



UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:)	DOCKET NUMBER
)	
CAPT KEVIN T&V LLC and)	PI 1305092
DE HUU PHAM,)	F/V Capt Kevin
)	
Respondents.)	Dated: September 29, 2017
)	

INITIAL DECISION AND ORDER

Before: M. Lisa Buschmann, Administrative Law Judge
United States Environmental Protection Agency¹

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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.

I. Statement of the case

On October 6, 2014, counsel for the National Oceanic and Atmospheric Administration (“NOAA” or “Agency”) issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”) addressed to Captain Kevin T&V, LLC, owner of the F/V Capt Kevin, and De Huu Pham, operator of the F/V Capt. Kevin (“Respondent Pham”). The NOVA alleges in three counts that on or about November 5, 9, and 10, 2013, Respondents unlawfully conducted longline fishing in the longline fishing prohibited area surrounding the Main Hawaiian Islands in violation of the Magnuson-Stevens Fishery Conservation Act (“Magnuson-Stevens Act” or “Act”), 16 U.S.C. § 1857(1)(A), and one of the Act’s implementing regulations, 50 C.F.R. § 665.802(v). The NOVA seeks a total penalty of \$49,604.70, or \$16,534.90 per count, to be imposed jointly and severally against the Respondents for the alleged violations.

In response, a request for hearing was submitted by Respondent Capt Kevin T&V, LLC (referenced herein as “Respondent LLC”) on October 22, 2014. Thereafter, NOAA and Respondent LLC accepted my office’s invitation to participate in an Alternative Dispute Resolution (“ADR”) process, and they engaged in ADR until it terminated without resolution on February 10, 2015. I was then designated to preside in this proceeding, and both NOAA and Respondent LLC submitted Preliminary Positions on Issues and Procedures (“PPIP”) in April 2015.² Shortly thereafter, it became apparent that Respondent Pham had not been served with the NOVA. Consequently, the Agency personally served Respondent Pham on June 9, 2015.³ The other parties served Respondent Pham with their PPIPs in August 2015. Respondent Pham did not submit any PPIP and did not participate in this proceeding until he appeared at the hearing.

The hearing in this matter was held February 24 and 25, 2016, in Honolulu, Hawaii. The Agency and Respondent LLC together presented Joint Stipulations of Fact, Exhibits, and Testimony (JX 1). The Agency presented seven exhibits (AX 1- AX 7) and the testimony of Richard Kupfer, Brandon Jim On, Terry Boone, and Respondent Pham. Respondent LLC presented eight exhibits (CKX 1- CKX 8) and called as witnesses Vinh Tran and Respondent Pham. The parties presented joint stipulations, which were admitted into evidence as Joint Exhibit 1 (JX 1). Respondent Pham, who participated with the aid of a Vietnamese interpreter, did not offer any witnesses or exhibits. Tr. at 7-8.

After the hearing, I granted the Agency’s motion to conform the transcript to the actual testimony. The Agency and Respondent LLC submitted post-hearing briefs and then submitted reply briefs, on May 30 and June 13, 2016, respectively, upon which, Respondent Pham not having filed anything after the hearing, the record closed.

² The parties supplemented their PPIPs in January and February 2016.

³ See Agency’s Notice of Personal Service on Respondent Pham (June 12, 2015). While he was being served, Respondent Pham indicated he had no permanent residence and provided the special agent who served him with a land-based address for the F/V Queen Alina, where he was then working. At the end of the hearing, he asked to be served at the Honolulu address for VAK Fisheries, LLC. Transcript of Hearing (“Tr.”) 338-39.

II. Statutory and Regulatory Background

Congress passed the Magnuson-Stevens Fishery Conservation Management Act (“the Act”) in 1976 “to take immediate action 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.” Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 401, 90 Stat. 331 (codified at 16 U.S.C. § 1801 *et seq.*). The Act, as amended, aims to “promote domestic commercial and recreational fishing under sound conservation and management principles.” *Id.* Among other provisions, the Act established eight regional fishery management councils, including the Western Pacific Fishery Management Council, to manage fisheries within their respective geographic areas of authority and develop relevant regulations. Pub. L. No. 94-265, §§ 302(a), 303, 90 Stat. 347-48, 351-52. Section 307(1)(A) of the Act makes it 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). A “person” is “any individual . . . , any corporation, partnership, association, or other entity . . . , and any Federal, State, local, or foreign government or any entity of any such government.” 16 U.S.C. § 1802(36).

The Agency enforces regulations related to management of pelagic fish species,⁴ which around Hawaii have been traditionally captured by both longline and trolling gear. Pelagic Fisheries of the Western Pacific Region, 56 Fed. Reg. 28116 (June 19, 1991) (Emergency Interim Rule). Between 1987 and 1990, the longline fleet tripled in size, and the total amount of longline catches increased from nearly 4 million pounds to more than 13 million pounds. *Id.* Meanwhile, the number of commercial troll/handline vessels⁵ was also growing but catching fewer fish – down from 5.3 million pounds to 4.5 million pounds. *Id.* The shifting dynamics between these two sectors of the fishing industry led to serious conflicts, physical confrontation, and gear destruction among fishermen. *Id.* As a result, the Western Pacific Fishery Management Council became concerned by the potential for violence between longline and other fishers. Pelagic Fisheries of the Western Pacific Region, 56 Fed. Reg. 60961 (Proposed Rule) (1991). After a Council-appointed task force investigation, the Agency in 1992 closed the waters around the main Hawaiian Islands to longline fishing “to prevent gear conflicts between longline vessels and troll/handline vessels engaged in the pelagic fisheries.” Pelagic Fisheries of the Western Pacific Region, 57 Fed. Reg. 7661 (Final Rule) (1992); *see also* Transcript at 39 (Agency expert Richard Kupfer⁶ testifying that “NOAA decided to implement an exclusion zone for longliners which would allow the trawlers and the hand liners to fish closer to the islands because they typically have smaller vessels and there were safety concerns that would force the longliners to fish further out where their vessels were better suited to handle those operations”).

⁴ Species managed in the Western Pacific Pelagic Fisheries include tuna, billfish, shark, and squid. 50 C.F.R. § 665.800.

⁵ Handline fishing involves fishing “from a stationary or drifting vessel using hook and line gear other than longline gear.” 50 C.F.R. § 665.800. Troll fishing involves fishing “from a moving vessel using hook and line gear.” *Id.*

⁶ *See* n.13, *infra*.

Since 1992, the boundaries of the closed area around the Main Hawaiian Islands have changed slightly over the years and the relevant regulations have been restructured and consolidated in various ways. *See, e.g.*, Fisheries off West Coast States and in the Western Pacific, 61 Fed. Reg. 34570 (July 2, 1996) (Final Rule); Fisheries off West Coast States and in the Western Pacific, 71 Fed. Reg. 17985 (April 10, 2006) (Final Rule); Western Pacific Fisheries Regulatory Restructuring, 75 Fed. Reg. 2198 (Jan. 14, 2010) (Final Rule). Although the prohibited fishing area for many years expanded and contracted seasonally, the Agency eliminated the seasonal boundary change in 2012 to make the closure consistent with separate regulations intended to reduce mortalities and serious injuries among false killer whales in Hawaii-based longline fisheries. Taking of Marine Mammals Incidental to Commercial Fishing, 77 Fed. Reg. 71260 (Nov. 29, 2012) (Final Rule). Regulations “to reduce mortality and serious injury of the Hawaii Pelagic and Hawaii Insular stocks of false killer whales in the Hawaii-based deep-set and shallow-set pelagic longline fisheries” prohibit longline fishing within the same geographic coordinates as the area closed under 50 C.F.R. Part 665. 50 C.F.R. §§ 229.3(w), 229.37(a), (d).⁷ *See also* Transcript at 39-40 (Mr. Kupfer explained that the insular stock of false killer whales became listed as an endangered species so NOAA “closed off that area [closer to the islands] to longliners”).

The regulations provide at 50 C.F.R. § 665.802(v) that it is “unlawful for any person” to “[u]se longline gear to fish within a longline fishing prohibited area in violation of [50 C.F.R.] § 665.806,” except under limited circumstances that do not apply here. “*Longline gear* means a type of fishing gear consisting of a main line that exceeds 1 nm [nautical mile] in length, is suspended horizontally in the water column either anchored, floating, or attached to a vessel, and from which branch or dropper lines with hooks are attached.” 50 C.F.R. § 665.800. “*Longline fishing prohibited area* means the portions of the [exclusive economic zone] in which longline fishing is prohibited as specified in §665.806.” *Id.* Under the Magnuson-Stevens Act, “[t]he term ‘fishing’ means – (A) the catching, taking, or harvesting of fish; (B) the attempted catching, taking, or harvesting of fish; (C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or (D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C).” 16 U.S.C. § 1802(16).⁸

Among the areas in which longline fishing is prohibited under 50 C.F.R. § 665.806 are the Main Hawaiian Islands (“MHI”), which are “the islands of the Hawaii Archipelago lying to the east of 161° W. long.” 50 C.F.R. § 665.12. As stated in 50 C.F.R. § 665.806(a)(2): “The MHI longline fishing prohibited area is the portion of the [exclusive economic zone] around Hawaii bounded by straight lines connecting the following coordinate[s] in the order listed”:

⁷ The False Killer Whale Take Reduction Plan outlined in 50 C.F.R. Part 229 was authorized by the Marine Mammal Protection Act rather than the Magnuson-Stevens Act, under which this case is brought.

⁸ *See* 50 C.F.R. § 665.12 (implying that definitions from the Magnuson-Stevens Act and section 600.10 of the regulations are incorporated into regulations governing the western Pacific fisheries); 50 C.F.R. § 665.10 (applying the same statutory definition for the regulations).

Point	N. lat.	W. long.
A	18°05'	155°40'
B	18°20'	156°25'
C	20°00'	157°30'
D	20°40'	161°40'
E	21°40'	161°55'
F	23°00'	161°30'
G	23°05'	159°30'
H	22°55'	157°30'
I	21°30'	155°30'
J	19°50'	153°50'
K	19°00'	154°05'
A	18°05'	155°40'

III. Findings of Fact

The following findings⁹ are based on a thorough and careful analysis of the testimony of the witnesses, the exhibits entered into evidence, and the entire record as a whole.

1. Respondent Capt Kevin T&V, LLC¹⁰ is a Hawaii limited liability company organized and doing business in the State of Hawaii and is a “person” subject to the jurisdiction of the United States for purposes of the Magnuson-Stevens Act. JX 1 ¶ 2.

⁹ The Findings of Fact are referenced herein below as “FF.”

¹⁰ Respondent Capt Kevin T&V LLC was referenced as “Captain Kevin T&V LLC” in some filings in this case, but the correct spelling is Capt Kevin T&V LLC. AX 1 at 19, 20, 22, 28, 30-32. Neither the spelling nor the identity of Respondent Capt Kevin T&V LLC has been raised as an issue in this case.

2. Respondent De Huu Pham is a resident of the state of Hawaii, a citizen of the United States, and a “person” subject to the jurisdiction of the United States for purposes of the Magnuson-Stevens Act. JX 1 ¶ 3; Tr. 87.
3. The F/V Capt Kevin was, at all relevant times, a U.S. Coast Guard-documented commercial fishing vessel with the following dimensions: 83.3 x 24.1 x 11.9 feet, 167 gross tons, 114 net tons. JX 1 ¶ 4; Tr. 88.
4. Respondent LLC was, at all relevant times, the owner of the F/V Capt. Kevin and holder of the Hawaii Longline Limited Entry permit issued by the National Marine Fishery Service authorizing the vessel to fish with longline gear in the waters surrounding the Hawaiian Islands. JX 1 ¶ 5;
5. Vinh Tran is a member-manager of Respondent Captain Kevin T&V, LLC. Tr. 71-72, 88.
6. Respondents are not covered by any exemption to the Main Hawaiian Islands Longline Fishing Prohibited Area (“MHI LFPA”). JX 1 ¶ 23; Tr. 72.
7. Respondent Pham was, at all relevant times, the captain of the F/V Capt. Kevin and was hired to serve in that position by Respondent Captain Kevin T&V, LLC. Respondent Pham served as captain of the vessel for at least three years, from November 2010 to November 2013. JX 1 ¶¶ 6-7; Tr. 72, 87-88, 199.
8. The F/V Capt Kevin departed from the port of Honolulu to begin the fishing trip at issue in this proceeding on October 16, 2013. During this fishing trip, the F/V Capt. Kevin fished exclusively with longline fishing gear, and the target species was tuna. JX 1 ¶ 8; AX 1 at 45-64; Tr. 88.
9. Longline fishing consists of three phases: “setting” the gear in the water; “soaking” the gear to allow time for the bait to attract fish, and “hauling” the gear with its catch aboard the vessel. Collectively, the three phases comprise a single fishing set. Tr. 31; AX 2.¹¹
10. Longline vessels in Hawaii fisheries deploy a main fishing line that is typically 30 to 48 miles long. Tr. 40-41. On the F/V Capt Kevin the length of the main line was 45 miles, but Respondent Pham’s crew deploys a length of about 35 miles. AX 1 at 45-64; Tr. 286-287. He recorded that he used 2400 hooks per set on this fishing trip. AX 1 at 45-64.

