

UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

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IN THE MATTER OF:	)	
	)	
LUAN VAN LE	)	DOCKET No. SE0903064ES
F/V LITTLE NIKKI	)	HON. BRUCE TUCKER SMITH
	)	ADMINISTRATIVE LAW JUDGE
RESPONDENTS.	)	

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**DECISION & ORDER**

**DATE ISSUED:**

JUNE 18, 2012

**ISSUED BY:**

HON. BRUCE TUCKER SMITH  
ADMINISTRATIVE LAW JUDGE

**APPEARANCES:**

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION  
DUANE SMITH, ESQ.  
NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION  
OFFICE OF GENERAL COUNSEL  
ENFORCEMENT & LITIGATION, SOUTHEAST REGION

FOR RESPONDENT LUAN VAN LE  
RUSSELL R. STEWART  
LAW OFFICES OF RUSSELL STEWART

## I. Preliminary Statement

On July 11, 2011, the United States Department of Commerce, National Oceanic and Atmospheric Administration (NOAA or Agency) issued a Notice of Violation and Assessment of Administrative Penalty (NOVA) to Respondent Luan Van Le (Respondent). NOAA charged in two counts that “on or about June 20, 2009, [Respondent], as owner/operator of the F/V LITTLE NIKKI, did own, operate, or be on board a vessel which was not in compliance with all applicable provisions of 50 CFR §223.206, in violation of the Endangered Species Act and 50 CFR §223.205(b)(1).”<sup>1</sup>

Specifically, the NOVA alleged that Respondent maintained two shrimp nets on the F/V LITTLE NIKKI without properly-functioning Turtle Excluder Devices (TEDs). The NOVA alleged one count, or violation, for the vessel’s port-side net and one count, or violation, for the vessel’s starboard-side net. The NOVA further alleged that by failing to maintain a properly-functioning TED in the vessel’s port and starboard nets, Respondent violated 16 USC §1538, the Endangered Species Act.

As a result of the two alleged violations, the NOVA sought imposition of \$26,400.00 in civil penalties.<sup>2</sup>

On August 8, 2011, Respondent, through counsel, transmitted a request to NOAA for an administrative hearing to contest the allegations contained within the NOVA.

On August 16, 2011, NOAA transmitted Respondent’s request for hearing to the Administrative Law Judge (ALJ) Docketing Center. On August 23, 2011, Chief ALJ

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<sup>1</sup> The NOVA originally cited 50 CFR §226(d) and 50 CFR §225.205(b)(1) as the relevant regulatory authority. At the hearing of this matter, the Agency orally amended the regulatory citations to 50 CFR §223.206 and 50 CFR §223.205. (Tr. at 7). Respondent denied any prejudice as a result of the amendments. (Id.).

<sup>2</sup> The agency sought a penalty of \$13,200 per net/violation.

(CALJ) Joseph N. Ingolia issued a Notice of Transfer and Assignment of ALJ and Order Requesting Preliminary Positions on Issues and Procedures (PPIPs).<sup>3</sup> The parties were directed to file their respective PPIPs not later than September 22, 2011. NOAA filed its PPIP on September 22, 2011.

Respondent failed to file his PPIP by the September 22, 2011, deadline. On September 23, 2011, the court entered an Order directing Respondent to show cause why he had failed to abide by the CALJ's Order to file his PPIP by September 22, 2011.

On September 28, 2011, Respondent filed his PPIP with the court and opposing counsel.<sup>4</sup> Although Respondent stated in his PPIP that "he is unable to pay any proposed penalty" and further stated he would provide documentation in support of his inability to pay, he failed to submit any such information until directed to do so by the court at the post-hearing telephone conference. The Agency properly objected to the court's consideration of Respondent's late submitted records.<sup>5</sup>

On October 7, 2011, the court held a telephonic pre-hearing conference with the parties. The court explained the basic form and structure of a NOAA administrative case as it developed, as well as Respondent's various procedural rights at the administrative hearing.

On February 24, 2012, Respondent filed a Supplemental PPIP in this matter.

