Jt. Stip. ¶ 15; JE 1 at 2; JE 14 at 98.

Thereafter, on May 2, 2012, Special Agent Giaretto contacted Minh Dang, one of the owners of Respondent H-N Fishery, and informed him of the foregoing events. Jt. Stip. ¶ 16; JE 14 at 98. Dang agreed to contact Respondent Diep by telephone and advise him that he was fishing in a closed area and to cease fishing in that location immediately. JE 14 at 98. After speaking with Respondent Diep, Dang informed Special Agent Giaretto of Respondent Diep's account that the USCG did not instruct him to leave the area where he had been fishing and advised him only that he was fishing near a "missile test area." Jt. Stip. ¶ 16; JE 14 at 98-99. Dang also informed Special Agent Giaretto that Respondent Diep could have outdated charts for the PMNM. Jt. Stip. ¶ 16; JE 14 at 99.

On May 3, 2012, the USCG notified Special Agent Giaretto that VMS data for the Vessel once again reflected that it was possibly conducting longline fishing activity within the PMNM. Jt. Stip. ¶ 17; JE 2 at 13-16, JE 14 at 99-100. William Pickering, the Special Agent in Charge of NOAA's Office of Law Enforcement for the Pacific Islands Division, subsequently directed Dang to instruct Respondent Diep to cease fishing operations and return the Vessel to port in Honolulu immediately. Jt. Stip. ¶ 17; JE 4 at 19; JE 14 at 99. Dang relayed this order to Respondent Diep, and Respondent Diep complied, as confirmed by another overflight by the USCG.[4] Jt. Stip. ¶ 18; JE 2 at 13-16; JE 14 at 99-100.

---

[4] The Agency asserts in its Initial Brief that these events occurred not on May 3 but on May 2, 2012. Agency's Initial Br. at 8. Presumably, this assertion is based upon the belief of the Agency's counsel that his failure to convert the timing of the events in question from Zulu time to local time led to errors in the dates set forth in the parties' Joint Stipulations, which state:

> 17) On May 3, 2012, the USCG informed Agent Giaretto that the VMS data for the F/V Sapphire III again showed possible fishing activity within the PMNM. NMFS Office for Law Enforcement made the determination at that point to terminate the fishing trip, and H-N Fishery, Inc. was immediately notified of this decision.
>
> 18) The Vessel owner contacted Khiem Diep via satellite phone and instructed him to return to Honolulu immediately. A second overflight by a USCG aircraft confirmed that Khiem Diep was in the process of retrieving his gear and returning to port.

Jt. Stip. ¶¶ 17, 18. The record contains ample evidence that these events did, in fact, occur on May 3. For example, the investigative report prepared by Special Agent Giaretto relates:

> On May 3, 2012, USCG . . . advised NOAA . . . that VMS signatures indicated the F/V SAPPHIRE III was again in the PMNM and soaking another set in the closed area. Subsequently, a determination was made by NOAA Special Agent in Charge William Pickering and NOAA's Office of the General Counsel to terminate the SAPPHIRE III's fishing operations, and instruct it to return to port.

Upon review of the VMS data, an enforcement technician and Special Agent Giaretto concluded that the Vessel had conducted eight longline fishing sets during the fishing trip in question and that the sixth, seventh, and eighth sets ended inside the PMNM. Jt. Stip. ¶ 24; *see* JE 9 (maps depicting the navigational course of the Vessel within the PMNM based upon the VMS data). A review of the logbooks kept by Respondent Diep and Ewing confirmed their determination. Jt. Stip. ¶¶ 25-26; *see* JE 9 (maps depicting the navigational course of the Vessel within the PMNM based upon the logbook entries); JE 10 at 60-67. More specifically, the Vessel conducted a longline fishing set on April 30, 2012, in the Exclusive Economic Zone of the United States ending at approximately 25° 51'N, 169° 45'W; on May 1, 2012, in the Exclusive Economic Zone of the United States ending at approximately 25° 55'N, 169° 39'W; and on May 2, 2012, in the Exclusive Economic Zone of the United States ending at approximately 25° 49'N, 169° 25'W. Jt. Stip. ¶¶ 19-21; JE 10 at 65-67. These end coordinates are approximately 18 nautical miles inside the seaward boundary of the PMNM. Jt. Stip. ¶¶ 19-21; JE 10 at 65-67, JE 9 at 31, 33-36. Among other species of fish, the Vessel caught 21 swordfish during the April 30 longline fishing set, 21 swordfish during the May 1 longline fishing set, and 16 swordfish during the May 2 longline fishing set. JE 10 at 65-67. Since a portion of these longline fishing sets were inside the PMNM, Respondents removed, harvested, or possessed, or attempted to remove, harvest or possess, living or non-living PMNM resources without a valid permit, violating Agency regulations and the Act. Jt. Stip. ¶¶ 19-22. Given that swordfish are a highly migratory species, the specific amount of swordfish harvested from within the PMNM during these fishing activities is uncertain. Jt. Stip. ¶ 23.

On May 8, 2012, Special Agents Brandon Jim On and Take Tomson interviewed Respondent Diep. Jt. Stip. ¶ 27. During the interview, Respondent Diep advised the Special Agents that he had used the Vessel's GPS plotter to navigate during the fishing trip in question and identified on the plotter the locations of what he believed to be areas closed to fishing. Jt. Stip. ¶ 27; JE 10 at 42; JE 14 at 103. Upon inspection of the plotter, the Special Agents were unable to discern any depiction of a closed area that resembled the shape of the PMNM, and they surmised that the plotter's software was out-of-date. Jt. Stip. ¶ 28; JE 10 at 42-43; JE 14 at 103.

IV. PRINCIPLES OF LAW

SAPPHIRE III's owner DANG was immediately contacted telephonically and via facsimile of this decision.

JE 14 at 99. Signed by William R. Pickering, the letter notifying Dang of the decision to terminate the Vessel's operations is dated May 3, 2012, and relates that the USCG and Office of Law Enforcement had been conducting an investigation of the Vessel from May 1 through May 3. JE 4 at 19. Additionally, the records of the second overflight performed by the USCG reflect that the aircraft began its surveillance of the Vessel at approximately 2224 Z on May 3, or 12:24 p.m. HAST or 11:24 a.m. SST on May 3. JE 2. These times again are consistent with Ewing's written statement, in which he recalled that "[o]n the 3rd of May, another coast guard plane had flown over Sapphire III and around the vessel multiple times, at approximately the same time of day as previous (incident on May 2)." JE 11 at 72, see also JE 11 at 69.

A. LIABILITY

1. Magnuson-Stevens Fishery Conservation and Management Act

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

Among other prohibited acts, Section 307 makes it unlawful for any person "to violate any provision of this Act or any regulation or permit issued pursuant to this chapter." 16 U.S.C. § 1857(1)(A). The Act defines the term "person" as "any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government." 16 U.S.C. § 1802(36).

2. The Papahānaumokuākea Marine National Monument

Originally named the Northwestern Hawaiian Islands Marine National Monument, the PMNM was established by issuance of Presidential Proclamation 8031 on June 15, 2006, pursuant to the Antiquities Act, 16 U.S.C. § 431-33. Establishment of the Northwestern Hawaiian Islands Marine National Monument, 71 Fed. Reg. 36,443 (June 26, 2006). The Proclamation reserves all lands and interests in lands owned or controlled by the Government of the United States in the Northwestern Hawaiian Islands, including emergent and submerged lands and waters, out to a distance of approximately 50 nautical miles from the islands. Establishment of the Northwestern Hawaiian Islands Marine National Monument, 71 Fed. Reg. at 36,443. The Proclamation describes this area, located northwest of the principal islands of Hawaii and including the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve, the Midway National Wildlife Refuge, and the Battle of Midway National Memorial, as "support[ing] a dynamic reef ecosystem with more than 7,000 marine species, of which approximately half are unique to the Hawaiian Island chain." *Id.* The Proclamation also observes that the area "has great cultural significance to Native Hawaiians and a connection to early Polynesian culture worthy of protecting and understanding." *Id.* The Proclamation then identifies a series of prohibitions and management measures to be enacted by NOAA and the U.S. Fish and Wildlife Service in furtherance of its purposes, including the barring of nearly all fishing activity within the PMNM. *Id.* at 36,444-50.

On August 29, 2006, NOAA and the U.S. Fish and Wildlife Service jointly published regulations codifying the provisions of the Proclamation pursuant to the authority of several statutes, including the Magnuson-Stevens Act. Northwestern Hawaiian Islands Marine National Monument, 71 Fed. Reg. 51,134 (Aug. 29, 2006) (to be codified at 50 C.F.R. Part 404). These

regulations restrict certain activities within the PMNM, including those at issue here. In particular, the regulations provide, in pertinent part:

> Except as provided in §§ 404.8, 404.9 and 404.10, the following activities are prohibited and thus unlawful for any person to conduct or cause to be conducted within the Monument without a valid permit as provided for in § 404.11:
>
> (a) Removing, moving, taking, harvesting, possessing, injuring, disturbing, or damaging; or attempting to remove, move, harvest, possess, injure, disturb, or damage any living or nonliving Monument resource . . . .

50 C.F.R. § 404.7(a).

B. STANDARD OF PROOF

To prevail on its claims that Respondents violated the Act and the regulations at 50 C.F.R. § 404.7(a), 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)).

With respect to the assessment of a penalty, 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, 35,631 (June 23, 2010). Rather, 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 Magnuson-Stevens Act provides that "[a]ny person who is found by the Secretary . . . to have committed an act prohibited by section 307 . . . shall be liable to the United States for a civil penalty." 16 U.S.C. § 1858(a). Similarly, the regulations at 50 C.F.R. § 600.735 provide that "[a]ny person committing, or fishing vessel used in the commission of a violation of the Magnuson-Stevens Act . . . and/or any regulation issued under the Magnuson-Stevens Act, is subject to the civil and criminal penalty provisions and civil forfeiture provisions of the

Magnuson-Stevens Act, to this section, to 15 CFR part 904 (Civil Procedures), and to other applicable law."

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

Under the Magnuson-Stevens Act, the amount of civil penalty assessed may not exceed $140,000 for each day of violation. 16 U.S.C. § 1858(a); Federal Civil Penalties Inflation Adjustment Act, 73 Fed. Reg. 75,321, 75,322 (Dec. 11, 2008) (codified at 15 C.F.R. § 6.4(e)(14)). To determine the appropriate amount of civil penalty, the Act identifies certain factors to consider:

> [T]he Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require. In assessing such penalty the Secretary may also consider any information provided by the violator relating to the ability of the violator to pay, *Provided*, That the information is served on the Secretary at least 30 days prior to an administrative hearing.

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

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

15 C.F.R. § 904.108(a).

In consideration of a respondent's inability to pay, a civil penalty may be increased or decreased from an amount that would otherwise be warranted by the other relevant factors. 15 C.F.R. § 904.108(b). To that end,

> [a] civil penalty may be increased if a respondent's ability to pay is such that a higher civil penalty is necessary to deter future violations, or for commercial violators, to make a civil penalty more than a cost of doing business. A civil penalty may be decreased if the respondent establishes that he or she is unable to pay an otherwise appropriate civil penalty amount.

Id. "[I]f a respondent asserts that a civil penalty should be reduced because of an inability to pay, the respondent has the burden of proving such inability by providing verifiable, complete, and accurate financial information . . . ." 15 C.F.R. § 904.108(c). Such financial information includes "the value of respondent's cash and liquid assets; ability to borrow; net worth;

liabilities; income tax returns; past, present, and future income; prior and anticipated profits; expected cash flow; and the respondent's ability to pay in installments over time." 15 C.F.R. § 904.108(d). "No 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).