¹¹ AX 2 is a video that provides a general overview of how longline vessels operate when they are deep setting or tuna fishing. Tr. at 35-36. The vessel it depicts is not the F/V Capt. Kevin and is not operating in a Hawaiian fishery, but the differences between the depiction and a typical longline vessel operating in a Hawaiian fishery were described in supporting testimony. This exhibit was admitted into evidence only for purposes of providing background information.

11. A longline vessel crew generally begins the setting operations by attaching a radio buoy to one end of the main line and releasing it off the boat. The line unspools as the boat continues to move forward and away from the radio buoy. As the main line unspools, a device called a “shooter” provides slack in the main line, and one crew member puts a snap with the branch line onto the main line and another crew member attaches a piece of bait to the hook end of the branch line, and at about the same time they toss each end of the branch line into the water. A beeper indicates when to deploy a branch line and when, after a predetermined number of branch lines are deployed, to attach a buoy to toss into the water. Respondent Pham’s crew on the F/V Capt Kevin attaches 24 branch lines with hooks before each line with a buoy. This process continues for about five hours until all of the gear the crew intended to set is in the water. Tr. 42-43, 209-210.
12. The speed of the vessel when engaged in the setting operation is commonly from 4.5 to 7 knots. Tr. 43, 134, 139, 208-210; AX 3; KCX 8.
13. Once the crew completes setting the gear in the water, the main line is detached from the boat and allowed to soak. Tr. 43.
14. After the main line is detached from the vessel, generally the vessel will drift in the general vicinity of where it finished setting the line. Tr. 43; AX 1 at 10, 13, 70; AX 3; CKX 4, 5, 6, 8.
15. While the gear is soaking, the crew usually eats and sleeps, because that is the only opportunity the crew has to rest during longline fishing operations. Tr. 44, 215. The crew on the F/V Capt. Kevin also cleans the vessel, showers, moves ice in the fish hold to make space for fish from the new haul, and moves boxes into position. Tr. 211-212, 215-218.
16. The captain typically will allow the gear to soak for a period of three to four hours, but the length of time depends on various conditions. Tr. 44, 197, 215.
17. The captain is required to record in the Longline Fishing Log when and where they stopped the set, and when and where they start and end the hauling operations. Tr. 44-45, 48.
18. At the end of the period of soaking the gear, Respondent Pham starts the vessel’s engine and locates the gear by the signals transmitted by the radio buoys attached to each end of the main line. Tr. 46; 210, 216.
19. Respondent Pham puts the F/V Capt Kevin on autopilot during the setting operation and to navigate to the radio buoy to begin the hauling operation, but he drives the vessel while the gear is being hauled. Tr. 208, 216, 219-220.

20. The vessel normally starts hauling in the gear from the end of the line most recently dropped into the water, and the vessel drives alongside the line in the water, creating slack on the gear so it can be pulled in. Tr. 46-47.
21. The typical speed of a vessel for the hauling process is three to five knots, but may vary depending on sea conditions, how many fish are caught and how much gear is set in the water. The vessel may slow or stop and drift to pull in larger fish caught on the line or to handle tangled gear, which tends to happen with more or bigger fish on the line. Conversely, in general, the fewer fish on the line the faster the gear can be hauled. Tr. 47-49, 135; AX 3; CKX 8.
22. The F/V Capt Kevin was equipped with a federally-mandated vessel monitoring system (“VMS”) that allows NOAA’s Office of Law Enforcement to determine the vessel’s physical location and speed by global positioning system (“GPS”). JX 1 ¶ 9, Tr. 70, 88-89.
23. The VMS automatically reports a vessel’s speed, longitude, and latitude to NOAA on an hourly basis, or, under certain circumstances, more frequently. JX 1 ¶ 10; Tr. 88-89, 105-06.
24. The VMS unit on the F/V Capt Kevin was accurate to within 6.5 meters. Tr. 109.
25. The VMS does not identify the location of longline fishing gear when it is deployed in the water. JX 1 ¶ 11.
26. During the fishing trip at issue, Respondent Pham maintained a Longline Fishing Log (“logbook”) that he filled out with his signature for every longline set, certifying that the information he recorded was “complete and true to the best of [his] knowledge.” AX 1 at 45-64; Tr. 90-93.
27. On November 5, 2013, the F/V Capt. Kevin set gear while traveling on a course heading west southwest for the 16th set of the fishing trip (“Set 16”). AX 1 at 10, 60, 67, 70, 73; CKX 4.
28. The F/V Capt. Kevin completed setting the gear for Set 16 at approximately 14:26 Hawaiian Standard Time (“HST”) on November 5 (0:26 UTC on November 6), and then the vessel, separated from its gear, drifted on an average course of southwest by west to west southwest for approximately three hours. AX 1 at 10, 70, 73; AX 3; CKX 4.
29. More than an hour after the vessel completed setting the gear, while the gear was soaking, the vessel drifted into the MHI LFPA between 15:20 and 16:20 HST on November 5 (1:20 and 2:20 a.m. UTC on November 6). AX 1 at 10; AX 3; CKX 1, 4, 8.

30. The vessel drifted while in the MHI LFPA on a west southwest course until approximately 17:28 HST (3:28 UTC), at which time it was drifting at a speed of less than one knot. AX 1 at 10; AX 3; CKX 1, 4, 8.
31. Within the next 14 minutes (17:28 to 17:42 HST, 3:28 to 3:42 UTC), the vessel had turned around and was traveling on a course heading northeast by east within the MHI LFPA. AX 1 at 10; AX 3; CKX 4.
32. The F/V Capt. Kevin was located inside the MHI longline fishing prohibited area until approximately 17:42 HST on November 5 (3:42 a.m. UTC on November 6), 2013. AX 3; CKX 1, 4, 8.
33. The VMS unit reported the vessel a maximum of 0.46 nautical mile inside the boundary of the MHI LFPA. JX 1 ¶ 17; AX 1 at 10.
34. The speed of the vessel as it exited the MHI LFPA was approximately 5 to 6 knots. The next VMS transmission at 18:28 HST (4:28 UTC) reported the vessel traveling at 1 knot. AX 3; CKX 8.
35. At the time of the next VMS transmission an hour later 19:28 HST (5:28 UTC), and at the subsequent hourly VMS transmissions until the end of the haul for Set 16, the vessel was traveling northeast at a speed of between 3 and 5 knots. AX 3; CKX 8.
36. In the logbook, Respondent Pham recorded inaccurately that he started hauling the gear for Set 16 at 17:01 HST (3:01 UTC), and recorded inaccurately that he started hauling the gear at the same GPS location as the location where he finished setting the gear. AX 1 at 60; CKX 4, 8; Tr. 45-46, 159, 178.
37. Respondents kept 47 fish from Set 16, including 39 tuna. AX 1 at 60.
38. On November 8, 2013 at approximately 9:35 a.m. HST (19:35 UTC), the F/V Capt. Kevin began to set gear for the 19th set of the fishing trip ("Set 19"). AX 1 at 15, 63, 72; AX 3; CKX 2, 5, 8.
39. While the gear was being set for Set 19, the vessel, traveling southwest, entered the MHI LFPA a few minutes after 14:05 HST on November 8 (0:05 UTC on November 9). AX 1 at 10; AX 3; CKX 2, 5, 8.
40. The F/V Capt. Kevin completed setting the gear for Set 19 at approximately 15:03 HST on November 8 (1:03 UTC on November 9), while the vessel was in the MHI LFPA. AX 1 at 15, 63, 72; AX 3; CKX 2, 5, 8.
41. For over six hours, from a few minutes after 14:05 HST on November 8 (0:05 UTC on November 9) until 20:44 HST on November 8 (6:44 UTC on November 9), 2013, the F/V Capt. Kevin was located inside the MHI longline fishing prohibited area. During this time, the vessel was at least 6.03 nautical miles inside the boundary of the

- MHI LFPA. JX 1 ¶ 22; AX 1 at 15, 63, 72; AX 3; CKX 2, 5, 8; Tr. 145, 148-149, 166-168.
42. The F/V Capt Kevin was located in the MHI LFPA while the gear for Set 19 was soaking. While still located in the MHI LFPA the crew hauled the gear from 18:06 HST on November 8 (4:06 UTC on November 9) until approximately 20:44 HST on November 8 (6:44 UTC on November 9), when it exited the MHI LFPA, after which it continued hauling the gear, traveling on a northeast course. AX 1 at 15, 63, 72; AX 3; CKX 2, 5, 8.
 43. Respondent Pham did not record in the logbook the time that he ended his haul for Set 19, nor did he record the longitude at which he began the haul. He inaccurately recorded the GPS position for the end of the haul as located only one minute east of the location he recorded for the end of the setting operation. AX 1 at 63; CKX 5.
 44. Respondents kept 49 fish from Set 19, including 42 tuna. AX 1 at 63.
 45. On November 9, 2013 at approximately 11:20 HST, (21:20 UTC), the F/V Capt. Kevin began to set gear for the 20th set of the fishing trip (“Set 20”). AX 1 at 16, 64, 73; AX 3; CKX 6.
 46. During the setting process, between 15:11 and 16:11 HST on November 9 (1:11 to 2:11 UTC on November 10), the F/V Capt. Kevin entered the MHI LFPA. AX 3; CKX 3, 6, 7, 8; Tr. 149-150; 165.
 47. The vessel completed setting the gear for Set 20 at approximately 16:14 HST on November 9 (2:14 UTC on November 10) within the MHI LFPA. About three minutes prior to that time, the vessel was located 0.75 nautical mile inside the boundary of the MHI LFPA. JX 1 ¶ 17; AX 1 at 16, 64, 73; AX 3; CKX 3, 6, 7, 8; Tr. 149-151, 165.
 48. While the gear was soaking for Set 20, at some time before 17:11 HST on November 9 (3:11 UTC on November 10), the vessel drifted outside the boundary of the MHI LFPA. AX 1 at 16, 73; AX 3; CKX 3, 6, 7, 8.
 49. Beginning at approximately 18:53 HST on November 9 (4:53 UTC on November 10), the crew of the F/V Capt. Kevin hauled the gear for Set 20 outside the boundary of the MHI LFPA. AX 1 at 16, 64, 73; AX 3; CKX 6, 7, 8; Tr. 179-180.
 50. The vessel was located less than one nautical mile outside the boundary of the MHI LFPA when it began hauling the gear for Set 20. AX 3; CKX 6, 7, 8.
 51. Respondents kept 21 fish from Set 20, including 9 tuna. AX 1 at 64.

52. Respondent Pham navigated the F/V Capt. Kevin using its computerized chart plotter, an electronic device that shows the position of the vessel and depth of the ocean. Tr. 73-74, 271; AX 1 at 39-42.
53. When Respondent LLC was formed in 2005, it hired Kevin Liu of Oceantronics to update the electronic navigating charts on the F/V Capt. Kevin's computerized chart plotter to display the vessel's real time position relative to the boundaries of the MHI LFPA. JX 1, ¶ 12; Tr. 74, 78, 293, 299, 300, 302, 303.
54. From November 2010 to November 2013, Respondent Pham was the only operator of the F/V Capt. Kevin. Tr. 321.
55. Respondent LLC did not inform Respondent Pham about NOAA regulations or how to use the chart plotter, did not show him where the boundaries for the MHI LFPA should have been displayed, did not instruct him to check the boundaries on the chart plotter prior to a fishing trip, and neither ensured that Respondent Pham had adequate training nor provided any training to Respondent Pham. Tr. 270-273, 280-281, 288, 294.
56. Prior to the trip at issue in this proceeding, Respondent Pham did not check the boundaries on the chart plotter or ensure that it displayed the correct boundaries. Tr. 288.
57. Respondent Pham had not read the applicable federal regulations governing longline fishing. Tr. 272.
58. Respondent LLC's manager Mr. Tran was not familiar with operating the chart plotter or with the MHI LFPA boundaries and did not check prior to the trip that the correct boundaries of the MHI LFPA were displayed on the chart plotter. Tr. 288, 302, 305, 307.
59. After the fishing trip, Mr. Tran and Respondent Pham indicated to Agent Jim On lines on the chart plotter they believed showed the borders of the closed area. But the lines they indicated were not actually the borders of the closed area nor were they the boundary lines created and installed by Mr. Liu. AX 1 at 39-42; Tr. 74-78.
60. At some point after Mr. Liu installed the update to the navigating charts to display the closed area boundaries, the file was deleted from the F/V Capt. Kevin's navigation system. JX 1, ¶ 13; Tr. 303-304, 320.
61. After the alleged violations, Respondent LLC reinstalled the software before the vessel resumed fishing. JX 1, ¶ 14; Tr. 304.
62. Respondents did not intend to enter the MHI LFPA on the fishing trip at issue. JX 1 ¶¶ 17, 20, 22.

