



UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:)
)
Donald Brent Killingsworth and) **Docket No. SE1705219, F/V Miss Salena**
Clarence Earl Chavers,)
)
Respondents.)
_____)

INITIAL DECISION AND ORDER

Date: December 17, 2019
Before: Christine Donelian Coughlin, Administrative Law Judge,
U.S. Environmental Protection Agency¹

Appearances: For the Agency:

Loren Remsberg, Esq.
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National Oceanic and Atmospheric Administration,
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For Respondents:

Donald Brent Killingsworth, Pro Se

Clarence Earl Chavers, Pro Se

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

I. PROCEDURAL BACKGROUND

The National Oceanic and Atmospheric Administration (“NOAA” or “Agency”) issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”), dated January 5, 2018, to Donald Brent Killingsworth (“Respondent Killingsworth”) and Clarence Earl Chavers (“Respondent Chavers”) (collectively, “Respondents”). The NOVA charges Respondents, jointly and severally, with two counts of violation of the Endangered Species Act (“ESA”) and implementing regulations. The NOVA alleges that on June 7, 2017, Respondents violated the ESA by owning, operating, or being on board a vessel that was not in compliance with 50 C.F.R. § 223.206(d). Specifically, the NOVA asserts that nets on the vessel owned by Respondent Chavers, and operated by Respondent Killingsworth, were rigged for fishing and did not have compliant Turtle Excluder Devices (“TEDs”) installed, in violation of the ESA at 16 U.S.C. §1538(a)(1)(G), and regulations at 50 C.F.R. §§ 223.205(b)(1) and 223.207(a)(9).

Respondent Killingsworth timely requested a hearing, and the Agency subsequently forwarded the case to this Tribunal on May 17, 2018.² On June 20, 2018, I was designated to preside over the litigation of this matter. On June 22, 2018, I issued an Order to Submit Preliminary Positions on Issues and Procedures (“PIIP Scheduling Order”) to the parties, setting forth various prehearing filing deadlines and procedures. Pursuant to the PIIP Scheduling Order, the Agency was required to file its Preliminary Position on Issues and Procedures (“PIIP”) on or before August 3, 2018, and Respondents were required to file their PIIP(s) on or before August 24, 2018. The Agency filed its PIIP on August 2, 2018. Neither Respondent Killingsworth, nor Respondent Chavers, filed a PIIP.

By order dated September 11, 2018, I scheduled the evidentiary hearing in this matter to commence on November 15, 2018.³ Prior to the hearing, the Agency filed a Motion in Limine to Exclude Respondents’ Introduction of Testimony, Documents, or Other Evidence (“Motion in Limine”). In its Motion in Limine, the Agency moved to exclude from hearing Respondents’ introduction of testimony, documents, or other evidence, due to their failure to file a PIIP. On October 18, 2018, I issued an Order on Agency’s Motion in Limine pursuant to which Respondents were precluded from presenting exhibits for admission into the record and testimony from witnesses other than themselves at the hearing. Respondents were permitted to testify on their own behalf and cross examine opposing witnesses at the hearing.

² Pursuant to 15 C.F.R. § 904.107(b), “a hearing request by one joint and several respondent is considered a request by the other joint and several respondent(s).”

³ The Notice of Hearing Order was sent by certified mail to Respondent Chavers at his address of record Gautier, Mississippi on September 11, 2018. However, the Notice of Hearing Order was subsequently returned to sender as unclaimed on October 10, 2018, with attempted delivery dates recorded on September 15, 2018; September 19, 2018; and September 29, 2018. Likewise, correspondence to Respondent Chavers regarding the Prehearing Conference, which was mailed on October 12, 2018, was also returned to sender as unclaimed with attempted delivery dates recorded as October 15, 2018; October 20, 2018; and October 30, 2018. However, at the hearing, Margaret Johnson, Respondent Chavers’ domestic partner, confirmed that the address used for service of both the Notice of Hearing Order and the correspondence regarding the Prehearing Conference was a current address for Respondent Chavers. *See* Tr. 6-8.

I conducted the hearing in Gulfport, Mississippi, on November 15, 2018.⁴ At the hearing, the Agency presented Agency's Exhibits ("AX") 1, 2, 4, and 5, which were admitted into evidence. The Agency also presented the testimony of three witnesses: Robert Dale Stevens ("Mr. Stevens"), a retired Fisheries Methods and Equipment Specialist with NOAA's National Marine Fisheries Service ("NMFS");⁵ Patrick Webb ("Sergeant Webb"), a Senior Master Sergeant with the Mississippi Department of Marine Resources; and Michael Fitts ("Officer Fitts"), an Officer II with the Mississippi Department of Marine Resources. Notably, Mr. Stevens was qualified as an expert in the design, use, and effects of TEDs. Tr. 34-35.

Respondent Killingsworth appeared at the hearing representing himself, and he testified and engaged in cross-examination of the Agency's witnesses. Respondent Chavers testified at the hearing by telephone, but otherwise was not present at the hearing and did not engage in cross-examination of the Agency's witnesses.⁶ Respondent Chavers sent his domestic partner, Margaret Johnson ("Ms. Johnson"), to be physically present at the hearing. Ms. Johnson relayed information about the location and the availability of Respondent Chavers throughout the hearing and helped coordinate his telephonic testimony.⁷

The Hearing Clerk of this office received the certified transcript of the hearing on December 6, 2018. Electronic copies of the transcript were served by email on the Agency and Respondent Killingsworth on December 6, 2018, and a print copy of the transcript was sent to Respondent Chavers on the same date. I issued an Order Scheduling Post-Hearing Submissions on December 17, 2018, which set filing deadlines for post-hearing submissions, including motions to conform the transcript to the actual testimony, initial post-hearing briefs, and reply post-hearing briefs.

On January 22, 2019, the Agency filed a Motion for Stay or Extension of Post-Hearing Submissions ("Motion for Extension") requesting an extension of the post-hearing filing deadlines due to the lapse in federal appropriations.⁸ The Agency then filed its Initial Post-Hearing Brief, as well as a Motion to Conform the Hearing Transcript to Testimony ("Motion to Conform"), on February 5, 2019. By order dated February 8, 2019, I granted the Motion for Extension, deemed the Agency's subsequent filings timely filed, and otherwise extended the filing deadlines for the remaining post-hearing submissions. The extended filing deadline for Respondents' Initial Post-Hearing Briefs was set as March 1, 2019, but neither Respondent filed such a brief. Additionally, although extended filing deadlines for Reply Post-Hearing Briefs were also established, no such briefs were submitted. On March 8, 2019, I granted the Agency's Motion to Conform and the record of the evidentiary hearing was modified accordingly.

⁴ Citations to the transcript of this evidentiary hearing are made in the following format: "Tr. [page]."

⁵ Mr. Stevens indicated in his testimony that he retired in November 2018. *See* Tr. 25.

⁶ Respondent Chavers indicated in his testimony that he works as truck driver. *See* Tr. 182, 185.

⁷ Ms. Johnson reported that Respondent Chavers was in Dallas, Texas on the hearing date, Tr. 6, and he "really didn't know that he was supposed to be" at the hearing on November 16, 2018, Tr. 7. Ms. Johnson confirmed that Respondent Chavers' address is the same as the address used for service of orders in this proceeding, including the Notice of Hearing Order issued on September 11, 2018. *See* Tr. 6-8.

⁸ Respondents did not file a response to the Agency's Motion for Extension.

II. STATEMENT OF THE ISSUES

A. Liability

The issue presented is whether Respondent Chavers, as owner of the F/V Miss Salena, and Respondent Killingsworth, as operator of the F/V Miss Salena, jointly and severally violated the ESA and its implementing regulations by owning, operating, or being on board a vessel with nets rigged for fishing that did not have compliant TEDs installed. *See* 16 U.S.C. § 1538(a)(1)(G); 50 C.F.R. §§ 223.205, 223.206(d)(2), 223.207(a)(9).⁹

B. Penalty

If liability for a charged violation is established, then I must determine the amount of any appropriate civil penalty to be imposed for the violation. To this end, I may evaluate certain factors, including the nature, circumstances, extent, and gravity of the violation; Respondents' degree of culpability; any history of prior violations; Respondents' ability to pay; and such other matters as justice may require. *See* 15 C.F.R. § 904.108(a) (enumerating factors that may be considered in assessing a penalty).

III. FACTUAL SUMMARY

The following is a summary of the facts that I have found in this matter based on a careful and thorough review of the record and the credible evidence presented at hearing.

In or around October 2016, Respondent Killingsworth entered into an agreement to purchase the shrimp trawler F/V Miss Salena ("Miss Salena") from Respondent Chavers, the owner of the vessel, through a series of payment installments. *See* Tr. 179, 186; *see also* AX 1 at 4; AX 4 at 5 (documentation from the United States Coast Guard identifying Respondent Chavers as the owner of Miss Salena at the time of this agreement). Pursuant to this agreement, Respondent Chavers continued to hold title to the Miss Salena until Respondent Killingsworth completed payment for the vessel through monthly installments. *See* Tr. 184-86, 188-89. Pertinent to the matters at issue in this proceeding, Respondent Killingsworth made a down payment on the vessel and was still in the process of providing monthly installments to Respondent Chavers as of June 7, 2017. Tr. 145, 179, 184-88. Prior to June 7, 2017, Respondent Chavers' last boarding of the Miss Salena to trawl for shrimp was in January 2017. *See* Tr. 179-80, 196-97. According to Respondent Chavers, Respondent Killingsworth had sole custody of the vessel after January 2017. *See* Tr. 180, 185, 188, 197. On May 22, 2017, Respondent Chavers applied for and obtained a commercial shrimping license for the Miss Salena in which he identified himself as captain and Respondent Killingsworth as an alternate captain for the vessel. *See* AX 1 at 5; Tr. 112-13, 188. This license authorized Respondent Killingsworth to operate the Miss Salena to trawl for shrimp in the absence of Respondent Chavers. *See* Tr. 113; *see also* Tr. 188 (testimony from Respondent Chavers discussing the purpose of acquiring this license identifying Respondent Killingsworth as an alternate captain).

⁹ The alleged violations do not fall under any of the "exceptions to prohibitions relating to sea turtles" delineated in 50 C.F.R. § 223.206.

In the morning of June 7, 2017, the date that shrimp season opened for the year in Mississippi state waters, Respondent Killingsworth captained the Miss Salena on a trip to trawl for shrimp off the coast of Mississippi, in the Mississippi Sound.¹⁰ *See* Tr. 45-46, 98, 126-27, 136, 167; AX 1 at 1. Respondent Killingsworth was accompanied on this trip on board the Miss Salena by a deckhand and his son. Tr. 152-54. Likewise, the NMFS Gear Monitoring Team (“Gear Monitoring Team”), was also out on the water of the Mississippi Sound on the morning of June 7, 2017, performing courtesy TED inspections. *See* Tr. 45; AX 1 at 1; *see also* Tr. 29-30 (discussing the Gear Monitoring Team and courtesy TED inspections). The Gear Monitoring Team included Mr. Stevens, who was employed at the time as a Fisheries Methods and Equipment Specialist with NMFS. *See* Tr. 45; AX 5 (resume reflecting Mr. Stevens’ position at this time).

