



UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:

David D. Stillwell and Rocco J. Scalone,

Respondents.

Docket No. SE1200825FM

(F/V Miss Stephanie)

Date Issued: May 29, 2015

INITIAL DECISION AND ORDER

Before:

M. Lisa Buschmann  
Administrative Law Judge  
United States Environmental Protection Agency<sup>1</sup>

Appearances:

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<sup>1</sup> The Administrative Law Judges of the U.S. Environmental Protection Agency are authorized to perform adjudicatory functions under Chapter 5 of Title 5 of the United States Code in cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011.

## **I. Statement of the Case**

On September 25, 2012, counsel for the National Oceanic and Atmospheric Administration (“NOAA” or “Agency”) issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”) to David D. Stillwell, owner of the F/V Miss Stephanie, and Rocco J. Scalone, operator of the F/V Miss Stephanie (collectively “Respondents”). The NOVA alleged that on or about February 16, 2012, Respondents jointly and severally violated the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”), 16 U.S.C. § 1857(1)(A), and the implementing regulation at 50 C.F.R. § 622.7(ff), by failing to comply with sea turtle conservation measures as specified in 50 C.F.R. § 622.10(b)(1).<sup>2</sup> The NOVA proposed a total penalty of \$5,000 for the alleged violation.

Respondents submitted a request for hearing on February 28, 2013. Subsequently, the parties participated in Alternative Dispute Resolution (“ADR”) but were unsuccessful in reaching settlement of this matter. The undersigned was designated to preside over a hearing in this case, and the hearing was scheduled. The Agency and Respondents each submitted a Preliminary Position on Issues and Procedures (“PPIP”).

A hearing in this matter was held at the Thirteenth Judicial Circuit Criminal Courthouse, in Tampa, Florida, on March 26, 2014. At the hearing, the Agency presented the testimony of one witness, Gary P. Ruane, II, United States Coast Guard (“U.S. Coast Guard”) Chief Boatswain’s Mate,<sup>3</sup> and offered ten exhibits, which were admitted into evidence. The Respondents appeared and testified at the hearing, and also presented the testimony of Ronald M. Castro, a crew member on board the F/V Miss Stephanie at the time of the alleged violation, and Richard Hand, a deck hand working on the F/V Miss Stephanie following the alleged violation. The Respondents introduced eleven exhibits, nine of which were admitted into evidence.

Following the hearing, the parties submitted their post-hearing briefs and reply briefs, and the record closed with the Respondent’s reply brief filed on July 3, 2014.

After careful review of the entire record, I find that a preponderance of the evidence establishes that on or about February 16, 2012, Respondents jointly and severally violated the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857 (1)(A), and the implementing regulations at 50 C.F.R. § 622.7(ff), by failing to comply with sea turtle conservation measures.

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<sup>2</sup> The regulations pertaining to fisheries in the Caribbean, Gulf, and South Atlantic, codified at 50 C.F.R. Part 622, were amended and re-codified on April 17, 2013. Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic, 78 Fed. Reg. 22, 950 (Apr. 17, 2013). These amendments do not apply to this proceeding. *Id.* The regulatory provisions and section numbers cited in this Initial Decision are those which were published in 2011 and in effect on March 17, 2012.

<sup>3</sup> As of the date of the hearing, Gary P. Ruane, II, had attained rank as Chief Boatswain’s Mate with the U.S. Coast Guard. However, the record reflects that at the time of the alleged violation, he held the rank of Boatswain’s Mate, First Class Petty Officer with the U.S. Coast Guard. Accordingly, for purposes of this decision, this witness is referred to as “Officer Ruane,” accounting for the rank he held at the time of the alleged violation.

## II. Statutory and Regulatory Background

The Magnuson-Stevens Act was enacted, *inter alia*, to “conserve and manage the fishery resources found off the coasts of the United States” and “to promote domestic commercial and recreational fishing under sound conservation and management principles . . . .” 16 U.S.C. § 1801(b)(1), (b)(3). The Act authorizes the Secretary of Commerce, in conjunction with Regional Fisheries Management Councils, to adopt fishery management plans and implement such plans through regulation. 16 U.S.C. § 1854(e). The Act states that “[i]t is unlawful . . . for any person . . . to violate any provision of this Act or any regulation or permit issued pursuant to this Act.” 16 U.S.C. § 1857(1)(A). The term “person” includes any individual, corporation, partnership, association or other entity. 16 U.S.C. § 1802(36).

The Gulf of Mexico Fishery Management Council administers the Gulf of Mexico Fishery Management Plan (“GMFMP”) under the Act. 16 U.S.C. § 1852. Regulations implementing the GMFMP under the Act are codified in Title 50, Part 622 of the Code of Federal Regulations. *See* 50 C.F.R. Part 622 (2011). The applicable regulations are those in Title 50 Part 622 as amended and published in 2011, which were in effect on the date of the alleged violation on February 16, 2012. Section 622.10 of those regulations lists conservation measures for protected resources, including sea turtle conservation measures. 50 C.F.R. § 622.10(b)(1) (2011).<sup>4</sup> Section 622.10(b)(1) of Title 50 provides as follows, in pertinent part:

- (b) Gulf reef fish commercial vessels and charter vessels/headboats --
  - (1) Sea turtle conservation measures.
    - (i) The owner or operator of a vessel for which a commercial vessel permit for Gulf reef fish . . . has been issued, . . . must post inside the wheelhouse . . . a copy of the document provided by NMFS [National Marine Fisheries Service] titled “Careful Release Protocols for Sea Turtle Release With Minimal Injury,” and must post inside the wheelhouse, the sea turtle handling and release guidelines provided by NMFS.
    - (ii) Such owner or operator must also comply with the sea turtle bycatch mitigation measures, including gear requirements and sea turtle handling requirements, specified in §§ 635.21(c)(5)(i) and (ii) of this chapter, respectively.
    - (iii) Those permitted vessels with a freeboard height of 4 ft. (1.2m) or less must have on board a dipnet, tire, short-handled dehooker, long-nose or needle-nose pliers, bolt cutters, monofilament line cutters, and at least two types of mouth openers/mouth gags. This equipment must meet the specifications described in §§ 635.21(c)(5)(i)(E) through (L) of this chapter with the following modifications: the dipnet handle can be of variable length, only one NMFS-approved short-handled dehooker is required (i.e., § 635.21(c)(5)(i)(G) or (H)

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<sup>4</sup> Citations to 50 C.F.R. parts 622 and 635 herein refer to the regulations as amended in 2011 and in effect in February 2012.

of this chapter); and life rings, seat cushions, life jackets, and life vests or any other comparable, cushioned, elevated surface that allows boated sea turtles to be immobilized, may be used as alternatives to tires for cushioned surfaces as specified in § 635.21(c)(5)(i)(F) of this chapter. \* \* \*

50 C.F.R. § 622.10(b)(1). The regulations thus require reef fishing vessels with a freeboard height of up to four feet to have on board the seven items listed in 50 C.F.R. § 622.10(b)(1)(iii), as specified in Section 635.21(c)(5)(i)(E) through (L) and modified by Section 622.10(b)(1)(iii), hereinafter referenced as “Turtle Mitigation Gear.” The general regulatory prohibitions for fisheries provide that “it is unlawful . . . for any person to . . . [f]ail to comply with the protected species conservation measures as specified in § 622.10.” 50 C.F.R. § 622.7(ff). Failure to have on board the seven Turtle Mitigation Gear items is therefore unlawful under the Act. 16 U.S.C. § 1857(1)(A).

All six species of sea turtles found in United States waters are either threatened or endangered, and are listed under the Endangered Species Act. *See* 50 C.F.R. § 17.11(h) (2011) (containing the “List of Endangered and Threatened Wildlife”); 50 C.F.R. § 224.101(h) (2011) (listing endangered species of sea turtles). NOAA has reported that “[i]ncidental take, or bycatch, in fishing gear is one of the main sources of sea turtle injury and mortality nationwide,” and has repeatedly explained that “[i]ncidental capture of sea turtles in fisheries (bycatch) is a primary factor hampering the recovery of sea turtles in the Atlantic Ocean and the Gulf of Mexico.” 2011 Annual Determination for Sea Turtle Observes Requirement, 75 Fed. Reg. 81,201, 81,202 (proposed Dec. 27, 2010); Endangered and Threatened Wildlife, Sea Turtle Conservation Requirements, 72 Fed. Reg. 7,382 (proposed Feb. 15, 2007).

### **III. Findings of Fact**

The following findings are based on a thorough and careful analysis of the testimony of witnesses, the exhibits entered into evidence, and the entire record as a whole.