63. During the fishing trip in which the violations occurred, the F/V Capt. Kevin caught 20,696 pounds of fish for which Respondent LLC was paid \$60,697.90. JX 1, ¶ 24; AX 1 at 96.
64. Respondents had committed the following violations prior to the violations at issue in this proceeding:
- a. On June 16, 2009, Respondent LLC received a written warning and paid a \$750 summary settlement for failure to notify the Agency upon entry and exit from the Papahānaumokuākea National Marine Monument.
 - b. On July 21, 2009, Respondent LLC paid a compromise penalty of \$1,000 for failing to dye bait blue and failing to awaken an observer before setting gear.
 - c. On January 25, 2010, Respondent LLC paid a \$5,000 penalty for sexual harassment of an observer.
 - d. On July 14, 2011, Respondents paid a \$1,000 summary settlement for failing to dye bait blue.
 - e. On February 17, 2012, Respondent LLC was issued a written warning for failing to notify the agency before departing on a fishing trip.

JX 1, ¶ 25; Tr. 89.

IV. Liability

A. Burden of Proof

The Administrative Procedure Act (APA) provides that “[a] sanction may not be imposed . . . except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence.” 5 U.S.C. § 556(d). In an action to establish civil liability under the Magnuson-Stevens Act, the Agency has the burden of proving the alleged violation by the preponderance of the evidence. *Cuong Vo*, NOAA Docket No. SE010091FM, 2001 NOAA LEXIS 11, at *17-17 (ALJ, Aug. 17, 2001); *Steadman v. Securities and Exchange Comm’n*, 450 U.S. 91, 100–03 (1981)(language and legislative history of “in accordance with . . . substantial evidence” in the APA establishes traditional preponderance-of-evidence standard); see also, *Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994). “The burden of showing something by a preponderance of the evidence . . . requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.” *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (inner quotations omitted) (brackets in original). Facts constituting violations of law may be established either by direct or

circumstantial evidence. *USPS Bd. Of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983); *Cuong Vo*, 2001 NOAA LEXIS 11, at *17 (ALJ, Aug. 17, 2001)(violations may be established by direct or circumstantial evidence).

B. Elements of Violation

To establish a Magnuson-Stevens Act violation under 16 U.S.C. § 1857(1)(A) and 50 C.F.R. § 665.802(v) by Respondents' failure to comply with 50 C.F.R. § 665.806(a)(2), the Agency must prove that: (1) Respondents are "persons"; who (2) used longline gear; (3) to fish (catch, take, or harvest fish; to attempt to catch, take, or harvest fish; to engage in any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or to engage in any operations at sea in support of, or in preparation for, any such activity); (4) within a longline fishing prohibited area, namely, the portions of the EEZ around the Main Hawaiian Islands specified in 16 U.S.C. § 665.806. 16 U.S.C. § 1802(16).

There is no dispute that Respondents are "persons" under the Act, that they used longline gear to fish on the dates in question, and that they were not subject to any exemption from complying with the longline fishing prohibition in the closed area. Findings of Fact ("FF") 1, 2, 5, 7. The issue in dispute is whether Respondents were "fishing" under the definition in 16 U.S.C. § 1802(16) within the longline fishing prohibited area around the Main Hawaiian Islands.

C. Defining "Fishing" using Longline Gear

1. Parties' Arguments

The Agency's position is that the vessel's VMS and logbook show that on each of the dates at issue, the F/V Capt. Kevin "was actively engaged in a longline set when the vessel and its gear were located inside the area closed to longline fishing." Agency's Post-Hearing Brief ("AB") at 9. The evidence shows that some portion of the longline gear was present inside the closed area during the three sets at issue, the Agency argues, but even if this was not proven, Respondents were actively engaged in "fishing" as defined in the Act during the time the vessel was in the closed area, and therefore were in violation as charged in the NOVA. The Agency points out that case law under the Magnuson-Stevens Act defines the term "fishing" broadly "'to include virtually any activity conducted by a vessel while its gear is in the water' and 'firmly establishes that when a vessel is found with its gear in the water, the vessel is actively fishing.'" AB at 10, quoting *In the Matter of Martuna, S.A. de C.V.*, 2010 WL 1676737, at *6-7 (NOAA Feb. 2, 2010) and citing, *In the Matter of Pesca Azteca, S.A. de C.V.*, 2009 WL 3721029 (NOAA Oct. 1, 2009), *In the Matter of Jerry F. Murphy*, 4 O.R.W. 794, 798, 1986 WL 80222, at *4 (NOAA Nov. 28, 1986)("For all intents and purposes, 'gear in water' constitutes fishing"; definition adopted after continuing difficulty trying to determine when actual fishing underwater was occurring) and *In the Matter of David Eugene Smith*, 2013 WL 1276031, at *6 (NOAA Feb. 4, 2013)(having gear baited for fishing while vessel in a closed area constitutes fishing in closed area, in violation of regulation).

Respondent LLC's position is that the regulation only prohibits the use of longline gear to fish within the closed area, but does not ban all fishing activities there nor prohibit the

physical presence there of the vessel itself while the longline gear soaks. It asserts that the Agency has not met its burden to prove that the F/V Capt. Kevin's gear entered the boundaries of the closed area, and has not shown evidence of activities Respondent Pham was engaged in while inside the closed area. In support, Respondent LLC states that the purpose of the regulation when originally promulgated was to prevent gear entanglement and conflicts between longline fishermen and near shore commercial troll and handline fishermen, citing 57 Fed. Reg. 7661 (March 4, 1992). It contends that the Agency's interpretation is more suited to cases where the act of fishing is prohibited, whereas the regulation at issue prohibits only the deployment of certain gear in the designated area. It distinguishes the cases cited by the Agency as involving both vessels and gear engaged in fishing operations in a prohibited area, where the vessel was connected to the gear and was an integral component to active fishing operations ongoing inside closed areas. Respondent, Capt. Kevin T&V LLC's Closing Arguments ("RB") at 6-10, Respondent, Capt. Kevin T&V LLC's Reply Brief ("RRB") at 2-3.

The Agency argues in response that the regulations, § 665.802(v) and § 665.806(a), ban the act of longline fishing within certain areas, not the mere presence there of gear that is used for fishing. Agency's Reply Brief ("ARB") at 2. Key facts to determine whether a vessel was "fishing" include whether the vessel deployed gear in the water, whether its "activities were geared toward" the vessel's 'economic benefit,' and whether activities with gear deployed were intended 'to complete its commercial fishing activity.'" *Id.* at 4, quoting *Martuna*, 2010 WL 1676737 at *10-11. NOAA asserts that there is "no bright-line distinction in the case law" that the gear must be attached to the vessel, as the vessel remains "an integral component of the fishing operations over the course of an entire longline set," including the soak. ARB at 4-6. NOAA posits that the key fact that gear has been deployed in the water is particularly relevant for longline fishing because "the Agency has no ability to track that gear within the water to ascertain the movement and location of the 45-mile-long mainline, branchlines, and thousands of hooks." ARB at 5. The Agency adds that "the vessel's logbook entries constitute an admission that the F/V Capt. Kevin was engaged in fishing operations during the entire duration of the sets conducted on each of the dates alleged in Counts One through Three." *Id.* at 6.

Respondent LLC argues that the Agency's proposed interpretation would prohibit a longline vessel located in a prohibited area, whether or not gear is deployed, from such mundane acts as transiting through the closed area, eating, showering, resting, transferring crew, taking on fuel and other supplies at sea; or engine or generator maintenance. RRB at 4.

2. Discussion and Conclusions

The VMS data establishes beyond dispute that the F/V Capt. Kevin entered the MHI LFPA while its longline gear was in the water, so the initial question is whether this fact is sufficient to determine that Respondents engaged in "fishing" in the prohibited area. The analysis begins with the statutory definition of "fishing": whether on the dates alleged, Respondents used longline gear to engage in: "the catching, taking, or harvesting of fish," the attempt to do so, "any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish," or "any operations at sea in support of, or in preparation for" any such activity, within the MHI LFPA. 16 U.S.C. § 1802(16) (emphasis added); 50 C.F.R. §

665.10, 665.802(v). Under this definition, “fishing” using longline gear may include operations at sea that are performed in support of or in preparation for setting longline gear in the water, setting the gear in the water, soaking the gear, any operations at sea while the gear is soaking that is in support of or in preparation for catching fish, and hauling the gear. The issue is whether the vessel is “fishing” while located in the prohibited area when the longline gear is soaking in a different location.

Duckworth v. United States, 705 F. Supp. 2d 30, 46, n. 11 (D.D.C. 2010) addressed the situation of a vessel and its deployed fishing gear being in different locations. The court upheld an administrative law judge’s conclusion that leaving lobster traps deployed at sea while permits were not valid constituted “fishing” under the Magnuson-Stevens Act. See, *In the Matter of F/V Reaper, Inc., Duckworth, et al.*, 2008 NOAA LEXIS 7 * 29, 55-56 (ALJ Oct. 6, 2008). The court noted with approval the ALJ’s findings that the traps are specifically designed to be left at sea and checked periodically to collect any catch, that the existence of the traps in the water constituted the violation of “fishing” without a license. The court also approved of the additional finding that the maintenance of the traps by conducting buoy checks on the gear constituted “fishing” in that it was an operation at sea in support of and in preparation of fishing activity. 705 F. Supp. 2d 30, 46, n. 11. The court’s decision in *Duckworth* established that the gear’s presence in the water is the locus of the “fishing” activity while the vessel is not in the vicinity of the gear, and that evidence of specific activities performed at sea while the gear is deployed also may fit the definition of “fishing.”

Applying this principle to the longlining context, putting out longline gear to soak constitutes “fishing,” but the vessel that set it is not necessarily engaged in “fishing” while the gear is soaking. For example, on occasion the vessel may leave its gear soaking for many hours while the vessel goes back to port to land fish caught previously, to replenish fuel or supplies, to drop off or pick up crew members, or to make repairs or conduct maintenance on the vessel. See, e.g. *In the Matter of Becker*, 2015 NOAA LEXIS 6, Docket Nos. AK 1003466, AK 1101486, (NOAA April 6, 2015)(seven sets of “fixed gear” deployed in Gulf of Alaska left to soak for over 16 hours while vessel went to port to offload fish previously caught). These activities while returning to port do not constitute using longline gear to engage in “the catching, taking, or harvesting of fish,” the attempt to do so, “any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish,” or “any operations *at sea* in support of, or in preparation for” any such activity, within the MHI LFPA. 16 U.S.C. § 1802(16) (emphasis added); 50 C.F.R. § 600.10.

The cases cited by the Agency do not demand a contrary conclusion. They do not involve longline fishing or analysis of the location of fishing activity when the vessel is separate from the gear. *In the Matter of Martuna, S.A. de C.V.*, 2010 NOAA LEXIS 1 (ALJ Feb. 2, 2010)(vessel held to be “fishing” in prohibited area while holding live tuna in closed large purse seine nets waiting for towboat to transfer them to live pens); *In the Matter of Pesca Azteca, S.A. de C.V.*, 2009 NOAA LEXIS 10 (ALJ Oct. 1, 2009), *agency review denied*, 2010 NOAA LEXIS 3 (NOAA App. March 1, 2010) (same); *In the Matter of David Eugene Smith*, 2013 NOAA LEXIS 3 (ALJ Feb, 4, 2013)(in decision on default, respondent held to be fishing in closed area where he had baited rod and reel on vessel and admitted he was fishing). *In the Matter of Murphy*, 1986 NOAA LEXIS 4 (ALJ Nov. 28, 1986), the administrative law judge stated,

without much discussion, “[f]or all intents and purposes, ‘gear in the water’ constitutes ‘fishing,’” given the difficulty of trying to determine when fishing underwater was occurring. He made this statement in the context of determining whether a vessel was “fishing” where indirect evidence showed that its shrimp trawling nets had been in the water. In *Martuna*, the administrative law judge included a detailed discussion of the term “fishing,” noting “NOAA case law has consistently read the term ‘fishing’ to include virtually any activity conducted by a vessel while its gear is in the water.” *Martuna*, slip op. at 10. He also stated that “[t]he fishing log by itself is an admission that [the vessel] was conducting ‘fishing operations.’” Slip op. at 10. However, these statements, as well as the case law he cites, were in the context of determining whether “fishing” had occurred based on evidence that fishing gear connected to the vessel was in the water. *Id.*, citing *Murphy, supra*; *In the Matter of Pierce*, 1991 NOAA LEXIS 39, 6 O.R.W. 527 (ALJ Aug. 13, 1991)(shrimp tow cages and nets extended from the vessel into the water); *In re Marques*, 1990 NOAA LEXIS 1, 6 O.R.W. 1 (ALJ Jan. 26, 1990)(cables extending from the vessel seen in the water as officers approached); *In the Matter of Curcuru*, 1990 NOAA LEXIS 25, 6 O.R.W. 132 (ALJ Sept. 25, 1990)(vessel’s pattern of movement and speed, and cables seen extending from the vessel into the water); *In the Matter of Cavanaugh*, 1983 NOAA LEXIS 45, 3 O.R.W. 143 149 (ALJ Jan. 28, 1983)(vessel dragging a net containing shrimp). In *Martuna*, during the time the vessel was in the prohibited United States EEZ area, the respondent had “skiffs in the water actively maintaining the integrity of the purse seine net in addition to having its gear in the water,” which activities were “geared toward keeping the bluefin tuna alive to conduct a transfer for its economic benefit, and this required that it enter the EEZ of the United States.” Slip op. at 10-11. Another administrative law judge, referencing many of the same cases,¹² noted in a longline fishing case in Hawaii that “NOAA case precedent thus firmly establishes that when a vessel is in a prohibited area with its gear in the water, it shall be determined to be actively fishing.” *In the Matter of Nguyen*, 1995 NOAA LEXIS 41 *25-28, Docket No. SW940130FM (ALJ Aug. 11, 1995). The judge found that the vessel was located in the prohibited area while hauling the last half mile to one mile of longline gear onto the vessel, and rejected the respondents’ argument that they were merely retrieving lost longline gear.

