



UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

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| In the Matter of: |) | Docket Number: |
| |) | NE0904013, F/V Bailey Boy |
| Stephen C. Daniels, |) | |
| Joseph J. Doak, III |) | |
| |) | |
| Respondents. |) | |
| _____ |) | |

INITIAL DECISION AND ORDER

Date: October 24, 2014

Before: Christine D. Coughlin, Administrative Law Judge, U.S. EPA¹

Appearances: For the Agency:

Meggan Engelke-Ros
Attorney Advisor
Office of the General Counsel, Enforcement Section
National Oceanic and Atmospheric Administration,
U.S. Department of Commerce,
Silver Spring, MD

For Respondents:

Stephen C. Daniels, Pro Se
Joseph J. Doak, III, Pro Se

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

I. STATEMENT OF THE CASE

The National Oceanic and Atmospheric Administration (“NOAA” or “Agency”) issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”), dated December 13, 2012, to Stephen C. Daniels and Joseph J. Doak, III (collectively “Respondents,” or individually “Respondent Daniels” or “Respondent Doak,” respectively). In the NOVA, the Agency alleged one count in which Respondents, jointly and severally, 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. § 648.14(e)(1), by “impeding, harassing and interfer[ing] with a NMFS-approved observer,” during a fishing trip from October 20, 2009 to October 26, 2009. The NOVA specifically alleges that “Respondents created a hostile work environment and impeded the observer in her work by refusing to provide requested information and reasonable assistance, all in violation of applicable law.” NOVA at 3. The Agency sought to impose a total penalty of \$17,500 against Respondents for this violation. By letter dated January 28, 2013, Respondent Daniels requested a hearing before an Administrative Law Judge. Under the NOAA’s Civil Procedures, a hearing request by one joint and several respondent is considered a request by the other joint and several respondent. 15 C.F.R. § 904.107(b).

On February 19, 2013, Chief Administrative Law Judge Susan L. Biro, issued a notice of Assignment of Administrative Law Judge, and Order to Submit Preliminary Positions on Issues and Procedures (PPIP) (“PPIP Scheduling Order”). In the PPIP Scheduling Order, Judge Biro set forth various prehearing filing deadlines and procedures, and ordered the Agency to file its PPIP on or before March 15, 2013, and ordered Respondents to file their PPIPs on or before March 22, 2013. On March 15, 2013, the Agency filed its PPIP.

On March 20, 2013,² Respondent Doak, on behalf of both Respondents, filed a Motion to File an Extension of Time, requesting an additional thirty days in which to submit Respondents’ PPIP, citing as the basis that Respondent Daniels “is off shore fishing and is not expected in before March 22, 2013.” On March 21, 2013, Judge Biro issued an Order Granting Motion to File an Extension of Time, establishing a deadline of April 22, 2013, for Respondents to submit their PPIPs. On April 18, 2013, Respondents filed a Motion to File an Extension of Time requesting an extension until May 29, 2013, citing as the basis that Respondent Doak is “out of town and the paperwork he holds is key to this case.” On April 22, 2013, Judge Biro issued an Order Granting Motion to File an Extension of Time, establishing a deadline of May 29, 2013, for Respondents to submit their PPIPs. When Respondents failed to submit their PPIPs, Judge Biro issued an Order to Show Cause, dated June 7, 2013, ordering Respondents to file a document explaining any good cause for their failure to submit PPIPs and why an order adverse to their interests should not be issued. In response, on June 18, 2013, Respondents filed a Motion to File an Extension of Time and Explanation of Late Filing of PPIP, requesting an extension until July 26, 2013, to file their PPIPs, to enable Respondent Daniels to return from squid fishing and in consideration of Respondent Doak’s financial situation. Respondents also

² Respondent Doak filed an earlier Motion to File an Extension of Time on March 18, 2013, however this earlier motion was not accompanied by a certificate of service of the motion upon the Agency. The Motion to File an Extension of Time, subsequently filed on March 20, 2013, contained such evidence of service of the motion upon the Agency.

asserted they were unable to file their PPIPs by May 29, 2013, because Respondent Daniels was unable to reach Agency's counsel to discuss the case before he left to go fishing on May 30, 2013. On July 11, 2013, Judge Biro issued a Decision on Response to Order to Show Cause and Order Granting Motion to File an Extension of Time, in which the deadline for the submission of Respondents' PPIPs was extended until July 26, 2013.

On July 24, 2013, Respondent Daniels, through counsel, filed his PPIP. Respondent Doak did not submit his PPIP. On August 9, 2013, Judge Biro issued a Hearing Order setting filing deadlines and scheduling the hearing for October 8, 2013, in Norfolk, Virginia. On September 19, 2013, the Agency submitted its supplement to the Agency's PPIP. On September 20, 2013, counsel for Respondent Daniels moved to withdraw from representation and that motion was granted by Judge Biro in an Order Granting Motion to Withdraw as Counsel dated September 30, 2013. Also on September 30, 2013, the Agency submitted its second supplement to its PPIP.

On October 1, 2013, the Agency submitted a Motion Requesting Postponement in the Event of an Extended Government Shutdown.³ On October 25, 2013, Judge Biro issued an Order on Motion Requesting Postponement in the Event of an Extended Government Shutdown, Notice of Hearing, and Hearing Order, in which the motion was deemed moot since the federal government remained shut down until October 17, 2013, and in which notice of the hearing was rescheduled to December 10, 2013, in Norfolk, Virginia.