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<sup>3</sup> Pursuant to 15 USC §1541, United States Coast Guard Administrative Law Judges may perform all adjudicatory functions required by Chapter 5 of Title 5 of the United States Code to be performed by an Administrative Law Judge for any marine resource conservation law or regulation administered by the Secretary of Commerce acting through the National Oceanic and Atmospheric Administration.

<sup>4</sup> Respondent also filed a response to the court's Show Cause Order explaining his tardiness was occasioned by a faulty facsimile machine. The court accepted Respondent's explanation. Query: was FedEx unavailable to counsel?

<sup>5</sup> The court is aware of its authority to take appropriate action in response to Respondent's failure to comply, timely, with court orders. 15 CFR §904.240.

On March 5, 2012, this matter came on for hearing at the Okaloosa County Courthouse Annex Extension in Fort Walton, Florida. Duane Smith, Esq. appeared on behalf of the Agency; Russell R. Stewart, Esq., appeared on behalf of Respondent.

At the hearing, NOAA presented the testimony of two witnesses and offered eleven exhibits into evidence, ten of which were admitted into evidence.<sup>6</sup>

Respondents did not offer any items of documentary exhibits into evidence at hearing. However, Respondent (using the services of a Vietnamese translator) testified on his own behalf and called an additional witness.

The hearing was concluded in one day.

On April 19, 2012, the court convened a post-hearing telephonic conference with the parties to discuss Respondent's federal income tax returns, Respondent's entitlement to Social Security Supplemental Security Income (SSI) and matters pertaining to the applicability and jurisdiction of the Endangered Species Act (ESA) to the instant matter. Respondent subsequently submitted a four-part exhibit, which was admitted as Respondent's Exhibit A.

After careful review of the entire record, the court finds that NOAA **PROVED** by a preponderance of reliable, probative, and credible evidence that Respondent did, on or about June 20, 2009, as owner/operator of the F/V LITTLE NIKKI, own, operate, or be on board a vessel which was not in compliance with all applicable provisions of 50 CFR §223.206, in violation of the Endangered Species Act and 50 CFR §223.205(b)(1).

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<sup>6</sup> Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at \_\_\_). Citations to Agency Exhibits are marked Agency Ex. 1, 2, 3, etc.; Respondent's Exhibits are marked Resp. Ex. A, B, C, etc.; ALJ Exhibits are marked ALJ Ex. I, II, III, etc. Attachment A to this Decision and Order lists the parties' respective witnesses and exhibits.

Specifically, the court finds that Respondent maintained two shrimp nets on the F/V LITTLE NIKKI without properly-functioning turtle excluder devices (TEDs).

## **II. FINDINGS OF FACT**

The following Findings of Fact are based on a thorough and careful analysis of the documentary evidence, the testimonies of witnesses, the exhibits entered into evidence and the entire record as a whole.

1. At all times relevant herein, it was and is unlawful for any person to violate any provision of the Endangered Species Act (ESA), or any regulations promulgated thereunder. 16 USC §1538(a)(1)(G).
2. At all times relevant herein, the “Gulf Area” was and is defined as “all waters of the Gulf of Mexico west of 81° W. long[itude] (the line at which the Gulf Area meets the Atlantic Area) and all waters shoreward thereof (including ports).” 50 CFR §222.102.
3. At all times relevant herein, requirements for Turtle Excluder Devices (TEDs) were/are set forth at 50 CFR 223.207.
4. At all times relevant herein, any shrimp trawler in the Gulf Area was and is required to have an approved Turtle Excluder Device (TED) in each net rigged for fishing. 50 CFR §223.206(d)(2).
5. At all times relevant herein, the F/V LITTLE NIKKI was and is a registered and flagged vessel of the United States, documentation number 1047710. (Agency Ex. 1).
6. At all times relevant herein, the F/V LITTLE NIKKI was and is owned by Respondent Luan Van Le. (Agency Ex. 1).
7. Respondent Luan Van Le is a “person” as defined by 16 USC §1532(13) and subject to the jurisdiction of the United States.
8. On or about June 20, 2009, the F/V LITTLE NIKKI was trawling in the “Gulf Area,” to wit: St. Andrews Bay. (Tr. 18-19).
9. On or about June 20, 2009, in the Gulf Area, Officer Neal G. Goss, IV of the Florida Fish and Wildlife Conservation Commission observed the F/V LITTLE NIKKI actively trawling for shrimp. (Tr. 18-19).