1. Since 1997, and at all times relevant to this proceeding, Respondent David D. Stillwell (“Stillwell”) owned the F/V Miss Stephanie, U.S. Documentation Number 580069. NOAA’s Exhibits (“NOAA Exs.”) 4, 5, 6; Transcript (“Tr.”) 6, 35, 225. He also owned at least one other reef fishing vessel. Tr. 225, 253.
2. At all times relevant to this proceeding, Stillwell held the following Federal Fisheries Permit for the F/V Miss Stephanie: Gulf of Mexico Reef Fish Commercial, Permit Number RR-209, which was effective December 29, 2011 through November 30, 2012. NOAA Ex. 6; Tr. 7.
3. The F/V Miss Stephanie has a freeboard height of four feet or less, and is 33.7 feet in length. NOAA Ex. 5.
4. Respondent Rocco J. Scalone (“Scalone”) operated the F/V Miss Stephanie as captain on commercial fishing trips during approximately seven months, from

January through July 2012. Tr. 125-126. He served as a captain on other fishing vessels in the Gulf of Mexico since 1986. Tr. 123.

5. On or about February 11, 2012, Scalone, as captain, with Ronald M. Castro ("Castro"), a crew member, departed from the port of Clearwater Beach aboard the F/V Miss Stephanie for a commercial fishing trip in the Gulf of Mexico, targeting grouper, snapper and amberjack. Tr. 123-24, 204; NOAA Ex. 1. Scalone had originally departed for the trip on or about February 7, 2012, but on February 11 he returned and then departed again from Clearwater Beach because of a breakdown of equipment on the vessel. Tr. 202-206, 226, 228-229; Respondents' Exhibit ("R Ex.") 1.
6. Stillwell authorized Scalone to engage in commercial fishing pursuant to the Federal Fisheries Permit issued to Stillwell for the F/V Miss Stephanie. Tr. 7.
7. Prior to the February 2012 trip, Scalone had taken at least one other fishing trip aboard the F/V Miss Stephanie. Tr. 126. He had served as captain on fishing vessels since December of 1986. Tr. 123.
8. Castro had been working as crew on commercial fishing trips aboard the F/V Miss Stephanie since 2008. Tr. 126, 253.
9. At the time of the fishing trip in February 2012, Gary P. Ruane II served as a U.S. Coast Guard Boatswain's Mate, First Class Petty Officer. NOAA Exs. 1, 2, 4.<sup>5</sup> Officer Ruane has worked for the U.S. Coast Guard for about sixteen years. Tr. 25-26. He estimates that he conducted 250 boardings in 2012 and several hundred fishery law enforcement boardings in his career. Tr. 28-29, 82-83.
10. On February 16, 2012, Officer Ruane, operating on the U.S. Coast Guard Cutter Alligator in the Gulf of Mexico, observed the F/V Miss Stephanie anchored and engaged in fishing with bandit rig and rod and reel. Tr. 30, 32; NOAA Ex. 1, 2, 4. He then conducted "a cold hit, random boarding" of the F/V Miss Stephanie at 6:05 p.m. Tr. 31, 33, 61, 70; NOAA Exs. 2, 4. He was accompanied by Steven Dobis, a U.S. Coast Guard boarding team member responsible for security. Tr. 70.
11. After conducting an initial safety inspection and verifying Scalone's identity and the F/V Miss Stephanie's documentation, Officer Ruane commenced an administrative inspection on the F/V Miss Stephanie, which included inspecting for required safety equipment. Tr. 33-35, 63, 72; NOAA Exs. 2, 4. During this inspection, he looked throughout the vessel. Tr. 36, 61-62, 101.

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<sup>5</sup> See *supra*, note 3. Although this witness subsequently obtained rank as a Chief Boatswain's Mate, Tr. 25; NOAA's Br. at 2, the record reflects that at the time of the alleged violation, he held the rank of Boatswain's Mate, First Class Petty Officer with the U.S. Coast Guard. NOAA Ex. 1, 2, 4.

12. After completing the administrative inspection, Officer Ruane commenced a fisheries inspection of the F/V Miss Stephanie, and asked Scalone to present the vessel's Turtle Mitigation Gear. Tr. 159-160; NOAA Exs. 1, 2.
13. During the inspection, Officer Ruane asked Scalone for each item of required Turtle Mitigation Gear, stating examples of the acceptable types of gear. Tr. 40-41, 43, 85, 99-100; NOAA Ex. 10.
14. The required Turtle Release Protocol document was in a binder on the F/V Miss Stephanie. Tr. 41, 85; NOAA Ex. 2. It was not posted in the pilothouse or otherwise conspicuously posted on the vessel. Tr. 41, 85.
15. Scalone showed Officer Ruane de-hookers on the vessel where they were fishing, which were being used to dehook fish that were caught. Tr. 43; NOAA Ex. 2.
16. Scalone showed Officer Ruane needle-nose pliers on the vessel. Officer Ruane accepted it as Turtle Mitigation Gear, but told Scalone that they were not 12 inches, and that he needed to get a bigger set of needle-nose pliers. Tr. 43-44; NOAA Ex. 2.
17. Needle-nosed pliers are used on fishing vessels, including the F/V Miss Stephanie, for purposes other than releasing sea turtles. Tr. 110, 258.
18. Scalone showed Officer Ruane monofilament line cutters on the vessel. Tr. 45; NOAA Ex. 2.
19. Officer Ruane asked to see a dipnet, but Scalone did not show him a dipnet and Officer Ruane did not otherwise see one on the vessel although he looked in places where dipnets are often kept on a vessel, namely on the sundeck, next to the life raft, or on top of the cabin. Tr. 42-43, 85, 116.
20. Officer Ruane asked to see a cushioned surface, and Scalone was not able to produce a cushioned surface during the boarding. Tr. 43.
21. Officer Ruane asked to see bolt cutters, but Scalone was not able to find any bolt cutters on the vessel during the inspection. Tr. 44-45, 103.
22. Officer Ruane asked to see mouth openers and mouth gags, but Scalone could not produce any mouth openers or mouth gags. Tr. 45-46. He showed Officer Ruane ropes on the vessel, but they were not folded into a hank, and were not approximately six feet in length. Tr. 45-46, 129; R Ex. 4.
23. During the inspection, Scalone produced three of the required Turtle Mitigation Gear items, namely de-hookers, needle-nose pliers, and line cutters, and did not

produce a dipnet, bolt cutters, cushioned surface, mouth openers or mouth gags. Tr. 41-46, 85, 99-100; NOAA Ex. 2.

24. Officer Ruane accompanied Scalone as he looked around the vessel for the Turtle Mitigation Gear. Tr. 40-46, 100-103.
25. Officer Ruane gave Scalone about two minutes to look for each item on the checklist, including each of the different types of mouth gags, before he read the next item on the checklist for Scalone to produce. Tr. 44-45, 98-100. Scalone also had opportunity to produce any additional items during the time Officer Ruane was filling out the Fisheries Violation Report documenting his findings of the fisheries inspection. Tr. 48-50; NOAA Ex. 1. Officer Ruane remained aboard the vessel for over an hour. Tr. 61, 97-98, 159, 293-294.
26. At the time of the inspection, Scalone did not know where Turtle Mitigation Gear would be kept on the vessel. Tr. 171, 173, 233-234, 263.
27. Officer Ruane separated Castro from Scalone during the entire boarding, and did not ask Castro about any Turtle Mitigation Gear on the vessel. Tr. 155-156, 170, 172-173, 256-257, 264. Castro was familiar with locations of items on the vessel but was not familiar with each item of Turtle Mitigation Gear. Tr. 241, 242, 246, 257-263.
28. Officer Ruane observed two life jackets on board the F/V Miss Stephanie. Tr. 62, 276; NOAA Ex. 4. He also observed a life ring of approximately 36 inches in diameter on board the vessel. Tr. 103-104, 221, 277, 294-296; NOAA Ex. 4.
29. Officer Ruane completed an Enforcement Action Report, a notification that the vessel was "missing five pieces" of Turtle Mitigation Gear, in violation of 50 C.F.R. § 622.7(ff). NOAA Ex. 3; Tr. 48, 54, 57-58. He also completed a Commercial Fishing Boarding Report, noting a fisheries violation. NOAA Ex. 4; Tr. 60-61, 64-65. Officer Ruane issued Scalone a copy of these reports before disembarking from the F/V Miss Stephanie. Tr. 57, 64.
30. Throughout the boarding, Scalone was very cooperative with Officer Ruane. Tr. 48, 112-114.
31. When a sea turtle becomes caught or entangled in fishing gear, having Turtle Mitigation Gear on board enables removal of hooks and safe release of the turtle without further injury. Tr. 37, 114-115.
32. If Turtle Mitigation Gear is not readily available to release a turtle, the turtle may suffer shock, a major factor in turtle fatalities associated with release from fishing gear. Tr. 114-115, 118.

