

I. PROCEDURAL HISTORY

The National Oceanic and Atmospheric Administration (“Agency”) issued a Notice of Violation and Assessment of Administrative Penalty, dated November 8, 2011, to M/V Miss Cher Enterprises of Florida, Inc. (“Miss Cher Enterprises”), and Kenneth Bruce Gorman. By letter dated January 3, 2012, Mr. Gorman requested a hearing on behalf of both parties.² The Agency then issued a First Amended Notice of Violation and Assessment of Administrative Penalty (“First Amended NOVA”), dated January 30, 2012, to M/V Miss Cher Enterprises of Florida, Inc., and Jack Hawthorne (“Respondents”), alleging in one count that Respondents violated Section 307(1)(A) of the Magnuson-Stevens Fishery Conservation and Management Act (“Act”), 16 U.S.C. § 1857(1)(A), and regulations promulgated under the Act at 50 C.F.R. § 622.7(x). In the First Amended NOVA, the Agency sought to impose a penalty of \$12,500 against Respondents for this violation.

On February 9, 2012, the undersigned issued a Notice of Transfer, Assignment of Administrative Law Judge, and Order Requiring Preliminary Positions on Issues and Procedures (PPIP) (“PPIP Scheduling Order”).³ In the PPIP Scheduling Order, the undersigned set forth various prehearing filing deadlines and procedures, and ordered the parties to file their respective PPIPs on or before March 9, 2012. On March 7, 2012, the Agency filed a Notice of Serious Settlement Discussions with Respondent M/V Miss Cher Enterprises of Florida Inc. and Joint Request for a Delay in Filing PPIPs by the Agency and Respondent Hawthorne. On March 8, 2012, the undersigned ordered that Respondents submit their PPIPs on or before March 23, 2012.

On March 19, 2012, Respondent Hawthorne filed his PPIP and a request for an extension of one week to fully comply with the PPIP requirements. Respondent Miss Cher Enterprises, represented by Mr. Gorman, filed a request on March 20, 2012, requesting an additional extension of time to negotiate a settlement with the Agency. The undersigned granted an extension of the PPIP deadline for both parties to April 6, 2012, per order dated March 21, 2012. The next day, March 22, 2012, Respondent Hawthorne filed a supplement to his PPIP, and on April 6, 2012, filed copies of documents responsive to the PPIP Scheduling Order.⁴

Also on April 6, 2012, the Agency filed its PPIP and a Notice of Settlement with Respondent M/V Miss Cher Enterprises of Florida Inc., stating that a hearing with respect to Miss Cher Enterprises was no longer needed, and that the Agency would now seek a penalty in the amount of \$10,000, against Respondent Hawthorne. The Agency asked the undersigned to remove Miss Cher Enterprises from the case. Shortly thereafter, Respondent Hawthorne, pursuant to 15 C.F.R. § 904.107(b), requested a 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 Copies of the PPIP Scheduling Order were mailed to each Respondent via regular mail on February 9, 2012. When both were returned, they were re-sent to each later in February.

⁴ All of Respondent Hawthorne’s PPIP documents are referenced collectively as “R’s PPIP.”

The Agency filed a Notice of Amendment Two to Agency's Pleadings on April 17, 2012, wherein it established four amendments to the First Amended NOVA pursuant to 15 C.F.R. § 904.207: 1) re-titling the case "SE0902348B" instead of "SE0902348"; 2) replacing "Jack" with "John," Respondent Hawthorne's legal name, and correcting his address; 3) officially modifying the amount sought against Respondent Hawthorne to \$10,000; and 4) modifying the charging language in the First Amended NOVA to exclude Miss Cher Enterprises. In an Order on Notice of Settlement issued April 20, 2012, the undersigned dismissed the claims asserted against Miss Cher Enterprises, recognized Respondent Hawthorne's hearing request, and implemented the amendments to the First Amended NOVA that were specified by the Agency.

On June 27, 2012, the undersigned issued a Notice of Hearing and Prehearing Order, setting filing deadlines and scheduling the hearing for September 13, 2012, in New Orleans, Louisiana. A Joint Set of Stipulated Facts, Exhibits and Testimony was filed on August 17, 2012, signed by Respondent Hawthorne and Agency counsel. Also on August 17, 2012, the Agency requested the issuance of subpoenas to compel the appearance and testimony at hearing of Seth Cameron and Nick Poudier. On August 23, 2012, the undersigned issued the subpoenas.

The hearing in this matter was held on Thursday, September 13, 2012, at the John Minor Wisdom U.S. Court of Appeals Building in New Orleans, Louisiana. The Agency presented the parties' Joint Set of Stipulated Facts, Exhibits and Testimony as Joint Exhibit ("JE") 1, the Agency's Exhibits ("AE") 1-3, and the testimony of four witnesses: Michael Harrelson, Emanuel Antonaras, Seth Cameron, and Kelly Moran Kalamas (via telephone). Respondent Hawthorne presented Respondent's Exhibit ("RE") 1, and testified on his own behalf.

The docket clerk of this Tribunal received the certified transcript of the hearing on September 27, 2012, and mailed a copy to both parties.⁵ The undersigned concurrently issued the Post-Hearing Scheduling Order, which set an October 12, 2012, deadline for any motions to conform the transcript to the actual testimony, an October 29, 2012, deadline for the Agency's post-hearing brief, and a November 28, 2012, deadline for Respondent's post-hearing brief.

The Agency filed a Motion to Conform Transcript to Actual Testimony on October 15, 2012, in response to which the undersigned issued an order granting some of the Agency's suggested corrections and rejecting others. On October 31, 2012, the Agency's Initial Post-Hearing Brief was filed. On November 20, 2012, Respondent Hawthorne's Post-Hearing Response was filed.

II. FACTUAL BACKGROUND

The following facts are either incorporated into the parties' Joint Set of Stipulated Facts, Exhibits and Testimony (Joint Exhibit 1) ("JE"), were undisputed at the hearing, or were stated as part of credible testimony at the hearing.

Respondent Hawthorne is a United States citizen and Mississippi resident. JE ¶ 1. From June 24 through June 26, 2009, Respondent Hawthorne was the captain in charge of the

⁵ Citations herein to the transcript are made in the following format: "Tr. [page]."

operations of the federally-permitted (Official Number 603657) shrimp trawler F/V (fishing vessel) Miss Cher. JE ¶ 3. At the time of the alleged violation, the F/V Miss Cher held a Gulf of Mexico Shrimp Moratorium Permit (SPGM-1536) and a South Atlantic Penaeid Shrimp Permit, both of which carried expiration dates of 3/31/10. AE 3 at 41.

On June 11, 2009, Michael Harrelson, an observer coordinator for NOAA working in the Agency's Fisheries Laboratory in Galveston, Texas, assigned Seth Cameron to serve as an observer on the F/V Miss Cher and so notified the boat owner. Tr. 9-10, 22. Because of a previous altercation aboard the F/V Miss Cher between a different observer and the captain of the boat, Mr. Harrelson instructed the owner of the boat, Mr. Kenneth Gorman, "that we can't have that type of issue onboard the boat for an observer." Tr. 23-25. According to Mr. Harrelson, Mr. Gorman agreed. Tr. 25.

Mr. Cameron reported for his work as an observer on the F/V Miss Cher on or about June 12, 2009. AE 3 at 54; *see* JE ¶ 7. However, for various disputed reasons (the month of June not being good for fishing in Tortugas, an expired safety device, crewman Nick Pouder arriving to the dock drunk or not arriving at all, a spider bite on Mr. Cameron's leg, and/or high or low tide), the ship did not promptly depart thereafter as expected. *Id.*; Tr. 79, 107, 180-81; AE 3 at 54; R's PPIP at 1. However, during the delay, Mr. Cameron remained in contact with Respondent Hawthorne, the boat captain, every day, either via a phone conversation or a visit to the boat. AE 3 at 54. While they were waiting to begin their trip, at one point Respondent Hawthorne advised Mr. Cameron that he did not have any money for food, so it would be "bread and water." *Id.* at 55. In response, Mr. Cameron bought groceries for the trip. *Id.*; Tr. 90. When the trip was further delayed, Mr. Cameron bought more groceries. *Id.* For approximately two weeks, Mr. Cameron stayed at a hotel near the marina waiting for the F/V Miss Cher to depart. Tr. 82. This trip was to be Respondent Hawthorne's first fishing trip in 12 years. Tr. 102, 264. Under protest, Respondent Hawthorne helped Mr. Gorman bring aboard two gallons of vodka for the trip. JE ¶ 13; Tr. 95, 231-32, 244.