On November 8, 2013, the Agency submitted a Motion Requesting Rescheduling of Hearing due to the unavailability of its witnesses. On November 14, 2013, Judge Biro issued an Order of Redesignation, in which I was designated to preside over this matter. On December 3, 2013, I issued an Order on Motion Requesting Rescheduling of Hearing, granting the request and rescheduling the hearing to February 11, 2014, in Norfolk, Virginia.

I conducted a hearing in this matter on Tuesday, February 11, 2014, in Norfolk, Virginia. The Agency presented Agency's Exhibits ("AE") 1 through 9, 11, and 16, which were admitted into evidence.⁴ The Agency also presented the testimony of four witnesses: Amy Martins, Branch Chief of the Northeast Fisheries Science Center of the National Marine Fisheries Service

³ From October 1, 2013 through October 16, 2013, regular government operations within the Federal Government were suspended due to a lapse in appropriations.

⁴ Agency Exhibit 16 is a single DVD containing the interviews that were conducted by NOAA of Respondents. Copies of the recorded interviews, each on a separate DVD, were submitted with the Agency's PPIP, which was served to Respondents as part of the pre-hearing process.

Tr. 122. However, at the evidentiary hearing Respondents questioned receipt of their recorded interviews. Respondent Daniels initially stated he might have received it, but later suggested that perhaps he had not. Tr. 126–127. Respondent Doak stated he never received a copy of his recorded interview. Tr. 127. Although Respondents were afforded the opportunity to view and listen to their recorded interviews during the hearing and offer any challenges they might have had to the consideration of those interviews in rendering this decision, they declined to do so. Tr. 193–198.

(NMFS), Tom Gaffney, NMFS Special Agent, Denise Craft, Fisheries Observer, and Sara Block, NMFS Special Agent. Respondents did not present documentary evidence but each testified at the hearing on their own behalf.

The docket clerk of this Tribunal received the certified transcript of the hearing⁵ on March 4, 2014, copies of which were provided to the parties concurrently with the issuance of the Order Scheduling Post-Hearing Briefs dated March 14, 2014. In that Order, the following schedule was established: March 21, 2014, as the deadline for any motions to conform the transcript to the actual testimony; April 4, 2014, as the deadline for the Agency's Initial Post-Hearing Brief; April 18, 2014, as the deadline for Respondents' Initial Post-Hearing Briefs; May 2, 2014, as the deadline for the Agency's Reply Post-Hearing Brief; and May 16, 2014, as the deadline for Respondents' Reply Post-Hearing Briefs.

The parties did not file motions to conform the transcript to the actual testimony. On April 4, 2014, the Agency filed its Initial Post-Hearing Brief. On April 15, 2014, Respondent Daniels requested an extension of time "of about a week" to file his initial post-hearing brief due to a death in his immediate family. On April 16, 2014, I issued an Order on Respondent Daniels' Request for an Extension of Time to File his Post-Hearing Brief and extended the filing deadlines as follows: April 25, 2014, for Respondents' Initial Post-Hearing Briefs; May 9, 2014, for the Agency's Reply Post-Hearing Brief; and May 23, 2014, for Respondents' Reply Post-Hearing Briefs. On April 25, 2014, Respondent Daniels filed his Initial Post-Hearing Brief and Respondent Doak filed his Initial Post-Hearing Brief; however, neither respondent provided copies of their briefs to the Agency. On June 4, 2014, an attorney for the undersigned transmitted copies of Respondents' Initial Post-Hearing Briefs to counsel for the Agency, who, following review of the briefs, expressed no desire to submit a reply brief. Consequently, no reply briefs were filed in this case.

II. STATEMENT OF THE ISSUES

Liability

In dispute is whether Respondent Daniels, as operator of the F/V Bailey Boy, and Respondent Doak, as a crew member aboard the F/V Bailey Boy, jointly and severally, violated the Act and regulations promulgated under the Act by "impeding, harassing and interfer[ing] with a NMFS-approved observer," during a fishing trip from October 20, 2009 to October 26, 2009.

Civil Penalty

If liability for the charged violation is established, then I must determine the amount of any imposed civil penalty that is appropriate. To this end, I may evaluate certain factors,

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

including: the nature, circumstances, extent, and gravity of the violation(s), Respondents' degree of culpability, any history of prior violations, and such other matters as justice may require.⁶

III. FACTUAL BACKGROUND

The following is a recitation of the facts I have found in this matter based on a careful and thorough review of the evidentiary record. Where material conflicts existed in the evidence, I found facts based on the evidence I deemed credible, with the rationale for any material conflict resolution articulated in the Analysis section of this decision.

Respondent Daniels is a principal officer and President of The "bailey Boy," Inc. ("BBI"), which owns the F/V Bailey Boy, and he is the operator and captain of the F/V Bailey Boy. Tr. 139, 157; AE 4 and AE 6. Respondent Doak has worked for Respondent Daniels as a crew member for several years, including in 2009. Tr. 137–38, 157, AE 1 at 14,⁷ AE 2 at 1; *see* AE 1 at 11–12. For the 2009 fishing year, Respondent Daniels, through BBI, obtained a fishing permit for the F/V Bailey Boy that included the following fisheries: Atlantic Mackerel, Monkfish, NE Multispecies, Skate, Spiny Dogfish, Illex Squid, and Summer Flounder. AE 6 at 1. Paragraph 8 of the Permit Conditions and Information states:

The Northeast Regional Administrator of the National Marine Fisheries Service [NMFS] requests that you carry a Northeast Fisheries Observer Program certified observer. If you have been contacted by a NMFS employee or designated contractor to carry an observer, it is illegal to engage in fishing activities without the observer on board. Minimum safety standards must be met and a valid US Coast Guard Commercial Fishing Vessel Safety Examination decal is required to carry an observer.