Effective June 23, 2010, NOAA modified the Rules of Practice to remove any presumption in favor of the Agency's proposed sanction and the requirement that the presiding Administrative Law Judge state good reasons for departing from the Agency's analysis. Regulations to Amend the Civil Procedures, 75 Fed. Reg. at 35,631. Instead, "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 & Daniel Joseph Rotoli*, 2012 NOAA LEXIS 11, at *11 (NOAA Sept. 27, 2012) ("*Frenier*") (quoting 15 C.F.R. § 904.204(m)).

For enforcement cases charged between March 16, 2011, and July 1, 2014, the Agency utilizes a "Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions" issued on March 16, 2011 ("March 16, 2011 Penalty Policy" or "Penalty Policy") to calculate a civil penalty.[5] 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.[6] *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.*

---

[5] The Agency's Penalty Policy is included in the stipulated record as Joint Exhibit 16.

[6] 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.

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 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. ARGUMENTS OF THE PARTIES

1. The Agency's Initial Brief

In its Initial Brief, the Agency first contends that it has established by a preponderance of the evidence that Respondents violated the Magnuson-Stevens Act and the regulations governing the PMNM, as charged in the NOVA, based upon the stipulated facts in the record of this case. Agency's Initial Br. at 12-13. The Agency then argues that the stipulated facts also support the assessment of a "significant" civil monetary penalty against Respondents when viewed in the context of the statutory penalty factors set forth at Section 308(a) of the Act, 16 U.S.C. § 1858(a). Agency's Initial Br. at 14.

In addressing the first set of these factors – the nature, circumstances, extent, and gravity of the charged violations – the Agency contends that closed area violations, such as the ones at hand, are generally "serious violations because they involve areas closed for important conservation reasons" and that, "given its provenance, the important conservation reasons behind the PMNM may exceed those of other areas closed to fishing solely for fishery management purposes." Agency's Initial Br. at 14. Noting that the PMNM was designated as a UNESCO World Heritage Site, the Agency argues that it is "on par with the Great Pyramids, Stonehenge, and the Great Barrier Reef, as a place of outstanding universal value." Agency's Initial Br. at 15

(citing JE 20 at 224). Indeed, the Agency observes, "[t]he PMNM was established in order to protect a diverse and dynamic ecosystem, with more than 7,000 marine species, of which approximately half are unique to the PMNM," and it is home to a number of species that not only are threatened and endangered but that also have "historically interacted with longline fishing gear." Agency's Initial Br. at 14-15 (citing JE 20 at 225). The Agency further argues that the violations at issue here are "grave" because "the established PMNM boundaries are the foundation of the overall management plan to protect all PMNM resources within it . . . [and] [c]losed areas like the PMNM can only be effective in protecting the resources within them if the regulated fleets fully comply with the closure." Agency's Initial Br. at 15. Thus, the Agency argues, the violations at issue "strike at the heart of the PMNM management efforts." Agency's Initial Br. at 16. Finally, the Agency notes that the creation of the PMNM was well publicized in advance of its establishment nearly six years prior to the violations and yet "Respondents' fishing activity took place an astonishing 18 miles inside the PMNM." Agency's Initial Br. at 15 (citing Jt. Stip. ¶¶ 19-21; JE 9-11).

Turning to Respondents' degree of culpability, history of prior violations, and ability to pay, the Agency first argues that Respondents' conduct was "negligent at best and reckless at worst." Agency's Initial Br. at 16. As support, the Agency notes that "[t]he violations appear to have stemmed from Respondents' failure to input the coordinates of the PMNM boundaries into the Vessel plotter," which, the Agency contends, "is anathema to modern fishing practices, particularly in the context of a sophisticated operation like a distant water longline fishing vessel." Agency's Initial Br. at 16 (citing Jt. Stip. ¶¶ 16, 28). The Agency also notes that other tribunals have found participants in federally regulated commercial fisheries to be responsible for understanding and complying with applicable laws and regulations, an obligation that "clearly extends" to the use of up-to-date navigational equipment. Agency's Initial Br. at 16-17 (citing *David W. Gregory & Michael Byrd*, 2013 NOAA LEXIS 1 (NOAA Feb. 28, 2013); *Binks Seafood Co., Inc., & Travis Tate*, 2003 NOAA LEXIS 6 (NOAA Mar. 17, 2003); *Chris Tsabouris & Faros Seafoods, Inc.*, 7 O.R.W. 203 (NOAA 1993)). Given that Respondents continue to participate in the WPPF, the Agency argues, "their lackadaisical attitude regarding navigation on the high seas and around closed areas must be corrected." Agency's Initial Br. at 17. The Agency concedes, however, that Respondents had not violated the Magnuson-Stevens Act within five years of the violations at issue. Agency's Initial Br. at 17. The Agency also concedes that "a significant penalty may impose a financial hardship on Respondent Diep" based upon documents he provided in support of a claim that he lacks the ability to pay the proposed penalty. Agency's Initial Br. at 17. Nevertheless, the Agency argues, "Respondents were charged jointly and severally, and under the well-established doctrine of *respondeat superior*, Respondent H-N Fishery Inc. should be liable for the entire penalty." Agency's Initial Br. at 17. Further, the Agency suggests that Respondent H-N Fishery "has the ability to pay a significant penalty" like that proposed by the Agency in the NOVA. Agency's Initial Br. at 21.

With respect to the final statutory penalty factor – other matters as justice may require – the Agency identifies a number of considerations that it urges me to weigh in determining the appropriate penalty to assess. Agency's Initial Br. at 18-21. For example, the Agency observes that "there is no doubt that this violation would not have been detected but for the efforts of the NMFS Vessel Monitoring System and the United States Coast Guard aircrews that were required to make <u>two</u> lengthy flights out to the PMNM to investigate Respondents' activities." Agency's

Initial Br. at 18 (citing JE 1, 9). The Agency argues that "[t]his factor is particularly significant given the remoteness of the PMNM – extending 1,200 miles from the main Hawaiian Islands." Agency's Initial Br. at 18 (citing JE 20 at ¶ 3). The Agency also urges me to consider the size or profitability of Respondents' fishing operations. Agency's Initial Br. at 18 (citing *Josh W. Churchman & Edward T. Paasch*, 2011 NOAA LEXIS 2 (NOAA Feb. 18, 2011) ("*Churchman*"), *aff'd*, 2012 NOAA LEXIS 7 (NOAA App. 2012). Based upon records itemizing the sales of the fish caught during the trip at issue, the Agency notes that "Respondents landed almost $61,000 in fish in just eight fishing sets by targeting swordfish" and argues that "[c]learly, Respondents run a large-scale commercial fishing operation in a fishery with high economic benefits from legal, and illegal, behavior." Agency's Initial Br. at 18 (citing JE 13).

Finally, the Agency argues in favor of a significant penalty as a means of motivating the regulated community to take whatever measures are necessary to assist vessel operators in ascertaining their positions relative to closed areas, as well as deterring both Respondents and others from committing similar violations in the future. Agency's Initial Br. at 18-19. Noting that the latter goal has long been recognized both by the U.S. Supreme Court and in NOAA's administrative proceedings, the Agency argues that "an appropriate sanction must remove any financial gain from a violation and impose an additional sanction to ensure that the violator and regulated community understand that there is a significant downside to violating the law." Agency's Initial Br. at 19 (citing *United States v. Ursery*, 518 U.S. 267 (1996); *Hudson v. United States*, 522 U.S. 93 (1997); *Brian M. Roche*, 2001 NOAA LEXIS 12, at *19 (NOAA Aug. 15, 2001)). The Agency then contends "that a reasonable basis for determining the financial gain to Respondents from the illegal fishing sets" is the economic benefit calculation used in the NOVA. Agency's Initial Br. at 19. To produce this calculation, "[t]he Agency pro-rated the gross ex-vessel value of all fish landed by the Vessel ($60,977.30) among the eight longline fishing sets by the Vessel on the trip, to come up with an average gross ex-vessel value per set of $7,622.16." Agency's Initial Br. at 14 n.7 (citing JE 13).

2. <u>Respondents' Initial Brief</u>

Respondents concede that "the Vessel conducted fishing operations and caught fish within the boundary of the Monument on April 30, May 1 and 2, 2012." Respondents' Initial Br. at 5. However, they challenge the amount of the civil penalty proposed by the Agency and "their respective liability for any penalty ultimately assessed." *Id.* Respondents object to the penalty proposed by the Agency in the NOVA as excessive and argue that it is subject to mitigation on numerous grounds. Respondents' Initial Br. at 5-10. First, Respondents contend, "it is clear NOAA was negligent in its handling of this situation and NOAA's negligence was a significant contributing factor to Capt. Diep continuing to set a portion of his gear within the boundary of the Monument on May 1 and 2, 2012." Respondents' Initial Br. at 6. In particular, Respondents question Special Agent Giaretto's failure to contact Dang immediately upon learning that the Vessel was conducting fishing operations in the PMNM on May 1, 2012. Respondents' Initial Br. at 7. In this regard, Respondents contend:

> Reasonable and prudent measures mandate that SA Giaretto should have contacted Dang the moment [the enforcement technician] advised him it appeared the Vessel was fishing inside the boundaries of the Monument. Had he done so, the Vessel

> could have been relocated immediately, ensuring the protection of Monument resources, avoiding further alleged violations, and enabling NOAA to not incur the cost of sending CG1717 on two unnecessary flights.

Respondents' Initial Br. at 7. Respondents also point to the failure of the USCG aircrew to inform Respondent Diep during their communications on May 2, 2012, that he was operating in a closed area, noting that "[e]ven Ewing was left with the belief after this initial communication that it was lawful for the Vessel to continue fishing in its current location." Respondents' Initial Br. at 6-7 (citing JE 11 at 72). Moreover, they argue, USCG aircrew "negligently mislead" Respondent Diep by stating he was "fishing **near** a particularly sensitive area (PSSA), **near** a closed area." Respondents' Initial Br. at 6 (emphasis added in original) (citing JE 1 at 2 and JE 14 at 98).

Respondents argue that mitigation of the penalty is also warranted "by the clear and undisputed fact Capt. Diep's conduct was inadvertent and due to his inexperience operating longline fishing vessels as Master." Respondents' Initial Br. at 7. As evidence that the violations were not purposeful, Respondents refer to Ewing's statement as indicating that "at no time during the trip did he get the impression that the Vessel was attempting to hide from anyone, or sneak into the Monument to fish, and that everything appeared normal." Respondents' Initial Br. at 7 (citing JE 11 at 69). They argue that since Respondents did not knowingly fish unlawfully, the Agency's assertion — that a significant penalty is needed to dissuade Respondents from committing similar violations in the future by eliminating any financial incentive — is "disingenuous." Respondents' Initial Br. at 8. Respondents also object to the Agency's position on the gravity of the violations, arguing that the PMNM was created not to protect resources such as the pelagic fish targeted by Respondents but "to protect near shore resources such as bottomfish, lobster, coral reefs, Hawaiian Monk Seals, and sea birds." Respondents' Initial Br. at 8 (citing JE 20). Respondents further argue that the species of fish that they target is highly migratory, not found exclusively within the PMNM, and not subject to federal protection as a species in danger of over fishing. Respondents' Initial Br. at 8 (citing Jt. Stip. ¶ 23). Thus, Respondents contend, "[t]here is no evidence that Respondents' presence 18 nm inside the 140,000 square mile area of the Monument had, or even threatened to cause, an adverse impact on protected species." Respondents' Initial Br. at 8.