On June 24, 2009, the F/V Miss Cher finally got underway from Fort Myers Beach, Florida, for a scheduled two-week fishing trip in the Gulf of Mexico. JE ¶ 4; Tr. 82. Aboard the vessel were Mr. Pouder (crewman), Respondent Hawthorne (captain), and Mr. Cameron (observer). JE ¶¶ 5-6. As the vessel was leaving Fort Myers on June 24th, it "hit a bad squall" and the crew lowered the outriggers for stability. JE ¶ 11; Tr. 82-83. During this process, one of the stay lines for the outriggers, "the outboard cable[,] got caught in the roof of the wheelhouse, ripped it up and so it was slamming up and down on the wheelhouse with each wave." JE ¶ 11; Tr. 83, 185. The vessel became beached on a sandbar and then Respondent Hawthorne anchored the boat near a location close to Fort Myers called the "230 bottom." JE ¶ 12; AE 3 at 35-36; Tr. 83, 186. Respondent Hawthorne's intention was to start drinking at this location until the alcohol was gone. JE ¶ 13; Tr. 191 ("my intentions were to go out there and drop that anchor, drink that booze and when it was gone, start my trip"); 232.

The next day, June 25, 2009, Mr. Cameron measured nets while Mr. Pouder and Respondent Hawthorne were working on the nets to get them ready to fish. Tr. 85. Mr. Cameron did not drink alcohol at all while aboard the F/V Miss Cher. Tr. 85, 116. However, Respondent Hawthorne and Mr. Pouder drank mixed beverages containing vodka and were

playing a game while working on the gear, where whoever falls down gets \$20 from the other person. JE ¶ 14; Tr. 85-87, 193, 244; AE 3 at 55. Later that day, Mr. Cameron cooked dinner inside. Tr. 85. The three men ate dinner together, during which time Respondent Hawthorne allegedly unlawfully intimidated and/or interfered with Mr. Cameron. JE ¶ 15.⁶

Later that evening, Mr. Cameron called Mr. Harrelson and communicated to him a “666 code,” which Mr. Harrelson explained “means there’s a problem aboard the boat.” Tr. 25, 91; see JE ¶ 16. To Mr. Harrelson, Mr. Cameron stated that the captain and the crew had threatened to lock Mr. Cameron up in his room, feed him bread and water, and throw him overboard. Tr. 26; AE 3 at 58. Mr. Harrelson called his supervisors, NOAA Fisheries and the U.S. Coast Guard, to arrange to transport Mr. Cameron off the F/V Miss Cher. *Id.*

On the morning of June 26, 2009, Mr. Cameron told Respondent Hawthorne that he wasn’t feeling well, and Respondent Hawthorne transited the F/V Miss Cher towards the shoreline to another location “just offshore” near a sea buoy. Tr. 92; AE 3 at 36, 58. NOAA Special Agent Kelly Kalamas received a call about the events the night before aboard the F/V Miss Cher, and contacted a state authority and the U.S. Coast Guard to coordinate a boarding. AE 3 at 4-6; Tr. 91. NOAA Special Agent Emanuel Antonaras was asked that morning to remove Mr. Cameron from the F/V Miss Cher “due to information . . . regarding threats to [him],” specifically threats to “tie up Mr. Cameron, feed him bread and water, and take away his satellite phone.” Tr. 65; AE 3 at 7, 33. Agent Antonaras called Mr. Cameron to inform him that he would be transported off the vessel, departed the Coast Guard station in Fort Myers with other federal agents on two Coast Guard vessels, and contacted Mr. Cameron again, who provided the F/V Miss Cher’s latitude and longitude. AE 3 at 33-34. The agents located the vessel and boarded. *Id.* at 34-35. All three men on the vessel, Respondent Hawthorne, Mr. Pouder and Mr. Cameron, appeared to be sober at the time, Agent Antonaras testified. Tr. 74-75. Mr. Cameron was escorted to one of the Coast Guard boats and taken to the station in Fort Myers. AE 3 at 35; JE ¶ 16.

While aboard the F/V Miss Cher, Agent Antonaras conducted interviews of Respondent Hawthorne and Mr. Pouder separately.⁷ Tr. 66-67; AE 3 at 7, 33, 35. Mr. Hawthorne provided a written statement in which he denied threatening or abusing the observer in any way.⁸ AE 3 at 38, 50. Mr. Pouder provided a written statement in which he denied witnessing any threats exchanged between or disturbances among the crew.⁹ AE 3 at 41, 52. When he returned to the Coast Guard station, Agent Antonaras interviewed Mr. Cameron and Mr. Cameron provided a

⁶ The specific events that took place at this time are in dispute. See discussion in Section IV(B).

⁷ A copy of Agent Antonaras’ investigation report, dated June 29, 2009, is located in Agency Exhibit 3 at page 33 (Attachment 5). Tr. 67. Agent Antonaras stated at the hearing that he adopts this report (pages 33 through 48 of Agency Exhibit 3), as his testimony. Tr. 68.

⁸ A copy of Respondent Hawthorne’s statement made on June 26, 2009, is located in Agency Exhibit 3 at page 50 (Attachment 6). AE 3 at 39.

⁹ A copy of Mr. Pouder’s statement made on June 26, 2009, is located in Agency Exhibit 3 at page 52 (Attachment 7). AE 3 at 41.

written statement. Tr. 75-76; AE 3 at 42.¹⁰ Subsequently, Respondent Hawthorne and Mr. Pouder completed their scheduled fishing trip on the F/V Miss Cher without an observer onboard. JE ¶ 17.

On August 13, 2009, Agent Kalamas interviewed Mr. Pouder, and Mr. Pouder provided a written statement, in which he made a variety of statements that contradicted those he made to Agent Antonaras less than a month earlier. Tr. 153-54, 56-62; AE 3 at 9-11, 67.¹¹ Agent Kalamas completed an investigation report. AE 3 at 1-15; Tr. 153-54.

III. APPLICABLE LAW AND REGULATIONS

A. Liability

i. Magnuson-Stevens Fishery Conservation and Management Act

In 1976, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (“Act”), 16 U.S.C. §§ 1801-1883, as amended, “to conserve and manage the fishery resources found off the coasts of the United States, and the Anadromous species and Continental Shelf fishery resources of the United States, by exercising sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish, within the exclusive economic zone.” Pub. L. No. 94-265, § 2, 90 Stat. 331 (1976). In order to achieve this purpose, Congress empowered the Secretary of the Department of Commerce to assess civil penalties and/or impose permit sanctions against any person who commits an act prohibited by Section 307 of the Act. 16 U.S.C. § 1858(a), (g). In turn, Section 307(1)(A) states: “It is unlawful for any person to violate any provision of this Act or any regulation or permit issued pursuant to this Act.” 16 U.S.C. § 1857(1)(A). The statutory definition of the term “person” includes “any individual (whether or not a citizen or national of the United States), any corporation, partnership, association or other entity (whether or not organized or existing under the laws of any State).” 16 U.S.C. § 1802(36).

ii. Regulations

As noted above, Section 307(1)(A) of the Act, 16 U.S.C. § 1857(1)(A), prohibits the violation of any regulations issued pursuant to the Act. One such regulation, 50 C.F.R. § 622.7(x), provides that “it is unlawful for any person to . . . [a]ssault, resist, oppose, impede, intimidate, or interfere with a NMFS-approved observer aboard a vessel.”

¹⁰ A copy of Mr. Cameron’s statement made on June 26, 2009, is located in Agency Exhibit 3 at 54 (Attachment 8). AE 3 at 48.

¹¹ A copy of Mr. Pouder’s statement made on August 13, 2009, is located in Agency Exhibit 3 at 67-69 (Attachment 11). AE 3 at 10.

B. Penalty

“Any person who is found by the Secretary . . . to have committed an act prohibited by section 307 [of the Act] shall be liable to the United States for a civil penalty.” 16 U.S.C. § 1858(a); *see also* 50 C.F.R. § 600.735 (“Any person committing, or fishing vessel used in the commission of a violation of the Magnuson-Stevens Act . . . and/or any regulation issued under the Magnuson-Stevens Act, is subject to the civil and criminal penalty provisions and civil forfeiture provisions of the Magnuson-Stevens Act, to this section, to 15 CFR part 904 (Civil Procedures), and to other applicable law.”). The amount of the civil penalty cannot exceed \$140,000. 16 U.S.C. § 1858(a); *see* Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended by the Debt Collection and Improvement Act of 1996, Pub. L. 104-134; 5 C.F.R. § 6.4(e)(14) (effective for violations that occurred between December 11, 2008, and December 6, 2012); 73 Fed. Reg. 75,321-01 (Dec. 11, 2008).