AE 6 at 2.

These certified observers are tasked with boarding fishing vessels embarked on fishing expeditions to collect data that is used primarily for determining fish stock assessments and the population of other marine resources that NMFS oversees. Tr. 17–22, 34–35; *see* AE 3, AE 11. In addition, data collected by observers is used for bycatch analysis, meaning catch not intended or targeted to be caught and discarded at sea. Observers also collect information regarding trip statistics, including the primary species targeted for the trip, as well as information about gear characteristics, including for example the mesh size of the cod end of a net for trawl gear. Tr. 17–20. According to Amy Martins ("Martins"), NMFS Fishery Sampling Branch Chief for the Northeast Fishery Science Center, this "mesh size" on trawl gear is a critical piece of information that NMFS uses to characterize a fleet "because it has a direct effect on the kind of bycatch that might be expected in that fleet strata" and to prioritize coverage of the various fisheries. Tr. 20.

⁶ While "ability to pay" is another factor that may be considered when determining penalty, Respondents have not raise such claims in this case. *See* 15 C.F.R. § 904.108.

⁷ The reference to the incidents giving rise to the Notice of Violation as occurring between October 20 and October 26, 2010 is likely a scrivener's error.

NMFS characterizes “different fleets by geographic area, gear type, mesh size, and trip length.” Tr. 21. Thus, the mesh size is “one of the key pieces of information that would characterize all of the catch of a particular trip into that grouping of data.” Tr. 14, 20–22.

The NMFS Northeast Fisheries Observer Program provides information about the observer program, and more specifically, about observer duties and vessel captain duties, in a two-page document titled “Observer Duties: What to Expect During an Observed Trip” (hereinafter referred to as “Observer Duties”) that it sends to current permit holders. Additionally, NMFS provides this information during fishing events and expositions and council meetings, and observers also have copies to provide to vessel captains. Tr. 24–27, AE 11. Observer Duties specifies that, among other things, observers are required to “[c]ollect information on fishing gear, such as size of nets and dredges, mesh sizes, and gear configurations” and to “[r]ecord all kept and discarded catch . . . on observed hauls” AE 11 at 1. Observer Duties also specifies the captain’s legal responsibilities, including “[c]ooperation] with the observer in the performance of the observer’s duties” and specifies that it is illegal for the captain or crew to, among other things, “[a]ssault, harass or sexually harass, intimidate or attempt to influence observers; [i]nterfere with or impede observer duties; [a]sk observers to stand watch or help with fishing operations” AE 11 at 2.

In 2009, Denise Craft (“Craft”), served as an approved observer for NMFS through a federal contractor. Tr. 54–56; *see* Tr. 17. Over the course of her career as an observer, Craft has taken over 800 trips and she is considered by NMFS to be one of the more experienced observers it utilizes. Tr. 185, 187. Craft was assigned as an observer aboard the F/V Bailey Boy, for a fishing trip that began on October 20, 2009 and ended on October 26, 2009. Tr. 57, AE 1 at 5, AE 2, AE 3. During this trip, Respondent Daniels was the captain and operator of the F/V Bailey Boy, and was accompanied by two crew members, one of whom was Respondent Doak. Tr. 58, 138, AE 2.

Within approximately two days of concluding the fishing trip, Craft prepared a document styled “Observer Report Regarding Treatment While Deployed,” in which she documented events that transpired during the fishing trip that comprised the bases of a complaint she filed against Respondents. Tr. 47, AE 2. Craft had also notified her supervisor that she did not want to take another trip aboard the F/V Bailey Boy. Tr. 58–59, 90, 95, AE 2 at 7. In response to a question on this report asking how Craft would feel if she was told she was being “deployed on this vessel tomorrow, with the same operator and crew . . .” she stated “I would say hell no! Or quit my job.” AE 2 at 7, Tr. 95. Of note, Craft had no complaints against the other crew member, Macon, who had been aboard the F/V Bailey Boy during the fishing trip. Tr. 58, 63, AE 2 at 5.

Craft described the overall environment that Respondents created during the trip as intimidating and hostile, noting a lot of yelling by Respondents that was often directed at her and the use of much profanity.⁸ Tr. 59–62, 63, 76, 78, 80, 88–89, 95, AE 2 at 3–5. For example, Craft recounted instances with the captain and operator of the vessel, Respondent Daniels, as follows:

⁸ For example, references to the “F-word” mean “F-u-c-k.” *See* Tr. 80.

Everything that went wrong on the trip was my fault. The engine was leaking oil. It was the f-ing observer's fault. Got hung up⁹ one haul and had to haul back early. My fault. Some seal broke on the engine. My fault. They weren't catching lots of fluke. My fault. The tows that didn't catch lots of squid—my fault. Every word out of the Capt.'s mouth was G D or the f word. He even called me a son of a bitch once. Maybe twice. * * * I was scared to ask him if he wanted a comment card or copy of the data. I asked & he said 'I don't want none of that f-ing shit. I don't want nothing to do with y'all. Y'all are ruining us. F-ing...' I walked away.