The Gear Monitoring Team approached the Miss Salena while the vessel was located in the Mississippi Sound, approximately two miles south of Bell Fountain Beach, and they identified themselves to the deckhand on board. Tr. 45-46. The Gear Monitoring Team then asked the deckhand if the vessel would be interested in a courtesy TED inspection prior to conducting trawling activities. Tr. 46. The deckhand declined the courtesy inspection, stated that the Miss Salena was setting out to begin trawling, and requested that the Gear Monitoring Team leave.¹¹ Tr. 46. In response, the Gear Monitoring Team began departing from the Miss Salena. *See* Tr. 47. As the Gear Monitoring Team backed away from the Miss Salena, Mr. Stevens observed one TED on the starboard side and one TED on the port side of the vessel as the port and starboard nets were trailing in the water. *See* Tr. 47-48. Mr. Stevens did not see any twist in the nets, and he observed that the TEDs appeared to bottom-exiting TEDs based upon the angle of the TED grids as the nets moved through the water. *See* Tr. 47-48, 50-51, 67-69. In discussing his observations at hearing, Mr. Stevens explained that when a net is not twisted, one can observe the top of the net and the angle of the TED grid. *See* Tr. 69. In such circumstances, the angle of the TED grid as it is moving through the water indicates whether a TED is bottom- or top-exiting, because a forward-leaning angle would direct a turtle downward, while a back-leaning angle would direct a turtle through a top-exiting TED. Tr. 67-68; *see also* AX 2 at 1. In addition to identifying that the TEDs on the Miss Salena appeared to be bottom-exiting, Mr. Stevens further observed that the TEDs in the nets on the vessel did not have flotation required for bottom-exiting TEDs. Tr. 49.

After Mr. Stevens observed that the TEDs in the nets appeared to be bottom-exiting and without flotation, the Gear Monitoring Team approached the Miss Salena for a second time. *See* Tr. 52. Upon this approach, the Gear Monitoring Team informed the deckhand that there appeared to be an issue with the TEDs on the vessel “that could get them in trouble,” and again asked the deckhand if the vessel would like the Gear Monitoring Team to perform a courtesy inspection. Tr. 52. In response, the deckhand instructed the Gear Monitoring Team to leave, and the Gear Monitoring Team then departed. *See* Tr. 54. Mr. Stevens and the Gear Monitoring

¹⁰ The Mississippi Sound encompasses the area inside the barrier islands off the coast of Mississippi in the Gulf of Mexico. Tr. 45-46.

¹¹ Respondent Killingsworth was not present during this interaction between the deckhand and the Gear Monitoring Team. *See* Tr. 47.

Team did not have any communication with Respondent Killingsworth during these two initial encounters with the Miss Salena on June 7, 2017. *See* Tr. 54.

After departing the Miss Salena following the MDMR Team's second approach of the vessel, Mr. Stevens called Officer Patrick Carron ("Officer Carron") of the Mississippi Department of Marine Resources ("MDMR"). Tr. 55. Mr. Stevens told Officer Carron that the Gear Monitoring Team had observed a possible bottom-exiting TED with no flotation on the Miss Salena. Tr. 55. Mr. Stevens and the Gear Monitoring Team then went on with conducting a courtesy inspection of another vessel. Tr. 56.

After Mr. Stevens spoke with Officer Carron, Officer Carron called Lieutenant Mike Strickland ("Lieutenant Strickland") and communicated that the Gear Monitoring Team was denied boarding of the Miss Salena. *See* Tr. 96; *see also* AX 1 at 1. Officer Carron then instructed a team of MDMR enforcement officials ("MDMR Team"), comprised of Lieutenant Strickland, Sergeant Webb, Officer Fitts, and Officer Steve Trosclair ("Officer Trosclair"), to board the vessel and conduct an inspection. Tr. 96-97. Sergeant Webb then called Mr. Stevens to ascertain the Miss Salena's description and location. Tr. 97. The MDMR Team subsequently located the Miss Salena in the Mississippi Sound, approximately three miles offshore. Tr. 98. When the MDMR Team encountered the Miss Salena, the vessel was actively engaged in trawling for shrimp. *See* Tr. 98, 126-27. The MDMR Team approached the Miss Salena and signaled for the vessel to pull up its nets. Tr. 98. The MDMR Team positioned the patrol boat off the stern of the Miss Salena, in between the nets on the vessel, as the crew raised the nets out of the water. *See* Tr. 98-99. As the nets on the Miss Salena were brought out of the water, Sergeant Webb observed that the TEDs in the nets appeared to be bottom-exiting based upon their positioning as they were surfacing. *See* Tr. 99-101. Specifically, Sergeant Webb observed that the grid angle of the TEDs appeared to be forward-facing, meaning that a turtle would be directed out the bottom of the net. Tr. 99-101. Once the nets were brought on board, the MDMR Team boarded the Miss Salena. Tr. 98.

After the MDMR Team came on board the Miss Salena, a crew member misinformed the MDMR Team that the vessel had previously been boarded on that day, and that the vessel's TEDs had been inspected.¹² *See* Tr. 101, 128, 139-40, 147. However, the MDMR Team was undeterred by this statement, and continued to conduct the boarding. *See* Tr. 101, 128. During the boarding, the MDMR Team examined and measured the nets and TEDs on the vessel, with Officers Fitts and Trosclair taking the measurements under Sergeant Webb's oversight. *See* Tr. 105-10; AX 1 at 1. While the MDMR Team was in the process of conducting their examination, a disagreement commenced between the MDMR Team and the crew of the Miss Salena as to whether the TEDs were top- or bottom-exiting. Tr. 102-03. Specifically, the deckhand aboard the Miss Salena argued that the TEDs were top-exiting, while members of the MDMR Team asserted that the TEDs were bottom-exiting. *See* Tr. 102. Notably, however, Respondent Killingsworth testified that he did not assert the argument that the TEDs were top-exiting during this exchange, because he had little knowledge regarding TEDs, and was not even aware at the

¹² Notably, in his testimony and written report of the boarding, Officer Fitts stated that Respondent Killingsworth also told the MDMR Team at the time of boarding that the Miss Salena had already been boarded and the vessel's TEDs inspected. *See* Tr. 128, 139-40; AX 1 at 1. However, Respondent Killingsworth denied making such a statement during the boarding, and attributed it solely to a crew member. Tr. 147.

time that there were different kinds of TEDs. *See* Tr. 146. Given the debate regarding whether the TEDs were top- or bottom-exiting, Sergeant Webb called Mr. Stevens and requested that he come on board the Miss Salena to verify the MDMR Team’s findings that the TEDs were bottom-exiting. Tr. 102. Mr. Stevens then returned to, and boarded, the Miss Salena. Tr. 103.

After boarding the vessel, Mr. Stevens determined that the TEDs in the nets on the vessel were midsize single-grid, hard TEDs that met the minimum requirements to be used inshore or offshore. Tr. 58-59. While Mr. Stevens was able to identify the type of TEDs being used aboard the Miss Salena, Mr. Stevens only inspected the starboard-side TED. Tr. 59, 78. During his inspection, Mr. Stevens was specifically seeking to identify whether the TED was bottom- or top-exiting, Tr. 59, and his methodology for determining this involved him “follow[ing] a single row of mesh from the center of the head rope, all the way down to where the TED attached to the net,” Tr. 60. Based on the positioning of the TED escape opening during this examination, Mr. Stevens determined that the starboard-side TED was bottom-exiting. Tr. 60. Mr. Stevens then repeated the inspection by following the mesh for a second time and determined again that the starboard-side TED was bottom-exiting. Tr. 60.

During his inspection, Mr. Stevens identified Respondent Killingsworth as standing “in the back, starboard corner or right-hand corner of the vessel.” Tr. 61. Following his inspection of the starboard-side TED, Mr. Stevens informed Respondent Killingsworth that the TED was bottom-exiting.¹³ Tr. 61, 165. Mr. Stevens confirmed to Officer Webb that the starboard-side TED was bottom-exiting, and then departed the vessel after determining that the MDMR Team did not further require his assistance. *See* Tr. 62-63.

Following Mr. Stevens’ departure, the MDMR Team completed their examination and measurement of the starboard-side net and TED by checking certain standard parameters, including the angle of the TED, the width and length of the grid, the bar spacing of the grid, the flaps of the net, and the chafing gear, to ensure that all components of the net were compliant. Tr. 105; *see also* Tr. 164 (testimony from Respondent Killingsworth regarding the MDMR Team checking such parameters). After evaluating the standard parameters of the starboard-side net and TED, the MDMR Team moved on to inspecting these standard parameters on the port-side net and TED, with Officers Fitts and Trosclair taking the measurements. *See* Tr. 106. In addition to examining the standard parameters of the port-side net and TED, Officers Fitts and Trosclair further employed a methodology of following the upper-side of a wing panel seam on the net from the head rope of the net to where it connected to the TED, in order to ascertain whether the port-side TED was top- or bottom-exiting. Tr. 106-07; 130-32. Based upon this examination conducted by Officers Fitts and Trosclair, the MDMR Team determined that the port-side TED was also bottom-exiting. *See* Tr. 106-07, 131-32; *see also* AX 1 at 1 (noting that Officers Fitts and Trosclair determined the TEDs were “bottom shooters” that did not have the required flotation).

¹³ In his testimony, Mr. Stevens reported that Respondent Killingsworth responded by nodding and stating “[t]hey both are.” Tr. 62. However, Respondent Killingsworth disputed making this statement in his testimony. Tr. 165. As Respondent Killingsworth acknowledged that he was unfamiliar with TEDs at the time of the boarding, *see* Tr. 146, 148, 155-56, 161, I do not find it necessary to resolve this factual dispute, as such a statement from Respondent Killingsworth based on his limited knowledge of TEDs would have very limited probative value.

While aboard the Miss Salena, the MDMR Team completed a TED Enforcement Boarding Form, which recorded certain information regarding the nets and TEDs obtained during the boarding. *See* Tr. 107; *see also* AX 1 at 2 (TED Enforcement Boarding Form). This form noted that the bottom-exiting TEDs on the vessel did not have proper flotation. AX 1 at 2; Tr. 108. Sergeant Webb discussed the form with Respondent Killingsworth and instructed him to print and sign his name at the bottom of the form if he agreed with the information in the form. *See* Tr. 108-09. Respondent Killingsworth proceeded to sign the form. Tr. 109, 159-60; *see also* AX 1 at 1.¹⁴ The MDMR Team provided Respondent Killingsworth with a copy of the completed TED Enforcement Boarding Form, *see* Tr. 110, and informed him that he would be able to continue trawling for shrimp that day if he put floats on the TEDs, *see* Tr. 110, 161-62, 174. At this point, the MDMR Team departed the vessel. Tr. 110. After the conclusion of the boarding conducted by the MDMR Team, Respondent Killingsworth acquired floats from another vessel, attached the floats to the TEDs on the Miss Salena, and attempted a couple of short drags with the nets before returning to the dock for the day. Tr. 146-48, 161-62.