To determine the appropriate amount of civil penalty to assess, the Act identifies certain factors to consider:

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

16 U.S.C. § 1858(a). Similarly, the Rules of Practice provide, in pertinent part:

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).

Recent modifications to the Rules of Practice removed any presumption in favor of the Agency’s proposed penalty and the requirement that the presiding judge state good reason(s) for departing from the Agency’s analysis. 75 Fed. Reg. 35,631, 35,631 (June 23, 2010). Instead, the presiding judge has the “authority and duty” to “[a]ssess a civil penalty . . . , taking into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m).

No penalty assessment may be made unless the alleged violator is given notice and opportunity for a hearing conducted in accordance with Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554. 16 U.S.C. § 1858(a). Pursuant to 5 U.S.C. § 3344 and 5 C.F.R. § 930.208, the U.S. Office of Personnel Management approved an agreement between the Agency and the U.S. Environmental Protection Agency (“EPA”), which holds that EPA Administrative Law Judges may preside over certain Agency administrative enforcement

proceedings initiated pursuant to the Magnuson-Stevens Fishery Conservation and Management Act and other statutes.

IV. DISCUSSION

A. The Burden of Proof and Legal Standard

To prevail on its claims that Respondent violated the Act and the 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); *Cuong Vo*, NOAA Docket No. SE010091FM, 2001 WL 1085351 (ALJ, Aug. 17, 2001) (citing *Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100-103 (1981)); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). This standard requires the Agency to demonstrate that the facts it seeks to establish are more likely than not to be true. *Fernandez & Strickler*, NOAA Docket No. NE970052FM/V, 1999 WL 1417462 (ALJ, Aug. 23, 1999). To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence. *Cuong Vo*, 2001 WL 1085351 (citing *Steadman*, 450 U.S. at 101).

The question presented to this Tribunal is whether a preponderance of evidence in the record shows that Respondent Hawthorne intimidated or interfered with Mr. Cameron while aboard the F/V Miss Cher. 50 C.F.R. § 622.7(x).¹² “The common meaning of intimidation is to place someone in fear.” *Kenneth Lee House*, NOAA Docket No. PI0902200, 2011 WL 7030843, at *11 (ALJ, July 12, 2011) (citing *Black’s Law Dictionary* (6th ed. 1991)). The Administrative Law Judge (“ALJ”) in *House* noted that “neither the statute nor the regulation speaks to a requirement that the intimidation must interfere with the observer’s lawful duties,” and applied the “reasonable person similarly situated” standard to determine whether the observer was intimidated. *House* at *11, 13. The judge “must consider all the facts and circumstances surrounding the incidents that occurred” on the voyage during which the alleged intimidation took place (including the fact that the observer was a woman), it was found in *House*. *Id.* at *12.

In *Sang Yeol Kim and Kim Fishing Co. Inc.*, NOAA Docket No. PI0902568, 2011 WL 7030845 (ALJ, July 26, 2011), the Agency alleged that the respondent, a vessel operator, threatened a female observer while on a fishing trip by calling her a “troublemaker,” “bad luck,” and approaching her with some kind of a knife and saying “look out.” *Kim Fishing* at *9. The record revealed, however, that the knife gesture and/or comments may have been in jest, and that at the time of the incident, the observer did not feel that her safety was compromised. *Id.* at *13-16. Instead, the ALJ found, the observer appeared to have developed the opinion that she had been threatened after she returned to shore at the trip’s completion. *Id.* at *15. In fact, the observer in *Kim Fishing* testified that immediately after the incident she was not worried about eating or socializing with the crew. *Id.* Therefore, the ALJ concluded, she was not “placed in

¹² By Order on Notice of Settlement issued April 20, 2012, the undersigned approved changes to the charging language in the Agency’s First Amended NOVA, which now reads: “On or about June 25, 2009, John Hawthorne, operator, of the F/V Miss Cher (US Doc. No. 603657) did intimidate or interfere with a NMFS-approved observer aboard a vessel, in violation of 50 C.F.R. 622.7(x).” See Notice of Amendment Two to Agency’s Pleadings, filed April 17, 2012.

fear” by the respondent’s behavior, and no liability could be found. *Id.* at *14. The ALJ held: “While perhaps impolite or unkind, these words do not amount to what a reasonable person aboard a longline fishing vessel would likely categorize as intimidation.” *Id.* at *16.

A provision similar to 50 C.F.R. § 622.7(x) was at issue in *Gosta (Swede) Lovgren*, NOAA Docket Nos. 314-066, 314-065, 3 O.R.W. 431, 1984 WL 60193 (ALJ, Feb. 28, 1984), *aff’d*, Civil Action No. 84-2436 (D.N.J.),¹³ *aff’d*, *Lovgren v. Byrne*, 787 F.2d 857 (3d Cir. 1986); it outlawed the forcible assault, resistance, opposition, impediment, intimidation, or interference of authorized NOAA officers.¹⁴ The respondent in the case, a dock operator, begrudgingly permitted NOAA agents to inspect an area where fish were being offloaded. 3 O.R.W. at 432. Because the offloading equipment was obscured from sight, one agent began climbing a ladder to a platform for a better view. *Id.* The respondent appeared at the top of the ladder, making it clear through “[h]is stance and the verbal exchange which ensued” that he did not want the agent to proceed. *Id.* He continued to make multiple “derogatory and foul,” “derisive comments,” and then ordered the agents off the premises. *Id.* The ALJ held the respondent liable for interfering with the agents’ inspection, and, likening the respondent’s statements to “hysterical and threatening outbursts,” found there to be aggravating circumstances. *Id.* at 437-438. Instead of the Agency’s proposed \$5,000 penalty for 2 counts, the ALJ imposed \$50,000. *Id.* On appeal before the Third Circuit, the ALJ’s opinion was affirmed. 787 F.2d at 860-862. It was noted that during the incident in question, the agent on the ladder “felt physically threatened,” and that respondent’s resistance to the agents’ inspection “contained elements of force and implied threats of violence.” *Id.* at 860, 862. Proving resistance, intimidation or interference “does not require fisticuffs.” *Id.* at 862.

B. Liability

The Agency argues that during the evening of June 25, 2009, Respondent Hawthorne “made a series of statements that, taken in the context of his drinking and belligerent demeanor, had the effect of intimidating” Mr. Cameron, who “was sufficiently disturbed . . . that he feared for his safety and felt compelled to abandon his mission.” AB at 3. “[A]ny reasonable person, armed with the same knowledge and placed in the same position as Seth Cameron, would have rationally feared for his safety and been intimidated by Respondent’s conduct.” *Id.* at 5. Respondent Hawthorne directly challenges the Agency’s conclusion, stating that “any reasonable person, armed with the same knowledge and placed in the same position as Seth Cameron, would have gone about the job in his charge and learned from the very experienced Capt. Hawthorne.” RB at 8.

Respondent Hawthorne and the Agency disagree as to what happened during the evening of the 25th between the former and Mr. Cameron; the evidence is explored below. Also, there is a great deal in the record describing Mr. Cameron’s total experience with Respondent Hawthorne from the days they spent in Fort Myers through June 26, 2009. To the extent that facts and circumstances surrounding their trip are relevant to whether a reasonable person similarly

¹³ The district court opinion is unavailable in any legal database this Tribunal may access.

¹⁴ 50 C.F.R. § 651.7(m). This was a regulation in effect at the time of violation, March 25, 1983. Today, the Act itself prohibits this behavior, 16 U.S.C. § 1857(1)(E).

situated to Mr. Cameron would have been put in fear by Respondent Hawthorne, they are examined here.