AE 2 at 3–4. On another occasion, when the other crew member, Macon, was offering assistance to Craft with weighing fluke and squid, Respondent Daniels commented “y'all must be f-ing each other or something.” AE 2 at 5.

Craft also asserted an inability to gather certain information while observing the trip. AE 2. Specifically, she was unable to record critical gear information, namely the cod end of nets used for fishing. AE 3 at 2–3. To illustrate, she recounted an incident involving Respondent Daniels, the vessel captain, as follows:

After they were done with the fluke net, and as they were switching nets and the fluke net was laid out on the dock of the boat, I asked if I could measure the codend. He said ‘you ain't measuring no codends on this boat.’ He said ‘the codend is in the water—what are you talking about?’ I said I wanted to measure the codend of the fluke net. He continued to roll it up on the net reel and pulled on it tight and just rolled it up the reel—no codend left down for me to reach or measure.

AE 2 at 3; Tr. 62. When Craft explained that her desire to measure the cod end was not for enforcement-related reasons but that the information was used “to determine what type of days this counts for off the sea day schedule—large mesh, med[ium] [m]esh, small mesh,” Respondent Daniels still did not permit or make it possible for Craft to measure the codend. Tr. 62, 101–02, 171, AE 2 at 3, AE 2 at 2–3. In order to measure the cod end, Craft would have required some assistance by a crew member, who would have needed to release “a lever and roll the net down.” Tr. 171. Instead, he stated measurements, purportedly for the fluke net and a squid net liner. Tr. 62, 101–102, AE 2 at 3, AE 3 at 2–3.

With regard to Respondent Doak's treatment of her while aboard the F/V Bailey Boy in October 2009, Craft described an incident in which she became fearful. At the beginning of the incident, Respondent Doak was approximately ten feet away from Craft, during which she

⁹ The term “hung up” refers to a situation when fishing nets that are being dragged along the bottom of the water get caught on another object, for example wreckage, and interrupts fishing. Getting “hung up” can destroy fishing nets and break cables. Tr. 173–74.

recounted the following: “It’s just me & Joe on deck. He’s sorting through the pile on deck. I’m standing at the hatch. He goes ‘You’re f-ing pissing me off!’ I looked around & said ‘Who, me?’ (I was the only person on deck with him.)” AE 2 at 4, Tr. 65. Respondent Doak then moved closer to Craft, about two feet away from her, wherein Craft recounts the following: “He got up and got close to me and said yes, you. I asked why. He said I’ve been watching you do nothing but a bunch of nonsense for the past two days. He said I was going to put them out of business by writing down all the by-catch.” Tr. 65, AE 2 at 4. Although Respondent Doak’s behavior scared Craft, she tried to ignore it and she continued to work. Tr. 81.

On another occasion, Craft and Respondent Doak were on the deck of the vessel after squid had been hauled on to the deck. In furtherance of her observer duties, Craft used baskets to collect samples from different areas of the catch that was on deck. Tr. 63. From those samples, she gathered information about the catch, in this instance, squid. Tr. 81. Typically, an observer will sort through her sampling basket and pick out the discarded catch or bycatch (for example, sea robins) from the basket but the observer is not responsible for assisting the fishing operation by picking out discards or bycatch from the rest of the haul. Tr. 63, 83–84, 97; AE 2 at 5; AE 3, AE 11 at 2. On this occasion, Respondent Doak yelled to Craft to “pick out the f-ing searobins [sic]” (referring to the pile of catch on deck). AE 2 at 5, Tr. 63. Craft did not. Respondent Doak continued to sort through the pile on deck and stated “OUCH! G D! I thought I f-ing told you to pick out the searobins! [sic]” AE 2 at 5, Tr. 63.

On other occasions, Respondent Doak, who was an insulin-dependent diabetic at the time, took off his sweatpants (under which he wore “boxers”) in front of Craft while in a public area of the vessel, the galley, to give himself a shot of insulin. Tr. 146, AE 2 at 5. Craft found his behavior inappropriate and believed he could have administered his medication in a private area of the vessel, like “in the head or the bunk room.” AE 2 at 5. To alleviate her discomfort in such situations, Craft walked away from Respondent Doak. Tr. 146, AE 2 at 5. Respondent Doak did not believe his behavior was inappropriate and was surprised to learn that Craft had included it in her complaints. *See* Tr. 146. Respondent Doak’s expectation at that time was that those around him be able to administer his medication if necessary. Tr. 146 (“And I ask everybody that comes on a boat you know, if [sic] fall out can you shoot me with this needle . . .”), Tr. 114–15, AE 8 at 4–5.

In another example, Craft recounted an incident in which Respondent Doak threatened to put eggs in her gloves and boots. Tr. 64, 82, AE 2 at 4, AE 8 at 4. As a consequence, Craft slept with her boots in her bunk the entire trip. Tr. 64, AE 2 at 4. According to Respondent Doak, a fishing environment is different than other work environments and threatening to put eggs in boots or grease in gloves is a test to determine an individual’s toughness. Tr. 139. In his words, “[y]ou’re going to pick on them a little bit.” Tr. 139.