At some time on June 7, 2017, either during the MDMR Team's boarding of the Miss Salena or a couple hours later, Respondent Chavers called Respondent Killingsworth after being informed of the boarding. *See* Tr. 148, 169-70, 172, 189-90.¹⁵ During this conversation, Respondent Chavers expressed to Respondent Killingsworth that the TEDs on the vessel were top-exiting. Tr. 148, 157. Subsequently, either later that day or the following day, Respondent Chavers and Respondent Killingsworth met to inspect the nets at the marina where the boat was docked. *See* Tr. 172, 190. Respondents removed the nets from the vessel and laid them on the dock to inspect them. Tr. 148-49, 190, 198. Through examining the nets in this method, Respondents concluded that the TEDs were top-exiting.¹⁶ *See* Tr. 150, 172-72, 190, 198. Notably, however, Respondents did not photograph the nets as they were laid out during this inspection, or request any additional inspection of the nets from NOAA. *See* Tr. 173, 195, 198. Although Respondent Chavers advised Respondent Killingsworth to call Mr. Stevens to request that he conduct another inspection of the nets, Respondent Killingsworth reported that he did not do so because he intended to replace the nets on the Miss Salena with a single rig net. Tr. 173.

Respondents each contacted Mr. Stevens following the boarding of the Miss Salena on June 7, 2017. Respondent Killingsworth visited Mr. Stevens at his office shortly after receiving the NOVA in this proceeding in January 2018. Tr. 175. Likewise, Respondent Chavers met with Mr. Stevens following the June 7, 2017 inspection on board the Miss Salena to discuss the incident. Tr. 185, 191-92, 198-99. During his conversation with Respondent Chavers, Mr. Stevens acknowledged that he checked only the starboard-side TED on Miss Salena. Tr. 191.

¹⁴ At hearing, Respondent Killingsworth stated that the TED Enforcement Boarding Form contains his signature, but that he did not print his name on the form. Tr. 159-60.

¹⁵ Respondent Killingsworth testified that he spoke with Respondent Chavers by telephone while the MDMR Team was still on board the Miss Salena. *See* Tr. 148, 157, 169, 172. However, Respondent Chavers testified that this telephone call took place hours after the officers departed. *See* Tr. 189-90.

¹⁶ Notably, Respondent Chavers described his method for determining whether a TED is top- or bottom-exiting at the hearing. *See* Tr. 193-94. He stated that his method involves setting the nets on the ground with the top of the net up for examination, and he indicated that this method is "foolproof." Tr. 193.

IV. LIABILITY

A. Principles of Law Relevant to Liability

i. *Standard of Proof*

To prevail on its claims that Respondents violated the ESA and its implementing regulations, the Agency must prove facts constituting the violations by a preponderance of reliable, probative, substantial, and credible evidence. 5 U.S.C. § 556(d); 15 C.F.R. §§ 904.251(a)(2), 904.270(a); *Vo*, 2001 WL 1085351, at *6 (NOAA Aug. 17, 2001) (citing 5 U.S.C. § 556(d); *Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Stedman v. SEC*, 450 U.S. 91, 100-03 (1981)). This standard requires the Agency to demonstrate that the facts it seeks to establish are more likely than not to be true. *Fernandez*, 1999 WL 1417462, at *3 (NOAA Aug. 23, 1999) (citing *Herman & MacClean v. Huddleston*, 459 U.S. 375, 390 (1983)). To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence. *Vo*, 2001 WL 1085351, at *6 (citing *Paris*, 4 O.R.W. 1058 (NOAA 1987)).

ii. *ESA and Implementing Regulations*

In 1973, Congress enacted the ESA, 16 U.S.C. §§ 1531-1544, as amended, “[t]o provide for the conservation of endangered and threatened species of fish, wildlife, and plants” that are “of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” Endangered Species Act of 1973, Pub. L. No. 93-205, pmb., § 2(a)(3), 87 Stat. 884, 884 (1973). The ESA directs the Secretary of Commerce, in coordination with the Secretary of the Interior, to identify any species that are endangered or threatened by using certain criteria and to list any such species in the Federal Register. 16 U.S.C. § 1533. The ESA further provides that it is unlawful for any person subject to the jurisdiction of the United States to violate any regulation promulgated under its authority that pertains to species listed as threatened or endangered. 16 U.S.C. § 1538(a)(1)(G).

In accordance with the ESA, several species of sea turtles found in waters of the United States are listed as either threatened or endangered. *See* 50 C.F.R. §§ 223.102(e), 224.101(h). Pursuant to these ESA listings, the Agency promulgated regulations pertaining to the threatened species of sea turtles. *See* 50 C.F.R. § 223.205. Under 50 C.F.R. § 223.205, “it is unlawful for any person subject to the jurisdiction of the United States to . . . [o]wn, operate, or be on board a vessel, except if that vessel is in compliance with all applicable provisions of § 223.206(d).” 50 C.F.R. § 223.205(b)(1). In turn, 50 C.F.R. § 223.206(d)(2) provides that “[a]ny shrimp trawler that is in the Atlantic or Gulf Area must have an approved TED installed in each net that is rigged for fishing.” 50 C.F.R. § 223.206(d)(2)(i). The term “[a]pproved turtle excluder device (TED)” is defined within the regulations as “a device designed to be installed in a trawl net forward of the cod end for the purpose of excluding sea turtles from the net.” 50 C.F.R. § 222.102. The regulations further require that “[f]loats must be attached to the top one-half of all hard TEDs with bottom escape openings.” 50 C.F.R. § 223.207(a)(9).

Under the ESA and implementing regulations “person” is defined to include “an individual, corporation, partnership, trust, association, or any other private entity; or any officer,

employee, agent, department, or instrumentality of the Federal Government . . . or any other entity subject to the jurisdiction of the United States.” 16 U.S.C. §§ 1532(13); 50 C.F.R. § 222.102. “All waters of the Gulf of Mexico west of 81° W. long (the line at which the Gulf Area meets the Atlantic Area) and all waters shoreward thereof (including ports)” comprise the “Gulf Area.” 50 C.F.R. § 222.102. The ESA defines a “vessel” as a “vehicle used, or capable of being used, as a means of transportation on water which includes every description of watercraft, including non-displacement craft and seaplanes.” 50 C.F.R. § 222.102. Correspondingly, a “shrimp trawler” is defined as “any vessel that is equipped with one or more trawl nets and that is capable of, or used for, fishing for shrimp, or whose on-board or landed catch of shrimp is more than one percent, by weight, of all fish comprising its on-board or landed catch.” 50 C.F.R. § 222.102.

B. Parties’ Arguments as to Liability

i. Agency’s Arguments on Liability

In its Initial Post-Hearing Brief (“AIB”), the Agency argues that it has established the Respondents’ liability for the charged violations by a preponderance of the evidence. *See* AIB at 9. The Agency states that with regard to liability for the charged violations “[t]he only issue in contention is whether the TEDs [on board the Miss Salena] were in compliance.” AIB at 9. The Agency contends that it has established that the TEDS on board the Miss Salena were not compliant with the ESA and regulations, because both of these TEDS were bottom-exiting and lacked the floatation required pursuant to 50 C.F.R. § 223.207(a)(9). *See* AIB at 9. In support of its position, the Agency notes that it is uncontested that the TEDs at issue were lacking floatation, and it asserts that “[t]he sole dispute is whether the TEDs were bottom-exiting, which required adequate floatation to prevent them from dragging along the ocean bottom, or top-exiting, which did not require floats.” AIB at 9.

With regard to this remaining issue, the Agency argues that “[t]he record is replete with evidence proving that both TEDs were bottom-exiting.” AIB at 9. The Agency asserts that the conclusion that both TEDs on the Miss Salena were bottom-exiting is well supported by the observations of Mr. Stevens, an expert witness with thirty-two years of relevant experience.¹⁷ AIB at 9 (citing Tr. 35). The Agency notes that Mr. Stevens observed both TEDs on board the Miss Salena as they were “dragged at the surface of the water during the setting process,” AIB at 9 (citing 47-48), and that he reported seeing “that the two TEDs were forward-leaning in the nets, angled toward the bow, indicating escape openings positioned at the bottom,” AIB at 9 (citing Tr. 41-42, 47-48). The Agency asserts that this observation from Mr. Stevens is highly probative, as Mr. Stevens had an unobstructed view of the nets and otherwise lacked motivation to seek out a compliance issue on board the Miss Salena while offering a courtesy inspection. AIB at 9-10. Likewise, the Agency cites to Mr. Steven’s testimony that he inspected the starboard-side TED, and is certain from his examination that this TED was bottom-exiting. AIB at 10-11. The Agency argues that the method employed by Mr. Stevens during his examination of the starboard-side TED, namely following a row of mesh for the length of the net, “is a surefire way to discover the orientation of the TED in a net.” AIB at 10 (citing Tr. 61). Further, the Agency

¹⁷ As previously noted, Mr. Stevens was qualified as an expert witness in the design, use, and effects of TEDs. Tr. 34-35.

underscores that Mr. Stevens utilized this method twice to verify his determination that the starboard-side TED was bottom-exiting. AIB at 10 (citing Tr. 59-60).¹⁸ AIB at 11-12 (citing AX 1-2; Tr. 160).

The Agency additionally argues that testimony from Sergeant Webb and Officer Fitts corroborates that of Mr. Stevens and further supports the finding that the TEDs on the Miss Salena were bottom-exiting. AIB at 10-11 (citing Tr. 99-101, 118-19, 129-32). The Agency asserts that “Sergeant Webb observed the forward-leaning angles of both TEDs as they came to the water surface, and he saw no escape flap webbing.” AIB at 10 (citing Tr. 99-101, 118-19). The Agency reiterates that while Mr. Stevens did only inspect the starboard-side net, Officers Fitts and Trosclair inspected the port-side net. AIB at 11 (citing Tr. 106-07, 131-32). The Agency contends that these Officers followed their training by inspecting the net through “[f]ollowing a top seam from the mouth to the TED,” which, the Agency claims, “is a highly effective inspection method, so long as the net is not twisted.” AIB at 11 (citing Tr. 72-72, 131). The Agency argues that through this inspection method, the Officers determined that the port-side TED on the Miss Salena was also bottom-exiting. AIB at 11 (citing Tr. 129-132). In further support of this determination, the Agency cites to Officer Fitts’ testimony that he is “completely certain” that the port-side TED was bottom exiting. AIB at 11 (citing Tr. 129-32).

The Agency’s final argument in support of its contention that both TEDs on the Miss Salena were bottom-exiting is “that Respondent Killingsworth acknowledged the violations at the time of the boarding” because he signed the TED Enforcement Boarding Form and thereby indicated agreement with the content of this form, which noted that the TEDs were bottom-exiting and without floatation. AIB at 11-12 (citing AX 1 at 2; Tr. 108-09). The Agency argues that this acknowledgment from Respondent Killingsworth, together with the testimony of Mr. Stevens, Sergeant Webb, and Officer Fitts, generates “a wealth of credible affirmative evidence” through which it has “met its burden and established the two flotation violations.” AIB at 12.

ii. Respondents’ Arguments on Liability

As previously noted, Respondents did not participate in prehearing exchange process in this proceeding, and, as a result, were precluded from presenting exhibits for admission into the record and testimony from witnesses other than themselves at the hearing, by the Order on the Agency’s Motion in Limine. Additionally, Respondents did not avail themselves of the opportunity to submit post-hearing briefs. Accordingly, Respondents’ arguments regarding liability were only expressed through their hearing testimony. At hearing, Respondents argued that the evidence submitted by the Agency to establish that the TEDs on board the Miss Salena were bottom-exiting is inaccurate or insufficient, and, further, that such evidence is rebutted by their finding that the TEDs in the nets on the Miss Salena were top-exiting following an inspection of the nets after the boarding.