Respondents next argue that the proposed penalty is excessive given their lack of prior violations and should be mitigated by their cooperation throughout the investigation of their activities. Respondents' Initial Br. at 8-9. According to Respondents, Respondent H-N Fishery "has also undertaken remedial measures to update the gps/plotter to incorporate updated boundaries for the Monument." Respondents' Initial Br. at 9.

Finally, Respondents object to the Agency's calculation of the economic benefit that they gained from the violative conduct, arguing that the Agency failed to establish "with any degree of reliability" the number of fish caught unlawfully. Respondents' Initial Br. at 9. Respondents note that their gear encroached only 18 nautical miles into the PMNM, while "a significant portion of their gear was set and lawfully harvested outside the Monument." Respondents' Initial Br. at 9-10. Respondents further argue that although "different species and numbers of fish were caught each day operations were conducted," the Agency "simply divided the total

sales for all fish caught by the total number of fishing days and argues, without substantive evidence establishing the argument is accurate and not pure conjecture, [that] Respondents gained an economic benefit of $7,662.16 per day." Respondents' Initial Br. at 10. Respondents also assert that the Agency's decision to terminate the fishing trip "resulted in hardship to Respondents" by "den[ying] the right to continue fishing and generate revenue to cover the expenses incurred." Respondents' Initial Br. at 10.

Turning to the notion that Respondent H-N Fishery is liable for the violations as the employer of Respondent Diep under the doctrine of *respondeat superior*, Respondents contend that the doctrine is inapplicable in this instance on the following grounds:

> 1) Diep's actions were outside the normal course and scope of his employment and duties as master of SAPPHIRE III; 2) any violations were committed without H-N Fishery's knowledge, consent, acquiescence and in direct violation of H-N Fishery's established operating procedures and instructions provided directly to Diep by H-N Fishery's principals; and 3) H-N Fishery implemented reasonable measures in an effort to ensure all captains and crew on board SAPPHIRE III were knowledgeable of and complied with fishery laws.

Respondents' Initial Br. at 10-11. Respondents cite two cases, *James Chan Song Kim, Askar Ehmes, & Ulheelani Corp.*, 2003 NOAA LEXIS 4 (NOAA Jan. 7, 2003) ("*James Chan Song Kim*"), and *John Fernandez III & Dean V. Strickler*, 1999 NOAA LEXIS 9 (NOAA Aug. 23, 1999) ("*John Fernandez III*"), as support for their position. Respondents' Initial Br. at 11. Respondents then maintain that "[i]t would be unjust to hold H-N Fishery liable under respondeat superior and/or as a joint and several party for Capt. Diep's mistake" because the company "entrusted their Vessel to Diep and had every reason to believe he would comply with all laws applicable to the fishery he was engaged." Respondents' Initial Br. at 13. If I find Respondent H-N Fishery liable for Respondent Diep's conduct, however, Respondents urge me not to find Respondent H-N Fishery jointly and severally for the entire penalty assessed but to apportion liability between Respondents separately. Respondents' Initial Br. at 13-14 (citing *Robert R. Flores & Astara Co., LLC*, 2009 NOAA LEXIS 15 (NOAA May 28, 2009) ("*Flores*")). More specifically, Respondent H-N Fishery argues that "a fair and appropriate civil penalty is $15,000 apportioned $10,000 to H-N Fishery and $5,000 to Capt. Diep, with the latter penalty held in abeyance given his lack of financial resources." Respondents' Initial Br. at 14.

3. The Agency's Reply Brief

In its Reply Brief, the Agency challenges each of the arguments raised by Respondents in favor of mitigation of the proposed penalty. First, with respect to Respondents' claim that the NMFS and USCG were complicit in the violations by failing to notify Respondent Diep that he was conducting operations within the PMNM, the Agency notes that such a claim "has been expressly rejected in previous NOAA cases." Agency's Reply Br. at 1. In particular, the Agency relies upon *Churchman*, 2011 NOAA LEXIS 2, at *56, to argue that Respondents' argument lacks merit because "there is . . . no policy or procedure which required NMFS or the USCG to inform Respondents of the ongoing violation." Agency's Reply Br. at 1-2. The Agency also challenges the factual basis for the argument, noting that the USCG aircrew did

advise Respondent Diep to contact the owner of the Vessel when he inquired about the location of the PMNM, which, the Agency argues, "was more than sufficient to inform the master that he should take some action to determine whether there was a problem." Agency's Reply Br. at 2 (citing Jt. Stip. ¶ 15).

In response to Respondents' arguments that the PMNM was not established to protect pelagic fish species such as the swordfish targeted by their operations, the Agency notes that the regulations at 50 C.F.R. § 404.7(a) refer generally to "any living or nonliving Monument resource" rather than to any specific species. Agency's Reply Br. at 3. Thus, the Agency argues, "it is clear that the Monument authorization and regulations were implemented to protect all of the 7,000 plus marine species found within its boundaries equally – transient fish included." Agency's Reply Br. at 3. The Agency also cites the affidavit of David Swatland, Acting Superintendent of the PMNM, as "mak[ing] it clear that restrictions on longline fishing in the ocean adjacent to the Northwest Hawaiian Islands have been in place since 1991, and more importantly, these restrictions were adopted into the Monument regulations through the imposition of a complete ban on commercial fishing in the Monument." Agency's Reply Br. at 3 (citing JE 20 at 225).

While the Agency acknowledges that Respondents did not commit the violations intentionally, that Respondents lack any history of violations of the Magnuson-Stevens Act within the last five years, and that Respondents fully cooperated with the investigation, the Agency argues that the seriousness of the violations and negligence exhibited by Respondents outweigh those mitigating factors in favor of a significant penalty. Agency's Reply Br. at 2-4. With respect to Respondents' culpability, the Agency argues:

> Simply put, H-N failed to outfit the Vessel with navigational equipment suitable for the mission and failed to prepare Diep for the fishing trip. While an owner may not necessarily be faulted for putting an inexperienced master on a vessel, they should be faulted for failing to prepare that master for the type of fishing he was expected to do, and more importantly, failing to provide that master with up-to-date navigational equipment necessary to the task at hand. . . .[T]o send an inexperienced master to remote areas of the Pacific Ocean bordering critical closed areas like the Monument without up-to-date navigational equipment borders on recklessness.

Agency's Reply Br. at 4.

Finally, the Agency counters Respondents' objection to the formula the Agency used to calculate the economic benefit that Respondents gained by arguing that an appropriate penalty must include the value of the fish caught unlawfully but that "there is no way to determine what the exact value should be because the lucrative swordfish involved in this case [were] auctioned off individually rather than as an entire load as done in other fisheries." Agency's Reply Br. at 5. Given the circumstances, the Agency contends, "it is reasonable and appropriate to estimate the gross ex-vessel value," which "is what the market believes is the value of the catch on the day it is sold, and is presumably deemed a fair price at the time by the fisherman." Agency's Reply Br. at 5 n.3. The Agency further argues that the estimated gross ex-vessel value in this case "was

provided by the auction house that actually sold the fish, and so it truly captures the market value of the fish as closely as is possible." Agency's Reply Br. at 5 n.3 (citing JE 13).

Turning to Respondents' arguments regarding the applicability of the doctrine of *respondeat superior* and the imposition of joint and several liability, the Agency contends that the present proceeding is distinguishable from the two cases cited by Respondents in which "'non-complicit' owners were found not liable for the actions of master/crew based on an innocent owner type defense." Agency's Reply Br. at 6. Unlike in those cases, the Agency argues, the unlawful conduct of Respondent Diep fell within the scope of his employment duties (that is, fishing by setting and retrieving longline fishing gear), Respondent H-N Fishery benefited financially from that conduct, and the record lacks evidence that Respondent H-N Fishery took any measures prior to the fishing trip to ensure compliance with the applicable law. Agency's Reply Br. at 6-7. Pointing to the rationale for the doctrine of *respondeat superior* as set forth in *James Chan Song Kim*, the Agency further argues that Respondent H-N Fishery "should be found jointly and severally liable along with Diep, with no reduction or apportionment in penalty warranted." Agency's Reply Br. 7. Finally, the Agency contends that "if the court determines that joint and several liability is warranted on the facts, the court need not reach the matter of whether Khiem Diep has the ability to pay a significant penalty because H-N does," which may be inferred from Respondent H-N Fishery's failure to submit verifiable information regarding its ability to pay.[7] Agency's Reply Br. at 7-8 (citing *Harald H. Dett et al.*, 2003 NOAA LEXIS 16, at *48 (NOAA Sept. 11, 2003); 15 C.F.R. § 904.108(c)).

4. <u>Respondents' Reply Brief</u>

In their Reply Brief, Respondents first contend that the Agency "intentionally misconstrues" their argument regarding the failure of NOAA's Office of Law Enforcement ("OLE") and the USCG to inform Respondents immediately of the ongoing violations. Respondents' Reply Br. at 1-2. According to Respondents, they are arguing not that "NOAA was legally obligated to tell them Capt. Diep was fishing in a closed area," as claimed by the Agency, but that "when NOAA OLE voluntarily undertook that duty while Respondents' fishing operations were actively underway, it did so in a negligent manner that materially contributed to the perpetuation and repetition of Capt. Diep's unknowing violation." Respondents' Reply Br. at 2. Respondents maintain that the USCG aircrew negligently misled Respondent Diep into believing that he was not in an area closed to fishing when they advised him that the Vessel was *near* a closed area, such that the observer even believed after this initial communication that the Vessel could lawfully continue fishing in its present location. Respondents' Reply Br. at 2-3.

Respondents next argue that the Agency "unfairly criticizes H-N Fishery for allegedly not properly outfitting SAPPHIRE III with the necessary navigational equipment for Capt. Diep to know where he was in the ocean relative to the Monument boundary." Respondents' Reply Br. at 3. To the contrary, Respondents contend, the Vessel "was equipped with a GPS chart plotter that displayed the [V]essel's physical location in real time on an electronic navigation chart, as well as, numeric longitude and latitude coordinates, on a computer screen in the wheelhouse."

---

[7] I also note that Respondents' PPIP did not identify a claim by Respondent H-N Fishery of inability to pay the proposed civil penalty.

Respondents' Reply Br. at 3 (citing JE 10 at 46-51). Arguing, in essence, that the plotter was "fully functional and accurate," Respondents maintain that "Capt. Diep's inexperience and lack of knowledge regarding coordinates of the Monument boundaries, which was not known by H-N Fishery's officers, resulted in an inadvertent incursion in this closed area." Respondents' Reply Br. at 3-4.

With respect to the economic benefit that they allegedly gained from their unlawful conduct, Respondents argue that the undisputed facts in the record demonstrate that "there is no viable and/or reliable basis in fact and/or law for this Court to find that Respondents, to a reasonable probability, received an economic gain from their conduct." Respondents' Reply Br. at 5. Furthermore, Respondents contend, "any minimal economic benefit received was overwhelmingly offset by the financial loss and hardship resulting from NOAA's unilateral decision to unnecessarily terminate the voyage prematurely." Respondents' Reply Br. at 5.

Citing *Flores* for the notion that I have the ability to apportion liability between respondents in a case, Respondents argue that apportionment is appropriate here on numerous grounds, including that Respondent H-N Fishery furnished Respondent Diep with a properly equipped vessel that enabled him to conduct fishing operations in compliance with applicable law, that Respondent H-N Fishery did not exercise any control over where Respondent Diep conducted operations, and that the record lacks any evidence suggesting that Respondent H-N Fishery knew or should have known about the unlawful conduct until Special Agent Giaretto notified Dang. Respondents' Reply Br. at 5.