At hearing, Mr. Cameron testified that before the crew left Fort Myers, Respondent Hawthorne regaled him with a tale about a confrontation he had had on another vessel where he (Respondent Hawthorne) “ended up beating” someone who had been chasing him with a knife. Tr. 89. Also while still in Fort Myers, Respondent Hawthorne allegedly told Mr. Cameron that “he didn’t have money for food and said if we weren’t going to get food, it would be ‘bread and water.’” AE 3 at 55. Mr. Cameron purchased groceries for the boat “at least twice,” explaining that “they [Respondent Hawthorne and Mr. Pouder] didn’t have any way to pay for it.” Tr. 90, 115; AE 3 at 55. Mr. Cameron further described how Respondent Hawthorne engaged him in discussions before the trip wherein he was questioning of the necessity of regulation by-catch reduction devices (“BRDs”), “like he was fishing for me to let him tie them off or something, or sew them shut” and how he said “he didn’t care if he would get in trouble” by doing so. Tr. 88-89; 102-04 (Respondent Hawthorne says on the record, “I did bring up the idea to sew one of the turtle shooters. [] . . . just to see how much shrimp that that was actually losing”); *see also* AE 3 at 54-55 (Cameron testimony) (“he was going to tie them shut to prove they lose their catch because of them. He was fishing for me to tell him to tie them up.”). As a result of these interactions, Mr. Cameron started to feel like Respondent Hawthorne “just didn’t want to go out with an observer.” Tr. 81. Nevertheless, despite these tensions, no serious altercations took place while the ship was delayed and the crew socialized in Fort Myers. Tr. 100-01; JE ¶ 7.

During the squall that immediately followed the F/V Miss Cher’s departure on June 24th, Mr. Cameron was in the wheelhouse when the cable of the port outrigger became caught in its roof, causing the roof to slam up and down only 18 inches above Mr. Cameron’s head. Tr. 83-84; AE 3 at 55; JE ¶ 11. Afterwards, Mr. Cameron said, he “really didn’t want” to continue the trip; he “was questioning . . . [Respondent Hawthorne’s] ability because of the time [12 years] that it had been since he had been out [as a captain on a boat fishing] . . . I just wasn’t sure how safe it was for that reason.” Tr. 84. At the hearing, Respondent Hawthorne cited this incident as a possible reason why Mr. Cameron wanted to leave the F/V Miss Cher, testifying:

The fact that the vessel was a nightmare and the roof being about to jerk off probably scared the hokey pokey out of him. I mean, Seth Cameron is not a shrimper. That roof almost being torn off and me having to clear those things and not losing my arm was just another day of work to me.

Tr. 255. The Agency argues that this event “immediately called into question” Respondent Hawthorne’s competency as captain of the vessel. AB at 5.

The next day, June 25, 2009, Mr. Cameron testified that Mr. Pouder began drinking alcohol around 10:00 a.m. and Respondent Hawthorne began drinking alcohol around 11:00 a.m. or 12:00 p.m. AE 3 at 55. Mr. Pouder and Respondent Hawthorne discovered that the nets weren’t ready for fishing, so they worked on them while Mr. Cameron took some net measurement and prepared dinner. *Id.* Mr. Cameron testified that Mr. Pouder and Respondent Hawthorne were playing “name that tune” for 25 cents, and the \$20 falling down game. Tr. 86, 193. Mr. Cameron testified that Respondent Hawthorne and Mr. Pouder finished drinking an

entire gallon (128 oz.) of vodka before 5 or 6 o'clock in the evening of the 25th. Tr. 95, 132-33. Respondent Hawthorne testified that he and Mr. Poudier "had three drinks," which he said were "big" and "tall," but that one of his own fell over, and once they sat down for dinner he stopped drinking completely, so he ended up drinking only two drinks. Tr. 193-95.

At about 5:30 p.m., the crew sat down for dinner. AE 3 at 56. Respondent Hawthorne asked Mr. Cameron about a comment that Mr. Cameron had made earlier in the day about the length of the tickler chain on the boat, and about other fishing-related matters. *Id.*; Tr. 86-87. Mr. Cameron testified that he tried to deflect the questions because Respondent Hawthorne "was getting really aggressive towards me" and "like staring at me." *Id.*; Tr. 87. Mr. Cameron described the scene as follows:

He was red and just – I felt like he was taking all the aggression of whatever was wrong in his life out on me at the time. And I was trying to deescalate it and not say anything to him. And he just started bringing up things that didn't make sense about some type of inheritance thing. And then something about the VA and about the government, the country and – so I didn't know, really, how to respond to him other than just sit there and just try not to engage him because it felt like he was like not even there. This was a conversation that was, like, in that setting it probably would have been different but because it was an alcohol-related setting, that made it a lot different. That made it a lot more unsettling. You know, it made me kind of fearful of what was going to happen not only to me later that day but at night.

Tr. 87-88. In his June 26th statement, Mr. Cameron reported that Respondent Hawthorne said to him during dinner that night that:

[H]e has me for 18 days and would prove to me that the "fisheyes" are costing him shrimp. He was yelling and then said he would take my sat. [satellite] phone to make sure I couldn't call anyone and tie me up and put me in a room. He also said that he didn't care what would happen to him as long as he proved his point and enforcement didn't find out till he got back to the dock.

AE 3 at 56-57. At the hearing, Mr. Cameron recalled Respondent Hawthorne saying that:

He would tie them [the BRDs] up anyway and lock me in the room, or a room, and feed me bread and water the whole time and, like, he could keep me for 30 or 40 days if he wanted to. And why don't you just let me drop you off on the beach for 18 days and I'll come back. So basically that I would be able to hang out while he went and fished and he would get his time still.

Tr. 89-90. To Agent Antonaras, Respondent Hawthorne denied making these threats. AE 3 at 37. At the hearing, it was Respondent Hawthorne's recollection of events that "he didn't badger" Mr. Cameron about BRDs; he only said that he had never seen a "bird's eye" and that he merely asked Mr. Cameron if it would be a good idea to sew up or tie up a turtle excluder device to see the difference in catch. Tr. 247-49.

According to Mr. Cameron, during dinner Respondent Hawthorne also brought up the Marine Corps, of which Mr. Cameron had been a member, and then “started saying how he hated America for a few minutes,” then about “the waste of government funds.”¹⁵ AE 3 at 57. At hearing, Respondent Hawthorne acknowledged: “I said something about I was ashamed to be an American. I did say those words.” Tr. 143, 196, 250. Though, he clarified, “I never said I hated America.” Tr. 250. After he said these things, Respondent Hawthorne commented on the poor treatment of patients at the VA Hospital, which Mr. Cameron “took issue with,” though he “didn’t get loud” or “offensive,” but “sharpened his tone.” Tr. 196, 249-50.

Respondent Hawthorne claims that he finished dinner and apologized “right then” to Mr. Cameron. Tr. 197. According to Mr. Cameron, however, Respondent Hawthorne did not apologize to him until the next morning, on June 26th, and even then only “apologized about the drinking,” “not acknowledging what had actually happened.” Tr. 137. Mr. Cameron remarked, “I thought that was strange. . . . like part of having an alcoholic incident.” *Id.* This contributed to his continued sense that he should get off of the boat. Tr. 138 (“because I felt like if he didn’t acknowledge that it happened, then there’s nothing to say that it wouldn’t happen again”).

The record reflects Mr. Cameron’s fairly extensive prior experience with boats and commercial fishermen. Before his assignment to the F/V Miss Cher, Mr. Cameron had been an observer on other vessels at least 4 times, including aboard long line and shrimp boats, for a total of approximately 40 days at sea. Tr. 120-22. Additionally, he testified that he was familiar with the fisheries industry and being around fishermen, having received a bachelor’s degree in fisheries and psychology, worked “for the Fish and Game” in Idaho and Washington as a fishery technician, for which he employed commercial fishermen, and worked as a commercial fisherman in the Bering Sea in Alaska. Tr. 77-78, 127-28, 140, 142. Further, he relayed that he had worked as a deckhand with a tugboat company in New Orleans and had other jobs before joining the observer program around April 2009. Tr. 122, 125-27. At the time of hearing in September 2012, Mr. Cameron testified that he was working in the commercial seafood industry. Tr. 78.

Mr. Cameron’s feelings during and immediately after the alleged threatening treatment from Respondent Hawthorne are reported in the record in his own June 26th statement and testimony at the hearing, in Agent Kalamas’ report, and were characterized by Mr. Harrelson at the hearing. Finding consistency between Mr. Cameron’s reports to agents, his signed statement, and his testimony, observing his demeanor at the hearing, and considering his background, the undersigned finds him to be a credible witness and his testimony reliable. Upon review of each account of the events of June 25th, there is no question that Mr. Cameron felt placed in fear, or intimidated, by Respondent Hawthorne’s statements and behavior on June 25, 2009.¹⁶

When asked whether he felt intimidated by Respondent Hawthorne, Mr. Cameron responded as follows:

¹⁵ Mr. Cameron served in the Marines as a rifleman from 1996-2000. Tr. 128.