¹⁸ The Agency also references the testimony from Mr. Stevens that Respondent Killingsworth made a statement during the boarding in which he acknowledged that the TEDs were bottom-exiting. AIB at 11 (citing Tr. 62). However, as noted, this portion of Mr. Stevens testimony was disputed by Respondent Killingsworth, *see* Tr. 165, and I find that any such statement would have very limited probative value given Respondent Killingsworth’s acknowledged unfamiliarity with TEDs during the boarding, *see supra* note 13, at 7.

In their testimony, Respondents asserted several arguments in support of their claim that the evidence submitted by the Agency to establish that the TEDs on board the Miss Salena were bottom-exiting is inaccurate or insufficient. Both Respondents argued that Mr. Stevens was mistaken in identifying the TEDs on the Miss Salena as bottom-exiting. *See* Tr. 149-50, 192-93. In support of this argument, both Respondents emphasized that Mr. Stevens did not inspect the port-side net and TED on board the Miss Salena on June 7, 2017. *See* Tr. 165-66, 191. Additionally, Respondent Chavers questioned Mr. Stevens' reported method of examining the starboard-side TED, on the basis that the nets on board the Miss Salena were of a two-seamed make, and therefore, unlike nets with a four-seamed make, these nets did not have a seam at the top of the net for Mr. Stevens to follow.¹⁹ Tr. 181. With regard to the MDMR Team's inspection of the TEDs on the Miss Salena, Respondent Killingsworth questioned the knowledge and experience of the MDMR officers inspecting the TEDs during the boarding, and further argued that these officers did not check the port-side TED to determine whether it was bottom-exiting. Tr. 162, 164-66. Likewise, Respondent Chavers argued that based upon his experience, MDMR personnel are not experienced or knowledgeable about inspecting nets. Tr. 181. Further, Respondent Chavers asserted that the nets on board the Miss Salena had been checked several times prior to the date of the alleged violations, including during prior enforcement boardings, and had been found to be acceptable. Tr. 181, 199-200. Respondent Chavers also asserted that nets with bottom-exiting TEDs are not commonly used to trawl for shrimp in the area, stating that "[n]obody pulls bottom-shooters in the bay, nobody." Tr. 184. Finally, Respondent Killingsworth argued that his experience after applying floats to the TEDs on the Miss Salena provides additional evidence that the TEDs were not bottom-exiting, as he testified that the nets became tangled and he was unsuccessful catching sufficient shrimp after attaching the floats. *See* Tr. 150.

Additionally, Respondents argued in their testimony that the evidence submitted by the Agency to establish that the TEDs on board the Miss Salena were bottom-exiting, including the findings of Mr. Stevens and the MDMR Team upon boarding, is rebutted by their finding that the TEDs in the nets on the Miss Salena were top-exiting following an inspection of the nets occurring after the boarding. Respondents testified that they met and inspected the nets on the Miss Salena following the boarding. Tr. 172, 190. Based upon their inspection of the nets, Respondents concluded that the TEDs in the nets were top-exiting. Tr. 148-49, 172-73, 198. Notably, in his testimony, Respondent Chavers described his method for determining whether a TED is top- or bottom-exiting. *See* Tr. 193-94. He stated that his method involves setting the nets on the ground with the top of the net up for examination, and he indicated that this method is "foolproof." Tr. 193. Likewise, Respondent Killingsworth testified that upon employing Respondent Chavers' method to examine the TEDs in the nets while the nets were on the ground, "it was very evident that they [were] top-shooter TEDs." Tr. 150.

Finally, beyond Respondents' assertion that the TEDs on the Miss Salena were top-exiting and complied with regulations, Respondent Chavers argued in his testimony that he should not be liable for the charged violations because he sold the Miss Salena to Respondent Killingsworth prior to the alleged violations and otherwise had not been on board the vessel for months prior to the date of the alleged violations. *See* Tr. 180, 184-85. Despite acknowledging

¹⁹ As discussed further below, this argument mischaracterizes Mr. Stevens' reported methodology, which involved following a row of mesh from the top of the net, rather than a net seam. *See* Tr. 60, 69.

that he held title to the Miss Salena at the time of the alleged violations, Respondent Chavers asserted that his only purpose for maintaining title was to ensure payment on the vessel from Respondent Killingsworth. *See* Tr. 188-89. Given these circumstances, Respondent Chavers argued that he should not be responsible for Respondent Killingsworth's actions on the date of the alleged violations. *See* Tr. 180, 184-85.

iii. Agency's Response to Respondents' Arguments

In its Initial Post-Hearing Brief, the Agency addresses the arguments presented by Respondents in their testimony. The Agency asserts that the Respondents' position that the TEDs on the Miss Salena were top-exiting, rather than bottom-exiting, lacks credibility and is "unsupported by corroborating evidence." AIB at 9. The Agency refutes Respondents' assertion that the evidence offered by the Agency for purposes of establishing that the TEDs on the Miss Salena were bottom-exiting is inaccurate or insufficient. *See* AIB at 12-14. The Agency asserts that such evidence presented includes "credible testimony by a TED specialist with thirty-two years of experience designing, studying, experimenting with, and inspecting TEDs, and two sworn law enforcement officers with years of experience inspecting TEDs." AIB at 14. Further, the Agency argues that the witnesses it presented "testified with clarity and certainty about their recollections," and otherwise lack motivation to provide other than truthful testimony. *Id.* Likewise, the Agency asserts that the conclusion drawn by each of the Agency's witnesses that the TEDs in the nets on board the Miss Salena were bottom-exiting is supported by "multiple observations and inspections." *Id.* Addressing Respondent Killingsworth's contention that the officers with the MDMR Team did not check the port-side TED during the boarding to determine whether it was bottom-exiting, the Agency argues that I should disregard this claim on the basis that it is not credible. AIB at 13. The Agency notes that Respondent Killingsworth acknowledged that the MDMR Team inspected multiple parameters of the nets. AIB at 13 (citing Tr. 162-64). Additionally, the Agency argues that Respondent Killingsworth's testimony regarding the inspection of the port-side net by the MDMR Team is undermined by his acknowledgement that he was not knowledgeable about TEDs at the time of the boarding, and his report that he was engaged on the telephone with Respondent Chavers during the boarding.²⁰ AIB at 13 (citing Tr. 75, 146, 157). Finally, the Agency suggests that Respondent Killingsworth's argument that the MDMR Team did not inspect the port-side TED is immaterial, as the Agency claims that Respondents indicated that the TEDs on the Miss Salena were of the same make. *See* AIB at 13 (citing Tr. 163, 182-83, 201).

With regard to Respondents' position that the evidence offered by the Agency to establish that the TEDs on the Miss Salena were bottom-exiting is rebutted by the reported inspection of the nets performed by Respondents following the boarding, the Agency argues that any such inspection is unsubstantiated and should be afforded little weight. *See* AIB at 12. The Agency notes that while Respondents reported conducting an inspection of the nets on board the Miss Salena following the boarding, they did not provide "any contemporaneous evidence of the alleged dockside inspection." AIB at 12. Specifically, the Agency notes that Respondents did not document the inspection by photograph, even though testimony from Respondent Chavers indicated that he had access to a camera on his cell phone, and that Respondents did not

²⁰ As previously noted, Respondent Chavers testified that his telephone call with Respondent Killingsworth occurred after, and not during, the boarding. *See* Tr. 189-90.

otherwise contact Mr. Stevens or the MDMR regarding the findings of their inspection. AIB at 12-13. The Agency further contends that Respondents contradicted each other in their testimony regarding the timing of their telephone conversation about the boarding and their subsequent inspection of the nets, and that such contradictions undermine their credibility. *See* AIB 13-14. Finally, the Agency indicates that any conclusions drawn by Respondents upon inspecting the nets on the Miss Salena have limited value, because Respondent Killingsworth acknowledged being unaware of the different makes of TEDs, AIB at 12 (citing Tr. 152-53), and Respondent Chavers “failed to articulate a clear method of inspection that assured him the TEDs were top-shooting,” AIB at 12 (citing Tr. 194).

Addressing Respondent Chavers’ argument that he should not be liable for Respondent Killingsworth’s actions on the date of the alleged violations, the Agency argues that Respondent Chavers is vicariously liable for the alleged violative conduct of Respondent Killingsworth as the owner of the Miss Salena. *See* AIB 15-16. Specifically, the Agency asserts that “Respondent Chavers, though not present on the shrimp trawler when it was boarded, was the registered owner of the vessel, applied for and held the fishing permit, and is vicariously liable for Respondent Killingsworth’s acts.” AIB at 15.

C. Discussion of Liability

To establish a violation of the ESA at 16 U.S.C. §1538(a)(1)(G), and regulations at 50 C.F.R. §§ 223.205(b)(1) and 223.207(a)(9), as alleged in both Count One and Count Two of the NOVA, the Agency must demonstrate, by a preponderance of the evidence, that (1) Respondents are persons subject to the jurisdiction of the United States, who (2) owned, operated, or were on board a shrimp trawler (3) in the Atlantic or Gulf Area (4) without an approved TED device installed in each net rigged for fishing. *See* 16 U.S.C. §1538(a)(1)(G); 50 C.F.R. §§ 223.205(b)(1), 223.207(a)(9); *see also* 50 C.F.R. § 223.206(d)(2)(i).

It is uncontested that Respondents are both “persons” subject to the jurisdiction of the United States under the ESA and corresponding regulations. 16 U.S.C. § 1532(13); 50 C.F.R. § 222.102. Further, the record establishes that on the date of the alleged violations, the shrimp trawler the Miss Salena was operating three miles off the coast of Mississippi, in the Gulf of Mexico, specifically in the Mississippi Sound.²¹ AX 1 at 1-2; Tr. 167. Therefore, it has been established that the vessel was operating in the Gulf Area. Accordingly, the remaining questions at issue in this proceeding are whether on the date of the alleged violations, Respondents owned, operated, or were on board the Miss Salena, and whether on this date the Miss Salena had nets rigged for fishing which did not have approved TEDs installed.

i. Respondents Owned, Operated, or Were on board the Miss Salena on June 7, 2017

The evidence of record establishes that Respondents owned, operated, or were on board the Miss Salena on June 7, 2017, and thus are liable for the alleged violations on this basis. Specifically, the record reflects that Respondent Killingsworth was operating the Miss Salena, and Respondent Chavers owned the vessel, on this date. Respondent Killingsworth

²¹ The coordinates for the Miss Salena as documented in AX 1 at 1 were 30 21.190 N, 088 55.410 W.

acknowledged that he was on board the Miss Salena during the boarding on June 7, 2017, *see* Tr. 163, 167; *see also* AX 1 at 2 (TED Enforcement Boarding Form with Respondent Killingsworth's signature), and further, that he was operating the vessel on this date, *see* Tr. 145, 167. Likewise, in his testimony, Respondent Chavers conceded that he held title to the Miss Salena on June 7, 2017. *See* Tr. 186, 188-89. Although Respondents had entered into an agreement for the sale of the Miss Salena in or around October 2016, *see* Tr. 179, 186, Respondents testified that Respondent Killingsworth had not completed payment for the vessel as of June 7, 2017, Tr. 145, 186. Respondent Chavers affirmed in his testimony that he retained title of the vessel as security until Respondent Killingsworth completed payment through monthly installments, which had not occurred as of June 7, 2017. *See* Tr. 184-89. As a result, the evidence of record clearly establishes that Respondent Chavers was the owner of the Miss Salena on June 7, 2017. Moreover, the record reflects that at the time of the alleged violations, Respondent Killingsworth was operating the Miss Salena under the commercial shrimping license obtained by Respondent Chavers. Respondent Chavers acknowledged obtaining a commercial shrimping license identifying himself as a captain, and Respondent Killingsworth as an alternate captain, for the Miss Salena. *See* Tr. 188; *see also* AX 1 at 5 (commercial shrimping license). The record reflects that Respondent Chavers applied for and obtained this license on May 22, 2017, after Respondents entered into an agreement for the sale of the Miss Salena. AX 1 at 5; *see also* Tr. 112-13. In his testimony, Respondent Chavers explained that this license was acquired for the purpose of allowing Respondent Killingsworth to operate the Miss Salena in the absence of the vessel's title being transferred to him. *See* Tr. 188. As a result, the evidence establishes that Respondent Chavers was the owner of the Miss Salena on the date of the alleged violations, and further, was the holder of the license used by Respondent Killingsworth to operate the Miss Salena to trawl for shrimp on the date of the alleged violations.