None of the aforementioned cases except *Duckworth* address a scenario in which the vessel is wholly separated from the fishing gear. I therefore consider *Duckworth* to be informative on determining the existence and locus of “fishing” activity when the gear is separated from the vessel. I find that when longline gear is soaking and not attached to the vessel, the location of the deployed longline gear is the locus of the “fishing” activity under the Magnuson-Stevens Act.

The Agency’s argument that NOAA has no ability to track the 45-mile longline gear within the water to ascertain its location, movement, and hooking of fish conflicts with the testimony of its own expert Mr. Boone, the vessel monitoring system program manager for NOAA’s Office of Law Enforcement. He testified that patterns can be seen from VMS transmissions that indicate the locations where the longline gear was set, and where it was

¹² In addition, the judge referenced *In the Matter of Savage*, 83 NOAA LEXIS 34, 3 O.R.W. 22 (ALJ May 16, 1983), *review denied*, 1983 NOAA LEXIS 27 (Adm’r July 12, 1983)(vessel was engaged in “fishing” where evidence showed clam dredging gear was in the water while the vessel was underway).

hauled, from beginning to end. Tr. 132, 134-140. The movement of the gear can be ascertained from these patterns, by the different paths of the vessel setting the gear and hauling the gear. Tr. 139-140. While the depth and locations of any fish caught on hooks cannot be determined from the VMS data, it is the latitude and longitude of the fishing activity that determines whether or not it occurred in a prohibited area.

To establish each alleged violation, the Agency must show that the Respondents were setting or hauling at least some portion of the longline gear within the boundary of the MHI LFPA, that at least some portion of the gear was soaking within the boundary, or that Respondents were within the boundary while engaged in “any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish,” or “any operations in support of, or in preparation for” the catching, taking, or harvesting of fish. 16 U.S.C. § 1802(16) (emphasis added); 50 C.F.R. § 665.10.

D. Count 1

1. Parties’ Arguments

The Agency points to Mr. Boone’s expert testimony showing that the VMS data on November 5-6, 2013 indicated a longline signature pattern of setting, soaking and hauling gear. VMS data, including average vessel speed, are consistent with the vessel being in the closed area as it was slowing, drifting and maneuvering while the longline gear was soaking, and as the vessel began to haul the gear. Respondent Pham’s testimony and logbook indicates that the hauling process began at 17:01 HST (3:01 Universal Time Coordinated (UTC)), which confirms that the vessel began the hauling process while in the closed area. Therefore at least some portion of the gear was inside the closed area, the Agency asserts. AB at 16-19.

Respondent LLC concedes that the vessel was physically present inside the boundary of the MHI at the reported distances on November 5-6, 2013, but denies that violation occurred because the gear “was clearly set in its entirety outside of the closed area” according to VMS data, and did not drift into the border of the closed area. In support, Respondent LLC makes the following arguments. The Agency failed to establish how and when the vessel’s fishing gear entered the MHI LFPA. RB at 12-13. The Agency disregards the log report on the vessels’ position at the beginning of the haul outside of the closed area, but selectively and thus inappropriately relies on the log report on the time the haul began. Under the Agency’s analysis, the first radio buoy for the beginning of the haul would have been brought onboard at 3:01 UTC, only 2 hours and 35 minutes after the gear was set, which is not consistent with Respondent Pham’s testimony as to his normal procedures of allowing the crew to rest after setting the gear, the time needed for breakfast, and preparations required to retrieve the gear. The VMS data also establishes that Respondent Pham did not begin hauling his gear until the vessel was outside the MHI LFPA. Specifically, it shows that the vessel was initially drifting until 3:41 UTC, when it increased its speed to 5 or 6 knots, proving that at that time the vessel was being maneuvered to the location of the end of the gear rather than hauling gear, because as Respondent Pham testified, the gear is typically hauled at 1.5 to 2 knots or, rarely, at 4 knots, but not more because the gear is deep in the water. The VMS data also shows the vessel was operating at speeds

typical of hauling gear after the vessel exited the boundaries of the MHI LFPA at 3:43 UTC. In addition, Respondent LLC asserts, the drift pattern for all sets in this area show that the gear remained in the same general location and did not drift in a southerly direction toward the MHI LFPA, as the course of the vessel when hauling was always north of the course for setting the gear. RB at 13-15.

In response, the Agency contends that there is no expert testimony on the VMS data or evidence of ocean currents and weather conditions upon which to make any reliable determination of speed and direction the gear drifted. ARB at 11-12. NOAA points out that VMS data shows that the vessel exited the closed area between 3:42 and 3:43 UTC, and the VMS reported average speeds and average course from 3:28 UTC and later which is consistent with a hauling process. ARB at 8-9, 11. The Agency notes that the vessel's logbook for the fishing trip at issue reports some soak times of under three hours, including one that was under one hour. *Id.* at 10. Acknowledging that the vessel location recorded in the logbook for the beginning of the haul was outside the closed area, NOAA argues that it cannot be accurate because it is the exact same location as that recorded for the end of the set, and as Mr. Kupfer testified, due to ocean current, wind and drift, the longline gear would not remain at the same location. ARB at 7.

Respondent LLC argues in reply that the Agency's position would require a finding that the end of the gear drifted at a rate faster than and past the F/V Capt. Kevin into the MHI LFPA, yet there is no evidence of where or how far the gear drifted in the water during the set. RRB at 8. There was no evidence as to the activities Respondent Pham and his crew were engaged in while the vessel was in the closed area on November 5, and no evidence as to any extenuating circumstances for prematurely terminating the soak time. RRB at 3. Respondent argues further that the Agency's position is speculative because the VMS data must be corroborated, as admitted by Mr. Boone, but the Agency has not supported it with "reliable, probative, credible and substantial" corroborating evidence. RRB at 4-7.

2. Discussion, Further Findings, and Conclusions

Mr. Boone, the Agency's expert on VMS systems and VMS analysis, explained that the GPS on the vessel's VMS unit transmits data, including location of the vessel and a "snapshot" in time of the vessel's speed and course. Tr. 107, 116-117. The data is exported to an interface that plots the data onto a map, giving a geographic representation of a vessel's course on the map throughout a fishing trip. Tr. 122, 124-125. Straight lines connect the points, indicating the vessel's course, but do not necessarily indicate the exact course taken by the vessel. AX 1 at 10-17, 67-74; Tr. 127-129. The VMS data for speed are measured over approximately a 5 second interval, in knots, with fractional values truncated. Tr. 331. A vessel which is traveling at a very low speed or drifting shows a speed of zero knots. Tr. 331-332. The average speed is calculated by the software comparing the preceding and succeeding data points for speed. Tr. 117.

Mr. Boone explained the "signature" pattern of longline fishing as a direct course with consistent speed of approximately 7 knots for setting the line, followed by a reduction in speed to generally under one knot where the vessel continues to drift or maneuver slowly "in a more or

less straight pattern,” after which the vessel “turns around and heads in a nearly reciprocal parallel course to his original set course” at a fairly consistent speed, typically 2.5 to 3 knots, indicating that the vessel is hauling the gear, starting from the last part of the gear that was set. Tr. 134-137, 139, 145. Between the setting and hauling of the line, the pattern forms a “v” shape in a cluster indicating the positions of the vessel while the longline gear, which is separated from the vessel, is soaking. Tr. 136-137. The position of the vessel when it completes setting the gear (“end set”) is not the same as the position of the vessel when it begins hauling gear (“begin haul”), because the gear drifts with the currents, temperature variations and wind. Tr. 46, 137.

For Set 16, the F/V Capt. Kevin was traveling west southwest as Respondent Pham and his crew set the gear. AX 1 at 10, 70, 73; AX 3. They completed setting it at approximately 14:26 HST (0:26 UTC), outside the MHI LFPA boundary, attaching the radio buoy at the end. AX 1 at 10, 60, 70; AX 3; CKX 4. The vessel, separated from its gear, then continued for three hours in the same trajectory, drifting southwest by west to west southwest until approximately 17:28 HST (3:28 UTC), at which time the VMS data reported the vessel’s speed at zero knots. AX 1 at 10, 70; AX 3; CKX 4. This point formed the bottom of the “v” shape in the signature pattern of VMS data plotted on a map. AX 1 at 10; AX 3; CKX 4; Tr. 176. Immediately or very soon thereafter, the vessel turned around, heading northeast by east, and approximately 14 minutes later, it exited the MHI LFPA, traveling at a speed of 5 knots. AX 1 at 10, 70; AX 3; CKX 4.

The Agency relies on Respondent Pham’s logbook entry of 17:01 HST recorded as the “begin haul” time, and Mr. Boone’s testimony based thereon, to support its position that the haul started while the F/V Capt. Kevin was in the MHI LFPA. However, this reliance is tenuous. Mr. Boone testified as follows:

Q: Do you know, from your examination of the vessel’s logbook, what time the captain logged he started his haul?

A: 17:01 local which works out to 3:01 UTC.

Q: So that data point, the second data point in the closed area that you identified 03:20 is after the captain commenced his haul, according to the logbook?

A: Correct.

* * * *

A: . . . If you’re asking on what basis I might conclude that the haul position was actually inside the closed area, I can speculate on that, if you like, but.

Q: No, I don’t want you to speculate. . . . So sitting here today, you have no opinion as far as where the vessel was when it started hauling gear on November 5, 6, 2013?

A: I do have an opinion on it and it's based on some analysis I did, based on the opportunity ellipsis that I mentioned earlier; and when you look at the times, *if you take his logbook position time as correct*, then he would have been within the closed area at that time.

Q: Are you finished? I didn't want to interrupt you.

A: Yes.

Q: So but you're basically just relying on the logbook time entered and discounting the longitude and latitude position that's all entered into the logbook?

A: That's correct. That's the basis of that.

Tr. 147, 158 (emphasis added). He did not testify as to any such analysis or opportunity ellipsis without the assumption of the logbook entry of 17:01 HST.

The time of 17:01 HST occurs between the two VMS data points at 16:20 and 17:20 HST, reporting vessel speeds of zero knots and 2 knots respectively, yielding an average speed of less than one knot, on the same course heading west southwest as the vessel was traveling while setting the gear. AX 3; CKX 4, 8. Therefore, at 17:01 HST the vessel was drifting in the same trajectory, and then about 27 minutes later, it turned around. AX 3; CKX 4. If the 17:01 HST logbook entry is accurate, then according to the VMS data, the vessel would be hauling gear in the same direction as it set the gear, and then, about a half hour later, turning around and traveling the opposite direction. This is inconsistent with Mr. Boone's description of the longline fishing "signature" pattern. Neither the Agency nor any of its witnesses explain this incongruity.

Indeed, the vessel turning around, "changing course to a near reciprocal parallel course" indicates that the vessel is turning toward the end of the gear, at some point guided by signals sent from the radio transmitter on the buoy, so the vessel can begin the haul, which generally occurs in the reciprocal direction from which it set the gear. Tr. 46-47, 136-140. The VMS data shows that at 17:28 HST (3:28 UTC) the gear of the F/V Capt. Kevin was still soaking, as confirmed by the following testimony of Mr. Boone during redirect examination:

Q: And then down at the bottom of the "v," what is that portion of the fishing evolution?

A: The end of the set and the soak.

Q: And then please show Her Honor what you believe to be the hauling or retrieving of line portion of the set.

A: That would be as he's turned to a nearly reciprocal heading parallel course and he's coming up here.

Tr. 176-177. Thus, the evidence shows that after the typical 3-hour soaking time, at approximately 17:28 HST the vessel turned around to find the radio buoy to begin the haul, and at some point thereafter, the crew found the radio buoy and began hauling the gear. FF 16. The logbook entry of 17:01 HST for the “begin haul” for Set 16 is therefore erroneous. It is just one among Respondent Pham’s several errors, omissions and “improbable” entries in recording data in the logbook. FF 38, 45; Tr. 159, 164, 167-168; AX 1 at 13; AX 1 at 50 (position for “end set” omitted from logbook); AX 1 at 63 (“end haul” time and “begin haul” longitude omitted); CKX 5 and AX 1 at 72 (logbook position for “end haul” extremely close to “end set” position, and “begin set” time does not correlate with VMS time and location data); CKX 6 (logbook position for “begin set” is distant from vessel locations shown by VMS data, logbook position for “begin haul” very close to “end haul”).