B. LIABILITY

The NOVA alleges three counts of violating the Magnuson-Stevens Act and the regulations governing the PMNM as follows:

> Count One alleges that on or about April 30, 2012, at the approximate position in the Pacific Ocean of 25°51'N, 169°45'W, Respondents violated Section 307(1)(A) of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A), and the regulations at 50 C.F.R. § 404.7(a), by removing, harvesting, or possessing, or attempting to remove, harvest, or possess, living or nonliving PMNM resources without a valid permit. Specifically, Respondents fished in the PMNM and caught, or attempted to catch, swordfish and other fish species in violation of applicable law.
>
> Count Two alleges that the violation identified in Count One occurred again on or about May 1, 2012, at the approximate position in the Pacific Ocean of 25°55'N, 169°39'W.
>
> Count Three alleges that the violation identified in Count One occurred again on or about May 2, 2012, at the approximate position in the Pacific Ocean of 25°49'N, 169°25'W.

JE 15 at 111. These violations were charged against Respondent Diep as the operator of the Vessel and Respondent H-N Fishery as the owner of the Vessel. In order for Respondent Diep to be held liable for the alleged violations in his capacity as the Vessel's operator, the Agency is required to establish that Respondent Diep is a "person" under the Magnuson-Stevens Act and that he removed, harvested, or possessed, or attempted to remove, harvest, or possess, living or nonliving PMNM resources without a valid permit, in violation of the regulations at 50 C.F.R. § 404.7(a). In turn, in order for Respondent H-N Fishery to be held liable in its capacity as the Vessel's owner, the Agency is required to establish that Respondent H-N Fishery is a "person" under the Magnuson-Stevens Act, as well as the superior or joint venturer of Respondent Diep, and that Respondent Diep acted within the scope of his position at the time he committed the acts in question, such that Respondent H-N Fishery is vicariously liable for Respondent Diep's unlawful acts under the doctrine of *respondeat superior*.

As reflected in the parties' Joint Stipulations, Respondents concede that they are both "persons" subject to the jurisdiction of the United States under the Magnuson-Stevens Act and that Respondent Diep was the Vessel's operator and Respondent H-N Fishery was the Vessel's owner at all times relevant to this proceeding. Jt. Stips. ¶¶ 1-3. Respondents also concede that on or about April 30, May 1, and May 2, 2012, Respondents conducted longline fishing sets at the coordinates set forth above, that these coordinates lie approximately 18 nautical miles inside the seaward boundary of the PMNM, and that these fishing sets led to Respondents removing, harvesting, or possessing, or attempting to remove, harvest or possess, living or non-living PMNM resources without a valid permit. Jt. Stip. ¶¶ 19-21. Finally, Respondents concede that these activities resulted in the three violations of Section 307(1)(A) of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A), and the regulations at 50 C.F.R. § 404.7(a), charged in the NOVA. Jt. Stip. ¶¶ 19-22.

Based upon these stipulations, I conclude that Respondent Diep is a "person" under the Magnuson-Stevens Act and that he removed, harvested, or possessed, or attempted to remove, harvest, or possess, living or nonliving PMNM resources without a valid permit on April 30, May 1, and May 2, 2012. He is thus directly liable as the operator of the Vessel for the charged violations.

As for Respondent H-N Fishery, I conclude that it too is a "person," as that term is defined by the Magnuson-Stevens Act. While Respondents stipulated that they had collectively conducted the unlawful activity, they argue in their Initial Brief against the use of the doctrine of *respondeat superior* as a means of holding Respondent H-N Fishery liable for the violations:

> [T]he doctrine of respondeat superior is not a valid basis to hold H-N Fishery liable for any violation of federal fisheries laws committed by Diep because: 1) Diep's actions were outside the normal course and scope of his employment and duties as master of SAPPHIRE III; 2) any violations were committed without H-N Fishery's knowledge, consent, acquiescence and in direct violation of H-N Fishery's established operating procedures and instructions provided directly to Diep by H-N Fishery's principals; and 3) H-N Fishery implemented reasonable measures in an effort to ensure all captains and crew on board SAPPHIRE III were knowledgeable of and complied with all fishery laws.

Respondents' Initial Br. at 10-11. Relying upon *James Chan Song Kim*, 2003 NOAA LEXIS 4 (NOAA Jan. 7, 2003), and *John Fernandez III*, 1999 NOAA LEXIS 9 (NOAA Aug. 23, 1999), for support, Respondents maintain that "[i]t would be unjust to hold H-N Fishery liable under respondeat superior" given that "H-N Fishery entrusted their Vessel to Diep and had every reason to believe he would comply with all laws applicable to the fishery he was engaged." *Id.* at 11-13. In response, the Agency argues that the present proceeding is distinguishable from the cases cited by Respondents in that the unlawful conduct of Respondent Diep fell within the scope of his employment duties, Respondent H-N Fishery benefited financially from that conduct, and the record lacks evidence that Respondent H-N Fishery took any measures prior to the fishing trip to ensure Respondent Diep's compliance with the applicable law. Agency's Reply Br. at 6-7.

Upon consideration, I agree with the Agency and conclude that Respondent H-N Fishery is vicariously liable for the violations under the doctrine of *respondeat superior*. The aim of this doctrine generally is to impose liability on an employer for its employee's unlawful acts committed in the scope of employment and in furtherance of the employer's business. *James Chan Song Kim*, 2003 NOAA LEXIS 4, at *27 (NOAA Jan. 7, 2003) (citing *Weinberg v. Johnson*, 518 A.2d 985, 988 (D.C. Cir. 1986); *Hechinger Co. v. Johnson*, 761 A.2d 15, 24 (D.C. Cir. 2000)). The doctrine is well-recognized in NOAA jurisprudence, with tribunals consistently affirming the principle that a vessel owner may be held liable for a violation resulting from the fishing operations of the vessel where the relationship between the owner and the perpetrator of the violation is that of an employer and employee or in the nature of a joint venture. *See, e.g.*, *Joseph F. Raposa*, 1995 NOAA LEXIS 43, at *9-10 (NOAA App. 1995) (upholding a determination that the operator of a vessel was the owner's agent and that the owner controlled the use of the vessel, such that the owner could be held liable under the doctrine of *respondeat superior* for the operator's violations of the Magnuson-Stevens Act); *Gonzalez Fisheries, Inc.*, 2006 NOAA LEXIS 36, at *17-18 (NOAA Dec. 5, 2006) ("*Gonzalez Fisheries*") ("When a corporation owns a vessel, it acquires a share of the vessel's proceeds from the fishing trip and thus, the corporation benefits financially from the illegal acts of the vessel's captain during the fishing trip. Therefore, the vessel owner should not be allowed to escape responsibility for the transgressions of the captain the vessel owner hires to operate its boat and has the authority to fire."); *Kenneth Shulterbrandt & William Lewis*, 7 O.R.W. 185, 1993 NOAA LEXIS 26, at *6-7 (NOAA 1993) ("*Shulterbrandt*") ("[The] doctrine applies where the relationship of agency, such as master and servant, employer and employee, or owner and operator of a vessel, is shown to exist. . . . The doctrine has been extended in some cases to apply to those [whose relationship] may be characterized as a joint venture [because] there is the intention of the parties to carry out a single business undertaking, a contribution by each of the parties to the venture, an inferred right of control, and a right to participate in the profits."); *Charles P. Peterson & James D. Weber*, 6 O.R.W. 486, 1991 NOAA LEXIS 34, at *10-12 (NOAA 1991) ("*Peterson*") (finding that the owner and operator of a vessel were engaged in a joint venture and that because "[the owner] stood to benefit by [the operator's] illegal fishing . . . whether such fishing was authorized or not," the owner was vicariously liable for the operator's violations of the Magnuson-Stevens Act).

In order to determine whether the doctrine applies to the owner of a vessel, the question generally is "whether the vessel owner had, at the time of the violation, the right to control the actions of the wrongdoer." *Shulterbrandt*, 7 O.R.W. 185, 1993 NOAA LEXIS 26, at *7 (NOAA 1993). However, "it is not necessary that the owner exercise detailed control over the operations of the vessel in order for it to be held liable for the illegal activities of its master and crew. It is sufficient that . . . the owner of the vessel and the major beneficiary of its operations authorized the expedition which was illegally conducted." *Sam Millis & Miss Charlotte, Inc.*, 4 O.R.W. 340, 1985 NOAA LEXIS 17, at *13 (NOAA 1985), *aff'd*, 4 O.R.W. 463, 1985 NOAA LEXIS 3 (NOAA App. 1985). "The fact that the owner was the permit holder also ties him to, and makes him responsible for, fishing activities conducted under the permit." *Peterson*, 6 O.R.W. 486, 1991 NOAA LEXIS 34, at *12 (NOAA 1991). Any conduct that is "directly related to the performance of duties that the employees or agents have broad authority to perform" may subject the owner to liability. *Corsair Corp.*, 1998 NOAA LEXIS 2, at *23 (NOAA Feb. 27, 1998) (citing *Blue Horizon, Inc.*, 7 O.R.W. 467, 1991 NOAA LEXIS 30 (NOAA 1991), *aff'd*, 6 O.R.W. 700, 1992 NOAA LEXIS 12 (NOAA App. 1992)). However, where conduct is driven solely by personal motives and not by any desire to serve the owner's interest, the perpetrator may be considered to have acted outside the scope of his or her position, thereby shielding the owner from liability. *See James Chan Song Kim*, 2003 NOAA LEXIS 4, at *33. In the majority of NOAA cases where vicarious liability was imposed under the doctrine of *respondeat superior*, the conduct in question was an illegal fishing activity performed "in an attempt to gain some type of benefit on behalf of the captain and/or owner." *Id.* at *31.

Applying these long-standing principles to the facts of this proceeding, I conclude that Respondent H-N Fishery was Respondent Diep's employer and, as such, had the right to control the actions of Respondent Diep at the time of the violations. Respondent Diep's account of the events underlying the violations certainly reflects that he viewed Minh Dang, one of the owners of Respondent H-N Fishery, as his superior. Specifically, he told the Special Agents who were interviewing him that Dang had hired him as the operator of the Vessel and that he had contacted Dang upon being told by the USCG on May 3 to "call his boss." JE 10 at 40-41. Respondent H-N Fishery then exercised its right of control when Dang ordered Respondent Diep on May 3 to cease operations and return the Vessel to Honolulu. Jt. Stip. ¶ 18; JE 10 at 41; JE 14 at 99. Respondent H-N Fishery also held the Hawaii Longline Limited Entry Permit under which Respondent Diep had conducted the fishing operations at issue. Jt. Stip. ¶ 7; JE 5, 6. These considerations warrant Respondent H-N Fishery being subject to liability for unlawful conduct committed by Respondent Diep in the scope of his employment.