As previously discussed, Respondent Chavers argued in his testimony that he should not be responsible for Respondent Killingsworth's actions on the date of the alleged violations, as he was only maintaining title of the Miss Salena to ensure Respondent Killingsworth fulfilled payment for the vessel under the sale agreement Respondents had entered. *See* Tr. 188-89. Nevertheless, the record clearly establishes that Respondent Chavers was the owner of the Miss Salena at this time of these violations, which is sufficient for establishing his liability for the alleged violations.

ii. The Miss Salena had nets rigged for fishing on June 7, 2017, which did not have approved TEDs installed.

It is undisputed that the Miss Salena had its starboard-side and port-side nets rigged for fishing prior to the boarding conducted by the MDMR Team on June 7, 2017, and further, that Respondent Killingsworth was fishing with these nets on this date. *See* Tr. 98, 126-27, 145, 167. However, as previously discussed, the parties dispute whether these rigged nets had approved TEDs installed. Specifically, while it is undisputed that the TEDs on the Miss Salena were hard TEDs, *see* Tr. 58, 108, 168, the parties dispute whether the TEDs in the nets rigged for fishing were bottom-exiting and without floatation required by 50 C.F.R. 223.207(a)(9), or top-exiting and compliant with applicable regulation without floatation. As a result, in making a determination on this issue, I had to resolve this factual dispute. After thorough review of all the credible evidence of record, I find that the TEDs in the nets rigged for fishing on board of the

Miss Salena on June 7, 2017 were bottom-exiting and did not have floatation required pursuant to 50 C.F.R. 223.207(a)(9), and therefore, that the Miss Salena had nets rigged for fishing on this date that did not have approved TEDs installed.

The preponderance of the evidence establishes that the TEDs in the starboard-side and port-side nets rigged for fishing on the Miss Salena on June 7, 2017 were bottom-exiting and without floatation as required by 50 C.F.R. 223.207(a)(9). Contrary to the assertions of Respondents, this finding is well-supported by the credible evidence submitted by the Agency, including the observations of Mr. Stevens, Sergeant Webb, and Officer Fitts, eyewitnesses with experience evaluating TEDs, and the contemporaneous documentation from the boarding conducted by the MDMR Team.

The evidence the Agency presented from Mr. Stevens, qualified as an expert in the design, use, and effects of TEDs,²² is compelling in making a determination as to whether the TEDs were top- or bottom-exiting. Mr. Stevens testified that during his employment as a Fisheries Methods and Equipment Specialist with NMFS, he observed the untwisted starboard-side and port-side nets of the Miss Salena after the Gear Monitoring Team first approached of the vessel. *See* Tr. 47-48, 50-51. During this initial observation, Mr. Stevens was able to view the TEDs in these nets as they moved through the water, and he observed that the angle of the TED grids in the visibly untwisted nets was consistent with bottom-exiting TEDs. *See* Tr. 47-48, 50-51, 67-69. Further, Mr. Stevens observed that the TEDs in the nets on the Miss Salena did not have floatation required for such bottom-exiting TEDs. Tr. 49. Notably, Mr. Stevens' initial identification of the TEDs as bottom-exiting and without floatation prompted the Gear Monitoring Team to approach the Miss Salena to offer assistance for a second time, Tr. 52, and subsequently prompted Mr. Stevens to report his observations to Officer Carron after the Gear Monitoring Team's assistance was again declined, *see* Tr. 55. After returning to the Miss Salena at the request of Sergeant Webb, Mr. Stevens conducted a thorough inspection of the starboard-side TED, which involved him following a single row of net mesh from the center of the head rope to where the TED was attached, twice. Tr. 60. From his inspection, Mr. Stevens was able to ascertain that the starboard-side TED was bottom-exiting based upon the positioning of the TED escape opening, at the bottom of the net. *See* Tr. 59-60. Notably, in his testimony, Mr. Stevens expressed that he was certain of his determination that the starboard-side TED on the Miss Salena was bottom-exiting, and he further identified his methodology of examining the TED as "surefire." Tr. 61.

In resolving the factual dispute in this proceeding regarding the orientation of TEDs on the Miss Salena, I find Mr. Stevens' testimony to be credible and well-supported, taking into consideration the detail he reported of his observations; his significant and relevant experience, encompassing 32-years of work focused on TEDs, *see* Tr. 29, AX 5; and the certainty which he expressed regarding his findings and methodology, *see* Tr. 61. As indicated by the Agency, the credibility of Mr. Stevens' testimony is further enhanced by his apparent lack of motive to provide other than truthful testimony, given his retirement status at the time of his testimony. *See* Tr. 25 (describing Mr. Stevens' employment status at the hearing). Additionally, I find Respondents' challenges to Mr. Stevens' testimony unpersuasive. Respondents did not offer a

²² As previously discussed, Mr. Stevens was qualified as an expert in the design, use, and effects of TEDs at the hearing. Tr. 34-35.

rationale for their contention that Mr. Stevens was mistaken in identifying the TEDs on the Miss Salena as bottom-exiting, and I find this assertion unsupported. As referenced by Respondents, Mr. Stevens inspection on the Miss Salena during the boarding conducted by MDMR Team was limited to the starboard-side TED. *See* Tr. 59, 78, 191. However, Mr. Stevens candidly acknowledged this fact in his testimony, *see* Tr. 59, 78, and while it limits his observations regarding the port-side TED, I do not find that it otherwise diminishes his credibility regarding the observations he reported. Further, I did not find the absence of an inspection of the port-side TED from Mr. Stevens to be critical to the Agency establishing that this TED was bottom-exiting, given the other evidence provided from the Agency regarding the port-side net and TED, including Mr. Stevens initial observations of the starboard and port nets and TEDs upon approaching the Miss Salena, *see* Tr. 47-48, 50-51, and the evidence submitted from the MDMR Team, discussed further below, including Sergeant Webb's initial observations of both starboard and port nets and TEDs on the Miss Salena, *see* Tr. 99-101, and examination of the port-side TED conducted by Officers Fitts and Trosclair, *see* Tr. 106-07; 130-32. Additionally, any significance attributed to the fact that Mr. Stevens did not inspect the port-side TED during the boarding by Respondents is incongruent with Respondent Chavers' acknowledgement that the starboard and port nets on the Miss Salena were "identical." Tr. 182, 191. Finally, with regard to Respondent Chavers' claim that Mr. Stevens' methodology in inspecting the starboard-side TED was compromised by two-seamed make of the net, this assertion mischaracterizes Mr. Stevens' reported methodology, which involved following a row of mesh from the top of the net, rather than a net seam, and is otherwise without support. *See* Tr. 60, 69 (testimony from Mr. Stevens regarding his methodology conducting the inspection of the starboard-side net).

In addition to the evidence from Mr. Stevens, the finding that the TEDs on the Miss Salena were bottom-exiting and lacking floatation is supported by the testimony of Sergeant Webb and Officer Fitts, and the contemporaneous documentation from the boarding conducted by the MDMR Team. Both Sergeant Webb and Officer Fitts established that they received training regarding TEDs and regularly perform TED inspections. *See* Tr. 92-93, 95, 123-25. Sergeant Webb testified that he watched the nets on the Miss Salena being raised prior to boarding the vessel, and he observed that the grid angle of the TEDs in the nets appeared to be forward-facing, consistent with bottom-exiting TEDs. *See* Tr. 99-101. This observation led Sergeant Webb to conclude that the TEDs in the nets on the Miss Salena were, in fact, bottom-exiting. Tr. 100-01, *see also* Tr. 127-28. Sergeant Webb and Officer Fitts testified that in addition to the MDMR Team inspecting certain standard parameters of both TEDS on board the Miss Salena, Officers Fitts and Trosclair conducted an examination of the port-side TED to ascertain whether it was top- or bottom-exiting, which involved following the upper-side of a wing panel net seam from the head rope of the net to where it connected to the TED. *See* Tr. 106-07; 130-32. Further, both Sergeant Webb and Officer Fitts reported that the findings of this examination led the MDMR Team to conclude that the port-side TED was also bottom-exiting. *See* Tr. 106-07, 130-32. Specifically, Officer Fitts testified that during his inspection of the port-side TED, he observed that the opening of the port-side TED was on the opposite side of the top portion of the untwisted net, consistent with a bottom-exiting TED. *See* Tr. 130-32; *see also* Tr. 72 (testimony from Mr. Stevens regarding the significance of finding an escape opening at the bottom of the net in the examination methodology employed by Officers Fitts and Trosclair). The testimony provided by Sergeant Webb and Officer Fitts is consistent with the information recorded on the TED Enforcement Boarding Form completed contemporaneously to the

boarding conducted by the MDMR Team.²³ *See* AX 1 at 2 (TED Enforcement Boarding Form); Tr. 107 (testimony regarding completion of this documentation during the boarding). Notably, the TED Enforcement Boarding Form reflects that both the starboard-side TED and port-side TED lacked floatation and were bottom exiting, specifically noting that there were “[n]o floats on bottom shooters.” AX 1 at 2.