Mr. Boone does not provide support other than his reliance on the 17:01 HST logbook entry for finding that the beginning of the haul was within the MHI LFPA. The question then is whether that erroneous logbook entry nevertheless weighs in favor of a finding that the crew of the F/V Capt. Kevin began the haul sometime during the 14 minutes, between 17:28 and 17:42 HST, after the vessel had turned around and began traveling on a course heading east northeast but before it exited the MHI LFPA. When questioned as to why he chose to rely on the logbook entry for the time rather than the entry for vessel location to indicate the beginning of the haul, his responses are vague. Tr, 159 (“Partly because they were instances in the logbook data where there was no way possible for the position to be accurate.”); 174 (“If you look at Point 11 [16:20 HST] and Point 12 [17:20 HST] in the VMS, they’re both within the closed area at the time, including points at the time of the start haul, and so it just makes sense that the vessel was likely between those two points.”). Mr. Boone’s later testimony on redirect examination is guided by the Agency attorney back to the logbook entries:

Q: Now let’s focus in down on the bottom section of the “v” so we can get some good detail on the point you plotted for the begin haul.

So according to the vessel’s logbook, that’s the position from the vessel’s logbook for the begin haul?

A: Yes.

Q: But where do we know the vessel was at that time?

A: Well, if I could, I could start here. This is 15:00 local and then he progresses to 15:20 local. Then this is 17:20 local here. So it’s before that position and after this position.

Q: So why then did you choose to give credence to the begin haul time, but not the begin haul position?

A: For one thing, the activity that you see subsequent to this is more consistent with the haul beginning here and then continuing, like I said, a reciprocal course.

Q: So now zoom out so we can sort of see that haul.

THE COURT: Okay, let's back up. He said the haul would start at the very bottom part of the "v" that that data point which, looking also at Exhibit 4 of the Respondent Capt. Kevin, would be Data Point No. 13 [17:28 HST]. There's Data Points 12 [17:20 HST] and 13. Those are the two very bottom of the "v," and I want to make sure we have clear where the witness is saying the beginning of the haul would be, at which data point.

Q: Is it fair to say you don't know precisely where the haul began?

A: That's correct.

Q: But time for the haul; is that consistent with the positional data?

A: The time for the haul would be between this point and this point.

Q: And the position for the latitude and longitude position for the haul; is that anywhere along the vessel's track on that fishing signature?

A: Position for the begin haul is close to what I would presume to be the beginning set position.

Q: And, in fact, it is identical to the end set position, correct?

A: Yeah. That's what in my experience would indicate that it's very close to the end set position.

Tr. 177-178. This testimony is vague, unclear, and somewhat evasive. To the extent he adheres to the logbook entry for the time the haul began, it is inconsistent with his earlier testimony about the "v" shape in the signature longline fishing pattern. However, the latter part of the testimony quoted above, while unclear, might suggest that the actual position of the vessel at the beginning of the haul was "very close to the end set position" - which was outside the MHI LFPA. Tr. 178. Mr. Boone's testimony, taken as a whole, does not support a finding that the haul began before the vessel exited the MHI LFPA.

Turning to the documentary evidence, all of the vessel locations reported from the VMS within the MHI LFPA during Set 16 are west southwest of the location where the vessel completed setting the gear. AX 1 at 10, 70; AX 3; CKX 4. Consequently, for Respondents to have begun the haul for Set 16 within the MHI LFPA, the gear must have drifted in direction heading approximately southwest. There is no evidence that the gear drifted in that direction, but there is evidence to the contrary - that it did not drift in that direction. Specifically, as can be seen on the Agency's maps plotting the VMS data and the logbook data for five sets on the fishing trip at issue, the vessel locations for the "begin haul" for the two sets not at issue in this case, Sets 17 and 18, are directly one minute north of the corresponding locations for the "end set." AX 1 at 11, 13, 61, 62, 68, 70, 71; AX 3. The logbook entries for the vessel locations on those sets appear fairly consistent with the VMS data. *Id.* Similarly for Sets 16, 19 and 20, the logbook's "end set" position is south of the trajectory showing the beginning of the haul. AX 1

at 10, 13, 67, 70, 71; AX 3. As each haul of the five sets continues, its trajectory intersects that for the setting operation, and then the vessel's position at or near the end of the haul is located south of the position of the beginning of the setting operation. AX 1 at 10, 11, 13, 60-62, 67-74; AX 3. This indicates that the line of gear was drifting north from the end of the setting location, and south from the beginning of the setting location, thus rotating in a clockwise direction. No evidence has been presented to the contrary. The Agency has the burden to show that Respondents were hauling gear or otherwise "fishing" within the MHI LFPA, and its contention that no expert testimony or evidence of ocean currents and weather conditions was presented to show gear drift is unavailing. Indeed, Mr. Boone testified that "the line drifted to the South" near the end of the haul, and that the same pattern is repeated. Tr. 139-140. As noted above, he testified that patterns can be seen from VMS transmissions that indicate locations where the longline gear was set and hauled from beginning to end, and movement of the gear can be ascertained from these patterns. Tr. 132, 134-140. The evidence shows that the gear for Set 16 did not drift into the MHI LFPA, and that Respondents did not begin to haul the gear until after the vessel exited the MHI LFPA.

VMS data for the vessel's speed during Set 16 is consistent with the haul beginning north of the MHI LFPA. The data shows that the vessel exited the MHI LFPA traveling at 5 and 6 knots (at 17:42 and 17:43 HST), then at 1 knot about 45 minutes later (18:28 HST, 4:28 UTC) when the vessel was north of the "end set" position. AX 1 at 10, 70; AX 3 CKX 4, 8. Although Mr. Boone does not rely on the truncated "spot speeds" in analyzing VMS data as they "may be misleading in some cases," it is not misleading on this issue because truncation to a "spot speed" of 6 knots represents the vessel's speed was 6 knots or more, but not less. Tr. 331. Respondent Pham testified that the gear is deep in the water, so it is typically hauled at speeds of 1.5 to 4 knots. Tr. 198, 219-220, 224. Mr. Kupfer, the Agency's expert in longline fishing operations and procedures, testified that hauling speeds "between 3 and 5 knots is pretty typical," and the fastest he had seen is 5 ½ knots. Tr. 34-35, 49. The VMS reported the F/V Capt. Kevin traveling as fast as 5 knots during the haul of Set 16, but there is no evidence indicating that it traveled as fast as 6 knots while hauling gear. AX 3; CKX 8. The vessel's speed of 1 knot at 18:28 HST (4:28 UTC) suggests either that the vessel had slowed or stopped to begin the haul, as Respondent Pham testified that the vessel is stopped when the radio buoy is brought on board to begin the haul, or that it was already hauling gear and was pulling in a larger fish or handling tangled gear. Tr. 250-251, 264. Therefore that data point does not weigh significantly on the issue of whether the vessel hauled gear while in the MHI LFPA. As a whole, however, the VMS data for the vessel's speed weigh in favor of a finding that in the 15 minutes from the time the F/V Capt. Kevin turned around until the time it had exited the MHI LFPA, the crew had not yet begun to haul the gear.

As the Agency has not shown that for Set 16 Respondents were hauling gear or otherwise catching, taking, or harvesting fish or attempting to do so within the MHI LFPA, the next question is whether the evidence shows that Respondents engaged in "any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish," or "any operations in support of, or in preparation for" the catching, taking, or harvesting of fish while the vessel was within the MHI LFPA as the gear was soaking. 16 U.S.C. § 1802(16) (emphasis added); 50 C.F.R. § 665.10. Respondent Pham testified that after the gear is set, he and the crew clean the vessel, shower, sleep, move ice in the fish hold to make space for fish from the new

haul, and move boxes into position. FF 15. At the end of the soak, Respondent Pham starts the engine, and directs the vessel by autopilot to locate the radio buoy attached to the end of the line to begin the haul. Tr. 216-218.

The word “operations” is significant in the statutory phrase “operations in support of, or in preparation for” the catching of fish, as it connotes work, processes, or procedures and not mere casual or incidental activities. Cleaning the vessel, showering and the like are not encompassed by the term “operations.” Moving boxes and ice appear to be preparations for catching fish, but are more on the level of minor housekeeping than processes for catching fish, and are not significant enough to bring the 3-hour interval while the gear is soaking within the definition of “fishing.” On the other hand, it might be argued that locating the radio buoy and driving the boat to the location of the longline gear could appear to be an “activity which can reasonably be expected to result in the catching” of fish or an “operation[] . . . in preparation for” the hauling of fish. However, the vessel is merely transiting, and therefore is no more an act of “fishing” under the Act than is the act of any vessel transiting to a fishing spot.

I find that the Agency has not shown by a preponderance of the evidence that Respondents fished within a longline fishing prohibited area in violation of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A) and 50 C.F.R. § 665.802(v), as alleged in Count 1 of the NOVA.

E. Count 2

Regarding Count 2, the Agency asserts that ten VMS transmissions, from 00:59 until 6:44 UTC on November 9, 2013 (14:59 to 20:44 HST on November 8), show that the F/V Capt. Kevin was “fishing” within the meaning of the Act within the closed area. This data as plotted on a map depicts a longline signature pattern. Specifically, the VMS data indicate that the vessel was engaged in the setting process when it entered the closed area, and the logbook data confirms the vessel ended the setting process at 1:03 UTC and began the hauling process at 4:06 UTC. In the meantime, the vessel allowed some portion of its gear to soak in the closed area for about three hours. AB at 20-22.

At the hearing, the Agency presented evidence demonstrating a prima facie case of Respondents’ liability with respect to Count 2, establishing that F/V Capt. Kevin was “fishing” inside of the MHI LFPA. In particular, there were ten VMS transmissions made from the vessel while it was inside the MHI LFPA – at 0:59, 1:05, 2:05, 3:05, 3:44, 3:58, 3:59, 4:43, 5:43, and 6:44 UTC on November 9, 2013 (14:59, 15:05, 16:05, 17:05, 17:44, 17:58, 17:59, 18:43, 19:43, and 20:44 HST on November 8). AX 1 at 15, 72; AX 3; Tr. at 145, 148-149. Based on the vessel’s average course and speed before, during, and after these particular VMS location transmissions, it was setting its line between 21:04 UTC on November 8 (11:04 HST) and 1:05 UTC on November 9 (15:05 HST on November 8), entering the prohibited area during the process. AX 1 at 63, 72; AX 3; Tr. at 145, 148-149. The logbook confirms the setting began at 19:35 UTC on November 8 (9:35 HST on November 8) and continued until 1:03 UTC on November 9 (15:03 HST on November 8). AX 1 at 63. The vessel’s average course and speed further reveal that it remained in the closed area while soaking its line and began hauling in the

closed area around 4:06 UTC on November 9 (18:06 HST on November 8) before eventually leaving the closed area as it continued to haul gear through 9:44 UTC on November 9 (23:44 HST on November 8). AX 1 at 63, 72; AX 3; Tr. at 145, 148-149. Thus, the Respondents set, soaked, and hauled the longline gear while it was inside the closed area.

Respondent LLC does not contest its liability under Count 2. It conceded as early as its initial PPIP (at p. 3) that “a violation occurred on November 9, 2013,” and stipulated that on November 8-9 the F/V Capt. Kevin fished using longline gear, that “a portion of the longline gear was set within the boundaries of the MHI LFPA,” and that the maximum incursion by the vessel into the prohibited area was approximately 6.43 nautical miles. JX 1 ¶ 18-20. Respondent Pham has not made any arguments or presented any evidence contesting liability for Count 2.

Accordingly, I find that the Agency has established that Respondents fished within a longline fishing prohibited area in violation of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A) and 50 C.F.R. § 665.802(v), as alleged in Count 2 of the NOVA.

F. Count 3

1. Parties' Arguments

Pointing to the one VMS transmission of the vessel from inside the MHI LFPA during Set 20, at 2:11 UTC on November 10, 2013 (16:11 HST on November 9), the Agency asserts that the vessel had been deploying its gear at that time. The VMS data shows that between 21:23 UTC November 9 to 2:11 UTC November 10, the vessel’s average speed was between 6 and 7 knots and its course steadily heading west by south consistent with the setting process, and that thereafter, the vessel’s speed dropped and the vessel transmitted a cluster of locations within the closed area, consistent with the soak. Next, from 5:38 UTC and later, the VMS data showed average speeds of 2.2 to 3.4 knots on a course steadily heading east. This data shows the signature longline pattern, as Mr. Boone testified, and the logbook entry for the location for the “end set” was “completely consistent” with the VMS data. AB at 23-25 (citing Tr. 180). Respondent Pham recorded that he ended the setting process at 2:14 UTC within the MHI LFPA, according to the logbook, which is consistent with the VMS data. Therefore, the Agency argues, the VMS data as confirmed by the logbook data establish that Respondents were actively fishing in the prohibited area with some portion of the gear located inside the prohibited area. AB at 23-25.