Respondents do not appear to dispute that Respondent H-N Fishery was Respondent Diep's employer and that it could, in theory, be held vicariously liable for his conduct under the doctrine of *respondeat superior*. Rather, the focus of their objection is whether Respondent Diep was acting within the scope of his employment at the time of his incursions into the PMNM and whether Respondent H-N Fishery is absolved from liability because of measures it implemented in an effort to ensure that its employees complied with applicable law, as well as its lack of knowledge of or acquiescence to Respondent Diep's unlawful setting of the fishing gear in the PMNM. *See* Respondents' Initial Br. at 10-11; Respondents' Reply Br. at 5. Respondents rely

upon two cases in support for their position.[8] In the first case, *James Chan Song Kim*, the owner, operator, and one crew member of a vessel were jointly and severally charged with a violation of the Magnuson-Stevens Act resulting from the crew member's alleged sexual harassment of a fisheries observer. *James Chan Song Kim*, 2003 NOAA LEXIS 4, at *1-2. The presiding Administrative Law Judge held that the crew member's behavior did not rise to the level of sexual harassment, and he thus declined to impose liability. *Id.* at *25-26. However, he discussed alternatively, that even if the actions of the crew member had been found to constitute sexual harassment, the specific circumstances of the case did not warrant holding the owner and operator vicariously liable under the doctrine of *respondeat superior*. *Id.* at *26. Looking to federal tort law, the Administrative Law Judge reasoned that sexual harassment by an employee is typically considered to be "a willful act driven by personal motives and, therefore, beyond the scope of employment," but noted that a negligent employer may nevertheless be held vicariously liable when an employer "knew or should have known about the conduct and failed to stop it." *Id.* at *32-33 (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)). Regarding the latter, the Administrative Law Judge discussed a possible affirmative defense to liability, namely, the reasonableness of an employer and a victim's conduct. To that end, the Administrative Law Judge considered the facts before him and whether the employer exercised reasonable care to prevent and promptly correct sexually harassing behavior and whether the victim unreasonably failed to utilize any preventative or corrective opportunities provided by the employer. *Id.* at *33-34 (citing same). In so doing, the Administrative Law Judge determined that the crew member had "acted for his own personal motives that were unrelated to the objectives of the vessel" and that the operator had "exercised reasonable care [throughout the 30-day fishing trip] to protect the life and personal safety of [the observer], as well as prevent any conduct from surfacing that might escalate into sexual harassment." *Id.* at *34-37.

In the second case cited by Respondents, *John Fernandez III*, the owner and operator of a vessel were jointly and severally charged with a violation of the Magnuson-Stevens Act resulting from the operator's alleged interference with a boarding inspection by the Coast Guard when he hauled back the vessel's fishing gear in direct contravention of the Coast Guard's orders. *John Fernandez III*, 1999 NOAA LEXIS 9, at *1-2. Ruling against the operator, the presiding Administrative Law Judge proceeded to exclude the owner from any liability for the operator's actions due to the "unique circumstances" of the case, namely that the owner did not benefit from the operator's disregard of the Coast Guard's orders, that the owner had "an excellent reputation in the industry" for safe and lawful operations and had voluntarily reported instances of his captains violating the law in the past, and that the operator had decided "on the spot" to disobey the Coast Guard's order, which demonstrated that the operator had acted beyond the scope of his employment at the time of the violation. *Id.* at *12-14. The operator in the case also held the fishing license under which the operations had been conducted. *Id.* at *13.

These cases collectively support the notion that the owner of a vessel may be shielded from liability for the unlawful conduct of the vessel's operator and crew where 1) the owner did

[8] Because vessel owners have been found to be legally responsible for the unlawful conduct of vessel operators and crew with such regularity, the number of cases in which vicarious liability was not imposed is limited.

not receive any direct benefit from the unlawful conduct; 2) the wrongdoer was driven by motives so personal in nature, or acted in a manner so impulsive and contrary to the standard practices of the owner, that the conduct may reasonably be deemed to be unrelated to the business of the vessel and outside the scope of the wrongdoer's employment; and 3) the owner had taken reasonable measures to ensure that the wrongdoer complied with applicable law. While the reasoning of these decisions is persuasive, it does not relieve Respondent H-N Fishery of liability given the stipulated record of this proceeding, which supports a finding that Respondent Diep was acting within the scope of his employment at the time of the violations and that Respondent H-N Fishery did not implement any measures to ensure that Respondent Diep complied with applicable law.

First, as the owner of the Vessel and Respondent Diep's employer, Respondent H-N Fishery ostensibly stood to benefit financially from Respondent Diep's operation of the Vessel, including his incursions into the PMNM. *See, e.g.*, *Gonzalez Fisheries, Inc.*, 2006 NOAA LEXIS 36, at *17 (NOAA Dec. 5, 2006) ("When a corporation owns a vessel, it acquires a share of the vessel's proceeds from the fishing trip and thus, the corporation benefits financially from the illegal acts of the vessel's captain during the fishing trip."). The record certainly lacks any evidence suggesting that Respondent Diep set and retrieved the Vessel's fishing gear on the days in question for any reason other than to harvest fish in furtherance of Respondent H-N Fishery's business. Further, this activity traditionally falls within the range of duties that the operator of a vessel is broadly authorized to perform. As observed by the Agency, "other than returning the vessel safely back to port, it is difficult to imagine an activity that is more within the scope of employment duties for a longline vessel master than setting/retrieving longline gear (i.e., fishing)." Agency's Reply Br. at 6.

While Respondent Diep's encroachment on the PMNM as he set the Vessel's fishing gear violated applicable law and, according to Respondents, disobeyed the policies and procedures established by Respondent H-N Fishery for its employees, this fact does not necessarily shift Respondent Diep's conduct outside the scope of his employment given that Respondent H-N Fishery still derived some benefit from it. *See, e.g.*, *James Chan Song Kim*, 2003 NOAA LEXIS 4, at *27-28 ("[W]hen a salesperson lies to a customer to make a sale, the tortious conduct is within the scope of employment because it benefits the employer by increasing sales, even though it may violate the employer's policies.") (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998)); *Peterson*, 6 O.R.W. 486, 1991 NOAA LEXIS 34, at *11-12 (NOAA 1991) ("[The owner] stood to benefit by [the operator's] illegal fishing . . . whether such fishing was authorized or not. . . . Since the owner is entitled to a share of the vessel's production, so must he bear responsibility for its unlawful use."). Moreover, unlike the owner in *John Fernandez III*, Respondents failed to demonstrate that Respondent H-N Fishery is well-recognized in the community for its safe and lawful operations. Indeed, the record is devoid of any evidence supporting Respondents' claims that Respondent H-N Fishery "implemented reasonable measures in an effort to ensure all captains and crew on board SAPPHIRE III were knowledgeable of and complied with all fishery laws," and that Respondent Diep's encroachment on the PMNM was a "direct violation of H-N Fishery's established operating procedures and instructions provided directly to Diep by H-N Fishery's principals [*sic*]." Such bald assertions are insufficient to absolve Respondent H-N Fishery of its legal responsibilities under the doctrine of *respondeat superior*. Thus, while the tribunals in *James Chan Song Kim*

and *John Fernandez III* spared the respective operator and owner from liability for the actions of their subordinates, those holdings were based on distinguishable facts from those presented here and are unpersuasive to relieve Respondent H-N Fishery of liability in this proceeding.

Based upon the foregoing discussion, I do not find Respondents' arguments against the imposition of vicarious liability convincing. Accordingly, I conclude that Respondent H-N Fishery is liable for the unlawful actions of Respondent Diep, and in turn, liable for the three violations charged in the NOVA, under the doctrine of *respondeat superior*.

C. CIVIL PENALTY

Having determined liability for the charged violations, I must now determine the appropriate amount of civil penalty to assess by evaluating the penalty factors set forth at Section 308(a) of the Act, 16 U.S.C. § 1858(a).[9] Thereafter, I will address the parties' arguments related to the apportionment of liability as it relates to the amount of penalty imposed.

1. Evaluation of Statutory Penalty Factors

a.) Nature, Circumstances, Extent, and Gravity of the Unlawful Conduct

The first set of penalty factors I must consider under the Magnuson-Stevens Act is "the nature, circumstances, extent, and gravity of the prohibited acts committed." 16 U.S.C. § 1858(a).

Upon consideration of the evidentiary record and the arguments presented by the parties, I find the nature, circumstances, extent, and gravity of Respondents' offenses to be especially serious. Notably, violations such as Respondents' that involve fishing within an area closed to that activity have been characterized by other tribunals as serious. *See, e.g.*, *Churchman*, 2011 NOAA LEXIS 2, at *39-40 ("Respondents' violations involve multiple acts of actual fishing within a closed area. Such actions represent serious violations with respect to the Agency's fishery management plans and conservation efforts."); *Lobsters, Inc., & Lawrence M. Yacubian*, 2001 NOAA LEXIS 8, at *33 (NOAA Dec. 5, 2001) ("Respondents entered into an area closed to fishing. The closure was for the purpose [of] protecting against the depletion of Multispecies. It is to protect marine resources and allow for the recovery of fisheries stocks. . . . Thus, entry into a closed area to fish is by its very nature a most serious undermining of the efforts to protect these precious resources."); *Brian M. Roche*, 2001 NOAA LEXIS 12, at *17-18 (NOAA Aug.

[9] The Agency utilized the Penalty Policy to calculate the original proposed penalty of $59,616.48, JE 15 at 114-116, and as noted above, the Penalty Policy entered the stipulated record as Joint Exhibit 16. In its briefs, however, the Agency refers not to the Penalty Policy but to the statutory penalty factors in order to support the appropriateness of the amended penalty amount sought by the Agency. Respondents likewise refer to the statutory penalty factors to argue in favor of mitigating the proposed penalty. Accordingly, my analysis of the parties' arguments and the appropriate amount of civil penalty to assess places greater focus on the relevant statutory factors.

15, 2001) ("There is no doubt that incursion into a closed area is a particularly serious violation.").

Given the ecological and cultural significance of the PMNM, I consider Respondents' multiple acts of fishing inside its boundaries to be particularly grave infractions. The exceptional value of the PMNM is well-documented and undisputed by the parties. *See* JE 19, 20; Jt. Stip. ¶ 9. As explained in both the Presidential Proclamation that created the PMNM and the affidavit of David J. Swatland, Acting NOAA Superintendent of the PMNM, the region encompassed by the PMNM consists of a diverse and dynamic ecosystem that is home to more than 7,000 marine species, of which approximately half are unique to that region. JE 19 at 190; JE 20 at 223. Among the marine species found in the PMNM are the critically endangered Hawaiian monk seal, the threatened green sea turtle, and the endangered leatherback and hawksbill turtles. JE 19 at 190; JE 20 at 223. The marine ecosystem is increasingly rare in that it is dominated by apex predators, unlike most other locations where larger species have been depleted; the endemism rates in the shallow and deep water reefs are as high as 90 percent, which is significantly higher than recorded anywhere else on the planet; and the condition of the coral reefs in the near shore waters of the PMNM is much like it was prior to human contact, which can no longer be said for most places on the planet. JE 20 at 223. The PMNM also hosts 14 million sea birds of 21 different species, including the endangered black-footed and short-tailed albatross and the Laysan duck. JE 20 at 223. Finally, as the oldest part of the chain of islands comprising the greater Hawaiian Archipelago, the Northwestern Hawaiian Islands play a significant role in Hawaiian cosmology and are considered the birthplace of Hawaiian life and culture. JE 20 at 223-24. In fact, two of the Northwestern Hawaiian Islands contain the highest concentration of Hawaiian sacred and cultural sites of any location in the entire archipelago. JE 20 at 224. As summarized by David J. Swatland in his affidavit, "the Monument is a unique seascape, rich in ecological, geological, and cultural heritage, a place where nature and culture are one, and a shining example of successful, multi-agency management of a large, ecosystem-based marine protected area." JE 20 at 225.

By establishing the PMNM and restricting activities within its boundaries, the Federal government clearly recognized the significance of the region and found that it was worthy of protection. *See* JE 19 at 190 ("[I]t would be in the public interest to preserve the marine area of the Northwestern Hawaiian Islands and certain lands as necessary for the care and management of the historic and scientific objects therein."). One protective measure deemed necessary was a restriction on commercial fishing, first by allowing such fishing to continue subject to a valid permit until June 15, 2011, and then by prohibiting the activity entirely thereafter. *See* JE 19 at 193-94, 50 C.F.R. §§ 404.10(b) and (c), 404.11(c). The view that commercial fishing posed a threat to the region is underscored by the restrictions imposed by the Proclamation on the issuance of permits, such as requiring the issuing authorities to find that the fishing activity would be conducted "with adequate safeguards for the resources and ecological integrity of the monument" and that "[t]he end value of the activity outweigh[ed] its adverse impacts on monument resources, qualities, and ecological integrity." *See* JE 19 at 195. Additionally, David Swatland explained in his affidavit that longline fishing in particular was banned by NMFS within 50 miles of most emergent land formations in the Northwestern Hawaiian Islands since as far back as 1991 "due to increasing interactions between longline fishing gear and the critically endangered Hawaiian monk seal, as well as endangered turtles and seabirds." JE 20 at 225.