10. On or about June 20, 2009, Respondent Luan Van Le operated the F/V LITTLE NIKKI in the Gulf Area trawling for shrimp.
11. On or about June 20, 2009, while in the Gulf Area operating the F/V LITTLE NIKKI, Respondent Luan Van Le fished for shrimp with noncompliant Turtle Excluder Devices installed on his port and starboard rigging nets thereby violating the Endangered Species Act, 16 USC §1538(a)(1); 50 CFR §§223.205(b)(1), (b)(2), 223.206(d)(2)(i). (Tr. at 13-14).
12. Respondent Luan Van Le's adjusted gross income for tax year 2009 was \$108.00; for tax year 2010 was \$5,779.00; and for tax year 2011 was \$1,137.00. (Respondent's Ex. A-2; A-3; A-4).
13. Respondent Luan Van Le became entitled to Social Security Supplemental Security Income (SSI) on October 28, 2010. Respondent Luan Van Le receives \$541.50 per month in SSI benefits. (Respondent's Ex. A-1).
14. Respondent Luan Van Le has not fished for shrimp since 2010. (Tr. at 103, 117).

### **III. Summary of Decision**

On June 20, 2009, while in the Gulf Area operating the F/V LITTLE NIKKI, Respondent Luan Van Le fished for shrimp without the requisite Turtle Excluder Device properly installed on his port and starboard rigging nets thereby violating the Endangered Species Act, 16 USC §1538(a)(1); 50 CFR §§223.205(b)(1), (b)(2), 223.206(d)(2)(i). A civil penalty in the amount of \$2,000.00 is hereby imposed upon Respondent Luan Van Le for his June 20, 2009, violations.

### **IV. Discussion**

#### **a. Agency's Burden of Proof**

In order to prevail on the charges instituted against a respondent, the Agency must prove the violations alleged by a preponderance of the evidence. 5 USC §556(d); In the Matter of Porter Watson, 2010 WL 3524743 (NOAA 2010); In re Cuong Vo, 2001 WL

1085351 (NOAA 2001). Preponderance of the evidence means the Agency must show it is more likely than not a respondent committed the charged violation. Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983). The Agency may rely on either direct or circumstantial evidence to establish the violation and satisfy the burden of proof. See generally, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764-65 (1984). The burden of producing evidence to rebut or discredit the Agency’s evidence will only shift to the Respondent after the Agency proves the allegations contained in the NOVA by a preponderance of reliable, probative, substantial, and credible evidence. Steadman v. S.E.C., 450 U.S. 91, 101 (1981).

**b. The Endangered Species Act—in brief**

In 1973, Congress passed the Endangered Species Act (ESA or Act), 16 USC §§1531 et seq., thereby establishing a program for the conservation of endangered and threatened species<sup>7</sup> and the ecosystems upon which they depend. 16 USC §1531(b). Accordingly, “it is unlawful for any person subject to the jurisdiction of the United States violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title . . . .” 16 USC §1538(a)(1)(G).

All species of sea turtles that are found in U.S. waters (Kemp’s Ridley, the Loggerhead, the Leatherback, the Green, the Olive Ridley, and the Hawksbill) are listed as either endangered or threatened under the ESA. 50 CFR §§223.102(b); 224.101(c). (Agency Ex. 11).

Pursuant to 50 CFR §223.205(b)(2),

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<sup>7</sup> “The term ‘endangered species’ means any species which is in danger of extinction throughout all or a significant portion of its range. . . .” 16 USC §1532(6). “The term ‘threatened species’ means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 USC §1532(20).

[I]t is unlawful for any person subject to the jurisdiction of the United States to . . . [f]ish for,<sup>8</sup> catch, take, harvest, or possess, fish or wildlife<sup>9</sup> while on board a vessel, except if that vessel is in compliance with all applicable provisions of §223.206(d).