Conceding that the vessel was physically present inside the boundary of the MHI LFPA at the distances and times reported by the VMS, Respondent LLC denies that there was any violation because the gear was not actually set within the border of the closed area. Respondent Pham’s logbook data as to time and location of setting and hauling gear are contradicted by the VMS data, Respondent LLC argues, and thus cannot corroborate the VMS data. RB at 15-16. The VMS data shows that the F/V Capt. Kevin had finished setting its gear at or shortly after 1:11 UTC, before it entered the closed area. Respondent Pham testified that his practice is to

record in the logbook the end of the setting gear after the crew finishes cleaning up, normally half an hour after the last buoy goes in the water, so his entry of 2:14 UTC signifies when the crew finished cleaning, which was the time it was in the MHI LFPA. A half hour earlier, when the last buoy would have gone into the water, the vessel would have been outside the closed area. RB at 16-17. Respondent LLC calculates in its Post-Hearing Brief that if the vessel traveled a distance of 0.75 nautical miles into the closed area at a speed of 7 knots, Respondent Pham logged the “end set” time 30 minutes after the vessel completed setting gear, and it was in the closed area for approximately 6.43 minutes. The VMS data shows the vessel at zero knots at 3:11 UTC and straight line average speed of 2 knots between 2:11 and 3:11 UTC, so the vessel’s speed was close to zero knots a majority of the time during that hour within which it transited through the prohibited area. Then, the vessel maneuvered into position to the first radio buoy between 4:39 and 4:51 UTC, and gear retrieval started between 4:53 and 5:38 UTC, clearly outside the MHI LFPA. Under the Agency’s interpretation of the VMS data, where the last radio buoy would have been set at 2:14 UTC, there would not be enough time for the crew to rest and the gear to soak before beginning the haul. As mentioned also in regard to Count 1, any gear that was deployed remained in the same general location and would not have drifted into the closed area. RB at 15-18.

In response, NOAA points to Mr. Boone’s testimony that it is reasonable to credit the logbook’s “end set” location and time, which were consistent with VMS data, while discounting the apparent inaccuracies in the locations for the “begin set,” “begin haul” and “end haul,” which it concedes were inconsistent with the VMS data. ARB at 13. The Agency argues that Respondent LLC mischaracterizes Respondent Pham’s testimony as to recording the end of the setting process, as his testimony indicates that he records it on a yellow pad immediately and then copies it in the official logbook after the vessel is cleaned. *Id.* at 13-14. Mr. Boone testified it would be hard to estimate the precise time between the VMS data points at 1:11 and 2:11 that the vessel crossed into the closed area without certain calculations and assumptions. The logbook entries and VMS data, with the longline signature pattern, are the most reliable and probative evidence, and they indicate the setting process ended inside the closed area, the Agency asserts. Respondent LLC’s 6.43-minute calculation is speculation and is erroneous because it is based on the shortest distance from the boundary of the closed area to the maximum recorded distance of incursion, 0.75 nm, which does not trace the actual path of the vessel or the location of the gear. *Id.* at 15-16. As with Count 1, the Agency points out that shorter soaking times than three hours occur regularly, and that there is an absence of evidence as to ocean current and wind to support any finding regarding drift of the mainline. ARB at 16.

Respondent LLC disagrees with the Agency’s interpretation of Respondent Pham’s testimony as to when he records the time and location. It argues that the vessel moved in a southwesterly direction just before hauling the gear, so if the gear had been set inside the closed area, some of the hauling operation should have occurred within it also. There is no substantial evidence that demonstrates that any of Respondents’ gear entered the MHI LFPA. RRB at 10-12. Respondent argues further that, as with Count 1, the Agency’s position is speculative because the VMS data must be corroborated, but the Agency has not supported it with “reliable, probative, credible and substantial” corroborating evidence. RRB at 4-7.

2. Discussion, Further Findings, and Conclusions

The VMS data shows that the F/V Capt. Kevin was traveling steadily west by south (average 255 to 262 degrees) between 6 and 7 knots from 21:22 UTC November 9 through 2:11 UTC November 10 (16:11 HST November 9). AX 3; CKX 6. At the latter point, 2:11 UTC, the vessel's spot speed was 7 knots and it was heading on a course of 265 degrees, west by south. *Id.* Respondent LLC does not explain why the vessel would be traveling at such a high rate of speed *one hour* after it asserts the vessel completed setting the gear at or shortly after 1:11 UTC, when the vessel's speed transmitted by the VMS was 8 knots. The VMS data indicates that the vessel was drifting later on, at 3:11 UTC, with the vessel's speed at zero, consistent with the soaking phase. *Id.* The VMS data indicates that Respondent Pham completed setting the gear between the VMS data transmissions at 2:11 and 3:11 UTC. *Id.* Respondent Pham's logbook entries of 16:14 HST (2:14 UTC November 10) and the vessel location of 22 degrees 58' North, 158 degrees 13' West for the "end set" is consistent with the VMS data showing the vessel at 22 degrees 58.3' North and 158 degrees 12.9' West at 2:11 UTC. AX 1 at 64, AX 3; CKX 6. The fact that his logbook entries for the vessel's position at the "start haul" and "start set" are very inconsistent with the VMS data, and thus erroneous, does not cast doubt on the accuracy of his logbook entries for time and position of the "end set."

The VMS data indicates that the vessel began hauling the gear between 4:51 and 5:38 UTC, as the VMS transmitted the vessel's speed at 3 knots steadily from 5:38 UTC on, and its course had changed from approximately southwest (240 degrees) at 4:50 UTC to northeast (51 degrees) at 5:38 UTC. AX 3; CKX 6. At 5:38 UTC, the vessel's position was 22 degrees 59' North, only slightly north of the boundary of the MHI LFPA, and approximately northeast of the "end set" position recorded by Respondent Pham. AX 3; CKX 6. Therefore the VMS data indicates that the gear drifted in a northerly or northeasterly direction from the "end set" position. This general direction of the gear drift is consistent with the evidence indicating drift of the gear in other sets of this fishing trip, showing the generally northern position of the "begin haul" position from the "end set" position, as discussed with respect to Count 1. AX 1 at 10, 11, 13, 60-62, 67-74; AX 3. On the other hand if the vessel completed setting its gear around 1:11 UTC, as Respondent LLC argues, when the vessel was at 22 degrees 59.4' North and 158 degrees 05.4' West, then the gear would have drifted a significant distance due west - as the VMS data and logbook time entry shows the haul began between 4:51 and 5:38 UTC at a position of 22 degrees 59.0' North and 158 degrees, between 12.1' and 13.9' West - which is inconsistent with the evidence indicating the drift of gear in the other sets of this fishing trip. AX 1 at 64; AX 3; CKX 6. As to Respondent LLC's argument that the vessel moved in a southwesterly direction just before hauling the gear, in fact the vessel initially moved north and then in a southwesterly direction while drifting, and then moved in a northeasterly direction between 4:51 and 5:38 UTC, when the haul began. AX 3; CKX 6.

The next question is whether Respondent's Pham's testimony about his recording of the "end set" time and position weighs against this evidence. He testified that after the third radio buoy is put in the water and the fishing gear is no longer attached to the vessel, he helps the crew clean up the vessel, which takes about 30 minutes, and then takes a shower. Tr. 211-212. He then testified as follows when examined by Respondent LLC's counsel:

Q: Does he [Respondent Pham] note at any time the vessel's position on the GPS and the time?

MR HO [Respondent LLC's counsel]: That's a big sigh.

A: After I'm done with everything, then I start taking note of the vessel GPS at the time.

Q: What does he [Pham] mean when he says when I'm done with everything? At what point is that?

A: So after we clean up everything, then I start writing down the GPS at the time.

* * *

After we're done with the cleaning, then I start writing down the GPS.

Q: Does he [Pham] also note the time?

A: Yes.

Q: Is that for entry in the logbook?

A: Yes.

Q: To designate when they have finished setting their gear; is that right?

A: Yes.

Tr. 212-213. I find this testimony not to be credible. The sigh and hesitation before he answered the question, and his initially vague words "done with everything," suggest that he was struggling over whether to be truthful or how much to disclose. His demeanor as he spoke those words was impassive, with very little eye contact with the interpreter and no eye contact with anyone else in the courtroom. This was particularly noticeable compared with his demeanor during his testimony generally, in which he was soft-spoken and reserved. Furthermore, he revealed more on cross examination. When shown a photograph of handwriting on a yellow pad, he acknowledged that he initially noted GPS positions and times for the "start set," "end set," "start haul" and "end haul" on the yellow pad. Tr. 264-265; AX 1 at 35, 43. The examination continued as follows:

Q: And the start of – you started your fishing is when you put the first radio buoy in the water, correct?

A: Yes.

Q: And that's the position in time he [Pham] writes down on this yellow piece of paper, correct?

A: Yes.

Q: And then later after cleanup, he writes in the official logbook, correct?

A: Yes.

Q: So there's a time delay between when you write in the yellow paper and when you put it in the logbook, correct?

A: Yes.

* * *

Q: (By Mr. Smith): So you told me before, that you write down the positions in the yellow book at the time they're happening, correct?

A: Yes.

Tr. 265-266; AX 1 at 34, 35, 43. This testimony is consistent with his earlier testimony that while the crew is setting the gear, he has the vessel on autopilot and walks around, and that when the crew completes setting the gear they notify him that the line is not attached to the vessel, after which he "comes out" to help them clean the vessel. Tr. 209-211. It is reasonable to infer that he would be in the wheelhouse immediately at the end of the setting operation in order to take the vessel off autopilot and let it drift while the gear is soaking. FF 14, 18, 19. The GPS is located in the wheelhouse. Tr. 205-206. His testimony as a whole indicates that he "comes out" from the wheelhouse to help clean the vessel after writing down the time and position of the vessel. Moreover, if he routinely cleaned the vessel for 30 minutes after the end of the setting operation before noting the time and position, then this might be apparent when comparing VMS and logbook data. Respondents have not shown any pattern in comparing the logbook data for "end set" as plotted on the maps with VMS data which would indicate that he waited 30 minutes after the end of the setting operation to note the time and vessel position. His logbook entries for the "end set" for the other sets in this fishing trip appear reasonably consistent with the VMS data; for example, his logbook entry on Set 19 for "end set" is 1:03 UTC at 22 degrees 51' North, 157 degrees 59' West, and the VMS data shows that at 1:05 UTC he was traveling at 8 knots, at 22 degrees 52.3' North, 157 degrees 58.9' West. AX 1 at 10, 11, 13, 14, 67, 68, 70, 71; AX 3; CKX 5.

The testimony and evidence as a whole supports a finding that the "end set" time and position Respondent Pham noted in the logbook for Set 20 was accurate. While that would indicate that the gear was soaking for less than the typical 3 hours, the logbook reveals intervals for the soak of less than three hours in four other sets in this fishing trip. AX 1 at 49, 51, 56, 60.

In conclusion, I find that the Agency has shown by a preponderance of the evidence that Respondents fished within a longline fishing prohibited area in violation of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A) and 50 C.F.R. § 665.802(v), as alleged in Count 3 of 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 \$178,156 per violation. 16 U.S.C. § 1858(a); 15 C.F.R. § 6.4(f)(15) (maximum penalty of \$100,000 under Magnuson-Stevens Act increased to \$178,156 as authorized by the Federal Civil Penalties Inflation Adjustment Act of 1990).¹³ The Magnuson-Stevens Act states that, in determining penalty amount, “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 on the [Agency] 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 burden is on the respondent to prove his inability to pay “by providing verifiable, complete, and accurate financial information to NOAA.” 15 C.F.R. § 904.108(c).

The Administrative Law Judge is empowered to “[a]ssess a civil penalty or impose 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 regulations “eliminate[] any presumption in favor of the civil penalty or permit sanction assessed by NOAA in its charging document” and “require[] 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

Guidance for penalty assessments under the multiple statutes NOAA enforces is set forth in the Agency’s “Policy for the Assessment of Civil Administrative Penalties and Permit

¹³ The most recent adjustments for inflation made by 15 C.F.R. § 6.4 became effective July 7, 2016. They apply to all penalties assessed thereafter by the Commerce department (until any future adjustment is made), including penalties assessed for violations that predate the adjustment. 15 C.F.R. § 6.5.

Sanctions” (“Penalty Policy”).¹⁴ While the Penalty Policy “provides guidance for the NOAA Office of the General Counsel,” it is not binding on Administrative Law Judges. Yet it may be useful as an analytical framework when assessing a penalty through 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 Agency presented the Penalty Policy at hearing. *See* AX 7. 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 prohibited act committed, and
- (ii) the degree of culpability of the violator, and

(b) adjustments upward or downward to reflect:

- (i) history of non-compliance, and
- (ii) other matters justice may require, including

(A) Conduct of the violator after the violation – whether the violator self-reports, promptly comes into compliance, cooperates with the investigation, attempts to avoid detection, or lies, obstructs, or interferes with the investigation; and

(B) History of compliance, economic impact of the penalty, or subsequently rescinded regulation

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

AX 7 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. AX 7 at 30. The schedules assign an “offense level” to the most common violations charged by the Agency, which under the Magnuson-Stevens Act range from “I” (least significant) to “VI” (most significant) and are designed to reflect the nature, circumstances, and extent of the violations. AX 7 at 4-5, 7-8. Where no offense level has been assigned to a violation, the Penalty Policy directs that the offense level of a similar violation be used or, if no similar offense can be identified, by assessing the gravity based on criteria listed in Penalty Policy generally. AX 7 at 5

¹⁴ The current Penalty Policy became effective July 1, 2014. It revised the original Penalty Policy, issued March 16, 2011.

n.4. Such criteria include: nature and status of the resource at issue in the violation, including whether the violation affects measures designed to protect essential fish habitat, endangered or threatened species or resources within a national marine sanctuary; 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 (e.g., limited versus open access fishery); and whether the violation is difficult to detect without on-scene enforcement presence or other compliance mechanisms. AX 7 at 8.