Once that prohibition was enacted, he explained, "all the evidence indicates that longline fishing gear interactions with monk seals, turtles, and birds were minimized or eliminated." *Id.*

Respondents do not dispute that they engaged in longline fishing activities within the PMNM on three occasions in April and May of 2012, 21 years after NMFS first restricted such activities in the vicinity of the Northwestern Hawaiian Islands and almost one year after the ban imposed by the Proclamation took effect. Jt. Stip. ¶¶ 19-21. In doing so, Respondents clearly frustrated the long-standing goals of protecting the region from the impacts of commercial fishing, and longline fishing in particular. Their attempts to minimize the gravity of their actions are unpersuasive. By arguing that the PMNM was created not to protect resources such as the pelagic species of fish targeted by their operations but to ensure the welfare of "near shore resources such as bottomfish, lobster, coral reefs, Hawaiian Monk Seals, and sea birds," Respondents ignore the plain language of the regulations at 50 C.F.R. § 404.7(a), which refer generally to "*any* living or nonliving Monument resource." As persuasively argued by the Agency, "it is clear that the monument authorization and regulations were implemented to protect all of the 7,000 plus marine species found within its boundaries equally – transient fish included." Agency's Reply Br. at 3. Indeed, the management scheme for the PMNM clearly was designed to safeguard the integrity of this unique ecosystem as a whole, rather than just certain species found therein. Thus, the highly migratory nature of swordfish and the absence of any federal protections for swordfish as a species in danger of over-fishing are of no consequence here. Even if the PMNM had been created to protect only the types of species identified by Respondents, David Swatland noted in his affidavit the impact of longline fishing on a number of those species, including the critically endangered Hawaiian monk seal and sea birds. I deem his assertions to be credible, and Respondents did not refute them with any evidence in the record. Accordingly, Respondents' claim that "[t]here is no evidence that [their activities] had, or even threatened to cause, an adverse impact on protected species" lacks any merit. Based upon these considerations, I find the violations to be grave in nature and to weigh in favor of a significant penalty.

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

The Magnuson-Stevens Act next requires me to consider Respondents' degree of culpability and any history of prior offenses. 16 U.S.C. § 1858(a). The Act also authorizes me to consider any information supplied by Respondents related to their ability to pay a penalty. *Id.*

With respect to Respondents' degree of culpability at the time of their unlawful activities, the evidentiary record supports a finding that Respondents were negligent, which supports at least a moderate penalty. In particular, uncontroverted evidence in the record reflects that the navigational equipment onboard the Vessel failed to depict the boundaries of the PMNM, which, by all accounts, rendered the equipment outdated. When Respondent Diep informed Special Agents Brandon Jim On and Take Tomson after returning to port that he had used the Vessel's GPS plotter to navigate during the trip and identified on the plotter the locations of what he believed to be areas closed to fishing, the Special Agents observed that these areas were circular in shape and marked by multiple "!" symbols, the meaning of which was unclear, and they were unable to discern any depiction of a closed area on the plotter that resembled the shape of the

PMNM. Jt. Stips. ¶¶ 27, 28; JE 10 at 42-43; JE 14 at 103. Based upon these observations, they surmised that "the chart plotter's software/map was probably not updated." JE 10 at 43. Additionally, Minh Dang, one of the owners of Respondent H-N Fishery, acknowledged to Special Agent Frank Giaretto of NMFS on May 2 that Respondent Diep likely had outdated charts on the Vessel. Jt. Stip. ¶ 16; JE 14 at 99. Respondents also assert in their Initial Brief that Respondent H-N Fishery "has . . . undertaken remedial measures to update the gps/plotter to incorporate updated boundaries for the Monument." Respondents' Initial Br. at 9. More specifically, Respondent H-N Fishery "installed Google Earth Software, with boundary coordinate data provided by NOAA Office of Law Enforcement, on the [Vessel]," which will "display the straight line boundaries for the [PMNM], as well as other closed fishing areas in the Western Pacific and Hawaii longline fishery, on an electronic chart relative to the [V]essel's real time location determined by GPS." Jt. Stip. ¶ 35. Thus, Respondents seemingly concede that the means of navigation onboard the Vessel were outdated at the time of the violations.

Respondents nevertheless attempt to assign all of the responsibility for the violations to Respondent Diep, arguing essentially that the plotter onboard the Vessel was "fully functional and accurate" and that the violations resulted solely from Respondent Diep's inexperience and lack of knowledge as to the location of the PMNM. The evidence discussed above weighs against any claim that the navigational equipment was accurate, and the duty to maintain its accuracy undoubtedly falls to Respondent H-N Fishery. As argued by the Agency, "an owner may not necessarily be faulted for putting an inexperienced master on a vessel," but "they should be faulted for failing to prepare that master for the type of fishing he was expected to do, and more importantly, failing to provide that master with up-to-date navigational equipment necessary to the task at hand." Agency's Reply Br. at 4. I agree. Respondent H-N Fishery bears a responsibility as the owner of the Vessel to exercise due care in ensuring that the captains it hires to operate the Vessel conduct those operations lawfully, such as by affirmatively forbidding a captain from conducting operations in areas closed to fishing, confirming the captain's knowledge of the locations of closed areas in the fishery where the captain will be conducting operations, and equipping the Vessel with means of navigation that accurately depict those areas. This duty is especially critical given that the Vessel operates in a remote part of the Pacific Ocean and in the vicinity of a vast conservation area like the PMNM where those operations are prohibited. As discussed in the Liability section of this Initial Decision, the record lacks any evidence that Respondent H-N Fishery took such actions prior to the start of the fishing trip. The record also lacks any evidence that Dang acted to prevent further incursions into the PMNM by Respondent Diep after he was informed by Special Agent Giaretto of Respondent Diep's incursion on May 2, such as alerting Respondent Diep to the coordinates of the PMNM's boundaries or directing him to use an updated means of navigation.[10] The likelihood that Dang

[10] According to the Offense Investigation Report at Joint Exhibit 14, Dang agreed to contact Respondent Diep by telephone on May 2 and advise him that he was fishing in a closed area and to cease fishing in that location immediately. JE 14 at 98. The parties agree that Dang subsequently told Special Agent Giaretto that Respondent Diep had explained to Dang during their telephone call that the USCG did not instruct him to leave the area in which he was fishing and advised him only that he was fishing near a "missile test area." Jt. Stip. ¶ 16; JE 14 at 98-99. Apart from the foregoing evidence, the actual dialogue between Dang and Respondent Diep on May 2 is unknown.

took any such action seems low given that Respondent Diep once again encroached on the PMNM the following day. I conclude, therefore, that Respondent H-N Fishery failed to fulfill its duty as the owner of the Vessel and that its actions amounted to inexcusable neglect.

The evidentiary record supports a finding that Respondent Diep likewise acted negligently. According to Dylan Ewing, the observer onboard the Vessel during the fishing trip, Respondent Diep informed Ewing at some point during the trip that he knew the PMNM was closed to fishing. JE 11 at 69; JE 14 at 105. The record contains ample evidence that Respondent Diep nevertheless failed to recognize that the Vessel had entered the PMNM as he conducted operations. Throughout the investigation, he maintained that he had been told by other vessels that fishing in the given area was permissible and that he believed his operations to be lawful. *See, e.g.*, Jt. Stip. ¶ 15; JE 1 at 2; JE 10 at 41, 43; JE 14 at 98. As discussed above, when he informed Special Agents Brandon Jim On and Take Tomson after returning to port that he had used the Vessel's GPS plotter to navigate during the trip and identified on the plotter the locations of what he believed to be areas closed to fishing, the Special Agents found that those areas did not match the shape of the PMNM and that their status was, in fact, indiscernible from the plotter. *See* Jt. Stips. ¶¶ 27, 28; JE 10 at 42-43; JE 14 at 103. Respondent Diep also professed not to understand from his communications with the USCG that he was fishing at that time in a closed area. Specifically, he explained to the Special Agents that he thought the USCG was advising him on May 2 of a prior violation and that the USCG "didn't say [or] wasn't understandably clear that anything was immediately wrong." JE 10 at 41; *see also* Jt. Stip. ¶ 27; JE 14 at 102.

Nothing in the record casts doubt upon Respondent Diep's sincerity. To the contrary, Ewing corroborated Respondent Diep's account in his own interview with the Special Agents, explaining that he too believed the Vessel's operations to be lawful at the time the USCG communicated with the Vessel on May 2 because he "got the impression that the violation [the USCG] was speaking about [had] occurred in the past and was not an immediate issue." JE 11 at 69; *see also* JE 11 at 72; JE 14 at 104. Ewing further explained that Respondent Diep also "appeared to be under the impression that things were fine." JE 11 at 69; *see also* JE 11 at 72. As for Respondent Diep's communications with the USCG on May 3, Ewing asserted that "the conversation was basically the same as the previous day," but that "on this occasion, the USCG seemed more concerned about Mr. Diep's citizenship." JE 11 at 69; *see also* JE 11 at 72; JE 14 at 105. Ewing also advised the Special Agents that Respondent Diep never appeared to be "attempting to hide from anyone or sneak into the Monument to fish" and that "everything appeared normal." JE 11 at 69; *see also* JE 11 at 72; JE 14 at 105.

The foregoing evidence establishes that Respondent Diep did not deliberately conduct operations inside the boundaries of the PMNM on the days in question. However, he clearly lacked knowledge of the coordinates of those boundaries or even a basic understanding of the area encompassed by the PMNM, which contributed to his failure to recognize that he had entered the closed area in spite of the outdated navigational equipment onboard the Vessel. His reliance upon the advice of other operators that fishing in the given area was permissible also does not excuse his actions. *See Churchman*, 2011 NOAA LEXIS 2, at *58 ("One commercial fisherman cannot rely upon information provided by another to excuse his own unlawful conduct."). As the captain of the Vessel, Respondent Diep was responsible for operating it in

compliance with applicable law, and a reasonably prudent person charged with this duty could be expected to exercise greater diligence in understanding the location of the areas where he was prohibited from conducting operations. I conclude that Respondent Diep's conduct fell below that degree of care and that he thus acted negligently in his operation of the Vessel.

Turning to the next factor that I am required to consider by the Magnuson-Stevens Act, Respondents' history of prior offenses, the parties agree that Respondents "have no prior violations of the Magnuson Act within the last five years" and that "[s]ince May 2, 2012, NOAA is not aware of Respondents having conducted any further illegal fishing operations in the PMNM." Jt. Stips. ¶¶ 31, 32. A number of administrative tribunals have found that an absence of prior or subsequent violations weigh in favor of a lower civil penalty under certain circumstances, such as where a respondent has not committed any other offenses during a lengthy career in the commercial fishing industry. *See, e.g.*, *Frenier*, 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 [of 11 years] in the commercial fishing industry . . . is noteworthy."); *Lars Axelsson, Dan Axelsson, & H & L Axelsson, Inc.*, 2009 NOAA LEXIS 14, at *26, *30-31 (NOAA Dec. 8, 2009) ("*Axelsson*") (finding that a reduction of the proposed penalty was warranted, in part, where respondents had participated in the fishing industry for over 30 years and had no history of prior offenses). The reasoning of those tribunals is persuasive, particularly given an extensive career in the fishing industry. However, the record of this proceeding lacks any evidence as to whether Respondents were cited for offenses of the Act outside of the relatively brief five-year period to which the parties referred in their Joint Stipulations. Consequently, the absence of violations during this brief period does not persuade me that a reduction in penalty is warranted.