¹⁶ The Agency did not present any evidence or substantial argument about whether Respondent Hawthorne “interfered” with Mr. Cameron. The findings in this Initial Decision concentrate exclusively on Respondent Hawthorne’s intimidation of Mr. Cameron.

I'm not sure what it was. It was not knowing – [Respondent Hawthorne] wasn't the same person that [night] . . . his persona was completely different than what it had been previous to that time. He was easy to get along with [before]. I – I was able to, like, redirect our conversations and kind of deflect, you know, what he was saying to me. But this – after he had been drinking it wasn't that way, it was just really pressurized speech. . . . I tried to avoid it and I couldn't. . . . I felt like I couldn't get away from him and that just adds to this – this feeling of being stuck in an island out of nowhere and not knowing, you know, what would happen if this is the beginning.

* * *

. . . it's a different person with him, staring at me, like. Pressure speech. It's like body language. I don't recall the specific body language that was being used, but I recall the feeling of it more so than visually.

* * *

He was on the other side of the settee from me. But it's like he was leaning towards me in that manner. And that in and of itself is kind of intimidating, I think. But also . . . that story that he previously told me about that person [sic] chasing each other out of the boat for several hours . . . kind of set up some red flags with me. [] And because of the circumstances at the time, I think that probably adding [sic] to the way I felt about it.

Tr. 130-31, 135-36. Mr. Cameron credibly described being “nervous about what could happen.” Tr. 93. “I didn't know if they were going to do it again,” he said. *Id.*

Agent Kalamas wrote in her report that on the morning of June 26th, Mr. Cameron told her that “he did not feel that he was in danger of being harmed however he was extremely uncomfortable due to the events that occurred on the previous evening and wanted to get off of the boat.” AE 3 at 6. When asked at the hearing what she meant by this, Agent Kalamas clarified that “at that point in time he was in no immediate harm,” however “he did not feel comfortable staying on the boat.” Tr. 154-55. Ms. Kalamas' testimony was straightforward and reliable. Her impression of Mr. Cameron's position that morning is credible particularly in light of Mr. Cameron's situation. Respondent Hawthorne was not threatening him with a knife or other weapon, nor was there any physical contact whatsoever or threat thereof; it is understandable that a former Marine would characterize his fear as a thoughtful discomfort rather than being “in danger of being harmed,” which would imply the threat of present physical harm. Tr. 154.

Mr. Harrelson testified that since he started working in the observer program in 1994, he can recall only two or three times when an observer needed to be removed from a vessel. Tr. 26-27. He distinguished statements and profanity that are “not threatening to the observer, [but] threatening to the workplace” from what Mr. Cameron had experienced. Tr. 36. Also speaking to this distinction, Mr. Cameron recounted his experience as an observer on a different vessel in 2010: “There was an incident . . . where I wasn't able to sample the nets. It wasn't like this where he was threatening me personally Nothing where a direct threat was made against me I never had a problem like this.” Tr. 123-24. Mr. Harrelson had not experienced any

problems before this incident with Mr. Cameron's job performance as an observer; in fact, after Mr. Cameron voluntarily left the Agency's employ, Mr. Harrelson attempted to re-hire him. Tr. 27-29.

On the night of the 25th, Mr. Harrelson felt at the time that Respondent Hawthorne's statements made to Mr. Cameron were "severe enough that we needed to take him off the boat." Tr. 36. Although he knew at the time that Respondent Hawthorne was willing to bring Mr. Cameron to shore himself, Mr. Harrelson felt that "it was critical to get him off the boat as soon as possible." Tr. 26. He explained that at the time, he "felt like this was real critical and . . . like I had to make a decision." Tr. 52. Given Mr. Harrelson's lengthy experience with the fisheries observer program, working as an observer himself before an observer coordinator, and because of his sincere and consistent testimony, I find his impressions of Mr. Cameron's situation aboard the F/V Miss Cher credible. And, because Mr. Cameron spoke with Mr. Harrelson on the night of the 25th, when his emotional reaction to Respondent Hawthorne's behavior was fresh, Mr. Harrelson's characterization of Mr. Cameron's situation carries great weight.

Ultimately, I find Respondent Hawthorne's testimony substantially less credible than that of Mr. Cameron. First, his statements throughout this proceeding have been inconsistent at times, and appear dubious at others. For example, at the hearing Respondent Hawthorne blamed the F/V Miss Cher's shoddy condition and Mr. Gorman for not telling him about a feature of the vessel, for the outrigger stay line ripping off the wheelhouse roof. Tr. 180, 183-84, 190, 234, 253-54, 263.¹⁷ Then, in his Brief, Respondent Hawthorne stated, in contradiction: "The problem encountered as the vessel left the Dock is a common one, and occurred because of lack of ability of Nick Pouder." RB at 2. Also, although Respondent Hawthorne stated repeatedly that his goal was to finish the *two gallons* of vodka with Mr. Pouder on the 25th while anchored, he insists that he only drank two large vodka-containing beverages that day. JE ¶ 13; Tr. 193-95, 232, 235; RB at 3.

Second, there was much testimony given at the hearing as to extent to which Respondent Hawthorne abused alcohol, much of it contradictory. He simultaneously testified that his "drinking heyday" ended seven or eight years ago, that he has not had a drink in months, that he "still [does] four or five after . . . work," that he "quit that completely" and doesn't do that "anymore." Tr. 235-36. Respondent Hawthorne readily described his drinking preference, and then appeared to cover for himself: "And I'm a rum drinker. I – I don't drink much vodka, either. Or was a drinker, but." Tr. 269. Significantly, he acknowledged having memory problems after drinking and told the undersigned, "I woke up in jail one time and didn't have a clue how I got there." Tr. 270. Also, he testified, "I've had a number of DUIs." Most importantly, however, there appears to be no dispute between the men as to the effect of alcohol on Respondent Hawthorne. Consistent with Mr. Cameron's description, Respondent Hawthorne honestly admitted at hearing that he "is two different people" when he is sober and when he is drunk. Tr. 236, 271, 130-31, 135-36.

¹⁷ Mr. Gorman "never told him" and therefore Respondent Hawthorne "didn't have a clue," he testified, that the F/V Miss Cher had a "line by the stay wires so while you're letting down [the outriggers], you pull that line until it clears the roof." Tr. 180, 184.

Further, as the Agency points out, Respondent Hawthorne is willing to engage in illegal behavior, and has indeed done so in the past (besides his DUIs). Tr. 271; R's PPIP at 1, "Directive #2" (I . . . suggested, we might, sometime during the TRIP, close-up one of the Excluders."); Tr. 201 ("I was given an order to lace TEDs and I did do it."); 211-12 ("that was the only time I ever got nailed by the Coast Guard . . . we'd take a few crab claws and we'd eat them. Well, it's illegal to have crab claws on a shrimp boat. So I was fined \$500 . . ."); 247-249 (acknowledging that sewing up TEDs is illegal, but that he thought Mr. Cameron had the authority to authorize it); 265 (about his work on boats in the oil fields: "But in the case of someone not showing up . . . I will assume a captain's responsibilities. But it's – it was illegal."); AB at 5.

Respondent Hawthorne's history of drinking, admitted associated memory loss and personality changes, his past illegal acts or willingness to at least bend the law, and his apparent skepticism of at least the Agency's TED regulations all detract considerably from his credibility as a witness, especially because the core issue of this case is his behavior, under the influence of alcohol, towards a federal fisheries observer.

As to Respondent Hawthorne's specific allegations that Mr. Cameron wanted to delay the trip or end it prematurely for reasons other than intimidation, there is no evidence to support them. Tr. 109-12, 136-37, 255 ("The crew's quarters didn't exist, there was a girl at the dock, he had to be in Washington."). On the contrary, Mr. Cameron testified that he would have earned "substantially more at sea than I would if I was sitting in a hotel." Tr. 81. While on standby waiting to embark, he was paid \$13 per hour and was responsible for hotel and food costs, for which he would not be reimbursed until later. *Id.* at 81-82. On the other hand, while at sea, Mr. Cameron testified, "we were allowed to get overtime after 40 hours and claim up to, I think, 84 hours." *Id.* at 81. Mr. Cameron testified that he had been supporting himself for three to four weeks before the F/V Miss Cher left Fort Myers, and two of those weeks were because of the F/V Miss Cher delays. *Id.* at 82. He flatly denied there being any reason to get back to shore other than the intimidation he experienced on the F/V Miss Cher. Tr. 137; *see* Tr. 112 (Mr. Cameron does not recall saying he needed to get to Washington state); 113 (Mr. Cameron describing the beds in the crew's quarters as "actually pretty wide, wider than you normally find on a shrimp boat").