33. The dipnet is for lifting a sea turtle up out of the water and put it back into the water. Tr. 38. The bolt cutter is for cutting a fish hook so it can be pushed out of the turtle. Tr. 38-39. Mouth gags are to keep the turtle's mouth open while the hook is being removed. Tr. 39.

#### IV. Liability

##### A. Burden of Proof

In an action to establish civil liability under the Magnuson-Stevens Act, the Agency has the burden of proving each alleged violation by the preponderance of the evidence. 5 U.S.C. § 556(d); *Cuong Vo*, NOAA Docket No. SE010091FM, 2001 NOAA LEXIS 11, at \*\*16-17 (ALJ, Aug. 17, 2001) (citing 5 U.S.C. § 556(d); *Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100-03 (1981)). Preponderance of the evidence means that the Agency must show that it is more likely than not that a respondent committed the charged violation. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). The Agency “may rely on either direct or circumstantial evidence to establish a violation and satisfy the burden of proof.” *Cuong Vo*, NOAA Docket No. SE010091FM, 2001 NOAA LEXIS 11, at \*17 (ALJ, Aug. 17, 2001) (citing *Reuben Paris, Jr.*, 4 O.R.W. 1058, 1987 NOAA LEXIS 13 (ALJ, Sept. 30, 1987) (finding liability on basis of circumstantial evidence)).

##### B. Elements of Violation

To establish a violation of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A) and 50 C.F.R. § 622.7(ff) by Respondents’ failure to comply with 50 C.F.R. § 622.10(b)(1), NOAA must prove that: (1) Respondents are each “persons” and owner or operator of a vessel, (2) with a freeboard height of four feet or less, (3) for which a Gulf of Mexico Reef Fish Commercial Permit has been issued, and (4) the vessel failed to have on board the following Turtle Mitigation Gear: dipnet, tire (or life vest or other comparable cushioned surface), short-handled de-hooker, long-nose or needle-nose pliers, bolt cutters, monofilament line cutters, and at least two types of mouth openers or mouth gags, as specified by 635.21(c)(5)(i)(E) through (L) and modified by 50 C.F.R. § 622.10(b)(1)(iii).

Scalone and Stillwell are both “persons” under the Act, 16 U.S.C. § 1802(36), and Findings of Fact 1 and 4 establish that Stillwell was the owner, and Scalone was the operator, of the F/V Miss Stephanie on February 16, 2012. Findings of Fact 2 and 3 establish that the F/V Miss Stephanie had a Gulf of Mexico Reef Fish Commercial Permit and had a freeboard height of four feet or less. Therefore, the first three elements of the violation are shown.

As to the final element, Findings of Fact 19 through 23 establish that during an inspection on February 16, 2012, while the vessel was in the Gulf of Mexico on a commercial fishing trip, Scalone was not able to show to Officer Ruane that the vessel had on board all of the Turtle Mitigation Gear required by 50 C.F.R. § 622.10(b)(1). The parties dispute whether the evidence is sufficient to establish liability.

## C. General Issues as to Liability

### 1. Parties' Arguments

Respondents' position is that the Agency has failed to meet its burden of proof in that the evidence shows that all of the Turtle Mitigation Gear was aboard the F/V Miss Stephanie on February 16, 2012. Respondents argue that Officer Ruane made statements that lack candor, made conclusions based on faulty interpretations of the law, and took actions that unreasonably prevented Respondents from producing the Turtle Mitigation Gear. Respondents' Initial Post-Hearing Brief ("R Br.") § III.B. Respondents challenge Officer Ruane's credibility by arguing that he had a "pattern of behavior" with a lack of care, shown by his citation of Respondents for failure to have appropriate lights, in violation of Rule 23, and his "fabricate[d] . . . story" that a stern light was "smashed in." R Br. § III.C, citing Tr. 75. Rule 23 only applies to vessels larger than the F/V Miss Stephanie, which did not, and was not required to, have a stern light, Respondents assert. The citation required a dockside inspection, in which, as Stillwell testified, the Coast Guard found that the F/V Miss Stephanie was not in violation of Rule 23. *Id.* citing Tr. 237. Respondents also point out Scalone's testimony that he did not recall the Master's Statement, written in past tense on the Fisheries Violation Report, that the vessel was missing five pieces of Turtle Mitigation Gear. Respondents argue that this suggests that the statement was written above Scalone's signature by Officer Ruane after the boarding, as Scalone would not have agreed with it. R Br. § III.C.6.

Respondents assert that Officer Ruane did not specifically ask Scalone for each item of Turtle Mitigation Gear, and was "conducting a pop-quiz on Captain Scalone to determine if he knew the requirements for [Turtle Mitigation Gear]." R Brief § III.C.4, citing Tr. 170, 235; Respondents' Post-Hearing Reply Brief ("R Reply Br.") § I.C. Respondents argue that he could not have asked for each item, because he knew there was a life ring on the vessel, and Scalone would have produced bolt cutters if asked for them. R Br. § III.C.1; R Reply Br. § I.C. Respondents argue that if less than five items were missing, only a warning would be issued, and Officer Ruane "clearly intended to flunk Captain Scalone" and punish Respondents with a penalty. R Reply Br. § I.C. Pointing out Scalone's testimony that Officer Ruane denied Scalone's request to allow Castro to assist in the search for the items, Respondents assert that all Turtle Mitigation Gear would have been produced if Officer Ruane had allowed Castro to participate. R Br. § III.C.4.

The Agency argues that the credible evidence shows that Respondents failed to have the required pieces of Turtle Mitigation Gear in accordance with regulatory specifications aboard the vessel on February 16, 2012. In addition to the fact that Scalone was not able to produce a dipnet, cushioned surface, bolt cutter, and two types of mouth gags, and admitted he did not know where Turtle Mitigation Gear was on the boat, the Agency points to Officer Ruane's testimony that he wrote and then read the statement on the Fisheries Violation Report that "Vessel was missing 5 pieces of the turtle mitigation gear" and Scalone signed his name, without making any correction, to indicate his agreement with it. NOAA Br. at 12. Supporting the credibility and veracity of Officer Ruane's testimony, the Agency points out his achievements in the Coast Guard and experience in fishery boardings, and that finding a person in violation has no bearing on whether he is worthy of career advancement or award, and moreover, that he gave

Respondents credit for certain items as Turtle Mitigation Gear even when they were not technically in compliance with specifications. NOAA Br. at 13-14.

The Agency urges that Respondents' self-serving statement that Turtle Mitigation Gear was on board the vessel should be discredited and does not excuse liability. It points out that violations of the Magnuson-Stevens Act are strict liability offenses, it need not prove Respondents' intent or knowledge, and confusion or ignorance of the law is not an excuse for liability. NOAA Br. at 14-15. The Agency notes that failure to produce during the inspection the gear allegedly on board prevented assessment of the gear to determine whether it met specifications for Turtle Mitigation Gear. NOAA Br. at 6-7.

## 2. Discussion and Conclusions on General Issues

As noted above, the regulations require vessels with a freeboard height of four feet or less to have on board the following seven items: "a dipnet, tire, short-handled dehooker, long-nose or needle-nose pliers, bolt cutters, monofilament line cutters, and at least two types of mouth openers/mouth gags," and that "[t]his equipment must meet the specifications described in §§ 635.21(c)(5)(i)(E) through (L)" with certain modifications. 50 C.F.R. § 622.10(b)(1). The Commercial Reef Fish Vessel Mitigation Gear Checklist ("Checklist") is a list of each of the seven items along with a brief summary of such specifications and modifications, and in addition, the items required for vessels with freeboard height over 4 feet. NOAA Ex. 10. The Checklist presented by the Agency as an exhibit is a printed form that has no handwriting on it, no check marks on the blank lines next to each item, and nothing to suggest that Officer Ruane used that particular copy of the document during the inspection. *Id.* Yet the purpose of the form does not appear to be for documentation during a boarding, as it has no blank lines for identifying the vessel, date of boarding, or boarding officer's name. *Id.*

Officer Ruane testified that the Checklist "is standard in the Coast Guard job aid kit" and that the Coast Guard requires use of the Checklist whenever sea turtle mitigation inspections are conducted. Tr. 40, 46-47. He stated at the hearing that he used it during the boarding of the F/V Miss Stephanie on February 16, 2012 and "went line-by-line and asked the master for each of these items," and that he "was there to educate" and "if something would work," then he would count it. Tr. 40-41, 47, 85. He testified specifically and consistently about his observations with respect to each applicable item on the Checklist. He stated that he credited certain items as Turtle Mitigation Gear although they did not meet regulatory specifications, and explained what the deficiencies were, for the purpose of educating the vessel operator. Tr. 41-46, 85, 110. His testimony that he asked for each of the items on the checklist and provided time for Scalone to find each of them is consistent with the length of time of the fisheries inspection, which Scalone testified lasted about 45 minutes, and the time elapsed during the entire boarding, which he estimated as an hour and a half. Tr. 161; see also, Tr. 61, 97-98, 159, 293-94. Officer Ruane's testimony is credible and undermines Respondents' arguments that he was motivated to punish Respondents with a penalty and that he lacked an appropriate level of care in performing inspections.