Next, culpability of the alleged violator is assessed at one of four levels, in decreasing order of severity:

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.

AX 7 at 8-9. Factors to be considered when assigning culpability include 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 the potential harm associated with the conduct; and “other similar factors as appropriate.” AX 7 at 9.

The gravity component and culpability component form the two axes of penalty matrices for each statute, set out in Appendix 2 of the Penalty Policy. AX 7 at 23. A range of penalties appears in each box of the matrix. A penalty range is thus determined by selecting the appropriate gravity and culpability levels on the axes. An initial base penalty is the midpoint of the penalty range within the applicable matrix box. AX 7 at 5, 23.

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. AX 7 at 9-10. 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. AX 7 at 10. Therefore, the Penalty Policy provides that a penalty may be increased where a respondent had a prior violation. AX 7 at 10.

Another adjustment factor reflects the activity of the violator after the violation, in terms of good faith efforts to comply and cooperation or non-cooperation. AX 7 at 12. The Penalty Policy lists the following examples of good faith factors to decrease a penalty: self-reporting, providing helpful information to investigators, and cooperating with investigators. AX 7 at 12. The Penalty Policy states that no downward adjustments are made for efforts primarily consisting of coming into compliance, for exhibiting common courtesy to law enforcement that would be expected from members of the public, or for self-reporting when discovery of the violation is inevitable. AX 7 at 12. The Penalty Policy describes bad faith factors leading to increased penalties as attempts to avoid detection, destroying evidence, intimidating or threatening witnesses, or lying. AX 7 at 12.

Added to the base penalty is any value of proceeds gained from unlawful activity and any economic benefit of noncompliance to the violator. AX 7 at 13. The Penalty Policy provides that these “are factored in to prevent violators from profiting from illicit behavior and engaging in improper behavior because the sanctions imposed are merely a ‘cost of doing business’ (i.e., because the economic benefit of their unlawful activity exceeds the cost of a potential penalty).” AX 7 at 13. Proceeds from fish caught in violation of statutory or regulatory requirements are assessed based on the gross ex-vessel value of the fish. AX 7 at 13.

C. Arguments of the Parties

a. NOAA

The Agency’s position regarding the nature, circumstances, extent, and gravity of the offenses is that Respondents’ fishing in a closed area is “a serious offense that strikes at the heart of the Agency’s management regimes.” AB at 26. The vessel made multiple incursions into the

closed area, and the catenary of the mainline and branch lines of Respondents' gear "means that the length of the fishing gear in the closed area would greatly exceed the distance reported as the maximum vessel incursion." AB at 26-27. This posed a significant threat to the insular population of false killer whales the closed area was designed to protect and also created the potential for gear conflict the closed area sought to prevent. AB at 27-28. To make matters worse, both Respondents lacked basic knowledge of the boundaries of the closed area and failed to take steps to avoid entering "[d]espite the fact that the boundary can be depicted in a straightforward graphical manner on a chart." AB at 29. They "took no steps to confirm that the boundaries were depicted on the chart plotter and were accurate, which would have been quite simple to do." AB at 29. This is especially troubling given that the chart plotter was, as Respondent LLC knew, Respondent Pham's primary navigation tool. AB at 30. The Agency proposed a base penalty of \$12,500 per count based on gravity level III and negligence as the level of culpability. AX 6.

The Agency's asserts with regard to Respondents' culpability that neither exercised the level of due care a reasonable owner and operator should exercise. AB at 31. Respondent LLC had a duty to ensure its captain operated lawfully and knew the closed areas in the fishery where he was conducting operations, and Respondent Pham had a duty to know the coordinates of the boundary of the closed area. AB at 31-32; ARB at 18. Yet Respondent LLC never offered, and Respondent Pham never received, training on the chart plotter even though when hired he had no prior navigational knowledge or experience as a captain aboard Hawaii-based longline fishing vessels. AB at 32-33; ARB at 18. Likewise, Respondent LLC did little to stay abreast of fishery regulations. AB at 32-33. Additionally, beyond having the boundaries reinstalled on the chart plotter, Respondent LLC "took no 'additional steps' after the trip at issue to determine why or how the boundary failed to appear[.]" AB at 34. Regardless, the attempt to install, and then reinstall, in the chart plotter the boundaries of the closed area does not excuse or mitigate Respondents' liability, particularly when Respondent LLC never checked the chart plotter and failed to schedule regular maintenance or require Respondent Pham to check it. AB at 35; ARB at 19. The company had a duty to ensure the accuracy of its navigational equipment. ARB at 19-20. Consequently, the Agency argues, Respondents' culpability level "was at a minimum negligent and was arguably reckless[.]" AB at 35.

As to Respondents' history of prior offenses, Respondent LLC stipulated to five prior offenses, including one related to another closed area regulation. AB at 31. Respondent Pham also admitted to a past violation of a fishing regulation intended to protect seabirds. AB at 31. The Agency did not propose adjusting the penalty for Respondents' good faith efforts to comply or degree of cooperation or noncooperation. AX 6.

Finally, the Agency urges that justice requires the Respondents to disgorge the proceeds of their illegal activity. AB at 36. This should be done by dividing by 20, the number of sets made during the trip, the \$60,697.90 that Respondent LLC was paid for the 20,696 pounds of fish it sold following the trip. That amount, \$3,034.90, should be added to each of the counts of violation to remove Respondents' ill-gotten gains. AB at 36. As to the proposal of Respondent LLC for a calculation based on the length of fishing line in the closed area and the depth of its vessel's incursion, this methodology requires facts and expert testimony not in evidence, and it contravenes the presumption under the Magnuson-Stevens Act that "if any portion of the fish is

unlawfully caught all of the fish are unlawfully caught,” citing to 16 U.S.C. § 1860(e). ARB at 21-23.

b. Capt Kevin T&V, LLC

In response to the Agency’s contentions, Respondent LLC urges that any penalty assessed should be mitigated particularly because it installed the closed area boundaries in its navigational software at the time closure of the MHI LFPA was implemented. RB at 19. The company “did not know, and had no reason to discover, that at some point the file . . . installed had been deleted.” RB at 19. The company reasonably relied on its hired electronics technician to maintain the chart plotter. RB at 19. Moreover, Respondent LLC immediately reinstalled the file when it was discovered missing during the investigation into this matter. RB at 19.

As to the hiring of Respondent Pham, Respondent LLC argues that it cannot be culpable for his lack of training because the Agency presented no evidence of what level of training would have prevented the violation. RB at 20; RRB at 12-13. Plus, Respondent Pham’s level of competence using the chart plotter is irrelevant because the closed area boundaries “had been permanently deleted.” RB at 20; RRB at 12-13. This deletion also led Respondent LLC to install a new program on their home computer to monitor in real time the vessel’s position. RB at 20.

Respondent LLC also notes that is the custom and practice of its managing member Vinh Tran to remain current on federal regulations and to update the navigation software and chart plotter as appropriate, that Respondent Pham was discharged after the trip and has not been rehired, that Respondent LLC “has always been careful and exercised reasonable measures in hiring their operators and working to ensure they conduct fishing operations in a safe and lawful manner,” that it had no reason to believe Respondent Pham would enter the prohibited area, and that he was responsible for the operation of the vessel. RB at 20-21.

With respect to calculating economic benefit, Respondent LLC asserts that the Agency’s method is inaccurate and “should be modified to consider the amount of fishing gear allegedly deployed for any day . . . a violation occurred.” RB at 22. This entails calculations based on the distance of the incursion, the number of hooks per mile of line that breached the closed area, the number of hooks per fishing set as a percentage of the total gear, and that percentage multiplied by the Agency’s proposed value of each set. Respondent LLC’s calculations yield economic benefits of \$495.60 and \$58.17 for Counts II, and III respectively. RB at 22-23.

Finally, liability – and therefore the penalty – should be apportioned between Respondents according to their respective degrees of culpability, Respondent LLC argues. RB at 23. Respondent LLC “is a diligent and careful owner that . . . used its best efforts to equip their vessel with the software necessary” to display the prohibited area on the chart plotter, and was “reasonable and prudent in hiring an experienced and reputable captain well known in the Vietnamese fishing fleet.” RB at 23; RRB at 15. Meanwhile, Respondent Pham, is an experienced longline fishing captain, solely responsible for the day to day fishing operations of the vessel while at sea with an independent duty to also know the coordinates and location of the

prohibited area and to set his gear within the legal limits. RB at 23. Respondent LLC argues that it was Respondent Pham's responsibility to inform his employer if the correct boundary lines were not displayed in the chart plotter. RB at 23.

D. Discussion and Conclusions

1. Joint and Several Liability

Respondents are charged jointly and severally in this matter. However, holding Respondents jointly and severally liable is consistent with the rationale of respondeat superior, to ensure that vessel owners do not gain the benefits of illegal fishing activities while avoiding the responsibility of preventing such activities. See, *David D. Stillwell, et al.*, 2015 NOAA LEXIS 11, NOAA Docket No. SE1200825FM, at *43 (ALJ, May 29, 2015). Several criteria must be met before an owner may be shielded from liability for the unlawful conduct of its vessel's operator and crew. First, the owner cannot receive any direct benefit from the unlawful conduct. Second, the wrongdoer must have been 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. Third, the owner must have taken reasonable measures to ensure the wrongdoer complied with applicable law. *In the Matter of Khiem Diep*, 2015 NOAA LEXIS 12 * 64, Docket No. PI1201802 (ALJ June 5, 2015).

In this instance, as the owner of the vessel and Respondent Pham's employer, Respondent LLC stood to benefit financially from Respondent Pham's operation of the F/V Capt. Kevin, including his incursions into the closed area, as it receives a share of the proceeds from the fish that were caught by the vessel and sold. Thus, the vessel owner benefits financially from any illegal acts of the vessel's captain during the fishing trip. Nothing in the record indicates Respondent Pham set the vessel's gear for any reason other than to harvest fish to the benefit of Respondent LLC's business. Respondent LLC was paid \$60,697.90 for the fish caught by Respondent Pham on the fishing trip at issue. FF 64. Even assuming *arguendo* that through his actions, Respondent Pham was disobeying policies and procedures that Respondent LLC established, his conduct is not necessarily shifted outside the scope of his employment, where Respondent LLC derived some benefit of it. *Burlington Industries v. Ellerth*, 524 U.S. 742, 757 (1998) (an employer may be held liable for both negligent and intentional torts conducted by its employee acting within the scope of his employment, actuated at least in part by a purpose to serve the employer even if the conduct is forbidden by the employer, such as when a salesperson lies to a customer to make a sale even though it may violate the employer's policies.)

Moreover, as discussed below, as there is no evidence that Respondent LLC trained Respondent Pham in the applicable federal regulations or the proper use of the chart plotter, or took other reasonable measures to ensure compliance with the law, Respondent LLC is culpable to the same degree as Respondent Pham.

Respondent LLC has not demonstrated facts that weigh against imposition of joint and several liability. Consequently, the Respondents are jointly and severally liable for the violations found herein.

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

Under the Penalty Policy's framework for analyzing the statutory penalty factors, "fishing in a closed area" prohibited by Magnuson-Stevens may be treated as a gravity Level II or Level III offense. AX 7 at 36-37. In distinguishing between the two levels, the Penalty Policy advises consideration of "(1) the nature of the area; (2) how far into the area the vessel travels; (3) how long the vessel is in the area; (4) the type of gear deployed; and [5] the amount of fish harvested in the closed area." AX 7 at 36 n.18. The Penalty Policy assesses "the nature of the area" based on "impact to the resource." AX 7 at 36 n.18. In application, a Level II offense occurs when "the impact to the resource was moderate because . . . the fishery was rebuilt or at sustainable levels, the distance and time in the closed area was relatively short, or little to no fish were actually caught in the closed area." AX 7 at 36 n.18. A Level III offense arises when "the impact to the resource was major because . . . the fishery was overfished, the distance and time in the closed area was relatively long, the gear was of the type that was completely prohibited, or a large amount or high value of fish were caught in the closed area." AX 7 at 36 n.18.

As to the effect of Respondents' actions on the fishery, Mr. Kupfer testified that one of the two purposes of closing the MHI LFPA to longliners, and the reason that it became permanently closed to longliners, was to protect the insular false killer whales, which are listed as an endangered species. Tr. 39-40, 70 The Penalty Policy provides that factors to take into consideration in assessing the gravity of the violation include whether the violation affects measures designed to protect endangered or threatened species, and the potential harm to the resource or the regulatory scheme or program. AX 7 at 8. Respondents' fishing within the MHI LFPA impacts measures designed in part to protect an endangered species and presented significant potential harm to the resource and regulatory scheme.