According to 50 CFR §223.206(d)(2)(i),

Any shrimp trawler<sup>10</sup> that is in the . . . Gulf Area<sup>11</sup> must have an approved TED installed in each net that is rigged for fishing. A net is rigged for fishing if it is in the water, or if it is shackled, tied, or otherwise connected to any trawl door or board, or to any tow rope, cable, pole or extension, either on board or attached in any manner to the shrimp trawler.

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<sup>8</sup> “Fishing, or to fish” is defined as:

(1) The catching, taking, or harvesting of fish or wildlife; (2) The attempted catching, taking, or harvesting of fish or wildlife; (3) Any other activity that can reasonably be expected to result in the catching, taking, or harvesting of fish or wildlife; or (4) Any operations on any waters in support of, or in preparation for, any activity described in paragraphs (1) through (3) of this definition.

50 CFR §222.102.

<sup>9</sup> The ESA defines “fish or wildlife” as

[A]ny member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

16 USC §1532(8). The relevant regulations have the same definition for the term wildlife. 50 CFR §222.102. Shrimp is defined as,

[A]ny species of marine shrimp (*Order Crustacea*) found in the Atlantic Area or the Gulf Area, including, but not limited to:

- (1) Brown Shrimp [ ];
- (2) White shrimp [ ];
- (3) Pink shrimp [ ];
- (4) Rock shrimp [ ];
- (5) Royal red shrimp [ ]; and
- (6) Seabob shrimp [ ].

50 CFR §222.102. Shrimp, then, as a crustacean, is included in the definition of fish or wildlife as set forth at 16 USC §1532(8).

<sup>10</sup> “Shrimp trawler” defined as

[A]ny 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 1 percent, by weight, of all fish comprising its on-board or landed catch.

50 CFR §222.102.

<sup>11</sup> Gulf Area means 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). 50 CFR §222.102.



Id.

**c. Jurisdiction in the Instant Matter**

Respondent contends that jurisdiction is improper, to wit: “the location of the alleged violation is within the Interim waters on the State of Florida. The Respondents allege that the Magnuson-Steven Act is not applicable . . . .” (Respondents’ Preliminary Position on Issues and Procedures).<sup>12</sup> Respondent is correct that the Magnuson-Stevens Act does not apply to this case. The Agency alleged a violation of the Endangered Species Act and not the Magnuson-Stevens Act. (NOVA).

There is no dispute herein that on June 20, 2009, Respondent was actively trawling for fish in St. Andrew’s Bay. (Tr. at 29). However, Respondent avers that St. Andrew’s Bay is considered “state waters” and inside the Territorial Sea Baseline (Tr. at 30; Respondent’s Post-Hearing Brief), thereby making the ESA inapplicable. According to NOAA Chart 4-11, 52d ed. (September 2007), St. Andrew’s Bay is west of 081 degrees. (Agency Ex. 8). Officer Goss recorded the coordinates of his boarding of the F/V LITTLE NIKKI as North 30, West 85. (Tr. at 34; Agency Ex. 9). Pursuant to 50 CFR §222.102, all waters of the Gulf of Mexico west of 81 degrees are considered in “Gulf Area” waters subject to the Endangered Species Act. Therefore, jurisdiction is properly situated as St. Andrew’s Bay and the location of the boarding occurred within Gulf waters.

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<sup>12</sup> “The Respondent would assert that the NOAA turtle device regulations only pertain to shrimp nets/turtle devices used in waters offshore of the territorial sea base line. . . . The locations of this alleged incident took place solely within the State of Florida internal waters. . . . No where has the Endangered Species Act adopted the federal offshore turtle device rules to be applied to State of Florida internal waters.” (Respondent’s Post-Hearing Brief).