According to Craft, she would have “sampled more baskets if [she] wasn’t always feeling like [Respondent Doak] was going to say something or cuss at [her] or get in [her] face.” AE 2 at 6. In spite of such feelings, Craft did not express the dissatisfaction she felt over her treatment while aboard the F/V Bailey Boy nor did she raise her concerns to Respondent Daniels, the captain of the vessel. Tr. 75–77. Her reason for not expressing her concerns to Respondent Daniels, was that he, too, had engaged in the offensive treatment during the trip. Tr. 75–77.

Craft recounted that, within the first twenty-four hours into the trip, when she told Respondent Daniels that she felt he was crossing the line with regard to way he spoke to her, he just got angrier. AE 1 at 13, AE 9 at 2.

In addition to the restrictions in sampling, Craft was unable to accurately record bycatch information from the fishing trip because Respondent Doak “kept throwing skates overboard” because he did not want her to record the bycatch. Tr. 64, 71, AE 2 at 7. On the “last haul,” Respondent Doak “shoveled everything overboard” and, as a result, Craft had to mark it as “unobserved.” Tr. 86, AE 2 at 7, AE 3 at 54.

Craft recounted that during the trip she “felt like quitting” or “staying in [her] bunk [for] the rest of the trip” due to “all the cussing” from Respondents. AE 2 at 8. Although she did not choose to quit or hide in her bunk, she expressed her belief that human beings should not be targeted with such profanity. *Id.* Specifically, she stated as follows, “It just wears on you. I started tearing up one time but I pulled myself together & dealt with it. No one saw me tear up. It just got really old – all the G D words & all the F words all the time.” *Id.*

Following Craft’s submission of the “Observer Report Regarding Treatment While Deployed,” an investigation by NOAA law enforcement ensued. Tr. 45–49, 58–59, 90, 95, 105–107, AE 2. During the course of that investigation, NOAA’s Special Agent Sara Block (“Block”) conducted interviews with each Respondent. Those interviews were recorded by audio and video. Tr. 107, AE 16. Respondent Daniels’ interview was conducted on January 7, 2010. Tr. 110, AE 1, AE 7, AE 16. Respondent Doak’s interview was conducted on January 11, 2010. Tr. 113, AE 1, AE 8, AE 16.

During the interview with Respondent Daniels, he acknowledged that it was apparent to him that Craft was mad when she was leaving after the trip had concluded but he stated did not know why she was mad, adding that Craft had never complained to him during the trip. AE 7 at 2, 6, AE 16. He accused Craft of lying, stating “she’s really mad about something.” AE 7 at 5–7, AE 16. He acknowledged not being nice to Craft, but asserted that he was not required to be nice. AE 7 at 3, 6, AE 16. When Craft asked him if he wanted a comment card or copy of the data she collected, he candidly recounted that he told her “to shove it up her ass, check and all.” AE 7 at 5, AE 16. While Respondent Daniels denied most of the allegations made against him by Craft, he conceded that he might have blamed the problems that were encountered on the trip (for example, the engine leaking oil, getting “hung up” on one haul and having to haul back early) to the presence of a woman, Craft, being on the vessel. Tr. 172–174, AE 7 at 4, AE 16. He also admitted stating “[F-ing] women on the boat! That should be against the [f-ing] law.” AE 7 at 3–5, AE 16. He acknowledged yelling at Craft on one occasion when he wanted her to get out of the way for a safety-related concern and explained that he yelled only so that she could hear him. Tr. 161; AE 1 at 10–11, AE 7 at 2, AE 16.

With regard to measuring the cod end of the net, Respondent Daniels stated during the interview that he never told her she could not measure it, and he believed she was able to do her job. AE 7 at 2, 5, AE 16. Notably, he testified differently during the evidentiary hearing conducted in this matter. Specifically, he explained in testimony that at the time Craft asked about measuring the cod end of the net “I was really in a hurry trying to something else done.

You know, and that's probably when I said no, you ain't going to measure it." Tr. 162. According to Respondent Daniels, he thought Craft should have measured the cod end during the evening hours after fishing was completed, but he neither expressed this to her nor offered her the opportunity to measure it at a later time, and Craft did not pursue the matter. Tr. 162–163.

In response to interview questioning, Respondent Daniels stated that he had been provided with instructions to give his crew about how to treat observers (presumably referring to Observer Duties) and that he gave these instructions to his crew members to read. AE 7 at 3, AE 11, AE 16. During the interview, Block read to Respondent Daniels regulatory language relating to the observer program that prohibits, for example, impeding, harassing, intimidating, or interfering with an observer. Respondent Daniels responded, "Well, I intimidate a lot of people, but I didn't say anything." AE 7 at 3, AE 16.

During Respondent Doak's interview, he stated that he received no instructions from the captain, Respondent Daniels, as to how an observer should be treated and that he had never seen an instruction sheet about how to treat an observer. AE 1 at 11, AE 8 at 2, AE 11, AE 16. He offered that he probably shared with Craft his typical remarks to any observer—that what observers do is not helpful to him—and at one point during the interview, while referring to Craft, he stated "she's the observer, she's the enemy." Tr. 115, AE 1 at 12, AE 8 at 3, 4, 6, AE 16. Expressing a similar sentiment later in the interview, he stated an observer's job is to save the planet and put him out of business. AE 8 at 4; AE 16.