As to the distances the F/V Capt Kevin traveled into the closed area, the depths of the incursions from the closest boundary of the MHI LFPA were between 6.03 and 6.54 nautical miles for Count 2 and 0.75 nautical mile for Count 3. FF 41, 47; AX 1 at 72, 73. The total size of the closed area is 82,450 square nautical miles. Taking of Marine Mammals Incidental to Commercial Fishing, 77 Fed. Reg. at 71262-63. Other than explaining that the distances were measured from the closest point of the closed area boundary to the VMS-reported vessel location – and that they do not account for transit through the closed area or total length of the vessel's line – the Agency did not offer evidence or argument as to the significance of the intrusions' magnitude. The time spent in the prohibited area is more indicative of the magnitude, and Set 19, addressed in Count 2, was significant, occurring over nearly six hours. FF 41; AX 3. Set 20, addressed in Count 3, lasted less than two hours, and considering the incursion depth of approximately 0.75 nautical mile, it was not of such a significant magnitude, considering also the time of 5 to 5 ½ hours to set the gear, 11 hours for the haul for Set 20, and soaking the line for 2 ½ to three hours. FF 46, 48; AX 1 at 63-64; AX 3.

Respondents deployed a “completely prohibited” type of gear in the closed area, a longline of a length of 35 miles with up to 2400 hooks, which has a large impact on the fishery. FF 10. Also, during the two sets in which the F/V Capt. Kevin fished the closed area, the captain’s logbook indicates the vessel landed 70 fish of various pelagic species, including 51 tuna. Specifically, for Count 2 Respondents landed 49 fish including 42 tuna, and for Count 3 Respondents landed 21 fish including 9 tuna. FF 44, 51; AX 1 at 63, 64. The 35-mile-long gear was not all deployed within the MHI LFPA, and it cannot be determined how many fish actually were hooked within the prohibited area and how many were hooked outside that area, but these were among the most successful sets of the fishing trip and it cannot be concluded, at least with Set 19, that Respondents caught “little to no” fish within the prohibited area during the six hours it was located there.¹⁵ FF 10; AX 1 at 45-64. Furthermore, the fish, which included tuna, had a high value. FF 63.

Given all of the above considerations, the gravity for Counts 2 and 3 are assessed as a Level III. However, the penalty should be a lower value for Count 3 than for Count 2 given the lesser magnitude of the incursion into the MHI LFPA and fewer fish caught in Set 20.

3. Culpability

Mr. Tran testified that when Respondent LLC was formed and it purchased the F/V Capt Kevin, Mr. Tran hired Kevin Liu to maintain all of the vessel’s electronics. Tr. 74, 299-300, 302. Among Mr. Liu’s tasks was to load onto the vessel’s computer the file that showed the boundaries of the closed area. Tr. 302-303. Although this shows some care was taken to comply with NOAA regulations, the failure to take further steps to ensure the accuracy and proper use of the chart plotter after its installation was neither reasonable nor prudent.

From November 2010 to November 2013, Respondent Pham was the only person to operate the F/V Capt Kevin. FF 7, 54; Tr. 321. However, Respondent LLC did not train Respondent Pham about NOAA regulations, how to use the chart plotter, how to check the boundaries of the MHI LFPA, and did not show him where the boundaries for the MHI LFPA should have been displayed. FF 55; Tr. 270-271, 280, 288. In fact Respondent LLC provided no training to Respondent Pham, and did not ensure that he had adequate training. FF 55. Respondent LLC merely relied on Respondent Pham’s experience in fishing based on a reference from a friend and an owner of a vessel on which Respondent Pham worked previously. Respondent LLC also inquired of the captain and crew after fishing trips as to whether there were any problems or whether anything needed to be done or repaired. Tr. 294, 295-297. As to keeping abreast of legal requirements regarding fishing, Mr. Tran testified that he relied on information being received in the mail. Tr. 297-299. Respondent LLC’s manager Mr. Tran was not familiar with operating the chart plotter or with the MHI LFPA boundaries and did not check prior to the trip that the correct boundaries of the MHI LFPA were displayed on the chart plotter. FF 58. Tr. 288, 302, 305, 307.

¹⁵ Although not found herein to constitute a violation, Set 16, which was set very close to the boundary of the MHI LFPA, resulted in 47 fish, including 39 tuna, being landed. FF 37.

Prior to the trip, Respondent Pham did not check the boundaries on the chart plotter or ensure the chart plotter displayed the correct boundaries. FF 56; Tr. 280-281. Additionally, he had not read the applicable laws, believing that “the owner of the vessel should know and then the owner would tell me.” FF 57; Tr. 272. Additionally, Respondent Pham was never advised to check the boundaries before embarking on a trip, nor did he ever see Mr. Tran check the boundaries. FF 55; Tr. 280-281.

When Agent Jim On began his investigation at the end of the trip, Mr. Tran told him that all of the software, charting maps, and plotters were up to date. Tr. 74. But when Respondent Pham turned on the chart plotter for the agent and pointed to the area he believed to be the closed area, Agent Jim On testified, “it was obvious . . . that it was not the closed area.” Tr. 75-76; AX 1 at 39-42. Mr. Tran also wrongly identified the closed area. Tr. 78. Mr. Liu arrived and confirmed that he previously had installed software identifying the closed area, but observed that it was not depicted on the chart plotter. Tr. 78. Mr. Tran testified that he first discovered that the file had been deleted during the investigation, and that he had no information or knowledge that the computer file depicting the closed area had been corrupted or deleted, and did not know why the file disappeared from the chart plotter. FF 60; Tr. 303-304, 320. Mr. Tran had Mr. Liu reinstall the software before the F/V Capt. Kevin left on its next fishing trip. FF 61; Tr. 304. Mr. Tran indicated that after the investigation, he installed a Google Earth program that allows him to track the location of the F/V Capt Kevin from his computer at home. Tr. 308-311.

Although there is no evidence that anyone intentionally deleted the computer file displaying the closed area, Respondents clearly did not take reasonable steps to ensure the vessel did not breach the area’s boundaries while fishing. Respondent LLC should have determined before its vessel left port that the navigational software was working correctly; this is an easy assessment that should be made before every trip. The company also should have formally and regularly trained its captain on the boundaries of the closed area, appropriate methods for navigating around these boundaries, and any other applicable laws and regulations. Likewise, Respondent Pham was obligated to educate himself on the boundaries of the closed area and to take reasonable and appropriate steps to avoid entry. He did not do so because he did not, at the very least, check the boundaries on the chart plotter or ensure the chart plotter displayed the correct boundaries prior to the trip. Consequently, the actions of both Respondents display their negligence and carelessness in abiding by federal regulations governing the fishery.

The evidence shows that the level of Respondents’ level of culpability, especially given the context of longline fishing - a very intensive fishing technique requiring heightened responsibility - exemplifies a significant degree of negligence, defined in the Penalty Policy as “failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances” by their “lack of diligence, a disregard of the consequences likely to result from [their] actions, [and their] carelessness.” AX 7 at 9. The degree of Respondents’ negligence does not quite fit the definition of recklessness, “a conscious disregard of a substantial risk” of the vessel fishing within prohibited areas, and a “gross deviation from the standard of conduct a law-abiding person would observe” when longline fishing or when engaging a captain to operate a longline fishing vessel. *Id.*

4. Matrix Value

Under the penalty matrix for violations of the Magnuson-Stevens Act, negligent violations of a Level III offense are assessed a penalty of \$ \$10,000 to \$15,000. AX 7 at 23.

Assessing the gravity of Respondents' violations in Counts 2 and 3 as level III with a culpability of a high degree of "negligence," the question is what value within the ranges to assess. I find that for Count 2, given the facts as discussed above, the penalty should be increased by \$1000 above the midpoint of the range to account for the high degree of Respondents' negligence. Therefore the matrix value for Count 2 is assessed at \$13,500.

The only differences between Count 2 and 3 are in the magnitude of the incursion and number of fish caught in each set, and I find that these factors more than counterbalance the increase representing the degree of negligence for Count 3. Therefore the base penalty for Count 3 should be assessed at less than the midpoint of the range in the matrix. The appropriate matrix value for Count 3 is \$11,500.

5. Adjustment Factors and Economic Benefit

From the base amount, the penalty must be adjusted upward due to both Respondents' history of violations. Respondent LLC has admitted to several prior transgressions, including unlawful entry into the Papahānaumokuākea National Marine Monument, failing to dye bait when necessary, failure to awaken an observer before setting, sexually harassing an observer, and failing to notify the Agency before departing on a fishing trip. FF 64; JX 1, ¶ 25(d). Respondent Pham during the hearing admitted to his role in the violation for failing to dye bait blue. Tr. 89-90.

The Penalty Policy instructs that prior violations similar to the newly charged violations should shift the penalty an entire matrix box to the right. AX 7 at 10, 23. Dissimilar prior violations should increase the penalty by an amount within the same matrix box. AX 7 at 10, 23. In this case, unlawful entry into the Papahānaumokuākea National Marine Monument is a violation bearing some similarity to fishing in the closed area around the Main Hawaiian Islands. The other prior violations are dissimilar. For these five prior violations, a \$2,750 increase from the base penalty is appropriate.

As to Respondents' efforts to comply and degree of cooperation, Respondents exhibited the common courtesy to law enforcement personnel, reinstalled the navigational software and obtained an application to observe the vessel's movements from land, but these actions primarily constitute coming into compliance and are not a basis to reduce the penalty under the Penalty Policy. FF AX 7 at 12.

In addition to Respondents' history of violations, the proposed penalty must also account for the value obtained from fish they caught in the closed area. For fish caught illegally, the Penalty Policy advises that the "gross ex-vessel value of the fish" represents the proceeds from unlawful activity that must be recouped "to prevent violators from profiting from illicit behavior and engaging in improper behavior because the sanctions imposed are merely a 'cost of doing

business' (i.e., because the economic benefit of their unlawful activity exceeds the cost of a potential penalty)." AX 7 at 13. The actual value of the fish should be used if known; if not known, it is appropriate to use a reasonable estimate based on available information. AX 7 at 13.

In this case, the F/V Capt. Kevin caught 20,696 pounds of fish during the trip at issue and sold the catch for \$60,697.90. FF 63 Although in this instance the fish were sold and not forfeited, the Magnuson-Stevens Act provides for "a rebuttable presumption that all fish found on board a fishing vessel which is seized . . . were taken or retained in violation of the Act." 16 U.S.C. § 1860(e). The Agency's position is accepted, that "if any portion of the fish is unlawfully caught all of the fish are unlawfully caught" within a set, particularly because a penalty must reflect an appropriate degree of deterrence and must not merely be a cost of doing business. Moreover, as the Agency has pointed out, the depth of the incursion does not necessarily correspond to the amount of longline that may be in the closed area because the incursion depth represents only the greatest straight-line distance the vessel was from the outer boundary. ARB at 21-22. To attempt to calculate the actual value of fish in each set that were caught in the prohibited area is not only exceedingly difficult, as it depends on many factors. As the Agency has pointed out, the depth of the incursion does not necessarily correspond to the amount of longline that may be in the closed area because the incursion depth represents only the greatest straight-line distance the vessel was from the outer boundary.

The vessel made a total of 20 fishing sets, and the average value of each set was \$3,034.90. The actual value of the fish caught within the MHI LFPA is not known but this value of the average for each set is a reasonable estimate based on available information. AX 7 at 13. Particularly given that relatively large numbers of fish were caught in Sets 19 and 20 compared to the other sets in this fishing trip, it is appropriate to add this value rounded to the nearest dollar, to each penalty to represent Sets 19 and 20.

6. Ability to Pay

The NOVA advised Respondents that they could seek to have the proposed penalty modified on the basis that they did not have the ability to pay, and that any such modification request must be made in accordance with 15 C.F.R. § 904.102 and be accompanied by supporting financial information. In this case, Respondents have not claimed inability to pay the penalty and have not provided any information concerning their financial condition. Respondents are therefore "presumed to have the ability to pay the civil penalty." 15 C.F.R. § 904.108(c).

7. Ultimate Conclusion

Taking into account the nature, circumstances, extent, and gravity of the violations, Respondents' degree of culpability and history of prior offenses, and other matters as justice may require, Respondents are assessed jointly and severally a civil penalty in the amount of \$ \$19,285 for Count 2 and in the amount of \$17,285 for Count 3, for a total penalty of \$36,570.

ORDER

IT IS HEREBY ORDERED THAT a civil penalty in the total amount of \$36,570 is assessed jointly and severally against Respondents CAPT KEVIN T&V, LLC and DE HUU PHAM.

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:

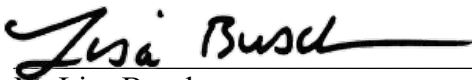
NOAA Daniel K. Inouye Regional Center
Office of General Counsel, Enforcement Section
1845 Wasp Blvd., Building 176
Honolulu, HI 96818

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

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.