#### **d. Turtle Involvement/Entanglement**

As discussed supra, “it is unlawful for any person subject to the jurisdiction of the United States violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title . . . .” 16 USC §1538(a)(1)(G). Further, pursuant to 50 CFR §223.205(b)(2),

[I]t is unlawful for any person subject to the jurisdiction of the United States to . . . [f]ish for,<sup>13</sup> catch, take, harvest, or possess, fish or wildlife<sup>14</sup> while on board a vessel, except if that vessel is in compliance with all applicable provisions of §223.206(d).

Therefore, a vessel with non-compliant TEDs violates the ESA regardless of whether a turtle becomes ensnared or not. Respondent’s argument to the contrary is without merit.

#### **e. Respondents’ Allegation of Faulty Nets**

Respondent does not dispute that the TEDs contained within the nets of the F/V LITTLE NIKKI were closed and non-functioning. (Respondent’s PPIP). However, Respondent claims the TEDs become twisted in the nets when they are hauled aboard his vessel, thus causing the flaps to close. (Tr. at 116; Respondent’s Post-Hearing Brief).

According to the testimony of John Mitchell, an expert in the field of TEDs, Respondent’s explanation for the TEDs’ positioning within the nets was “next to impossible . . . in the normal operation of the retrieval of the trawl. . . . [I]n my experience there’s too much material there to be completely inserted into the space and then up underneath the float or buoy.” (Tr. at 125-126). Respondent’s assertion that the flaps of the TEDs close when hauled aboard is simply not believable.

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<sup>13</sup> See Footnote 7, supra.

<sup>14</sup> See Footnote 8, supra.

The court gives particular credence to Mr. Mitchell's testimony based upon his approximately 30-years of experience working with TEDs. (Tr. at 71). According to Mr. Mitchell, the photographs taken by Officer Goss depict "the flap . . . tucked inside the horizontal opening at the top of the TED . . . effectively seal[ing] the TED, making it ineffective." (Tr. at 75-76).

Additionally, the court finds Respondent's unique explanation of the TEDs malfunction to be less than credible, given his somewhat extensive history of TED violations. (ALJ Ex. I).

## **V. Civil Penalties**

The court notes that in 2010, the Agency eliminated the presumption in favor of assessed civil penalties and permit sanctions contained in the NOVA and NOPS. See, 75 Fed. Reg. 13050 (Mar. 18, 2010) (Proposed Rule); and 75 Fed. Reg. 250523 (Jun. 23, 2010) (Final Rule) (now codified at 15 CFR §904.204(m)). Additionally, the ALJ is no longer required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document. Id. Now, the ALJ is authorized to assess a civil penalty, "taking into account all of the factors required by applicable law." Id.

Two salient factors noted by the court are: 1) Respondent's meager income, as reflected in his recent tax returns (Respondent Ex. A-2, A-3, A-4); and 2) Respondent's status as a recipient of Social Security Supplemental Security Income (SSI). (Respondent Ex. A-1).

Furthermore, on September 23, 2010, U.S. Commerce Secretary Gary Locke appointed Charles Swartwood, III to serve as a Special Master to review several law

enforcement cases brought by NOAA/National Marine Fisheries Service (NMFS). (See Secretarial Decision Memorandum, September 23, 2010).

Thereafter, the Special Master conducted an exhaustive review of certain selected cases investigated and prosecuted by NOAA.

On May 17, 2011, U.S. Commerce Secretary Locke made public the Report and Recommendation of the Special Master Concerning NOAA Enforcement Action of Certain Designated Cases authored by Special Master Charles Swartwood, III. (See generally Swartwood Report found at <http://www.noaa.gov/lawenforcementupdates/specialmasterreport.pdf>, of which this court takes official notice).

Among the taskings assigned to the Special Master by Secretary Locke – the specific duty to review the types and amounts of assessed penalties to ensure those penalties were neither oppressive, excessive or unfair (Swartwood Report at 2, 131).

In the instant case, this court heeds the clear guidance of the Swartwood Report and the Secretary's subsequent remittance of penalties to fisherman aggrieved by the imposition of excessive penalties.

Here, the administrative record clearly reveals Respondent's history of non-compliance with pertinent federal regulations. (ALJ Ex. I). NOAA might have sought criminal sanctions against Respondent for his violations of the ESA, per the strictures of 16 USC §§1531-1544. However, the agency chose to resolve Respondent's violations administratively.