As with Mr. Stevens’ testimony, I find the testimony of Sergeant Webb and Officer Fitts credible and well-supported in making a determination regarding the orientation of TEDs on the Miss Salena. Sergeant Webb and Officer Fitts offered consistent accounting of the boarding of the Miss Salena and their observations in their testimony. Likewise, their testimony was consistent with that of Mr. Stevens and the contemporaneous documentation from the boarding. Sergeant Webb and Officer Fitts offered specific observations in support of their conclusion that the TEDs on board the Miss Salena were bottom-exiting, and their observations were supported by their training and experience inspecting TEDs. *See* Tr. 92-93, 95, 123-25 (discussing such training and experience). Further, I do not find the Respondents’ challenges to the testimony of Sergeant Webb and Officer Fitts to be supported. Contrary to Respondents’ generalized characterizations regarding the qualifications of the MDMR Team to inspect TEDs, the record reflects that Sergeant Webb and Officer Fitts received training and have significant experience with inspecting TEDs, as previously noted. *See* Tr. 92-93, 95, 123-25. Although Sergeant Webb and Officer Fitts testified that Officers Fitts and Trosclair employed the methodology of following a net seam to determine the orientation of TED during the inspection of the port-side TED, I did not find support for Respondent Chavers’ contention that this methodology was precluded by the make of the nets on the Miss Salena. Furthermore, although this was not the same methodology employed by Mr. Stevens in his inspection of the starboard-side net, Mr. Stevens notably testified that such seam following methodology is nevertheless reliable. *See* Tr. 72. I also found no support for Mr. Killingsworth’s assertion that the MDMR Team did not inspect the port-side TED to determine whether it was bottom-exiting, and this assertion is directly contradicted by the testimony of both Sergeant Webb and Officer Fitts, and the contemporaneous documentation from the boarding conducted by the MDMR Team, which was signed by Respondent Killingsworth, as discussed above.

Similarly, I do not find that the credible and well-supported testimony from Mr. Stevens, Sergeant Webb, and Officer Fitts, identifying that the TEDs on the Miss Salena were bottom-exiting, is rebutted by the unsubstantiated claims raised by Respondents regarding prior net inspections, uncommon use of bottom-exiting nets in the area, or the results of the Miss Salena trawling for shrimp after applying floatation to the nets. Respondent Chavers provided no support for his contention that the nets on board the Miss Salena had been inspected and found in compliance prior to the date of the alleged violations, including during prior enforcement boardings. Additionally, no support was offered for Respondent Chavers’ assertion that bottom-exiting TEDs are uncommon for shrimp trawling in the area, or Respondent Killingsworth’s report of unsuccessful results when trawling with floatation attached to the TEDs on the Miss Salena after the boarding, and such claims are further unpersuasive as they are otherwise not determinative of the orientation of the TEDs on board the Miss Salena on the date of the alleged violations. As a result, I relied upon the credible and well-supported testimony of Mr. Stevens,

²³ As discussed, this form was signed by Respondent Killingsworth. *See* Tr. 109, 159-60; AX 1 at 1.

Sergeant Webb, and Officer Fitts, in resolving the factual dispute regarding the orientation of the TEDs on the Miss Salena on the date of the alleged violations.

In addition to evaluating the evidence submitted by the Agency in making a determination regarding the disputed issue of the orientation of the TEDs on the Miss Salena, I also considered the testimony from Respondents regarding their inspection of the nets following the boarding conducted by the MDMR Team, and their accompanying conclusion that the TEDs in the nets were top-exiting. As noted, Respondents testified that they met and inspected the nets on the Miss Salena following the boarding, Tr. 172, 190, and that based upon this inspection they concluded that the TEDs in the nets were top-exiting, Tr. 148-49, 172-73, 198. However, I do not find Respondents' conclusion regarding the orientation of the TEDs to be adequately supported. Respondents offered no corroborating evidence from their inspection to support their stated conclusion, despite Respondent Killingsworth representing that others were in attendance during their inspection. *See* Tr. 149 (testimony from Respondent Killingsworth indicating that others were present for their inspection of the nets following the boarding). Additionally, Respondents' testimony regarding their inspection of the nets lacked detail regarding how they arrived at the conclusion that the TEDs in the nets were top-exiting. Aside from generally describing his methodology for inspecting nets, *see* Tr. 193-94, Respondent Chavers did not identify specific observations from the inspection that supported the conclusion that the TEDs were top-exiting. Likewise, despite asserting that it was "very evident" that the TEDs were top-exiting from the inspection of the nets following boarding, Tr. 150, Respondent Killingsworth was also unable to identify specific basis for this conclusion in his testimony, *see* Tr. 156-57. Respondent Killingsworth's testimony regarding the net inspection conducted by Respondents following the boarding was additionally undermined by his acknowledgement that he was not knowledgeable regarding TEDs at the time of the alleged violations, *see* Tr. 146, 148, 155-56, 161, and, in fact, was not even aware that there were different kinds of TEDs as of the boarding preceding this net inspection, *see* Tr. 146, 155. Further, the credibility of Respondents' self-serving testimony regarding their inspection of the nets following the boarding is diminished by inconsistency between Respondents' accounts. In particular, Respondents offered differing testimony regarding when they conducted the inspection of the nets following the boarding, with Respondent Killingsworth reporting that it occurred the day following the boarding, *see* Tr. 172, and Respondent Chavers testifying that the examination occurred the day of the boarding, *see* Tr. 190. Accordingly, I do not find that Respondents' testimony regarding their inspection of the nets following the boarding supports finding that the TEDs in the nets on the Miss Salena were top-exiting, and otherwise find that such testimony is insufficient to rebut the credible, well-supported evidence from the Agency establishing that the TEDs on the Miss Salena were bottom-exiting.

Accordingly, I find that the preponderance of the evidence establishes that the TEDs in both the starboard-side and port-side nets of the Miss Salena were bottom-exiting and without floatation as required by 50 C.F.R. 223.207(a)(9). Therefore, the record establishes that the Miss Salena had starboard and port nets rigged for fishing which did not have approved TEDs installed. As a result, having resolved the final element regarding liability for violations of the ESA at 16 U.S.C. §1538(a)(1)(G), and regulations at 50 C.F.R. §§ 223.205(b)(1) and 223.207(a)(9), the preponderance of the evidence establishes Respondents' liability for the violations alleged in Count One and Count Two of the NOVA.

V. CIVIL PENALTY

Having determined that Respondents are liable for the violations in Count One and Count Two of the NOVA, I must next determine the appropriate civil penalty to impose for such violations, if any. In making this assessment, I have considered the applicable statutory and regulatory provisions, outlined below. I did not, however, consider the Agency's penalty policy in my penalty assessment, as this document was neither introduced as an exhibit during the evidentiary hearing, nor the subject of a motion requesting that I take official notice of it, which were the options outlined to the parties in advance of the hearing to effectuate my consideration of this policy.

A. Principles of Law Relevant to Civil Penalty

The ESA provides for the assessment of civil penalties for any person who violates its provisions or implementing regulations. 16 U.S.C. § 1540(a)(1). For the violations established in this proceeding, the maximum allowable penalty is \$25,246 for any person knowingly violating these provisions, and \$1,729 for other violations of these provisions. *See* 16 U.S.C. § 1540(a)(1); 15 C.F.R. § 6.3(f)(14).

Although the ESA does not set forth factors to be considered when assessing a penalty, the procedural rules governing this proceeding, set forth at 15 C.F.R. Part 904 ("Rules of Practice") provide:

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

15 C.F.R. § 904.108(a).

In making a determination regarding the civil penalty, there is no presumption in favor of the penalty proposed by the Agency, and an Administrative Law Judge is not "required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document." *Nguyen*, 2012 WL 1497024, at *8 (NOAA Jan. 18, 2012) (citing 75 Fed. Reg. 13050 (Mar. 18, 2010) (Proposed Rule); 75 Fed. Reg. 250523 (Jun. 23, 2010) (Final Rule) (codified as amended at 15 C.F.R. § 904.204(m)). The Administrative Law Judge must independently determine an appropriate penalty "taking into account all of the factors required by applicable law." 15 C.F.R. § 904.204(m); *see also* 15 C.F.R. § 904.108 (enumerating factors that may be considered in assessing a penalty).

B. Parties' Arguments as to Civil Penalty

i. Agency's Arguments Regarding Penalty

In its Post-Hearing Brief, the Agency requests that I assess a civil penalty of \$9,000 against Respondents, jointly and severally, for the violations in both counts of the NOVA. *See* AIB at 14. The Agency argues that this proposed penalty amount is permissible under the maximum statutory penalty amount for knowing ESA violations, which it alleges is the applicable penalty maximum for the violations at issue. *See* AIB at 15-16. Additionally, the Agency otherwise contends that this proposed penalty amount is warranted by the nature, extent, and gravity of the violations; the culpability of Respondents; Respondents' history of prior violations; and Respondents' ability to pay. *See* AIB at 15-17.

With regard to determining the appropriate maximum statutory penalty amount for the violations, the Agency argues that the appropriate maximum penalty amount is that for knowing violations of the ESA, as provided for in 16 U.S.C. § 1540(a)(1). *See* AIB at 14-15. The Agency notes that within the context of the ESA, "[t]he term 'knowingly' has been construed . . . to require only the commission of voluntary acts which cause or result in the violation." AIB at 15 (quoting *Simmons*, 2013 WL 8600018, at *9 (NOAA Aug. 30, 2013)). Applying this meaning to the present case, the Agency argues that Respondents' violative actions were voluntary, and therefore knowing. *See* AIB at 15. Specifically, the Agency argues that Respondent Killingsworth intended to use the nets and TEDs installed on the Miss Salena by Respondent Chavers to trawl for shrimp on the date of the violations, and therefore Respondent Killingsworth "fully intended to commit the acts that gave rise to the violations." AIB at 15. Additionally, the Agency contends that Respondent Chavers is vicariously liable for the knowing acts of Respondent Killingsworth, as Respondent Chavers was the owner of the Miss Salena at the time of the violations, and further, obtained the license under which Respondent Killingsworth was operating the vessel. *See* AIB at 15-16. The Agency further asserts that Respondent Chavers "chose the specifications for the nets and TEDs," and otherwise installed the TEDs on the vessel, which both Respondents reported operating to trawl for shrimp in 2017. AIB at 15. As a result, the Agency asserts that the violative conduct of Respondents was voluntary, and therefore the violations are appropriately deemed knowing for purposes of considering the penalty under the ESA. *See* AIB at 16-16.

Addressing the factors in support of its proposed penalty, the Agency argues that the proposed penalty amount is supported by the nature, extent, and gravity of the violations; the culpability of Respondents; Respondents' history of prior violations; and Respondents' ability to pay. *See* AIB at 15-17. With regard to the nature, extent, and gravity of the violations, the Agency notes that four species of sea turtles, all of which are either endangered or threatened, "are prevalent in the Gulf of Mexico, and incidental capture in shrimp trawling gear is a leading cause of their death." AIB at 16 (citing AX 2). The Agency asserts that the regulations Respondents violated "were enacted to protect sea turtles that are present in the waters they fished" and, therefore, "[c]ompliance with those regulations is thus of the utmost importance to the survival of sea turtle species in danger of extinction." AIB at 16 (citing Tr. 65). The Agency cites to testimony from Mr. Stevens describing how the absence of any flotation attached to bottom-exiting TEDs could lead to injury or death for any sized turtle caught in the nets. AIB at 16 (citing Tr. 49-50, 63-65, 137). Furthermore, the Agency contends that such consequences are

particularly grave because they impact “the recoverability of these imperiled species.” AIB at 16. Given the harms associated with noncompliant TEDs, the Agency argues that “[t]he civil penalty assessed should be adequate to deter Respondents, specifically, and the commercial shrimping industry, generally, from lax compliance” AIB at 17.