In sum, upon consideration of all the evidence adduced at hearing, it is hereby found that the Agency has shown by a preponderance of the evidence that Mr. Cameron was placed in fear by Respondent Hawthorne on June 25, 2009.

C. Absence of Mr. Poudier and Mr. Campbell at the Hearing

Multiple times during the hearing, and in his post-hearing Brief, Respondent Hawthorne decried the absence of Nick Poudier's testimony. Tr. 63 ("the truth that we seek in this matter and in this hearing would be seriously, seriously hampered without the presence of Nick Poudier;" Agency counsel "assured me that he was going to do everything possible within his means to have Mr. Poudier present" and "did not call me and inform me that Mr. Nicholas Poudier would not be present;" Mr. Poudier's absence "almost virtually kills my defense"); 257 ("Why isn't Nick Poudier here? . . . it seems like the biggest error that the prosecution in this case could

make would be the nonattendance of Seth Poudr [sic.]); 260 (“Why isn’t he here?”); RB at 7 (“Nick Poudr should have not been that hard too [sic] find”). Respondent Hawthorne also repeatedly mentioned NOAA agent Steve Campbell at the hearing, and spoke about discussions that he had had with him about the incident. Tr. 163, 172-73, 175, 206-7, 217, 219-21, 238. About Mr. Campbell, Respondent Hawthorne stated: “And he also had an opinion, which is not being heard in court today . . . it’s not being let known here.” Tr. 220. In his Brief, Respondent Hawthorne again expressed frustration that Agency counsel did not call Mr. Campbell to testify at the hearing. RB at 5.

On August 17, 2012, the Agency requested the issuance of a subpoena for the testimony of Mr. Poudr. The undersigned granted the Agency’s request and issued the subpoena. At the start of the hearing, the Agency explained that it was “unable to serve Nicholas Poudr.” Tr. 8-9. When asked whether he had himself requested a subpoena for Mr. Poudr, Respondent Hawthorne answered that his intent to examine Mr. Poudr was clear from his PPIP, and that Agency counsel had said it would take care of requesting a court order for Mr. Poudr’s attendance. Tr. 273. Ultimately, Respondent Hawthorne stated that he did not realize that he was required to make any efforts to ensure Mr. Poudr would be at the hearing, asserting “I mean, I – I’m not going to go get Nick if somebody else can drag him here.” Tr. 274. Also, regarding Agent Campbell, Respondent Hawthorne explained at the hearing that he had informed Agency counsel of his intent to request Agent Campbell’s attendance, and that when Agency counsel stated that it would object, Respondent Hawthorne decided not to make that request. Tr. 219-220.

As was settled in *Pavlik v. United States*, 951 F.2d 220 (9th Cir. 1991) (a NOAA civil penalty case brought under the Northern Pacific Halibut Act of 1982), “absent evidence of improper motives or that the government possesses exculpatory materials, the due process clause does not require the government to call witnesses simply for the sake of facilitating the defense’s presentation of its own case.” 951 F.2d at 224 (citing *United States v. Heck*, 499 F.2d 778, 789 n.9 (9th Cir.), *cert. denied*, 419 U.S. 1088 (1974)). The Act and the Rules of Practice governing this proceeding permit the parties to request a subpoena from the presiding judge ordering witnesses to testify at a hearing. 16 U.S.C. § 1858(f); 15 C.F.R. § 904.245. As the Ninth Circuit in *Pavlik* aptly concluded, if a party considers a witness critical to its defense, it should have called or attempted to call that person. 951 F.2d at 224.

Regardless, Mr. Poudr’s credibility as a potential witness was eroded considerably by both parties in the documentary evidence and in testimony at the hearing. In interviewing Mr. Poudr on the F/V Miss Cher, Agent Antonaras felt that he was “vague” in his answers to questions, but that it was difficult to tell if Mr. Poudr just could not remember something or if instead, there was something he was hiding. Tr. 74. During his discussion with Agent Kalamas and in his August 2009 statement, Mr. Poudr kept referring to Seth Cameron as “Sean.” Tr. 161. Respondent Hawthorne himself characterized Mr. Poudr as “an alcoholic,” “a lively party boy,” “drunk,” and, importantly, testified that on the night in question, “Nick drank completely until he finally passed out.” Tr. 188, 195, 198-99, 225. If he hid vodka in his stateroom, Respondent Hawthorne testified, Mr. Poudr “would tear [it] apart when I was outside.” Tr. 191. Mr. Cameron described Mr. Poudr as “kind of like transient,” and noted that Respondent Hawthorne told him Mr. Poudr “showed up intoxicated” to the dock. Tr. 131-32. Mr. Poudr’s

statements to Agent Antonaras and Agent Kalamas are drastically different. *See* AE 3 at 52, 67. For all of these reasons, it would be inappropriate to assign any weight to any of Mr. Pouders' statements made in the course of NOAA's investigation of this matter.

D. Ultimate Findings of Fact and Conclusions of Law

Upon thorough and careful review of the documentary and testimonial evidence in the record of this proceeding, I find that the Agency has proven by a preponderance of the evidence the following:

1. Respondent John Hawthorne is a "person" as defined by the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1802(36), and is subject to the jurisdiction of the United States.
2. On June 24, 2009, through June 26, 2009, Seth Cameron was an "observer" approved by the National Marine Fisheries Service, as defined by the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1802(31).
3. On June 25, 2009, Respondent Hawthorne and Seth Cameron were onboard a vessel, the F/V Miss Cher.
4. On June 25, 2009, Respondent Hawthorne intimidated Seth Cameron, in violation of 50 C.F.R. § 622.7(x).
5. Respondent Hawthorne violated a prohibition set forth in 50 C.F.R. § 622.7(x), a regulation promulgated under the Magnuson-Stevens Fishery Management and Conservation Act pertaining to fisheries of the Caribbean, Gulf and South Atlantic.
6. Because Respondent Hawthorne violated a regulation issued pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A), he is liable to the United States for a civil penalty, 16 U.S.C. § 1858(a).

E. Civil Penalty Assessment

As stated above, the Agency's penalty analysis shall not be presumed accurate, and its proposed penalty amount is not presumed appropriate. 75 Fed. Reg. 35,631 (June 23, 2010); *Nguyen & Harper*, NOAA Docket No. SE0801361FM, 2012 WL 1497024, at *8 (ALJ, Jan. 18, 2012); 15 C.F.R. § 904.204(m). Nor must the presiding judge state good reasons for departing from the Agency's analysis. 75 Fed. Reg. 35,631, 35,631 (June 23, 2010). The penalty imposed shall be determined independently in accordance with the factors set forth in the Act and 15 C.F.R. § 904.108(a).

i. The Agency's Arguments

In its Initial Post-Hearing Brief ("Agency's Brief" and "AB"), the Agency states that in calculating its proposed penalty in this case it "considered the factors enumerated in 15 C.F.R.

904.108, and the internal policy guidance contained in the NOAA Penalty Policy and Penalty Schedules,” which the Agency states is a publically available document.¹⁸ AB at 6.

According to the Agency’s Brief, there is a difference in “offense level” between observer interference, which it characterizes as a Level II violation, and observer intimidation, which it deems a Level III violation. AB at 6-7. “This difference . . . highlights the concern the Agency has with providing for its observers’ safety and the significance the Agency places on protecting its observers from harassment and intimidation as they seek to carry out their very important duties,” argues the Agency. AB at 7. The Agency next addresses Respondent Hawthorne’s culpability level, and argues that his conduct was at least negligent “in that he failed in his duty to provide a shipboard environment free from threats and intimidation.” AB at 7.