Scalone testified that during the inspection, he was “not asked about a dipnet” or for a bolt cutter, and that Officer Ruane said “he needed to see the turtle mitigation gear.” Tr. 172, 181-182, 193. When his attorney asked him on direct examination, “So you were asked more or less just to provide the turtle mitigation gear; whatever you provided is what he accepted,” Scalone responded “correct.” Tr. 172. This testimony is not credited, as it is not affirmative or consistent, where he also testified, “I don’t recall if he expressly said ‘I need to see this, this and this.’ But he said ‘We need to see the gear.’” Tr. 159-160.

Although there was conflicting testimony as to whether the “stern light” on the vessel was working on the day of the inspection, the testimony as a whole suggests a misunderstanding rather than a false accusation or fabrication on the part of Officer Ruane. Scalone explained at the hearing that there was a stern light on the vessel, but because a stern light on the back of a vessel would be on the work deck and “it gets broken,” it was moved forward to the back of the roof, the transom. Tr. 157-158, 165-167.

Aside from the issue of whether Scalone signed after the statement on the Fisheries Violation Report, a signature under the statement that the “Vessel was missing 5 pieces of the turtle mitigation gear,” does not constitute an admission that the dipnet, cushioned surface, bolt cutters, and mouth gags or mouth openers were not on board the vessel. The items were not specifically listed on the inspection documents shown to Scalone, so he may not have been aware of which five items were counted as missing. NOAA Exs. 2, 3.

Any argument that Respondents intended to have the items on board, or did not know of the requirement, are irrelevant to liability, because violations of the Magnuson-Stevens Act are strict liability offenses. However, Respondents’ statement that Turtle Mitigation Gear was on board the vessel is not dismissed as irrelevant without further analysis, as the regulation states that “vessels . . . must have on board” the items of Turtle Mitigation Gear. 50 C.F.R. § 622.10(b)(iii).

The remaining arguments of the parties regarding the disputed items of Turtle Mitigation Gear are addressed below.

#### D. Bolt Cutters

Respondents argue that Scalone would have produced bolt cutters if Officer Ruane had specifically asked for them and had not prevented Castro from assisting Scalone during the inspection. R Br. § III.C.4, citing Tr. 170-173, 235. At the hearing, Stillwell and Castro testified that tools, including a bolt cutter, shown in a photograph were kept in a toolbox under the bunks on the F/V Miss Stephanie. R Ex. 11; Tr. 235-236, 259, 261-262.

The Agency argues that the bolt cutter in the photo does not appear to be at all near the required dimensions required by the regulations. NOAA Br. at 7.

The Agency’s point is well taken. The regulations include the following “minimum design standards”:

They must be approximately 17 inches . . . in total length, with 4-inch . . . long blades that are 2 ¼ inches . . . wide, when closed, and with 13-inch . . . long handles.

50 C.F.R. § 635.21(c)(5)(i)(J). In the photograph, although there is no indication of the measurements of the bolt cutter, the relative proportions can be seen. The blades of the bolt cutters are very short, about half as long as the width of the blades, and thus they cannot be four inches long and 2¼ inches wide. Respondents presented testimony that the bolt cutters on board the F/V Miss Stephanie were used for purposes other than for releasing sea turtles. Tr. 176, 259. Thus, Respondents' evidence indicates that any bolt cutters on board the vessel were not designated as, and did not meet the requirements for, Turtle Mitigation Gear.

A preponderance of the evidence shows that the vessel failed to have on board bolt cutters as specified by the applicable regulations.

#### E. Mouth Openers/Mouth Gags

Respondents assert that during the inspection, Scalone "produce[d] a piece of rope," and while Officer Ruane deemed it non-compliant because it was not six feet in length, it met the standard of 50 C.F.R. § 635.21(c)(5)(i)(L), which allows any size rope that creates a hank at least two inches thick. R Br. § III.C.2. Furthermore, Respondents argue, at the time of the inspection other rope was on board the vessel that could have been compliant, but Officer Ruane did not examine any other rope and did not specify the length of rope. R Br. § III.C.2; R Reply Br. § I.A. Respondents assert that their photographs show rope on the vessel "rolled up in hank position" and more than six feet in length. *Id.*; R Exs. 4, 6, 7. Finally, Respondents argue that mouth gags would have been produced if Officer Ruane had not "unreasonably prohibited" Castro from assisting Scalone during the inspection. R Br. § III.C.4.

The Agency alleges that although the greatest amount of time during the inspection was spent in looking for mouth openers or mouth gags, Scalone did not find any. NOAA Br. at 4. The Agency argues that there is no evidence that the mouth gags Respondents allege were on board met the regulatory requirements. NOAA Br. at 7.

The regulations require vessels to have on board at least two of the seven types of mouth openers and mouth gags described in 50 C.F.R. § 635.21(c)(5)(i)(L)(5): a block of hard wood, a set of three canine mouth gags, a set of two sturdy dog chew bones, a set of two rope loops covered with hose, a hank of rope, a set of four PVC splice couplings, or a large avian speculum. 50 C.F.R. § 635.21(c)(5)(i)(L).

When asked at the hearing whether he went through each of the seven types of possible mouth gags with Scalone, Officer Ruane answered in the affirmative and then stated that he "went right through the checklist, and I would read off examples of what was acceptable." Tr. 99-100, 102. He stated that Scalone showed PVC pipe that was in use for vessel operation, and ropes, but he did not see any ropes covered with hose or that were six feet in length. Tr. 46, 91. He testified that a hank of rope is already folded up rather than being made when a turtle is on

board, but if he saw a piece of rope of the appropriate size and thickness to make a mouth gag but not folded, he would not find a violation but that he would “fix it on the spot, show him how to do it.” Tr. 102-103.

Scalone testified that after Officer Ruane disembarked from the F/V Miss Stephanie, he talked to Castro, who “knew where the piece of PVC pipe was,” “the wood,” “the rope,” and the de-hookers, but he did not specify any other Turtle Mitigation Gear items. Tr. 171, 173-174. Castro testified that in a cubby in the wheelhouse, there was “the PVC pipe” and a block of wood, and that on deck in front of the dipnet was a rope, which was longer than six feet. Tr. 257-258, 263. Respondents presented a photo that depicts, attached to the bulkhead in front of a dipnet, a looped segment of rope, which Scalone testified was “probably a dock line . . . thirty feet long” and a half-inch thick, “wrapped up” for storage so it doesn’t tangle. Tr. 129-130; R Ex. 4. When asked whether it is “capable of fashioning [into] a two- to four-inch . . . hank,” he answered “I can do that.” Tr. 130. Stillwell did not testify specifically as to mouth gags or mouth openers, but simply acknowledged that he bought Turtle Mitigation Gear and that Castro knew where it was on the boat. Tr. 241-242, 249.

The references in testimony to “PVC pipe” do not support a finding that “a set of four PVC splice couplings,” as listed in 50 C.F.R. § 635.21(c)(5)(i)(L)(6), was on board. The vague references to wood also do not support a finding that a block of wood, as listed in the regulation, was on board, as there is no indication in the record as to its size or shape, whether it could be suitable for use as a mouth gag, whether it was “a smooth block of hard wood,” or whether it had dimensions of approximately 11 inches long and one inch thick, as specified in 50 C.F.R. § 635.21(c)(5)(i)(L)(1).

A “hank of rope” is described in the regulations as follows:

Placed in the corner of a turtle’s jaw, a hank of rope can be used to gag open a sea turtle’s mouth. A 6-foot (1.83 m) lanyard of approximately 3/16-inch (4.76 mm) braided nylon rope may be folded to create a hank, or looped bundle, of rope. Any size soft-braided nylon rope is allowed, however it must create a hank of approximately 2-4 inches (5.08 cm-10.16 cm) in thickness.

50 C.F.R. § 635.21(c)(5)(i)(L)(5). Respondents’ evidence of rope on board the vessel does not show that it was folded into a hank of approximately two to four inches thick at the time of the inspection. A rope that is not folded into such a hank at the time of the inspection, particularly a rope thirty feet in length and used for other purposes on the vessel, simply does not meet the specifications of 50 C.F.R. § 635.21(c)(5)(i)(L)(5). The regulation specifies “a hank of rope” and defines how it is made, and does not merely require a certain length of rope that may be folded later into a hank. The rope must be already formed into a hank in order to prompt the crew to use it as a mouth gag when a sea turtle is on board the vessel, or it would not serve its purpose.