With regard to threatening to put eggs in Craft's gloves and boots, Respondent Doak stated that he was joking and never actually carried through on the threat, noting that others had carried through on such threats to him in his early days of fishing. Tr. 139, AE 8 at 4, AE 16. With regard to the remaining allegations discussed in the interview, Respondent Doak generally denied engaging in the behavior alleged by Craft. AE 8 at 4–6, AE 16. He expressed his belief that the complaints lodged by Craft stemmed from his and Respondent Daniels' refusal to "[kowtow]" to Craft because she was physically pretty. Tr. 115, AE 8 at 2–3 and 6, AE 16. He later conceded, during the evidentiary hearing, that he "pick[ed] on her [Craft]" during the fishing trip because he was annoyed with delays in starting the trip, delays caused by an expired safety decal and the need for re-inspection of the vessel before carrying an observer. Tr. 139–140, 154–156.

On February 9, 2010, Block prepared a Case Package that comprised the information collected in the course of her investigation of the complaints by Craft against Respondents. AE 1. That information included the recorded interviews of Respondents as well as the Memorandum of Interviews that Block subsequently prepared, Craft's complaint, permit and vessel information relating to Respondent Daniels and the F/V Bailey Boy, and observer logs for the fishing trip. AE 1. Thereafter, the Agency issued the NOVA that is the subject of this proceeding.

IV. PRINCIPLES OF LAW

Liability

Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act” or “Act”) in 1976 “to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States” Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 2(b)(1), 90 Stat. 331 (1976), as amended, (codified at 16 U.S.C. § 1801). The Act aims to “promote domestic commercial and recreational fishing under sound conservation and management principles” 16 U.S.C. § 1801(b)(3). The Act “authorize(s) the Secretary of Commerce . . . to station observers aboard commercial fishing vessels to collect scientific data required for fishery and protected species conservation and management, . . . and to monitor compliance with existing Federal regulations.” Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Observer Health and Safety, 72 Fed. Reg. 61,815, 61,815 (Nov. 1, 2007); *see* 16 U.S.C. § 1881b(a). The Act further states that “any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may— require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery” 16 U.S.C. § 1853(b)(8). An “observer” is defined as “any person required or authorized to be carried on a vessel for conservation and management purposes by regulations or permits” 16 U.S.C. § 1802(31). Agency regulations further clarify the definition of “observer” as “any person serving in the capacity of an observer employed by NMFS, either directly or under contract, or certified as a supplementary observer by NMFS.” 50 C.F.R. §600.10 (2009).

Section 307(1)(A) of the Act makes it unlawful “for any person¹⁰— to violate any provision of this Act or any regulation or permit issued pursuant to this Act.” 16 U.S.C. § 1857(1)(A). Section 307(1)(L) of the Act makes it unlawful “to forcibly assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with any observer on a vessel under this Act, or any data collector employed by the National Marine Fisheries Service or under contract to any person to carry out responsibilities under this Act” 16 U.S.C. § 1857(1)(L). Similarly, Agency regulations provide that it is unlawful for any person to

[a]ssault, resist, oppose, impede, harass, intimidate, or interfere with or bar by command, impediment, threat, or coercion any NMFS-approved observer or sea sampler conducting his or her duties; or any authorized officer conducting any search, inspection, investigation, or seizure in connection with enforcement of this part; or any official designee of the Regional Administrator conducting his or her duties, including those duties authorized in § 648.7(g).

50 C.F.R. §648.14(e)(1) (2009).

“The Regional Administrator may request any vessel holding a permit for Atlantic sea scallops, NE multispecies, monkfish, skates, Atlantic mackerel, squid, butterfish, scup, black sea

¹⁰ “Person” is defined to include “any individual . . . , any corporation, partnership, association, or other entity . . . , and any Federal, State, local, or foreign government or any entity of any such government.” 16 U.S.C. § 1802(36).

bass, bluefish, spiny dogfish, Atlantic herring, tilefish, or Atlantic deep-sea red crab; or a moratorium permit for summer flounder; to carry a NMFS-certified fisheries observer.” 50 C.F.R. §648.11(a) (2009). Further, an owner or operator on which a NMFS-approved observer is embarked must, among other things,

[a]llow the . . . observer free and unobstructed access to the vessel's bridge, working decks, holding bins, weight scales, holds, and any other space used to hold, process, weigh, or store fish; [and a]llow the . . . observer to inspect and copy any the vessel's log, communications log, and records associated with the catch and distribution of fish for that trip.

50 C.F.R. §648.11(d)(6)–(7) (2009).

“In general, ‘offenses under the [Magnuson-Stevens Act] are strict liability offenses.’” *Tommy Nguyen*, NOAA Docket No. SE0801361FM, 2012 NOAA LEXIS 2, at *17 (ALJ, Jan. 18, 2012) (quoting *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999)); see *Timothy A. Whitney*, 6 O.R.W. 479, 1991 NOAA LEXIS 33, at *10 (ALJ, July 3, 1991) (quoting *Accursio Alba*, 2 O.R.W. 670, 1982 NOAA LEXIS 29, at *7 (NOAA App. 1982)) (“[S]cienter is not an element of a civil offense under . . . 16 U.S.C. § 1857.”); see also *Tart v. Massachusetts*, 949 F.2d 490, 502 (1st Cir. 1991) (discussing strict liability under “so-called ‘public welfare’ offenses”).