In support of its proposed penalty of \$10,000, the Agency argues that it was deprived of the mission-critical scientific data and information that Mr. Cameron would have collected aboard the F/V Miss Cher, had he remained for the two-week trip. AB at 6. This information informs the Agency’s decision-making as to regulating the fisheries. *Id.* “So Respondent’s conduct had a deleterious effect not only on [Mr. Cameron], but also on the Agency and by extension the entire fishing industry . . .” *Id.*

Moreover, the Agency asserts that Respondent Hawthorne “steadfastly refused to accept any responsibility for his actions, and continues to assert that he did nothing wrong.” AB at 7. Further, his decision to drink on June 25th “endangered the safety of the vessel and all aboard her,” and his threats to Mr. Cameron “are worthy of severe condemnation” and the imposition of a \$10,000 penalty. *Id.*

Finally, the Agency explains that Mr. Gorman settled with the Agency for \$2,500 after providing information on his inability to pay a \$12,500 civil penalty. AB at 7. Respondent Hawthorne produced no information on his ability to pay, and the Agency made no adjustment to its proposed penalty related to that factor. *Id.*

ii. Respondent Hawthorne’s Arguments

At hearing, Respondent Hawthorne testified in his defense as to his experience and competency on the water. Specifically, he stated that during the time he was not working in the shrimping industry, he “remained working at sea on much larger vessels with much larger crew, and with no problems with either crew nor Coast Guard of this kind.” RB at 5. Further, he claimed that he had assisted the Coast Guard on “numerous occasions” and was so well known by the Coast Guard that he “was passed by while other boats in the area were being boarded.” *Id.* To further support his competency as a captain, Respondent Hawthorne pointed out that he “made 18 days fishing aboard that wreck [F/V Miss Cher] . . . without anybody being killed nor

¹⁸ The Agency did not submit for the record at any point in this proceeding a copy of the NOAA Penalty Policy and Penalty Schedules to which it refers, nor did the Agency point out where Respondent Hawthorne could locate the publically available document until after the hearing in its Brief. AB at 6-7. Being beyond the record, the Penalty Policy is not considered here beyond the arguments made in reference to it by the Agency.

the boat sinking.” RB at 6 (emphasis in original). Also, it was his decision to station Mr. Cameron in the wheelhouse on the 24th “in case of trouble.” RB at 2. Finally, in 25 years at sea, he was fined only once he said, and that was for one undersize crab claw taken from a derelict crab trap. RB at 6; *see* Tr. 180, 182.

The Agency’s attack on his character has “no limit,” Respondent Hawthorne accuses in his Brief. RB at 2; Tr. 217; RB at 5 (Agency counsel would have this Tribunal believe Respondent Hawthorne is “Captain Jack the Ripper Hawthorne,” which is an “illusion”); RB at 6-7 (attacks are “unfounded and quite offensive”). Respondent Hawthorne argues that his reputation is positive among residents of the small Mississippi town where he resides, and that he is one of the “good guys.” RB at 7. Further, he has cooperated with all involved in this matter. RB at 8.

iii. Nature, Circumstances, Extent and Gravity of the Alleged Violation

The fact that alcohol was involved in Respondent Hawthorne’s physical and verbal intimidating, violative behavior made a big difference to Mr. Cameron on the night of the 25th, and is significant to a determination of the “nature, circumstances, extent and gravity” of the violation here. Tr. 87-88, 93.

First, it is noted that the violation occurred under the influence of alcohol, where the abuse of alcohol to an extreme extent was intentional and planned. Respondent Hawthorne specifically and repeatedly acknowledged at hearing that his explicit goal on the day in question was to consume, with Mr. Pouder alone, the entirety of the supply of two gallons of vodka brought aboard the ship. Tr. 191, 232; *see also* JE ¶ 13. Respondent chose this course of conduct even though he was aware of the effect of the alcohol upon his personality. Tr. 236, 271, 130-31, 135-36.

Second, the decision to engage in such extensive alcohol abuse under the specific circumstances facing Respondent Hawthorne at the time increases the magnitude of the gravity of the violation. Although he testified that the F/V Miss Cher on the 25th was anchored at sea “in a very safe position” (Tr. 246), Respondent Hawthorne acknowledged being aware at the time of the vessel’s poor condition. Tr. 183 (the boat “was about to fall apart”); 190 (“anything could happen on this trip”); 234 (there was a fire in the engine room “[o]n this occasion,” and the vessel almost sank); 253-54 (the boat was less safe with only two crewmen, Respondent Hawthorne and Mr. Pouder; “we might get lucky and not sink”); 263 (“The gear was falling apart. The gear was shot.”); R’s PPIP at 2. He even asserted, “Seth doesn’t know how lucky he was getting off that boat.” Tr. 221; *see also* RB at 6 (If Mr. Cameron “knew anything about boats . . . he would have never went to sea aboard her.”). Respondent Hawthorne’s admissions about the vessel’s poor condition at the time demonstrates the great extent to which, as captain, he was egregiously irresponsible in allowing himself and his sole crewman to drink to excess aboard the boat he himself characterized “a death trap.” Tr. 221. Moreover, it buttresses, not only in hindsight, but contemporaneously, the extreme uneasiness Mr. Cameron felt being board the F/V Miss Cher at the time. In sum, as the Agency correctly argues, the evidence suggests that Respondent Hawthorne’s decision to drink excessively on June 25th generally “endangered the safety of the vessel and all aboard her.” AB at 7.

Furthermore, there is also the extent, nature and circumstances of the intimidating statements made by Respondent Hawthorne to Mr. Cameron – that he would be locked up on the ship, left on a sandbar, fed only bread and water, or denied his only connection to help (the satellite phone). AE 3 at 57; Tr. 89-90. For a captain who, as Respondent Hawthorne himself acknowledged, is in charge and responsible for all that occurs on the boat (Tr. 172-73) to make such threats to an observer alone at sea, aboard a small, poorly maintained vessel with only one other crewman, seems particularly egregiously intimidating, and supports the credibility of Mr. Cameron’s feelings of great insecurity under the circumstances. Mr. Harrelson acknowledged that after he spoke to Mr. Cameron he was convinced as to the seriousness of the situation, saying he thought Mr. Cameron was in “dire straits” and that “something worse” could happen. Tr. 26. Attesting further to the gravity of a situation where threats are being made to an observer at sea, Mr. Harrelson testified: “We’ve been fairly lucky in our program. What scares me to death, that one day we might not be so lucky, somebody gets hurt real, real bad.” Tr. 52. As such, it is concluded that these types of cases should not be taken lightly given the amount of risk undertaken by the observers by going to sea with captains like Respondent Hawthorne who could abuse alcohol, or who have been absent from the industry for so long. The penalty here should reflect the seriousness of the situation in which Mr. Cameron found himself.

Finally, the Agency’s argument that not having an observer aboard the F/V Miss Cher was “deleterious” to the Agency and the fishing industry as a whole is persuasive. AB at 6. After all, the parties stipulated to the importance of the observer program: “Observers provide the Agency with information critical to the successful performance of the Agency’s mission, including information on fishing practices, bycatch, and species-specific scientific data.” JE ¶ 10. Mr. Harrelson added that observer information is “very important because we get an actual snapshot of what’s taking place” in the fisheries. Tr. 11. The goal of fisheries management is to have stable fisheries, and observers further this goal by collecting information about “the status of stocks of all the fisheries, especially the important ones that are commercially important . . . but also ecological species and protected species.” *Id.* Observers also have the opportunity to see “all sorts of experimental new ideas” that fisherman may utilize. Tr. 14. Without the data that observers collect, the agency’s ability to effectively manage the nation’s fisheries is impacted negatively. Tr. 13.

iv. Respondent’s Degree of Culpability, Any History of Prior Violations, Ability to Pay

The duty to know and follow the law is squarely on Respondent Hawthorne. *O’Neil*, 1995 WL 1311366, at *5 (“commercial 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 & Weber*, 6 O.R.W. 486, 1991 NOAA LEXIS 34, at *9 (ALJ, July 19, 1991) (“When one engages in a highly regulated industry, that person bears the responsibility of knowing and interpreting the regulations governing that industry.”). Respondent Hawthorne testified that he had been a captain “for many years.” Tr. 177. He knew that Mr. Cameron was a NMFS-approved observer assigned to the F/V Miss Cher, and that it was against the law to assault, resist, oppose, impede, intimidate, or interfere with an observer aboard a vessel. JE ¶¶ 8-9. Speaking of his own responsibilities aboard the F/V Miss Cher, Respondent Hawthorne stated that when you are a boat captain, “you are in charge of anything that happens aboard the vessel.”