A preponderance of the evidence shows that there were no mouth gags or mouth openers as defined in 50 C.F.R. § 635.21(c)(5)(i)(L) on board the F/V Miss Stephanie on the date of the inspection.

#### F. Cushioned Surface

The applicable regulations require that a tire be on board meeting the following specifications of 50 C.F.R. § 635.21(c)(5)(i)(F):

A minimum of one tire is required for supporting a turtle in an upright orientation while it is onboard, although an assortment of sizes is recommended to accommodate a range of turtle sizes. The required tire must be a standard passenger vehicle tire, and must be free of exposed steel belts.

The following modification to that requirement applies to vessels with a freeboard height of four feet or less:

life rings, seat cushions, life jackets, and life vests or any other comparable, cushioned, elevated surface that allows boated sea turtles to be immobilized, may be used as alternatives to tires for cushioned surfaces as specified in § 635.21(c)(5)(i)(F) of this chapter.

50 C.F.R. 622.10(b)(1)(iii).

Respondents' position is that the life ring and life jackets on board the vessel are permissible Turtle Mitigation Gear under the regulations. Respondents point out that Officer Ruane noted two life jackets and a life ring on board during the administrative inspection, but that he did not count them as Turtle Mitigation Gear because they were not presented by Scalone as such. Respondents argue that there is no legal authority to support the Agency's interpretation that life jackets designated as Personal Flotation Devices (PFDs) for the persons on board cannot meet the requirement for Turtle Mitigation Gear. They argue further that a situation in which life vests were needed as PFDs would not be a situation that would allow for care to be given to a hooked sea turtle. Furthermore, Respondents and Castro testified that two additional life vests were on board the vessel on the date of the inspection. R Br. § III.C.1.; R Reply § 1.C.

In reply, the Agency points out Coast Guard regulations for commercial fishing vessels require each vessel to be "equipped with at least one . . . wearable personal flotation device of the proper size for each individual on board . . ." NOAA Reply Br. at 3 (quoting 46 C.F.R. § 28.110). The Agency supports the accuracy of Officer Ruane's count of PFDs based on the importance of properly recording on the Form 4100 (NOAA Ex. 4) the number of PFDs and people on board, for search and rescue situations. NOAA Reply Br. at 3-4.

Officer Ruane testified that he "went line-by-line" from the Checklist and asked Scalone for each of the items of Turtle Mitigation Gear, including a "cushioned surface." Tr. 40-41, 43. The line on the Checklist for the cushioned surface reads as follows: "Life rings, seat cushions, life jackets, and life vest may be used as alternative to automobile tire for cushioned surfaces." NOAA Ex. 10. It is not entirely clear from the testimony that Officer Ruane read that whole line to Scalone, but Respondents have not cited to any requirement that each line must be read in its entirety to the vessel operator during an inspection. The evidence shows that Officer Ruane

gave Scalone ample opportunity to produce the items during the inspection. Findings of Fact 24, 25, 29.

Officer Ruane testified that the life ring he saw on the vessel would not suffice as a “cushioned surface.” Tr. 103-104. Indeed, the regulation does not state that *any* life ring meets the requirement. The regulation specifies that they “allow[] boated sea turtles to be immobilized” and “may be used as alternatives to tires for cushioned surfaces as specified in § 50 C.F.R. § 635.21(c)(5)(i)(F),” which in turn states that the tire is “for supporting a turtle in an upright orientation while it is onboard” and that it “must be a standard passenger vehicle tire.” 50 C.F.R. §§ 622.10(b)(1)(iii), 635.21(c)(5)(i)(F). Officer Ruane explained at the hearing that the life ring on board the F/V Miss Stephanie did not meet those requirements because it would not support an average sea turtle given the large size of the life ring, and it was not a cushioned surface,” as it was “relatively hard.” Tr. 103-104. He and Scalone estimated the size of the life ring as approximately 36 inches in diameter. Tr. 104, 221. Scalone stated that the life ring was made of styrofoam, plastic and polypropylene, and Officer Ruane explained that Coast Guard approved life rings are required to be of “hard plastic.” Tr. 221, 295.

The life ring on board was significantly larger than a passenger vehicle tire, life jacket or seat cushion, and very large relative to Coast Guard specifications for life rings, which is between 20 and 30 inches in diameter. 46 C.F.R. §§ 160.050-2; 160.150-2. Respondents have not rebutted Officer Ruane’s testimony with any showing that the life ring on board the vessel would “allow[] boated sea turtles to be immobilized” and would be appropriate as “as [an] alternative[] to tires for cushioned surfaces” to “support[] a turtle in an upright orientation while it is onboard.” § 50 C.F.R. § 635.21(c)(5)(i)(F).

Furthermore, the fact that Officer Ruane documented that a life ring and life jackets were on board the vessel does not establish that Respondents met the requirement for a cushioned surface. Finding of Fact 28; NOAA Ex. 4; Tr. 62, 74, 84, 101. Scalone testified that there were four identical life jackets on board, located “right above the captain’s seat,” attached to the bulkhead. Tr. 156-157, 220. Stillwell testified that the F/V Miss Stephanie had been equipped with four life jackets since he bought the vessel, and Castro testified that there were always four life jackets “in the wheelhouse, strapped up on the ceiling.” Tr. 232, 259, 260. Nevertheless, Scalone did not point out a life jacket or a life ring when Officer Ruane requested that he produce a cushioned surface as Turtle Mitigation Gear. Finding of Fact 20. The separation of Castro from Scalone during the inspection does not affect Respondents’ liability, particularly in this case, where Castro was not familiar with all of the required items of Turtle Mitigation Gear. Finding of Fact 27; Tr. 155, 170-173, 256. When asked at the hearing where the items were kept on the vessel, he referred to a dipnet, and stated that the other gear, including “the PVC pipe,” a block of wood, needle-nose pliers, and hook extractors, were stowed “in a little cubby.” Tr. 257-258. He only mentioned a rope, bolt cutters and life jackets when Respondents’ attorney asked about them, but did not identify them as Turtle Mitigation Gear and he did not know what a hank of rope was. Tr. 258-259. The life jackets were not stowed in a “little cubby” but were “strapped up on the ceiling.” Tr. 259. His testimony shows that he did not know that a life jacket or life ring could serve as an item of Turtle Mitigation Gear.

The captain's failure to identify any life jacket or other personal flotation device on board as a cushioned surface for immobilizing a sea turtle means that such device would not have served as Turtle Mitigation Gear in the event that a sea turtle was caught. Therefore, it cannot be considered as sufficient to meet one of the seven items required by 50 C.F.R. § 622.10(b)(1)(iii).

The Agency has shown by a preponderance of the evidence that Respondents failed to comply with the requirement of 50 C.F.R. § 622.10(b)(1)(iii) to have on board "life jackets, and life vests or any other comparable, cushioned, elevated surface that allows boated sea turtles to be immobilized" to serve as an "alternative[] to tires for cushioned surfaces" as an item of Turtle Mitigation Gear.

#### G. Dipnet

Officer Ruane testified that he "didn't see a dipnet at all on board" and that Scalone did not show him a dipnet during the inspection. Tr. 42-43, 85, 116. Scalone, Stillwell and Castro, on the other hand, testified that a dipnet was mounted with zip ties on the starboard side bulkhead of the vessel in February 2012. Tr. 127-129, 140-141, 144, 230-232, 257. Respondents presented photographs showing a dipnet, allegedly taken on the F/V Miss Stephanie before and after the inspection, bearing date marks of February 13, 2012; March 23, 2012; April 11, 2012; and May 21, 2012. R Br. § III.C.3; R Exs. 4, 6, 7, 8. Stillwell testified that he purchased the dipnet for the F/V Miss Stephanie in 2004 or 2005 and mounted it permanently on the wall, and that it has never been removed. Tr. 230-232.

Two of the photographs showing a dipnet, dated February 13 and May 21, 2012, include a dog in the photo. R Exs. 4, 7. However, Officer Ruane denied seeing a dog on board on the day of the inspection. Tr. 65, 92, 93. NOAA suggests that the photos do not depict conditions on the vessel on February 16, 2012, pointing out Scalone's admission that the camera used for taking the photos is capable of changing dates printed on the photo, and his testimony that he trained the dog to bark at boats, which would draw the attention of an inspector. NOAA Br. at 14, citing Tr. 65, 138-139, 197.

Respondents testified that the photos show Scalone's dog, which was always on board with him on fishing trips, including during the inspection. Tr. 141-142, 154-155, 240. Scalone and Castro testified that Officer Ruane instructed his crewman to take Castro with the dog to the back deck, away from Scalone. Tr. 155, 256. Respondents argue that the photos with the dog impeach Officer Ruane's credibility and reliability of his memory. R Br. § III.C.3; R Reply Br. § 1.B.