Standard of Proof

To prevail on its claims that Respondents 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); *In re Cuong Vo*, NOAA Docket No. SE010091FM, 2001 NOAA LEXIS 11 (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)); see 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. *In re Fernandez*, NOAA Docket No. NE970052FM/V, 1999 NOAA LEXIS 9, at *8 (ALJ, Aug. 23, 1999). To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence. *In re Cuong Vo*, 2001 NOAA LEXIS 11, at *17.

Civil Penalty

Section 308(a) of the Act provides that “[a]ny 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 or any other statute administered by NOAA 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); 15 C.F.R. § 6.4(f)(14) (effective for violations that occurred between December 11, 2008, and December 6, 2012); *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. 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).

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 [sic] the information is served on the Secretary at least 30 days prior to an administrative hearing.

16 U.S.C. § 1858(a). Similarly, NOAA's Civil Procedures 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).

There is no presumption in favor of the penalty proposed by the Agency, and an Administrative Law Judge is not "required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document." *In re Nguyen*, NOAA Docket No. SE0801361FM, 2012 NOAA LEXIS 2, at *21 (ALJ, Jan. 18, 2012); *see* 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,632 (June 23, 2010). The Administrative Law Judge must independently determine an appropriate penalty "taking into account all of the factors required by applicable law." 15 C.F.R. § 904.205(m); *see* 15 C.F.R. § 904.108 (enumerating factors that may be considered in assessing penalty).

V. ANALYSIS

A. Parties' Arguments

As to liability, the Agency argues that Respondents harassed and intimidated Craft while she was deployed as a NMFS-approved observer aboard the F/V Bailey Boy. Agency's Initial Post-Hearing Brief at 4. Specifically, the Agency contends the evidentiary record establishes

that Respondent Doak “would yell obscenities at and make threatening remarks or gestures to Ms. Craft while she was working.” *Id.* at 5. Respondent Daniels “made statements during the trip indicating he blamed Ms. Craft for bad luck that the vessel experienced during the trip.” *Id.* The Agency argues that Respondents’ behavior put Craft in fear. *Id.* at 4–5. The Agency contends Respondents did not refute “most of the allegations made by Ms. Craft” and that their behavior rose to the level of harassment and intimidation. *Id.* at 5. The Agency counters Respondents’ suggestion, that their behavior was reflective of the culture in the commercial fishing industry and that Craft was easily offended, by arguing that Craft was and is an experienced observer, was “accustomed to the culture onboard commercial fishing boats,” and in excess of 851 trips, has neither received vessel complaints about her nor made any other complaints “about things said to her aboard a vessel.” *Id.* at 5.

The Agency also argues that Respondents interfered with Craft’s ability to complete her observer duties by “failing to give her relevant information, refusing her access to the nets in order to take measurements and discarding fish before she had a chance to sample them.” *Id.* at 6 (citing AE 2, AE 3). The Agency challenges any suggestion by Respondents that Craft may have had an unreasonable expectation of assistance and asserts that Craft has “vast experience working as an observer aboard commercial fishing boats and is adept at completing her duties in that environment,” as supported by the testimony of Martins. *Id.*

Lastly, the Agency notes “Respondents were unhappy about having to carry an observer, much less a female observer, on this trip” and, prior to starting the trip, already felt “unduly burdened by observer requirements that delayed their departure while they waited for the Coast Guard to conduct a safety inspection [of the vessel]” that was required as a prerequisite to carrying an observer. *Id.* The Agency asserts that Respondents’ position—that they did not intend to offend, harass, intimidate, or interfere with Craft—is immaterial since there is no scienter, or knowing, requirement under the Act or implementing regulations (citing the following: *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999) (holding that scienter is not an element under the Magnuson Act because conservation-related offenses under the statute are strict liability offenses). “As a general matter, scienter is not required to impose civil penalties for regulatory violations when the regulation is silent as to state of mind.” *Id.* citing *Tart v. Massachusetts*, 949 F.2d 490, 502 (1st Cir. 1991). Regulators “need not prove intentional or knowing violations.” *Roche v. Evans*, 247 F.Supp. 2d 47, 59 (D. Mass 2003)). Rather, the Agency suggests that a “reasonable person” standard is an appropriate measure and that the court should look to the “totality of the circumstances aboard the vessel in deciding if an observer was intimidated.” *Id.* at 7. In applying such a standard, the Agency contends that any reasonable person in Craft’s place “would have felt harassed and intimidated by the conduct of Respondents.” *Id.*

As to penalty, the Agency asserts that Respondents’ “reckless disregard for the law highlights the need to assess a penalty that will encourage future compliance.” *Id.* at 8. The Agency argues that data collected through the observer program is “critical to making decisions regarding the management of federal fisheries and, specifically, bycatch monitoring in various fisheries.” *Id.* It asserts that the observer program is utilized to conduct stock assessments that are necessary to fishery management and setting annual catch limits to ensure the sustainability of fisheries. *Id.* at 9. When Respondent Daniels did not allow Craft to measure the mesh size of

his nets, the data Craft collected aboard the vessel “could not be applied to any of the fleet strata so could [sic] not be used in the Agency’s stock assessments.” *Id.* at 9. Aside from this “secondary impact,” the Agency contends the “primary impact” of Respondents’ violative behavior was the effect it had on Craft while aboard “a 64.9-foot fishing boat with the Respondents for seven days during which time she was made to feel unhappy and scared.” *Id.* Lastly, the Agency argues Respondents have not “taken any responsibility for the violations in this case, despite their knowledge of the law regarding observer coverage and clear documentation of the violations.” *Id.* at 10.