The next statutory penalty factor to be considered is Respondents' ability to pay a civil penalty. Respondent Diep submitted documents to support a claim of inability to pay the proposed penalty, found in the stipulated record at Joint Exhibit 21. Based upon these documents, the Agency acknowledges that "a significant penalty may impose a financial hardship on Respondent Diep." Agency's Initial Br. at 17. The Agency proceeds to argue, however, that:

> [I]f the court determines that joint and several liability is warranted on the facts, the court need not reach the matter of whether Khiem Diep has the ability to pay a significant penalty because H-N does. The failure to provide verifiable information regarding ability to pay a penalty 'gives rise to the adverse inference or conclusion that [a respondent has] the ability to pay the civil penalty. . . .'

Agency's Reply Br. at 7-8 (citing *Harald H. Dett, William C. Hauck, & Amy N., Inc.*, 2003 NOAA LEXIS 16, at *48 (NOAA Sept. 11, 2003); 15 C.F.R. § 904.108(c)).

As observed by the Agency, the Rules of Practice place the burden of demonstrating an inability to pay a civil penalty on respondents, requiring that a respondent provide "verifiable, complete, and accurate financial information to NOAA" in order to support a claim of inability

to pay and advising that a respondent who fails to supply "such financial information as Agency counsel determines is adequate to evaluate the respondent's financial condition" is "presumed to have the ability to pay the civil penalty." 15 C.F.R. § 904.108(c); *see also* 15 C.F.R. § 904.108(g), (h). The record of this proceeding lacks any evidence pertaining to the financial condition of Respondent H-N Fishery, and I may thus presume that Respondent H-N Fishery is able to pay a civil penalty like that proposed by the Agency. As discussed in greater detail below, I also find that Respondents failed to demonstrate that apportionment of liability, as described in *Flores*, is appropriate in this case. Liability is therefore imposed jointly and severally. Accordingly, as argued by the Agency, I need not consider Respondent Diep's financial condition as part of my determination of an appropriate amount of civil penalty to assess because Respondent H-N Fishery has not demonstrated an inability to pay the penalty in full.

c.) Such other matters as justice may require

Finally, the Magnuson-Stevens Act requires me to consider such other matters as justice may require in determining the appropriate penalty to assess. 16 U.S.C. § 1858(a). The parties identify many such considerations in their briefs, which warrant some discussion.

Among "other matters" that it cites, the Agency argues in favor of a significant penalty as a deterrent both to Respondents and others in the regulated community from committing similar violations in the future. Agency's Initial Br. at 18-19. Noting that deterrence has been recognized as a legitimate goal in civil enforcement actions both by the U.S. Supreme Court and in NOAA jurisprudence, the Agency argues that it may be achieved by assessing a penalty that "remove[s] any financial gain from a violation and impose[s] an additional sanction to ensure that the violator and regulated community understand that there is a significant downside to violating the law." Agency's Initial Br. at 19 (citing *United States v. Ursery*, 518 U.S. 267 (1996); *Hudson v. United States*, 522 U.S. 93 (1997); *Brian M. Roche*, 2001 NOAA LEXIS 12, at *19 (NOAA Aug. 15, 2001)). The Agency then contends "that a reasonable basis for determining the financial gain to Respondents from the illegal fishing sets" is the economic benefit calculation used in the NOVA. Agency's Initial Br. at 19. To produce this calculation, "[t]he Agency pro-rated the gross ex-vessel value[11] of all fish landed by the Vessel ($60,977.30) among the eight longline fishing sets by the Vessel on the trip, to come up with an average gross ex-vessel value per set of $7,622.16." Agency's Initial Br. at 14 n.7 (citing JE 13); Agency's Reply Br. at 5 n.1 (citing JE 13). The Agency maintains that "there is no way to determine what

[11] As asserted by the Agency:

> Gross ex-vessel value is what the market believes is the value of the catch on the day it is sold, and is presumably deemed a fair price at the time by the fisherman. As such, it is the most reliable and consistent basis for determining an economic benefit. [The Penalty Policy] relies on gross ex-vessel value of catch as the standard calculation for economic benefit in all civil penalties involving fish caught in violation of statutory or regulatory requirements.

Agency's Reply Br. at 5 (citing JE 16 at 133)

the exact value should be" of the fish harvested within the PMNM because "the lucrative swordfish involved in this case are auctioned off individually rather than as an entire load as done in other fisheries," but that "it is reasonable and appropriate to estimate the gross ex-vessel value" as it did here because its formula is "a consistent and fair method for determining Respondents' economic benefit from the illegal sets." Agency's Reply Br. at 5.

While Respondents concede that Respondent Diep harvested fish within the PMNM, they object to the Agency's calculation of the economic benefit that they gained from that activity, arguing that the Agency failed to establish "with any degree of reliability" the number of fish caught unlawfully. Respondents' Initial Br. at 9. As support for their position, Respondents note, among other considerations, that their gear encroached only 18 nautical miles into the PMNM, while "a significant portion of their gear was set and lawfully harvested outside the Monument," and that "different species and numbers of fish were caught each day operations were conducted." Respondents' Initial Br. at 9-10. Nevertheless, Respondents contend, the Agency "simply divided the total sales for all fish caught by the total number of fishing days and argues, without substantive evidence establishing the argument is accurate and not pure conjecture, Respondents gained an economic benefit of $7,622.16 per day." Respondents' Initial Br. at 10. Respondents further argue any economic benefit that they gained from their unlawful conduct was "overwhelmingly offset by the financial loss and hardship resulting from NOAA's unilateral decision to unnecessarily terminate the voyage prematurely." Respondents' Reply Br. at 5.

Upon consideration, I find the Agency's position to be convincing. Given the root of the violations at issue, a penalty that deters Respondents and other participants in the industry from fishing without a clear understanding of the locations of areas closed to that activity and without up-to-date means of navigation on their vessels that accurately depict those areas is warranted. This goal may only be achieved by imposing a penalty that includes the value of the fish unlawfully caught as well as an additional amount, such that the sanction for fishing in a closed area exceeds any economic benefit to be gained to a sufficient degree that it is not regarded merely as a "cost of doing business." *See, e.g.*, *Matthew James Freitas, et al.*, 2013 NOAA LEXIS 4, at *160 (NOAA Aug. 23, 2013) ("A civil penalty must take into account the value of the catch obtained through unlawful means to alter the economic calculus that might lead a participant in a fishery to simply account for a potential fine as a cost that can be absorbed with the proceeds from such unlawful activity. Otherwise, enforcement would be severely compromised."); *Churchman*, 2011 NOAA LEXIS 2, at *60-61 ("The deterrent effect of a monetary sanction can . . . be accomplished in these cases by imposing a significant sanction against each Respondent that encompasses not only the value of the unlawful catch but also an additional amount. . . . [A] sanction amount should be large enough to alter the economic calculus that might lead Respondents and other participants in the fishery to simply account for any possible sanction as the cost of doing business.").

Here, records kept by the auction house that sold the fish that Respondent Diep caught during the fishing trip were entered into the stipulated record as Joint Exhibit 13 and reflect that the gross ex-vessel value of the entire catch was $60,977.30. JE 13. As observed by the Agency, however, the value of the fish harvested from the PMNM specifically is unknown because the fish appear to have been sold individually, without any indication of their species or

the day on which they were harvested. *See* JE 13. While Respondents argue that the Agency thus failed to satisfy its burden of establishing the economic benefit that Respondents derived from their unlawful conduct, I disagree and I find, based upon the stipulated record before me, that the Agency's methodology for estimating the gross ex-vessel of the fish unlawfully caught by Respondents is reasonable and appropriate. Further, as argued by the Agency, "it is quite possible that NOAA's estimate significantly undervalues the illegal catch given that it represents just 37% of the total catch while the 49 swordfish landed in the three illegal sets constitute over 57% of the total swordfish retained during the trip." Agency's Reply Br. at 5 (citing JE 10 at 60-67). Thus, it is conceivable that the Agency's calculation might present a windfall, or benefit, to Respondents. Nevertheless, I conclude that the proceeds of Respondents' unlawful activity amounted to $7,622.16 for each day of violation, which I factored into my determination of the appropriate amount of civil penalty to assess.

Turning to the "other matters" identified by Respondents, they first argue in favor of mitigating the penalty because of their cooperation throughout the investigation of their activities, as demonstrated by the "interrogation of Capt. Diep by the [USCG] flight crew; Dang's efforts to relocate the Vessel and subsequent agreement to terminate the voyage and return the Vessel to port; and Respondent's providing verbal and written statements to NOAA OLE, as well as, providing unfettered access to the Vessel's equipment." Respondents' Initial Br. at 9. Respondents also point to the remedial measures undertaken by Respondent H-N Fishery to update the navigational equipment onboard the Vessel after the initiation of this proceeding. *Id.* Both Respondents' cooperation with law enforcement personnel, and Respondent H-N Fishery's subsequent efforts to update the navigational equipment onboard the Vessel such that it displays the boundaries of areas closed to fishing in the Western Pacific and Hawaii longline fishery and enables Respondent H-N Fishery to monitor the location of the Vessel continuously in real time, are uncontested. Jt. Stip. ¶¶ 33, 35. Upon consideration, I agree with Respondents. The degree of cooperation and initiative to prevent further violations shown by Respondents should be encouraged, and I, therefore, find these considerations to serve as mitigating factors in my determination of the appropriate amount of civil penalty to assess. *See, e.g.*, *Eli Tobias Bruce, Sr.*, 2012 NOAA LEXIS 10, at *46-47 (NOAA Aug. 14, 2012) ("The help offered by Respondent, his cooperative and agreeable demeanor, and his apparent commitment to coming into compliance quickly and permanently, should be encouraged, and here warrants a significant reduction in the penalty."); *Michael Straub & Steven Silk*, 2012 NOAA LEXIS 1, at *24 (NOAA Feb. 1, 2012) ("Respondents' truthfulness and cooperation throughout this process tends to favor a low civil monetary penalty."); *Axelsson*, 2009 NOAA LEXIS 14, at *30-31 (NOAA Dec. 8, 2009) (finding that a reduction of the proposed penalty was warranted, in part, where respondents had cooperated with the Agency and corrected their failure to submit timely reports upon being informed of the deficiency); *Pesca Azteca, S.A. de C.V.*, 2009 NOAA LEXIS 10, at *41 (NOAA Oct. 1, 2009) (finding that the crew of the fishing vessel "fully cooperated" with the USCG during its boarding of the vessel, which served as a mitigating factor), *aff'd*, 2010 NOAA LEXIS 3 (NOAA App. 2010).

Respondents also argue in favor of mitigating the penalty because "NOAA was negligent in its handling of [the events underlying the violations] and NOAA's negligence was a significant contributing factor to Capt. Diep continuing to set a portion of his gear within the boundary of the Monument on May 1 and 2, 2012." Respondents' Initial Br. at 6. In particular,

Respondents cite Special Agent Giaretto's failure to contact Dang immediately upon learning that the Vessel was conducting fishing operations in the PMNM on May 1 and the USCG's failure to advise Respondent Diep on May 2 that he was fishing at that time in a closed area. Respondents' Initial Br. at 6-7. Acknowledging the Agency's assertion that it was not legally obligated to inform Respondents of their unlawful operations, Respondents maintain that the Agency "voluntarily undertook that duty" and "did so in a negligent manner that materially contributed to the perpetuation and repetition of Capt. Diep's unknowing violation." Respondents' Reply Br. at 2. Respondents conclude, "Although NOAA and the USCG's failure to communicate clear and accurate information is not grounds for exoneration, it is a valid basis for this Court to substantially mitigate any civil penalty assessed." Respondents' Reply Br. at 6.