To the contrary, the testimony and evidence concerning the dog does not diminish the credibility or reliability of Officer Ruane's testimony, as the presence of a dog was not relevant to his inspections. Even if he saw a dog on board, he testified that he would not have made any notations of a dog being aboard. Tr. 92. Scalone testified that the dog is "[v]ery friendly." Tr. 196-197. Thus if a dog was indeed on board but did not interfere with the inspection or pose any other problem on the vessel, there is no reason for Officer Ruane to remember, two years later, an irrelevant detail such as whether or not a dog was on board.

Given the small size of the vessel, the location of the dipnet in the photos, the facts that Officer Ruane read to Scalone the items of required gear and looked all over the vessel, and the testimony of Officer Ruane as a whole, an inference must be drawn that Scalone would have pointed out the dipnet and that Officer Ruane in any event would have seen it, if it was in fact on board during the inspection. Findings of Fact 3, 13, 24. Therefore, the evidence supports a finding that the dipnet was not on board the vessel on February 16, 2012, and suggests that it was later placed there and photos taken with a manipulated date stamp. Alternatively, if the dipnet was in fact on board the vessel, Officer Ruane may not have counted it as acceptable Turtle Mitigation Gear when comparing it to the requirements stated on the Checklist: that the dipnet must have a 31 inch hoop and 38 inch bag depth, with a handle able to support 100 pounds. NOAA Ex. 10.

Respondents have neither asserted nor provided evidence that a dipnet on board the vessel met the regulatory specifications that it “must have a sturdy net hoop of at least 31 inches . . . inside diameter and a bag depth of at least 38 inches . . . to accommodate turtles below 3 ft . . . carapace length,” with mesh openings not less than three inches and no sharp edges or burrs on the hoop. 50 C.F.R. § 635.21(c)(5)(i)(E)(1). Stillwell vaguely testified that it was “huge.” Tr. 245. A determination cannot be made merely from this vague description, or from the Respondents’ photographs depicting the dipnet, that it met these requirements.

In conclusion, a preponderance of the evidence shows that Respondents failed to have on board the F/V Miss Stephanie on the date of the inspection a dipnet as required by 50 C.F.R. § 622.10(b)(1)(iii).

#### H. Joint and Several Liability

Respondents are charged jointly and severally in this matter. Stillwell testified that he had obtained the Turtle Mitigation Gear for the F/V Miss Stephanie. Tr. 230, 245. Assuming this were true, the mere fact of having previously purchased the equipment, and thus having an intent to comply, does not excuse liability. Violations of the Magnuson-Stevens Act and implementing regulations are strict liability offenses. *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999); *Roche v. Evans*, 249 F. Supp. 2d 47, 59 (D. Mass. 2003); see *Timothy A. Whitney*, 6 O.R.W. 479, 1991 NOAA LEXIS 33, at \*10 (ALJ, July 3, 1991) (quoting *Accursio Alba*, 2 O.R.W. 670, 1982 NOAA LEXIS 29, at \*7 (NOAA App. 1982)) (“[S]ciencer is not an element of a civil offense under . . . 16 U.S.C. § 1857.”); cf. *Tart v. Massachusetts*, 949 F.2d 490, 502 (1st Cir. 1991) (legislative silence as to state of mind should not be construed as including a mens rea requirement in a statute for a criminal offense where it is a regulatory offense not known at common law).

Holding Respondents jointly and severally liable is consistent with the rationale of *respondeat superior*, 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.” *James Chan Song Kim, et al.*, 2003 NOAA LEXIS 4, at \*29 (ALJ, Jan. 7, 2003). The parties stipulated that Stillwell authorized Scalone to conduct commercial fishing on the F/V Miss

Stephanie in accordance with the permit for issued the vessel. Finding of Fact 6. It is concluded that Respondents are jointly and severally liable for the violation found herein.

In sum, taking the record as a whole, the Agency has proved by a preponderance of the evidence that Respondents failed to comply with sea turtle mitigation measures, namely the requirements regarding a dipnet, bolt cutters, cushioned surface, and two types of mouth openers or mouth gags, in violation of 50 C.F.R. § 622.10(b)(1). Therefore, Respondents violated the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A) and 50 C.F.R. § 622.7(ff), as alleged in the NOVA.

## V. Penalty

### A. Statutory and Regulatory Provisions

Any person found to have committed an act made unlawful by the Magnuson-Stevens Act “shall be liable to the United States for a civil penalty” not to exceed \$140,000 per violation. 16 U.S.C. § 1858(a); 15 C.F.R. § 6.4(f)(14) (2011) (maximum penalty of \$100,000 in the Act increased to \$140,000 as authorized by the Inflation Adjustment Act). The Magnuson-Stevens Act states that, in determining the amount of such penalty, “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” shall be taken into account. 16 U.S.C. § 1858(a); *see* 15 C.F.R. § 904.108.

The Act also allows consideration of a respondent’s ability or inability to pay a penalty. 16 U.S.C. § 1858(a); *see also* 15 C.F.R. § 904.108(b)-(h). Under the Act, “any information provided by the violator relating to the ability of the violator to pay” may be considered, but only if “the information [was] served ... at least 30 days prior to [the] administrative hearing.” 16 U.S.C. § 1858(a); *see* 15 C.F.R. § 904.108(b)-(h). The regulations provide that the burden is on the respondent to prove such inability “by providing verifiable, complete, and accurate financial information to NOAA.” 15 C.F.R. § 904.108(c).

The Administrative Law Judge is responsible for “[a]ssess[ing] a civil penalty or impos[ing] a permit sanction, condition, revocation, or denial of permit application, taking into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631-32 (June 23, 2010). The current regulation “eliminates any presumption in favor of the civil penalty or permit sanction assessed by NOAA in its charging document,” and “requires instead that NOAA justify at a hearing ... that its proposed penalty or permit sanction is appropriate, taking into account all the factors required by applicable law.” 75 Fed. Reg. at 35,631.

### B. Penalty Policy

On March 16, 2011, NOAA issued a “Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions” (“Penalty Policy”) which provides guidance for penalty

assessments under multiple statutes enforced by NOAA. While it states that it “provides guidance for the NOAA Office of the General Counsel” and refers to NOAA attorneys determining proposing penalties, it may be useful, yet is not binding, for Administrative Law Judges to use as an analytical framework for determining a penalty in an initial decision. See *Student Public Interest Research Group, Inc. v. Hercules, Inc.*, No. 83-3262, 1989 U.S. Dist. LEXIS 16901, at \*5 (D. N.J. Apr. 6, 1989) (a penalty policy “provides a helpful analytical framework” for the court in arriving at a civil penalty).

The Penalty Policy was included as Exhibit 9 by the Agency. Under the Penalty Policy, a civil penalty is calculated as follows:

- (1) A “base penalty,” which represents the seriousness of the violation, calculated by:
  - (a) an initial base penalty amount reflecting:
    - (i) the gravity of the violation and
    - (ii) the culpability of the violator, and
  - (b) adjustments upward or downward to reflect:
    - (i) history of non-compliance,
    - (ii) commercial or recreational activity, and
    - (iii) good faith efforts to comply after the violation, cooperation/non-cooperation;
- (2) plus an amount to recoup the proceeds of any unlawful activity and any additional economic benefit of noncompliance.

NOAA’s Ex. 9 at 4-5.

To determine the gravity component of an initial base penalty, a search is made for the particular violation on the schedules in Appendix 3 of the Penalty Policy. The schedules assign an “offense level” to the most common violations charged by the Agency, which levels under the Magnuson-Stevens Act range from least significant (“I”) to most significant (“VI”) and are designed to reflect the nature, circumstances, and extent of the violations. *Id.* at 4-5, 7-8. Where no offense level has been assigned to a violation, the Penalty Policy directs use of the offense level of an analogous violation or, if no similar offense can be identified, by assessing the gravity based on criteria listed in the NOAA’s Ex. 9 at 5 n.4, 7-8. The criteria include: nature and status of the resource at issue in the violation; extent of harm done or potential harm to the resource or regulatory scheme or program; whether the violation involves fishing in closed areas, in excess of quotas, without a required permit, or with unauthorized gear; whether the violation provides a significant competitive advantage over those operating legally; the nature of the regulatory program (limited versus open access fishery); and whether the violation is difficult to detect without on-scene enforcement presence or other compliance mechanisms. *Id.* at 8.