Turning to Respondents’ culpability for the established violations, the Agency argues that Respondents acted negligently, at a minimum, given that commercial fishing is a highly regulated industry in which participants are expected to know and abide by governing laws and regulations. AIB at 17 (citing *O’Neil*, 1995 WL 1311365, at *3 (NOAA June 14, 1995)). The Agency asserts that Respondent Chavers is an experienced fisherman who “authorized an inexperienced captain to operate his vessel,” and that Respondent Killingsworth “made no effort to educate himself about TED requirements before dropping the nets in the water.” AIB at 17. Additionally, citing to evidence from Officers Webb and Fitts, the Agency claims that a crew member on the *Miss Salena* attempted to evade law enforcement by erroneously reporting to the MDMR Team that the vessel had already been inspected at the time of the boarding.²⁴ *Id.* (citing Tr. 101, 128, 139-40). Additionally, the Agency otherwise notes that the deckhand on board the *Miss Salena* refused the assistance from the Gear Monitoring Team on two occasions, including after being alerted to an observed compliance problem. *Id.* (citing Tr. 52-53). Based upon such circumstances, the Agency concludes that “Respondents’ acts fell below the standard of care that a crew concerned with compliance would have shown.” *Id.*

Finally, the Agency addresses Respondents’ history of prior violations and ability to pay a penalty. The Agency acknowledges that neither Respondent Killingsworth, nor Respondent Chavers, has a history of prior natural resource violations. Tr. 17. The Agency also notes that “Respondents have not asserted a financial inability to pay the penalty assessed.” AIB at 17.

ii. Respondents’ Arguments Regarding Penalty

As with Respondents’ arguments regarding liability, Respondents only asserted arguments regarding the civil penalty in their hearing testimony. In his testimony, Respondent Killingsworth opposed the imposition of a penalty on the basis that he was not informed about a monetary penalty during the boarding conducted by the MDMR Team, *see* Tr. 147, 158, and he otherwise asserted his position that he should have been issued a written warning for the violations, rather being assessed a penalty, *see* Tr. 150-51.²⁵ Respondent Killingsworth further argued in his testimony that the proposed penalty is excessive given that he had only trawled for shrimp for a limited duration on the date of the violations. Tr. 145, 147. Addressing his culpability for the violations, Respondent Killingsworth indicated that at the time of the

²⁴ The Agency further cites to Officer Fitts’ testimony that Respondent Killingsworth also told the MDMR Team at the time of boarding that the *Miss Salena* had already been boarded and the vessel’s TEDs inspected. *See* AIB at 17. However, as previously discussed, Respondent Killingsworth denied making such a statement during the boarding, and attributed it solely to a crew member. Tr. 147.

²⁵ Notably, in making this argument, Respondent Killingsworth made reference to the Agency’s penalty policy. However, as previously noted, I did not consider the Agency’s penalty policy in determining the penalty in this matter, as this document was neither introduced as an exhibit during the evidentiary hearing, nor the subject of a motion requesting that I take official notice of it, which were the options outlined to the parties in advance of the hearing to effectuate my consideration of this policy. *See supra* at 20.

violations he was not an experienced commercial fisherman, *see* Tr. 145, 171, and was otherwise unfamiliar with TEDs, *see* Tr. 146, 148, 155-156, 161. He further expressed that he had not acted with the intention of violating the law when operating the Miss Salena. *See* Tr. 150. Likewise, Respondent Killingsworth reported that he did not have contact with the Gear Monitoring Team when they approached the Miss Salena to offer courtesy inspections, *see* Tr. 144-45, 153, and further, that while a crew member informed the MDMR Team at the time of the boarding that the vessel had already been boarded, he did not make such a statement, *see* Tr. 147. Finally, Respondent Killingsworth noted that he had no history of prior violations and that he complied with the MDMR Team by attaching floats to the TEDs on board the Miss Salena upon the conclusion of the boarding. Tr. 151.

Addressing his culpability for the violations in his testimony, Respondent Chavers emphasized that he was not on the Miss Salena at the time of the violations, and that Respondent Killingsworth had taken possession of the vessel as of January 2017. *See* Tr. 184-85, 197. Respondent Chavers further testified that prior to the date of violations, he offered to accompany Respondent Killingsworth to trawl for shrimp in order to assist him, but that Respondent Killingsworth declined his offer and stated that he did not need Respondent Chavers' assistance. *See* Tr. 180.

C. Discussion of Civil Penalty and Assessment

As previously noted, the ESA provides a higher maximum penalty amount for persons knowingly violating the ESA or its implementing regulations, than those otherwise violating such provisions. *See* 16 U.S.C. § 1540(a)(1). Thus, as a preliminary matter in determining an appropriate civil penalty, I must consider whether Respondents "knowingly" violated the ESA and the implementing regulations for purposes of establishing the applicable maximum penalty amount for the violations in Count One and Count Two of the NOVA. Within the context of the ESA, the term "knowingly" has been construed to require only the commission of voluntary acts which cause or result in the violation. *Huber*, 1994 WL 1246350, at *3 (NOAA Apr. 12, 1994). Upon thorough examination of the evidence, I find that Respondents acted knowingly in committing the violations of the ESA and implementing regulations in both Count One and Count Two of the NOVA, and therefore, that the applicable maximum penalty amount is that for such knowing violations.

Respondent Killingsworth was permitted to operate the Miss Salena to trawl for shrimp on the date of the violations under the commercial shrimping license obtained by Respondent Chavers. *See* Tr. 112-13, 188; AX 1 at 5. On the date of the violation, Respondent Killingsworth intended to, and was actively engaged in, trawling for shrimp on the Miss Salena. *See* Tr. 145, 147, 167 (testimony from Respondent Killingsworth regarding his operation of the Miss Salena to trawl for shrimp on the date of the alleged violations). As discussed, the TEDs in the nets on the Miss Salena were non-compliant with 50 C.F.R. §§ 223.501(b)(1) and 223.207(a)(9). Accordingly, it is clear that Respondent Killingsworth committed a voluntary act which caused or resulted in the established violations in Counts One and Two, and therefore such violations were knowing within the meaning of the ESA.

Additionally, although Respondent Chavers was not present on the Miss Salena at the time of the violations, the record nevertheless establishes his liability for Respondent Killingsworth's knowing violative conduct. "[T]he law is well-established that the knowledge and actions of the operator of a fishing vessel may be imputed to the owner of the vessel under the Endangered Species Act." *Frenier*, 2012 WL 7807963, at *11 (NOAA Sept. 27, 2012) (citing *Faithful Lady, Inc.*, 1996 WL 1352599, at *8 (NOAA Nov. 6, 1996) ("It is well established in the law that owners are liable for the acts of a captain, master or operator of a vessel, whether he is an independent operator or an employee, even 'knowing' violations of the ESA")). It has been established in the present case that Respondent Chavers was the owner of the Miss Salena at the time of the violations. *See supra* at 14-15; Tr. 184-89. As previously noted, Respondent Chavers argued in his testimony that he was merely maintaining title to the Miss Salena to ensure payment on the vessel from Respondent Killingsworth. *See* Tr. 188-89. Notably, ownership of a vessel has been found to be an insufficient basis for establishing liability for knowing violation of the ESA committed by an operator in circumstances where a vessel owner has merely retained legal title due to a security interest in a sale arrangement, but has otherwise relinquished possession and control of the vessel. *See Shulterbrandt*, 7 O.R.W. 185, 188-89 (NOAA 1993). However, in the present case, the record establishes that Respondent Chavers had not relinquished possession and control of the Miss Salena after entering into the sale agreement with Respondent Killingsworth, and therefore does not support Respondent Chavers' contention that he was merely holding title to the Miss Salena for security purposes. Although Respondent Chavers asserted that Respondent Killingsworth had possession of the vessel at the time of the violations, he acknowledged using the vessel to trawl for shrimp in January 2017, after he had entered into a sale arrangement with Respondent Killingsworth. *See* Tr. 179-80. Even more significantly, the record reflects that Respondent Chavers' maintained control of the vessel, by applying for and obtaining the commercial shrimping license which allowed Respondent Killingsworth to operate the Miss Salena to trawl for shrimp. *See* Tr. 188; *see also* AX 1 at 5 (commercial shrimping license). In his testimony, Respondent Chavers stated that this license was acquired for the purpose of allowing Respondent Killingsworth to operate the Miss Salena, and acknowledged that Respondent Killingsworth would not otherwise be able to operate the vessel to trawl for shrimp in the absence of him taking this action. *See* Tr. 188. As Respondent Chavers did not relinquish possession and control of the Miss Salena after entering into the sale agreement with Respondent Killingsworth, it is evident that his interest in the vessel was not strictly limited to a security interest associated with the sale arrangement, as Respondent Chavers argued. Further, Respondent Chavers' status as the holder of the license used by Respondent Killingsworth to operate the Miss Salena to trawl for shrimp on the date of violations provides a basis for imputing Respondent Killingsworth's knowledge and actions during such fishing activity to him. Where a vessel owner is the holder of authorization permitting fishing activities, this status provides a basis sufficient to find liability for violative conduct arising from fishing activities conducted under such authorization. *See Atlantic Spray Corp.*, 1997 WL 1402870, at *23 (NOAA Apr. 2, 1997); *Peterson*, 6 O.R.W. 486, 491 (NOAA 1991); *Simmons*, 2013 WL 8600018, at *12 (NOAA Aug. 30, 2013). Accordingly, I find that Respondent Killingsworth's knowing violative conduct is attributable to Respondent Chavers on this basis.

Having found that the violations in Count One and Count Two of this matter were knowing within the meaning of the ESA, I have determined that the applicable maximum penalty

amount is that for knowing violations, which, as previously noted, is \$25,246. *See* 16 U.S.C. § 1540(a)(1); 15 C.F.R. § 6.3(f)(14) (setting forth the applicable maximum penalty amount). As a result, I have applied this maximum penalty amount in calculating the penalty for the violations in this matter.

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

I have considered the substantial evidence of record regarding the nature, circumstances, extent, and gravity of the violations in this matter in making the penalty assessment. Relevant to these considerations, I note that the record establishes the importance of the requirement that shrimp trawl nets have approved TEDs installed. *See* Tr. 35-36; AX 2. The record reflects that all sea turtles found in the United States waters are listed as either threatened or endangered under the ESA, AX 2 at 1, and further that the incidental capture of sea turtles in shrimp trawls is a greater threat to the survival of sea turtles in the United States than any other human activity combined, AX 2 at 1; *see also* Tr. 36. Thus, the importance of adhering to the requirement to install an approved TED on any shrimp trawl net is found to be of particular significance.