Thus, given the guidance to be found in the wake of the Swartwood Report, Respondent's lack of recent fishing activity (Tr. at 103, 117), Respondent's meager

income and his status as a recipient of Social Security SSI, it would be unthinkable to impose the assessed penalty sought by the agency.<sup>15</sup>

Considering the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, and the probative evidence of prior offenses by Respondents and his ability to pay; the following penalty is appropriate:

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<sup>15</sup> Hence, the court's reluctance to impose sanctions for Respondent's failure to timely comply with court orders per 15 CFR §904.240.

## VI. Order

**IT IS HEREBY ORDERED**, that a civil penalty of \$1,000.00 per net, in the total amount of \$2,000.00, imposed on Respondent Luan Van Le for the reasons set forth supra.

**PLEASE TAKE NOTICE**, that a failure to pay the civil penalty to the Department of Commerce/NOAA within thirty (30) days from the date on which this decision becomes final Agency action will result in the total penalty becoming due and payable, and interest being charged at the rate specified by the United States Treasury regulations and an assessment of charges to cover the cost of processing and handling of the delinquent penalty. Further, in the event the penalty, or any portion thereof, becomes more than 90 days past due, Respondent may also be assessed an additional penalty charge not to exceed 6 percent per annum.

**PLEASE TAKE FURTHER NOTICE**, that any petition for review of this decision must be filed within 30 days of this date with the Administrator of the National Oceanic and Atmospheric Administration as subject to the requirements of 15 CFR §904.273. If neither party seeks administrative review within 30 days after issuance of this order, this initial decision shall become the final decision of the Agency. A copy of 15 CFR §904.273 is attached hereto as Attachment B.

**IT IS SO ORDERED.**

Done and dated this the 18th day of June, 2012,  
at New Orleans, Louisiana.



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HONORABLE BRUCE TUCKER SMITH  
ADMINISTRATIVE LAW JUDGE

## VII. ATTACHMENT A – EXHIBIT & WITNESS LIST

### NOAA EXHIBITS – AS OFFERED/ADMITTED CHRONOLOGICALLY

1. United States of America, Department of Homeland Security, United States Coast Guard: National Vessel Documentation Center Certificate of Documentation and Abstract of Title for the F/V LITTLE NIKKI (3 pages)
2. Florida Fish and Wildlife Conservation Commission Division of Law Enforcement Incident Summary Report Number FWNW09OFF-5593 dated 6/20/09 (2 pages)
3.
  - a. Color photograph depicting nets actively trawling with orange buoy in net (1 page)
  - b. Color photograph depicting nets containing shrimp in water (1 page)
  - c. Color photograph depicting Respondent handling net (1 page)
  - d. Color photograph depicting orange buoy blocking the Turtle Excluder Device (1 page)
  - e. Color photograph depicting orange buoy blocking the Turtle Excluder Device (1 page)
  - f. Color photograph depicting Turtle Excluder Device tucked into flaps (1 page)
  - g. Color photograph depicting unobstructed Turtle Excluder Device (1 page)
  - h. Color photograph of dry erase board (1 page)
4. Citation issued by Florida Fish and Wildlife Conservation Commission Division of Law Enforcement, Citation #172986C (1 page)
5. Citation issued by Florida Fish and Wildlife Conservation Commission Division of Law Enforcement, Citation #139269C; Florida Fish and Wildlife Conservation Commission Division of Law Enforcement, Incident Summary Report (FWNW-08-OFF-2084) including color photographs, handwritten notes, maps, Certificate of Documentation, collection letter, Notice of Violation, Violation Status Form (35 pages)
6. Bay County Court Clerk Summary Case Details: State of Florida v. Le, Luan Van (09004527MMMA); State of Florida v. Le, Luan Van (0800618MMMA); State of Florida v. Le, Luan Van (08002598MMMA); State of Florida v. Le, Luan Van (0301145MMMA) (11 pages)
7. *Curriculum Vitae*, John F. Mitchell (4 pages)
8. NOAA Chart 4-11 (52d ed., Sept. 2007) (1 page)
9. NOAA Chart 11391 (24th ed., Dec. 2005) (1 page)
11. Adopted testimony of John Mitchell (2 pages)