Next, culpability of the alleged violator is assessed as one of four levels in increasing order of severity: (A) unintentional, including accident and mistake; (B) negligence; (C) recklessness; and (D) intentional. NOAA’s Ex. 9 at 8-9. The Penalty Policy lists factors to be

considered when assigning culpability, including whether the alleged violator took reasonable precautions against the events constituting the violation, the level of control the alleged violator had over these events, whether the alleged violator knew or should have known of the potential harm associated with the conduct, and “other similar factors as appropriate.” *Id.* at 9.

The four levels of culpability reflected in the matrices:

An intentional violation generally exists when a violation is committed deliberately, voluntarily or willfully, i.e. the alleged violator intends to commit the act that constitutes the violation. \* \* \* \*

Recklessness is a conscious disregard of a substantial risk of violating conservation measures that involves a gross deviation from the standard of conduct a law-abiding person would observe in a similar situation. Recklessness occurs where someone does not intend a certain result, but nonetheless foresees the possibility that his or her actions will have that result and consciously takes that risk. Recklessness may also occur where someone does not care about the consequences of his or her actions. Recklessness involves a lesser degree of fault than intentional wrongdoing but a greater degree of fault than negligence.

Negligence is the failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances. Negligence denotes a lack of diligence, a disregard of the consequences likely to result from one’s actions, or carelessness. Negligence may arise where someone exercises as much care as he or she is capable of, yet still falls below the level of competence expected of him or her in the situation. The failure to know of applicable laws/regulations or to recognize when a violation has occurred may itself be evidence of negligence.

Finally, an unintentional act is one that is inadvertent, unplanned, and the result of an accident or mistake. An unintentional act is one not aimed at or desired. This culpability level reflects the strict liability nature of regulatory violations, and the fact that the statutes NOAA enforces are designed to protect marine resources even where a violation is unintended.

*Id.* at 8-9.

The gravity component and culpability component form the two axes of penalty matrices or each of the statute, set out in Appendix 2 of the Penalty Policy. A range of penalties appears in each box on the matrix. A penalty range is thus determined by selecting the appropriate level for gravity and culpability on the axes. The initial base penalty is the midpoint of the penalty range within the box. NOAA’s Ex. 9 at 5.

The adjustment factors provide a basis to increase or decrease a penalty from the midpoint of the penalty range within a box, or to select a different penalty box in the matrix. *Id.* at 10. The Penalty Policy states that a prior violation of natural resource protection laws are evidence of intentional disregard for them, or reckless or negligent attitude toward compliance,

and may indicate that the prior enforcement response was insufficient to deter violations. Therefore, the Penalty Policy provides that a penalty may be increased where a respondent had a prior violation.

Another adjustment factor in the Penalty Policy provides for a decrease in the penalty in certain circumstances where the violation arises from non-commercial activity. *Id.* at 11. The Penalty Policy states that a decrease is appropriate because an individual recreational violator is likely to have a lesser impact on the natural resource or regulatory program, typically participates in regulated activities less frequently, and does not have the same degree of economic gain. However, such an adjustment in the penalty is not always appropriate. *Id.*

The final adjustment factor reflects the activity of the violator after the violation, in terms of good faith efforts to comply and cooperation or non-cooperation. The Penalty Policy lists the following examples of good faith factors to decrease a penalty: self-reporting, providing helpful information to investigators, and cooperating with investigators. The Penalty Policy states that no downward adjustments are made for efforts primarily consisting of coming into compliance, or for self-reporting where discovery of the violation was inevitable. *Id.* at 12. The Penalty Policy describes bad faith factors, to increase a penalty, as attempts to avoid detection, destroying evidence, intimidating or threatening witnesses, or lying. *Id.*

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

#### C. Arguments of the Parties

The Agency proposes a penalty of \$5,000 for the Respondents' violation. The Agency states that it considered the relevant statutory provisions, the provisions of 15 C.F.R. § 904.108, and the Penalty Policy, in assessing the proposed penalty. NOAA Br. at 16. The Agency explains that the required sea turtle mitigation gear is intended to minimize that harm to the turtle if incidentally caught, and that all species of sea turtles found in the Gulf of Mexico are either endangered or threatened. NOAA argues that fishing without knowing where sea turtle gear was located "put any endangered or threatened sea turtle at risk if caught." *Id.* at 16-17. The Agency urges that its regulations "stand as the last line of defense against the permanent loss of sea turtles for this and future generations." *Id.* at 17.

The Respondents argue that they are law abiding fishermen, without a history of wrongdoing over years of fishing, with a well-managed fishing operation. R Br. § III.C.5. Respondents note that the boarding occurred on Scalone's second fishing trip with the vessel, so he was paired with Castro who knew where items were on the vessel. *Id.* Respondents did not raise an argument as to inability to pay the proposed penalty.

D. Discussion and Conclusions

1. Nature, Circumstances, Extent and Gravity of the Violation

The requirement that a vessel have all the Turtle Mitigation Gear on board allows safe and effective release of sea turtles caught in fishing gear, with minimal injury to the turtle. Finding of Fact 31. Turtle Mitigation Gear is not readily available, the turtle could experience shock, a major factor in turtle fatalities associated with release from fishing gear. Finding of Fact 32. Appendix 3 of the Penalty Policy provides that under the Magnuson-Stevens Act, the violation of “failing to have required gear onboard” is a gravity Level II offense, although the listing is not specific to Turtle Mitigation Gear. NOAA Ex. 9 at 32. It is noted that “[f]ailing to comply with sea turtle mitigation gear and handling requirements by international agreement,” in the context of tuna fishing, as a gravity Level III offense. *Id.* at 39. It is further noted that Appendix 3 lists under the Endangered Species Act (which has a different penalty matrix than the Magnuson-Stevens Act) violations involving discrepancies in Turtle Excluder Devices: those that are “likely to kill some turtles encountered” are Level II offenses and those that are “likely to kill most turtles encountered” are Level III offenses. *Id.* at 50. Based on these other similar offenses, the relative gravity of failure to have the required Turtle Mitigation Gear on board is appropriately assessed as a Level II offense.

Nevertheless, the gravity level of a violation in particular instances may vary, as gravity reflects not only the nature of the violation, but also the extent and circumstances of the violation. Some of the evidence of record presents the question of whether the gravity should be reduced to reflect a lesser extent of violation, or to reflect the particular circumstances of this case. First, although the Respondents failed to comply with the requirements regarding a dipnet, bolt cutters, cushioned surface and mouth openers/mouth gags, the Respondents complied with the remaining requirements of the Turtle Mitigation Gear. Officer Ruane indicated in his testimony that inspections finding three pieces of missing Turtle Mitigation Gear result in only a written warning. Tr. 281. Scalone produced de-hookers, needle-nose pliers, and line cutters during the inspection. Finding of Fact 23. This fact loses some of its significance, however, considering the testimony that the de-hookers and needle-nosed pliers are used on the vessel for purposes other than releasing sea turtles, and that the latter were not 12 inches in length as required by 50 C.F.R. § 635.21(c)(5)(i)(I). Findings of Fact 15, 17. Furthermore, these items are not useful without a dipnet, cushioned surface and mouth gags for bringing on board, immobilizing, and holding open the mouth of a turtle, in the circumstances when a turtle should be brought on board.

Second, life jackets on board potentially could serve as an immobilizer, if designated as such. However, as noted above, Scalone’s failure to identify them as Turtle Mitigation Gear showed that they were not designated to serve as, and thus would not serve as, Turtle Mitigation Gear in the event a sea turtle was caught. Further suggesting that life jackets would not be used as such gear, Scalone indicated reluctance to bring on board a sea turtle, as he testified that sea turtles “are not small animals. They’ve got a beak that can cut a four-by-four of wood in half with one snap. . . they’re large animals. . . I’ve never met one. I don’t plan on meeting one . . . If . . . you’re trying to pull a three-or four hundred pound animal out of his environment and he’s

upset at ya, he's gonna try and bite you." Tr. 183-184. There is no basis for reducing the penalty on the basis of the presence of life jackets on the vessel.

The presence of some of items that may be used as Turtle Mitigation Gear on board a vessel does not warrant a reduction of penalty in the circumstances of this case. The items were not designated and kept together as Turtle Mitigation Gear. In Officer Ruane's experiences of boarding vessels, most vessels have the Turtle Mitigation Gear collected together in a bag or box, so that the items are not lost or misplaced. Tr. 39-40, 110. On a smaller vessel, a few of the items may not fit together in a small box for stowage, but the captain must be aware of their location so they can be readily accessed when a turtle is caught and time is of essence for its survival. Findings of Fact 31, 32. The missing items in this case, the dipnet, cushioned surface, mouth gags and bolt cutter, are crucial for properly removing hooks and saving the life of the turtle. Finding of Fact 33. As Officer Ruane explained, if Turtle Mitigation Gear items cannot be found within a reasonable amount of time, it is the same as not having the items on board. Tr. 45. Viewing the evidence as a whole, the purpose of the regulatory requirement to have the Turtle Mitigation Gear on board the vessel was wholly thwarted in this case.