Specific to the particular circumstances involved in the violations established in Count One and Count Two, the record reflects Respondents' violative conduct posed a lethal threat to any sea turtles encountered. As previously discussed, the record has established that on the date of the violations, Respondent Killingsworth was actively engaged in trawling for shrimp with bottom-exiting TEDs in the port and starboard nets on the Miss Salena, which did not have the required floatation. Mr. Stevens explained in his testimony that in the absence of floatation, bottom-exiting TEDs are rendered ineffectual, as the lack of floatation will cause the exit opening of such TEDs to ride on the sea floor, thereby blocking the exit and precluding sea turtles from escaping. *See* Tr. 49-50; 63-65. Mr. Stevens further articulated that sea turtles will drown in such bottom exiting TEDs without floatation, and therefore, failure to provide the required floatation on bottom-exiting TEDs poses a lethal danger to sea turtles. *See* Tr. 63-65; *see also* Tr. 43 (testimony from Mr. Stevens regarding consequences of a sea turtle being unable to escape shrimp net). As a result, it is evident that Respondents' violations posed a lethal threat to sea turtles, and therefore, are of significant gravity to warrant a substantial penalty.

ii. Respondents' Degree of Culpability

With respect to the culpability of Respondents, the evidence demonstrates that Respondents acted negligently in committing the violations in Count One and Count Two. As parties authorized to engage in trawling for shrimp under the commercial shrimping license obtained by Respondent Chavers, Respondents were engaged in the commercial fishing industry. *See* AX 1 at 5 (commercial shrimping license); Tr. 188 (testimony from Respondent Chavers regarding this license). Accordingly, Respondents were participants in a regulated industry and had a responsibility to remain apprised of the regulations which applied to their actions, including the applicable requirements for TEDs. *See Alba*, 2 O.R.W. 670, 672 (NOAA App. 1982) (“[A] participant in a regulated industry. . . has a responsibility to familiarize himself with the regulations which apply to him.”); *see also O’Neil*, 1995 WL 1311365, at *3 (NOAA June 14, 1995) (“[C]ommercial fishing is regulated and those engaged in it for profit activities are required to keep abreast of and abide by the laws and regulations that affect them.”); *Peterson*, 6

O.R.W. at 490 (“When one engages in a highly regulated industry, that person bears the responsibility of knowing and interpreting the regulations governing that industry.”). Respondents each demonstrated negligence with regard to their duties as members of the commercial fishing industry in committing the violations established in this matter.

Turning specifically to Respondent Killingsworth’s culpability, the record reflects that Respondent Killingsworth acted negligently in committing the established violations by operating the Miss Salena without adequately acquainting himself with the equipment on board the Miss Salena and the applicable regulations, including the regulations pertaining to TEDs. Respondent Killingsworth acknowledged that at the time of the violations he was not an experienced commercial fisherman, *see* Tr. 145, 171, and was otherwise unfamiliar with TEDs, *see* Tr. 146, 148, 155-156, 161. Notably, Respondent Killingsworth testified that he did not discuss the TEDs on board the Miss Salena, or the applicable requirements, with Respondent Chavers during process of negotiating the purchase of the vessel. *See* Tr. 152, 171. Respondent Chavers additionally testified that Respondent Killingsworth had declined his offer to provide assistance by accompanying Respondent Killingsworth to trawl for shrimp. *See* Tr. 180. Further, Respondent Killingsworth indicated in his testimony that prior to the date of the violations, he did not seek information from the MDMR or NOAA regarding requirements applicable to commercially fishing for shrimp, *see* Tr. 171, and otherwise did not investigate such requirements on his own, *see* Tr. 152. However, despite his level of inexperience and his ignorance regarding the equipment on board the Miss Salena and the applicable regulations, Respondent Killingsworth engaged in trawling for shrimp under the commercial shrimping license on the date of the alleged violations. Significantly, the record also reflects that Respondent Killingsworth had the opportunity to correct the deficiencies with the TEDs on the Miss Salena prior to the boarding, as the Gear Monitoring Team twice approached vessel to offer a courtesy TED inspection. *See* Tr. 45-46, 52-53. However, Respondent Killingsworth did not avail himself of the assistance being offered by the Gear Monitoring Team. While Respondent Killingsworth testified that he “would have even welcomed” a courtesy inspection of the TEDs on the Miss Salena performed by the Gear Monitoring Team, Tr. 145, his deckhand twice refused such assistance while Respondent Killingsworth was operating the vessel on the date of the violations, *see* Tr. 46, 52-53. Although Respondent Killingsworth did not have direct contact with the Gear Monitoring Team when they offered assistance to the Miss Salena, *see* Tr. 144-45, 153, he nevertheless is accountable for the actions of his crew as the captain of the vessel on the date of the violations. Respondent Killingsworth’s failure to correct the deficiencies with the TEDs on the Miss Salena prior to the boarding, upon the offers of assistance from the Gear Monitoring Team, further supports a finding that he acted negligently in committing the violations.

Likewise, the record demonstrates that Respondent Chavers also acted negligently as the owner of the vessel in committing the established violations in this proceeding. Respondent Chavers reported that he is an experienced commercial fisherman, with nearly 40 years of fishing experience. Tr. 180, 182. In contrast, as previously noted, Respondent Killingsworth was not an experienced commercial fisherman at the time of the violations, *see* Tr. 145, 171, and more specifically, lacked knowledge about TEDs, *see* Tr. 146, 148, 155-156, 161. Despite Respondent Killingsworth’s lack of experience with commercial fishing, Respondent Chavers entered into an arrangement with Respondent Killingsworth that allowed him to operate the Miss Salena while

Respondent Chavers maintained the title for the vessel. *See* Tr. 179, 186, 184-88 (testimony from Respondent Chavers regarding the sale arrangement with Respondent Killingsworth). Further, Respondent Chavers acquired a commercial shrimping license in which he identified Respondent Killingsworth as an alternate captain for the Miss Salena, and he acknowledged that he did so with the express purpose of allowing Respondent Killingsworth to operate the Miss Salena while he maintained title to the vessel. *See* Tr. 188. Additionally, the record reflects that Respondent Chavers did very little to ensure that Respondent Chavers was familiar with the TEDs on the Miss Salena, and the applicable regulations, before operating it trawl for shrimp on the date of the established violations. As previously noted, Respondent Killingsworth reported that he did not discuss the TEDs on board the Miss Salena, or the requirements applicable to them, with Respondent Chavers when making arrangements for the purchase of the vessel. *See* Tr. 152, 171. Likewise, although Respondent Chavers reported that he offered to assist Respondent Killingsworth by accompanying him to trawl for shrimp, Respondent Killingsworth declined this offer, and the record does not reflect that Respondent Chavers took other steps to ensure that Respondent Killingsworth was familiar with the TEDs on the vessel and the applicable regulations before operating the Miss Salena under the commercial shrimping license. *See* Tr. 180. These circumstances reflect that Respondent Chavers acted negligently as the owner of the vessel in committing the established violations. Having determined that both Respondent Killingsworth and Respondent Chavers acted negligently in committing the established violations, I considered this level of culpability in determining the penalty in this matter.

iii. History of Prior Violations

As acknowledged by the Agency, the record does not reflect a history of prior violations for either Respondent Killingsworth or Respondent Chavers. In NOAA civil enforcement proceedings, the absence of prior violations has been found to be an appropriate mitigating factor in penalty calculations. *See, e.g., Straub*, 2012 WL 1497025, at *9 (NOAA Feb. 1, 2012) (“The absence of prior offenses . . . tends to favor a low civil monetary penalty.”); *The Fishing Co. of Alaska*, 1996 WL 1352613, at *17 (NOAA Apr. 17, 1996) (“In an industry that is so heavily regulated, this absence of prior violations by any of the Respondents has been taken into consideration as a mitigating factor in the penalty assessment.”), *aff’d*, 195 F.Supp.2d 1239 (W.D. Wash. 2002), *aff’d*, 333 F.3d 1045 (9th Cir. 2003). As a result, I considered Respondents’ absence of violations as a mitigating factor in calculating the penalty. However, as the violations in this matter resulted from Respondent Killingsworth’s conduct in operating the Miss Salena, and he reported only limited experience in the commercial fishing industry at the time of the violations, *see* Tr. 145, 171, these circumstances reduced the weight of this mitigating factor in determining the penalty in this matter.

iv. Ability to Pay

As to Respondents’ ability to pay, the Rules of Practice state that if a respondent wants the presiding judge to consider his inability to pay a penalty, he must submit “verifiable, complete, and accurate financial information” to the Agency in advance of the hearing. 15 C.F.R. § 904.108(c), (e). More specifically, the Rules of Practice provide that “[n]o information regarding the respondent’s ability to pay submitted by the respondent less than 30 days in

advance of the hearing will be admitted at the hearing or considered in the initial decision of the Judge, unless the Judge rules otherwise.” 15 C.F.R. § 904.108(e). In the present matter, Respondents did not submit evidence regarding an inability to pay claim within the time period set forth by the Rules of Practice, and otherwise did not provide a justification for their failure to do so. As such, this factor was not considered in my assessment of the penalty in this case.

v. *Other Matters as Justice May Require*

In considering other matters as justice may require in determining the penalty amount, I do not find that any such factors warrant penalty adjustment in this matter. For example, while I considered that Respondent Killingsworth was cooperative during the boarding of the Miss Salena conducted by the MDMR Team, *see* Tr. 155, and ultimately took action to bring the TEDs on board the vessel into compliance by attaching floatation upon the conclusion of the boarding, *see* Tr. 146-48, 161-62, I do not find such conduct warrants a reduction in the penalty in consideration of the circumstances of this case. As previously discussed, the record reflects that the Gear Monitoring Team twice approached the Miss Salena to provide a courtesy TED inspection prior to the boarding, and therefore, Respondent Killingsworth had ample opportunity to correct the deficiencies with the TEDs on the Miss Salena prior to the boarding, yet did not do so. *See* Tr. 45-46, 52-53. Additionally, Respondent Killingsworth’s cooperation during the boarding of the Miss Salena is undermined by the fact that a crew member misinformed the MDMR Team that the vessel had previously been boarded on that day, and the vessel’s TEDs had been inspected. *See* Tr. 101, 128, 139-40, 147. Although the MDMR Team conducted the inspection despite the representation that the vessel had already been boarded, the crew member’s conduct is consistent with an attempt to evade the enforcement activity, and as the captain of the Miss Salena on the date of the violations, Respondent Killingsworth is accountable for the actions of his crew member. Considering the circumstances present in this case, I do not find that Respondent Killingsworth’s conduct in cooperating with the boarding and taking action to bring the TEDs on board the vessel into compliance at the conclusion of the boarding warrants a reduction in the penalty amount.

Upon consideration of all the forgoing, including the aforementioned consideration of the factors listed in 15 C.F.R. § 904.108(a), it is hereby determined that for Respondents’ two violations of the ESA at 16 U.S.C. §1538(a)(1)(G), and regulations at 50 C.F.R. §§ 223.205(b)(1) and 223.207(a)(9), on June 7, 2017, a civil penalty in the amount of \$9,000 is appropriate.

VI. DECISION AND ORDER

Respondents are liable for the charged violations in this case. A civil monetary penalty of \$9,000 is imposed for the charged violations. Once this Initial Decision becomes final under the provisions of 15 C.F.R. § 904.271(d), Respondents will be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein.

PLEASE TAKE NOTICE, that any petition for reconsideration of this Initial Decision must be filed with the undersigned within 20 days after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and


the alleged errors and relief sought must be specified with particularity. *Id.* Within 15 days after a petition for reconsideration is filed, any other party to this proceeding may file an answer in support or in opposition. The undersigned will rule on any petition for reconsideration.

PLEASE TAKE FURTHER NOTICE, that any petition to have this Initial Decision reviewed by the NOAA Administrator must be filed with the Administrator within 30 days after the date this Initial Decision is served and in accordance with the requirements set forth at 15 C.F.R. § 904.273. A copy of 15 C.F.R. §§ 904.271-273 is attached.

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

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

SO ORDERED.


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

Dated: December 17, 2019
Washington, D.C.