### NOAA EXHIBIT NOT ADMITTED

10. Florida Fish and Wildlife Conservation Commission, Division of Law Enforcement, Incident Summary Report (FWNW-09-OFF-5914); Florida Fish and Wildlife Conservation Commission, Division of Law Enforcement, Citation (173101 C); 5 color photographs depicting nets; Florida Fish and Wildlife Conservation Commission, Evidence/Forfeited Property Disposition;

Florida Fish and Wildlife Conservation Commission, Division of Law  
Enforcement, Shrimp Trawl Measuring Guidelines (03/13/09) (8 pages)

RESPONDENT'S EXHIBITS – AS OFFERED/ADMITTED CHRONOLOGICALLY

- A. Documents submitted post-hearing
  - 1. SSI Notice of Award letter (Oct. 28, 2010) (13 pages)
  - 2. 2009 Federal tax return (12 pages)
  - 3. 2010 Federal tax return (14 pages)
  - 4. 2011 Federal tax return (9 pages)

ALJ EXHIBIT

- I. Joint Stipulation Regarding Prior Offenses (2 pages)

NOAA WITNESSES

- 1. Neal Gordon Goss, IV
- 2. John Francis Mitchell

RESPONDENT WITNESSES

- 1. Tinh Sineath
- 2. Luan Van Le



## **VIII. ATTACHMENT B: PROCEDURES GOVERNING ADMINISTRATIVE REVIEW**

15 CFR § 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party may petition for review of an initial decision of the Judge within 30 days after the date the decision is served. The petition shall be addressed to the Administrator and filed at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue NW, Washington, DC 20230.

(b) Review by the Administrator of an initial decision is discretionary and is not a matter of right. A petition for review must be served upon all parties. If a party files a timely petition for discretionary review, or action to review is taken by the Administrator upon his or her own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator.

(c) Petitions for discretionary review may be filed only upon one or more of the following grounds:

(1) A finding of a material fact is clearly erroneous based upon the evidence in the record;

(2) A necessary legal conclusion is contrary to law or precedent:

(3) A substantial and important question of law, policy, or discretion is involved (including the amount of the civil penalty); or

(4) A prejudicial procedural error has occurred.

(d) Each issue must be separately numbered, concisely stated, and supported by detailed citations to the record, statutes, regulations, and principal authorities. Issues of fact or law not argued before the Judge may not be raised on review unless they were raised for the first time in the initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.

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

(f) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. No further replies are allowed.

(g) If the Administrator declines to exercise discretionary review, such order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the

final decision of NOAA. The Administrator need not give reasons for declining review.

(h) If the Administrator grants a petition for discretionary review, he or she will issue an order specifying issues to be briefed and a briefing schedule. Such issues may constitute one or more of the issues raised in the petition for discretionary review and/or matters the Administrator wishes to review on his or her own initiative. Only those issues specified in the order may be argued in the briefs and considered by the Administrator. No oral argument will be permitted.

(i) After expiration of the period for filing briefs under paragraph (h) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision.

## IX. CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **DECISION & ORDER** on the following parties in this proceeding as indicated below:

Duane Smith, Esq.  
National Oceanic & Atmospheric Administration  
Office of General Counsel, Enforcement &  
Litigation, Southeast Region  
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Russell R. Stewart  
900 E. Fourth Street  
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Telephone: (850) 769-1682  
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*Via Email*

ALJ Docketing Center  
United States Coast Guard  
40 South Gay Street, Room 412  
Baltimore, Maryland 21202-0001  
Telephone: (410) 962-5100  
Facsimile: (410) 962-1746  
Email: [aljdoCKETcenter@uscg.mil](mailto:aljdoCKETcenter@uscg.mil)  
*Via Email*

Done and dated this 18th day of June, 2012,  
at New Orleans, Louisiana.



KATY J.L. DUKE, ESQ.  
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