Nevertheless, the small size of the vessel, 33.7 feet in length, suggests a lesser potential for harm than a larger fishing vessel, and thus some reduction in the penalty. Finding of Fact 3.

## 2. Culpability

The evidence shows that Respondents' culpability at least meets the "negligence" level of culpability, that is, a "lack of diligence, a disregard of the consequences likely to result from one's actions, or carelessness." NOAA Ex. 9 at 9. Scalone merely relied upon Castro to assure that the equipment was on board and locate it. Tr. 126-27, 170. He testified that before he embarked on the first fishing trip on the F/V Miss Stephanie, he "went over the vessel" with Castro, but his testimony refers generally to Turtle Mitigation Gear, and indicates that he could not identify items of required Turtle Mitigation Gear *before or during the inspection*, and that he did not know whether or not all the items were on board. For example, he testified as follows:

Q: And during that time [going over the vessel with Castro before the fishing trip], did you talk about sea turtle mitigation gear?

A: Yes.

Q: And do you know what sea turtle mitigation gear is?

Q: Yes, sir, I do.

\* \* \* \*

A: The issues that I have with this statement that there were five missing pieces of turtle mitigation gear were, the gear was aboard the vessel. \* \* \* \*

I, as the captain, knew where the safety equipment was. And I had a general knowledge of what else was on the boat, I knew everything was there. Because Dave [Stillwell] and I talked about it, and Ronnie [Castro] and I talked about it before we left on the trips. So

the equipment was there. I couldn't get Ronnie to find – to ask Ronnie where this equipment was, 'cause we were separated.

\* \* \* \*

But for the TMG [Turtle Mitigation Gear], I did not know where all that equipment was. It was on the boat. And as soon as the boarding was over, Ronnie and I looked up and I went, "Well, he wrote these up." Ronnie says, "Well here's the wood, here's the rope, and here's" – "here's this. So why didn't you show it to him?" I said "I didn't know it was there."

\* \* \* \*

What he asked me for was the turtle mitigation gear. And I said – and I believe I said it was on board, and that I would have to ask my crewman where it was. Because I was on my first or second trip on the vessel, so I was not aware of where all of the gear was.

Tr. 126-127, 170-171, 194. Scalone's failure to check the vessel to ensure that it had Turtle Mitigation Gear on board prior to taking it out on a commercial fishing trip, and his failure to familiarize himself with where it was located on the vessel, was a failure "to exercise the degree of care that a reasonably prudent person would exercise." Finding of Fact 26; NOAA Ex. 9 at 9. Furthermore, Scalone's testimony suggesting his reluctance to bring a turtle on board, and his ignorance of Turtle Mitigation Gear requirements despite his decades of experience as a fishing captain in the Gulf of Mexico, suggests a gross deviation from the standard of conduct of a law-abiding person. Finding of Fact 4; Tr. 183-184.

Stillwell testified that he has been fishing since 1993, and owned the F/V Miss Stephanie since 1997, and that it goes out for approximately 20 fishing trips per year. Tr. 225, 247-248. His testimony as to obtaining Turtle Mitigation Gear was vague except as to the dipnet. Tr. 230-231, 235-236, 249-250. Even if they were once placed on board, he admitted that items are removed, borrowed, and sometimes go missing off the F/V Miss Stephanie. Tr. 235-236, 243. Thus he could have foreseen that items of Turtle Mitigation Gear may not be on board, resulting in a situation where a sea turtle is caught and the crew lacks the gear to safely release it. Nevertheless, he vaguely testified that he only periodically performs checks on his boats, and relies upon captains to check the equipment before going out most of the time. Tr. 242-244. He relied on Castro generally to familiarize Scalone with the vessel, but his testimony was not specific as to Castro's knowledge of the location of Turtle Mitigation Gear. Tr. 170, 241-242. His failure to take any further steps to ensure the F/V Miss Stephanie was equipped with Turtle Mitigation Gear prior to the vessel's departure for a fishing trip, particularly when items are sometimes missing from the boat, is at least a failure "to exercise the degree of care that a reasonably prudent person would exercise." NOAA Ex. 9 at 9.

Neither Respondent took reasonable precautions to ensure compliance with sea turtle bycatch mitigation requirements, and they should have known of the potential harm of not having the gear on board. Respondents' conduct in regard to the violation, viewing the evidence as a whole, is best characterized as negligent but approaching the level of recklessness, considering the factors listed in the Penalty Policy for assessing the level of culpability.

### 3. Matrix Value

Under the penalty matrix for violations of the Magnuson-Stevens Act, negligent violations of a Level II offense are assessed a penalty of \$4,000 to \$6,000. NOAA Ex. 9 at 25. Starting with \$5,000, the midpoint of the range for a negligent Level II offense, the penalty for the violation is reduced to account for the extent and circumstances of the violation, as discussed above. However, the higher level of Respondents' culpability counterbalances that reduction, resulting in a value of \$5,000 as an initial base penalty, considering the gravity of the offense and Respondents' culpability in this case.

### 4. Adjustment Factors and Economic Benefit

The record does not contain evidence that any of the Respondents have ever been cited for a violation of natural resource protection laws prior to the violation charged in the instant proceeding. The Penalty Policy matrix values are set consistent with the policy therein that the penalty is only adjusted upward for a history of prior violations and is not reduced for lack of prior violations. NOAA Ex. 9 at 10-11. Accordingly, the penalty is not reduced for Respondents' lack of prior offenses.

As to Respondents' good or bad faith after the violation, the evidence shows that Scalone was very cooperative with Officer Ruane during the boarding on February 16, 2012. Finding of Fact 30. However, in the circumstances of a simple inspection for gear and a failure to have it on board, and where there was no ongoing investigation, these facts are not significant in allowing for greater efficiency in administering the enforcement program. Therefore, a reduction in the base penalty is not warranted.

The Agency did not adjust its proposed penalty to reflect any avoided costs stemming from Respondents' failure to obtain the required turtle bycatch mitigation gear. The Turtle Mitigation Gear is estimated to cost approximately \$400. *See John Hill, et al.*, NOAA Docket No. SE1201470FM, 2014 NOAA LEXIS 2, \*40 (ALJ, May 6, 2014). The penalty assessed in this case far exceeds the cost of gear and is sufficient to deter a violator from avoiding purchase of Turtle Mitigation Gear as a cost of doing business. Therefore, an increase to the penalty for economic benefit of noncompliance is not warranted in this case.

### 5. Ability to Pay

The NOVA advised Respondents that they could seek to have the proposed penalty amount modified on the basis that they did not have the ability to pay, and that any such modification request would have to be made in accordance with 15 C.F.R. § 904.102 and be accompanied by supporting financial information. NOVA at 2. Respondents never raised an issue of inability to pay, and while they opposed the penalty in their PPIP, they never provided the required financial information. Respondents' PPIP at 6. Because liability is assessed jointly and severally in this case, and both Respondents are presumed able to pay the civil penalty, the penalty will not be reduced on the basis of Respondents' ability to pay.

F. Ultimate Conclusion

Taking into account the nature, circumstances, extent and gravity of the violation and Respondents' degree of culpability, an initial base penalty of \$5,000 is assessed. No adjustments are warranted for any history of prior offenses or other matters as justice may require. Therefore, Respondents are assessed jointly and severally a civil penalty in the amount of \$5,000.

## ORDER

**IT IS HEREBY ORDERED THAT** a civil penalty in the total amount of \$5,000 is assessed jointly and severally against Respondents David D. Stillwell and Rocco J. Scalone.

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

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

**PLEASE TAKE NOTICE**, that this Initial Decision becomes effective as the final Agency action, sixty (60) days after the date this Initial Decision is served, unless the undersigned grants a petition for reconsideration or the Administrator reviews the Initial Decision. 15 C.F.R. § 904.271(d).

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

**PLEASE TAKE FURTHER NOTICE**, that any petition for reconsideration of this Initial Decision must be filed within twenty (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 fifteen (15) days after a petition is filed, any other party to this proceeding may file an answer in support or in opposition. The undersigned will rule on any petition for reconsideration.

**PLEASE TAKE FURTHER NOTICE**, that any petition for review of this decision by the Administrator of NOAA must be filed within thirty (30) days after the date this Initial Decision is served and in accordance with the requirements of 15 C.F.R. § 904.273. If neither party seeks administrative review within thirty (30) days after issuance of this order, this initial decision shall become the final administrative decision of the Agency. A copy of 15 C.F.R. §§ 904.271-904.273 is attached.



M. Lisa Buschmann  
Administrative Law Judge  
U.S. Environmental Protection Agency