Some legal precedent supports Respondents' position. *See Timothy Jones & AO Shibi, Inc.*, 2011 NOAA LEXIS 7, at *18-19 (NOAA Dec. 20, 2011) ("Some precedent under the Federal Tort Claims Act holds that when the government voluntarily assumes a duty, it has an obligation to perform such a duty with due care. Even assuming this principle applied, such reliance would in no way excuse Respondents' violation but could serve as a slight mitigating factor in assessing a penalty should it be adequately demonstrated that the Agency did not, in fact, [perform the duty in question].") (citing *Indian Towing Co. v. United States*, 350 U.S. 61, 76 (1955); *Rogers v. United States*, 397 F.2d 12, 14 (4th Cir. 1968)); *Churchman*, 2011 NOAA LEXIS 2, at *38, n.7 ("[T]he fact that neither the NOAA-contracted observers [who were on board the fishing vessel on some of the days of violation] nor the Agency informed [the respondent] about his fishing locations within the [conservation area] despite the fact that such information was readily available" was a "minor mitigating factor," but it "in no way excuse[d] his violations" because "neither the government nor its employees/observers are under any obligation to inform fishermen of facts that they are duty-bound to determine for themselves.").

However, the notion supported by such cases – that the penalty assessed for a given violation is subject to mitigation because the government failed to notify the regulated party of the offense in a timely manner, or otherwise negligently performed its voluntary effort to advise the regulated party of the offense, such that the regulated party continued to engage in the violative conduct after the government learned of it – does not ultimately persuade me that, given the facts of this case, a reduction of the penalty is warranted. I recognize that some of the actions taken by NMFS and the USCG during the events underlying the violations at issue are somewhat puzzling, noting as an example the USCG's cautionary statement to Respondent Diep on May 2 that he was "fishing near a Particularly Sensitive Sea Area (PSSA) near a closed area," rather than notifying him that he was, in fact, located inside the closed area. The fact that these communications contributed to the observer's belief that the Vessel's operations were lawful at that time would also lend some support for the reasonableness of Respondent Diep reaching that conclusion as well. However, the record does not sufficiently support Respondents' claim that the alleged negligence of NMFS and the USCG was a "significant contributing factor" to Respondent Diep continuing to set the Vessel's fishing gear within the PMNM, namely because Respondent Diep spoke with Dang soon after his communications with the USCG, at which time Dang presumably disabused Respondent Diep of his belief that his operations had been lawful and advised him that he had indeed been fishing within the PMNM. Notwithstanding his communications with Dang, Respondent Diep still encroached upon the PMNM the following day. Thus, I am not convinced that his incursion on May 2 would have been prevented had

Special Agent Giaretto contacted Dang immediately upon learning that the Vessel was conducting operations in the PMNM on May 1, or that his incursion on May 3 would have been prevented had the USCG informed him on May 2 that he was located at that time within the PMNM, as Respondents claim. Further, the duty to be knowledgeable of the boundaries to areas closed to fishing falls squarely upon Respondents, and the facts of this case, such as the mere cautionary statement by the USCG to Respondent Diep mentioned above, do not establish that the Agency or USCG attempted to assume that duty. For these reasons, I do not find NMFS and the USCG at fault for Respondents' unlawful conduct, and I conclude that a reduction in the penalty because of their actions is not warranted.

2. Appropriate Amount of Civil Penalty to Assess

Upon consideration of the facts of this case and the statutory penalty factors discussed above, I have determined that a penalty of $18,122.16 per count of violation is warranted, noting a downward departure from that proposed by the Agency to account for Respondents' level of cooperation and the subsequent remedial measures taken to prevent future violations. The total penalty I have assessed in this matter for the three counts of violation is $54,366.48 ($18,122.16 x 3 = $54,366.48).

3. Apportionment of Liability

I turn now to the parties' arguments related to the imposition of joint and several liability for the penalty amount. As discussed above, the Rules of Practice authorize the assessment of a civil penalty "against two or more respondents jointly and severally. Each joint and several respondent is liable for the entire penalty but, in total, no more than the amount finally assessed may be collected from the respondents." 15 C.F.R. § 904.107(a). Consistent with this authority, the NOVA assesses the proposed penalty jointly and severally against Respondents. JE 15 at 112. Respondents urge me not to impose joint and several liability, however, and argue instead in favor of apportioning liability between Respondents separately. Respondents' Initial Br. at 13-14; Respondents' Reply Br. at 5. Citing *Flores* for the notion that I have the ability to apportion liability between respondents in a case, Respondents argue that apportionment is appropriate here on numerous grounds, including that Respondent H-N Fishery "provided Capt. Diep with a fully and properly equipped vessel that enabled him to conduct fishing operations that fully complied with federal fishing regulations," that Respondent H-N Fishery "did not direct Capt. Diep where to fish" but instead "left [it] to his discretion," and that the record lacks evidence demonstrating either that Respondent H-N Fishery "knew or should have known incursions into the Monument were happening" before Special Agent Giaretto notified Dang or that Respondent H-N Fishery "had reason to suspect Capt. Diep would conduct operations in prohibited areas." Respondents' Reply Br. at 5 (citing *Flores*, 2009 NOAA LEXIS 15 (NOAA May 28, 2009)). The Agency counters that the present proceeding is distinguishable from *Flores* in that the presiding Administrative Law Judge in that case apportioned liability between the owner and operator of the vessel based upon the particular facts presented, including evidence that the operator had tampered with the vessel's GPS, and that this proceeding "includes no such facts that would warrant apportionment of the penalty." Agency's Initial Br. at 20. The Agency also points to the rationale for the doctrine of *respondeat superior* as set forth in *James Chan Song Kim*, arguing that the doctrine of *respondeat superior* applies to Respondent H-N Fishery

and that it thus "should be found jointly and severally liable along with Diep, with no reduction or apportionment in penalty warranted." Agency's Reply Br. at 7.

As observed by the Agency, the presiding Administrative Law Judge in *James Chan Song Kim* described the doctrine of *respondeat superior* as a basis for imposing joint and several liability:

> The rational [*sic*] behind the doctrine of *respondeat superior* to apply joint and several liability is to prevent the vessel owners and operators from reaping the benefits of illegal fishing activities while avoiding the responsibility that goes along with such tactics. For example, a vessel owner corporation acquires a share of the vessel's products and benefits financially from the illegal acts undertaken by the captain during a fishing trip. As a result, the vessel owner should not be allowed to escape responsibility for the transgressions of the captain that it hires, authorizes to operate its boat, and has the authority to fire. Moreover, it is the owner's continued authority and legal control over the vessel, as well as his unequivocal right to hire and fire the captain, that creates an agency relation with the captain. This, in turn, is a sufficient basis to support joint and several liability.

James Chan Song Kim, 2003 NOAA LEXIS 4, at *28-30 (internal citations omitted).

Conversely, the presiding Administrative Law Judge in *Flores* held the owner of the fishing vessel to be vicariously liable for the operator's unlawful conduct under the doctrine of *respondeat superior* but found the "unique facts and circumstances" of the case to warrant the apportionment of liability among the owner and operator. *Flores*, 2009 NOAA LEXIS 15, at *25-27, 33-38. More specifically, the owner and operator in that case were charged jointly and severally with seven counts of violating the Magnuson-Stevens Act in connection with a fishing trip allegedly conducted by the operator in and around the PMNM. *Id.* at *1-2. Finding that the Agency had adequately demonstrated the charged violations, the Administrative Law Judge held that the owner was vicariously liable for the violations under the doctrine of *respondeat superior*. *Id.* at *18-27. He declined to impose joint and several liability, however, explaining that "[t]he reason for severing liability derives from the imbalance of culpability between the [owner and operator] and from [the operator's] total failure to accept any responsibility for his actions." *Id.* at *33-34. In this regard, the Administrative Law Judge first noted that the owner had participated in the proceeding from the outset, while the operator "did not bother to participate and face the charges levied against him." *Id.* at *34, 36-37. The Administrative Law Judge reasoned that, "[g]iven [the operator's] continued absence . . . and the likelihood that he would ignore a civil penalty, it would be manifestly unjust for [the owner] to be liable for the entire civil penalty assessed . . ., which would be a certain result under a joint and several penalty assessment." *Id.* at *37. As for the relative culpability of the respondents, the Administrative Law Judge explained that the record amply demonstrated that the owner "appeared to exercise due diligence in hiring [the operator] to captain the vessel and had no reason to suspect that [the operator] might fish in prohibited areas." *Id.* at *34-35. Moreover, he found that the owner "was prudent in trying to prevent the instant violations" by taking such measures as specifically directing the operator to refrain from entering the PMNM and monitoring the location of the vessel, but that the owner "was simply unsuccessful in its attempts to prevent the incursions."

Id. at *34. The Administrative Law Judge also credited the owner's anger upon discovering that the incursions had occurred as being "consistent with having clean hands." *Id.* In contrast to the owner's relative lack of culpability, the Administrative Law Judge found that the operator "for all intents and purposes appeared to be acting as a rogue while fishing in the Monument" given that the owner had not authorized his entry and had even affirmatively forbidden it. *Id.* at *35. The Administrative Law Judge also noted that "the GPS on board the [vessel] was mysteriously inoperable during at least some of the incursions," which he found not only to demonstrate that the owner "was limited in its ability to monitor [its] vessel or prevent illegal fishing" but also to "cast an even darker shadow of doubt upon [the operator's] already questionable mental state for these offenses" and to support the notion that the operator was "acting rogue." *Id.* at *35-36.

Upon consideration, I agree with the Agency and find Respondents' reliance on *Flores* to be misplaced. As previously discussed in my evaluation of the statutory penalty factors, Respondent Diep and Respondent H-N Fishery were equally culpable at the time of the violations. The record certainly lacks any evidence suggesting that, like the operator in *Flores*, Respondent Diep was "acting rogue" as he set a portion of the Vessel's fishing gear within the PMNM. As reflected in the observer's account of the events underlying the violations, Respondent Diep at no time appeared to be attempting to evade detection as he conducted operations within the PMNM. Furthermore, Respondents failed to proffer any evidence to support a claim that Respondent H-N Fishery took measures to ensure that its employees complied with applicable law, such as expressly forbidding Respondent Diep to conduct operations in areas closed to fishing or attempting to monitor the whereabouts of the Vessel, as did the owner in *Flores*. To the contrary, the record demonstrates that Respondent H-N Fishery failed even to equip the Vessel with means of navigation that accurately depicted the PMNM. For these reasons, I find that the holding of *Flores* is inapplicable and that apportionment of liability is not appropriate in this proceeding. Liability is, therefore, joint and several.

VI. DECISION AND ORDER

A total civil penalty of $54,366.48 is hereby imposed jointly and severally on Respondents H-N Fishery, Inc., and Khiem Diep for the violations for which they were found liable herein. Once this Initial Decision becomes final under the provisions of 15 C.F.R. § 904.271(d), Respondents will be contacted by the Agency with instructions as to how to pay the civil penalty.

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 Donelian Coughlin
Administrative Law Judge
U.S. Environmental Protection Agency

Dated: June 5, 2015
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.