Tr. 172-73; *see also* Tr. 230-31. Under the circumstances here, the Agency is generous in characterizing Respondent Hawthorne's culpability as merely negligent.

As mentioned above, Respondent Hawthorne did admit to knowingly violating TED regulations on a previous job, and to being cited by the Coast Guard for violating a separate fisheries regulation. Tr. 201 ("I was given an order to lace TEDs and I did do it."); 211-12 ("that was the only time I ever got nailed by the Coast Guard . . . we'd take a few crab claws and we'd eat them. Well, it's illegal to have crab claws on a shrimp boat. So I was fined \$500 . . ."). His candor is appreciated, as is the limited prior history of a single citation in a long, 25-year career. Tr. 180, 182.

The Rules of Practice state that if the respondent wants the presiding judge to consider his inability to pay the penalty, he must submit "verifiable, complete, and accurate financial information" to the Agency in advance of the hearing. 15 C.F.R. § 904.108(e). No evidence of Respondent Hawthorne's inability or ability to pay was submitted at any time in this proceeding. As such, this factor shall not be considered.

iv. Such Other Matters as Justice May Require

Cooperation between members of the regulated fishing community and NOAA appears to be of paramount importance to the success of the NMFS observer program and, particularly, the safety of the observers on duty. Though Respondent Hawthorne's behavior towards Mr. Cameron aboard the F/V Miss Cher was the exact opposite of cooperative and agreeable, his apology (albeit unspecific) to Mr. Cameron on the morning of the 26th (Tr. 137), his courtesy towards the Agency personnel with whom he interacted, his mostly respectful cross-examination of the witnesses, and his candor at the hearing are noted. Tr. 217, 220. *See Straub & Silk*, NOAA Docket No. SE1100711, 2012 WL 1497025, at *16 (ALJ, Feb. 1, 2012) (" . . . Respondents' truthfulness and cooperation throughout this process tends to favor a low civil monetary penalty."); *Pesca Azteca*, NOAA Docket No. SW0702652, 2009 WL 3721029, at *16 (ALJ, Oct. 1, 2009) (mitigating penalty in part because the fishing vessel's crew "fully cooperated" with U.S. Coast Guard patrol agents during their boarding of the vessel). However, Respondent Hawthorne himself and Mr. Cameron testified to Respondent Hawthorne's volatile temperament in matters both related and unrelated to his role as a boat captain, leading this Tribunal to conclude that for a person of such mercurial nature (Tr. 87-88, 130-31, 135-38, 197, 218, 235-36, 270-71), very little mitigation of the penalty is warranted for these considerations.

Respondent Hawthorne was able to continue the fishing trip aboard the F/V Miss Cher without an observer onboard, which would appear, from the evidence in the record, vastly preferable to him. Respondent Hawthorne testified to spending approximately 18 nights fishing on the trip after Mr. Cameron was removed, catching 24 or 25 boxes of shrimp, or 120 pounds, and earning an amount in the range of \$800-\$1,000. Tr. 263-64. This gain for Respondent Hawthorne is taken into account in determining the appropriate penalty.

Though not specifically presented as mitigating factors of the penalty, Respondent Hawthorne testified on some subjects that together warrant some consideration. He testified to a fairly acute understanding of the procedures to follow when you catch a turtle in your net. Tr.

182. He stated that he “never sunk a boat, never got anybody killed, not even close.” Tr. 227-28. In addition, he has allegedly saved three lives, one of them being a dog. Tr. 215, 224. He has suffered on-the-job injuries and worked what must be physically grueling and at times exhausting jobs. Tr. 226 (“on the oil boats . . . I almost got killed”); 226-27 (“the foreman almost killed me. Ended up having to have surgery. Having to have shoulder completely rebuilt.”). And he concurs that the sea can be a dangerous place. Tr. 231. While it is certainly not the ambition of this Tribunal to make life any more difficult than it normally is for honorable hardworking fisherman, the observer program has important objectives and it is important to strongly dissuade those who might contemplate failing to cooperate with it by means of threats and/or intimidation.

v. Conclusion

Upon consideration of all the foregoing and the penalty factors listed in 16 U.S.C. § 1858(a) and 15 C.F.R. § 904.108(a), it is hereby determined that for one count of violation of the Magnuson-Stevens Fishery Conservation and Management Act, a civil penalty in the amount of \$7,000 is appropriate.

ORDER

A total penalty of **\$7,000** is hereby **IMPOSED** on **Respondent John Hawthorne** for the violation upon which he was found liable herein.

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

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

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, on **April 29, 2013**, 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.



Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency¹⁹

Dated: February 27, 2013
Washington, DC

¹⁹ As stated above, the Administrative Law Judges of the U.S. EPA are authorized to hear cases pending before the Agency pursuant to an agreement effective September 8, 2011.

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*** This section is current through the January 31, 2013 ***
*** issue of the Federal Register ***

TITLE 15 -- COMMERCE AND FOREIGN TRADE
SUBTITLE B -- REGULATIONS RELATING TO COMMERCE AND FOREIGN
TRADE
CHAPTER IX -- NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
DEPARTMENT OF COMMERCE
SUBCHAPTER A -- GENERAL REGULATIONS
PART 904 -- CIVIL PROCEDURES
SUBPART C -- HEARING AND APPEAL PROCEDURES
DECISION

15 CFR 904.271-273

§ 904.271 Initial decision.

(a) After expiration of the period provided in § 904.261 for the filing of reply briefs (unless the parties have waived briefs or presented proposed findings orally at the hearing), the Judge will render a written decision upon the record in the case, setting forth:

(1) Findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law, or discretion presented on the record;

(2) An order as to the final disposition of the case, including any appropriate ruling, order, sanction, relief, or denial thereof;

(3) The date upon which the decision will become effective; and

(4) A statement of further right to appeal.

(b) If the parties have presented oral proposed findings at the hearing or have waived presentation of proposed findings, the Judge may at the termination of the hearing announce the decision, subject to later issuance of a written decision under paragraph (a) of this section. In such cases, the Judge may direct the prevailing party to prepare proposed findings, conclusions, and an order.

(c) The Judge will serve the written decision on each of the parties, the Assistant General Counsel for Enforcement and Litigation, and the Administrator by certified mail (return

receipt requested), facsimile, electronic transmission or third party commercial carrier to an addressee's last known address or by personal delivery and upon request will promptly certify to the Administrator the record, including the original copy of the decision, as complete and accurate.

(d) An initial decision becomes effective as the final administrative decision of NOAA 60 days after service, unless:

(1) Otherwise provided by statute or regulations;

(2) The Judge grants a petition for reconsideration under § 904.272; or

(3) A petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative under § 904.273.

§ 904.272 Petition for reconsideration.

Unless an order or initial decision of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or initial decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of such order or initial decision. The filing of a petition for reconsideration shall operate as a stay of an order or initial decision or its effectiveness date unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the administrative proceeding may file an answer in support or in opposition.

§ 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address:

Assistant General Counsel for Enforcement and Litigation,
National Oceanic and Atmospheric Administration, 8484 Georgia
Avenue, Suite 400, Silver Spring, MD 20910.

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse, modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

(c) Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for discretionary review, or review is timely undertaken on the Administrator's own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

(d) A petition for review must comply with the following requirements regarding format and content:

(1) The petition must include a concise statement of the case, which must contain a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;

(2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;

(3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations, and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;

(4) A copy of the Judge's initial decision must be attached to the petition;

(5) Copies of all cited portions of the record must be attached to the petition;

(6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and

(7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or

additional evidence that is not a part of the record before the Judge.

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.

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

(g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.

(h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.

(i) If the Administrator issues an order denying discretionary review, the order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.

(j) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be briefed and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail,

return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

(1) An initial decision shall not be subject to judicial review unless:

(1) The party seeking judicial review has exhausted its opportunity for administrative review by filing a petition for review with the Administrator in compliance with this section, and

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section.

(m) For purposes of any subsequent judicial review of the agency decision, any issues that are not identified in any petition for review, in any answer in support or opposition, by the Administrator, or in any modifications to the initial decision are waived.

(n) If an action is filed for judicial review of a final agency decision, and the decision is vacated or remanded by a court, the Administrator shall issue an order addressing further administrative proceedings in the matter. Such order may include a remand to the Chief Administrative Law Judge for further proceedings consistent with the judicial decision, or further briefing before the Administrator on any issues the Administrator deems appropriate.