Respondent Daniels, noting that the trip Craft observed was made more tense and difficult due to engine and gear problems, argues that “[i]f Miss Craft felt uncomfortable, afraid or unhappy, she did not indicate it to me.” Respondent Daniels’ Initial Post-Hearing Brief at 1. He further contends that had he, as captain of the vessel, been made aware that Craft felt harassed and scared, he “would have taken her back to the dock.” Respondent Daniels states that he has captained the F/V Bailey Boy “for over 35 years” having “taken hundreds of observers”¹¹ and previously never had an observer file a complaint “against me or my crew.” *Id.* He contends that the only occasion during the trip when he interfered with her collection of data was “when safety was a concern” and asserts that it appeared as though Craft was “very efficient and thorough” in her data collection. *Id.* Nevertheless, he is apologetic for any offense to Craft. *Id.* at 1–2. Lastly, Respondent Daniels argues that given the fact that this is the first observer complaint lodged against him and his crew, he believes the proposed penalty of \$17,500 is excessive. *Id.* at 2.

Respondent Doak agrees that the trip was “very difficult,” which may have caused tension. Respondent Doak’s Initial Post-Hearing Brief. He, too, is apologetic for being “out of order” to Craft, and explains “I often times joke and pick on new help. *Id.* Maybe I was too tough on [Craft].” *Id.* He further states “me and [Respondent Daniels] have learned a lesson and you will never hear of this behavior from us again.” *Id.*

B. Liability

Some elements of the alleged violation are not in dispute. It is undisputed that Respondents are “persons” as defined under the Act; that Respondent Daniels is a principal officer and President of BBI, the entity that owns the F/V Bailey Boy, and is an operator of the vessel (Tr. 4, AE5, AE 6, AE 7, AE 16); that the F/V Bailey Boy held a permit for fisheries that subject it to the requirements of the Observer Program (AE 6; Tr. 120–121); and that Respondent Doak was, at the time of the alleged violation, a crew member aboard the F/V Bailey Boy (Tr. 59, 138; AE 7, AE 8, AE 16). What remains at issue is whether Respondents (Respondent Daniels, as an operator of the F/V Bailey Boy, and Respondent Doak, as a crew member aboard the F/V Bailey Boy) jointly and severally, violated the Act and implementing regulations by their

¹¹ After researching the permit number for the F/V Bailey Boy, Martins noted during the evidentiary hearing there were “12 trips that we counted . . . back to 2005. I think there was one trip in 2007. There was one trip in 2009. A couple trips. And the most was four trips in 2011 and 2013.” Tr. 188.

actions and behavior toward Craft, a NMFS-approved observer, while she conducted her duties aboard the F/V Bailey Boy from October 20, 2009 to October 26, 2009.

Under the Act, it is unlawful for a person “to forcibly assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with any observer on a vessel . . . or any data collector employed by [NMFS] or under contract to any person to carry out responsibilities under this Act.” 16 U.S.C. § 1857(1)(L). Similarly, Agency regulations provide that it is unlawful for any person to “[a]ssault, resist, oppose, impede, harass, intimidate, or interfere with or bar by command, impediment, threat, or coercion any NMFS-approved observer . . . conducting his or her duties” 50 C.F.R. § 648.14(e)(1).

Notably, neither the Act nor Agency regulations define the terms “harass” or “intimidate,” both of which are germane to this case. Consequently, I have turned to the common legal definition of “harassment” and “intimidation” for guidance. “Harassment” is defined as: “words, gestures and actions which tend to annoy, alarm and abuse (verbally) another person;” “makes repeated communications . . . in offensively coarse language;” or “engages in any other course of alarming conduct serving no legitimate purpose of the actor.” Black’s Law Dictionary (5th ed. 1979). “Intimidation” is defined as “unlawful coercion; extortion; duress; putting in fear.” Black’s Law Dictionary (5th ed. 1979).

A hostile work environment exists when the harassing behavior is “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)); *In re Evans*, NOAA Docket No. 316-319, 1996 NOAA LEXIS 7, at *15 (ALJ, Apr. 10, 1996); *In re Palmer*, NOAA Docket No. 311-287, 1996 NOAA LEXIS 8, at **18–19 (ALJ, Apr. 10, 1996). This standard “requires an objectively hostile or abusive environment, one that a reasonable person would find hostile or abusive as well as the victim’s subjective perception that the environment is abusive.” *In re Evans*, NOAA Docket No. 316-319, 1996 NOAA LEXIS 7, at *15 (ALJ, Apr. 10, 1996); *In re Palmer*, NOAA Docket No. 311-287, 1996 NOAA LEXIS 8, at *19 (ALJ, Apr. 10, 1996); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993). To this end, a court must evaluate all of the circumstances surrounding the alleged harassment, including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the employee’s work performance.” *Harris*, 510 U.S. at 23; *In re Evans*, NOAA Docket No. 316-319, 1996 NOAA LEXIS at *15; *In re Palmer*, NOAA Docket No. 311-287, 1996 NOAA LEXIS at *19. Similarly, “[i]ntimidation is conduct reasonably calculated to put another in fear . . . [measured objectively by] an ordinary, reasonable person [standard].” *United States v. Yockel*, 320 F.3d 818, 824–825 (8th Cir. 2003) (quoting *United States v. Smith*, 973 F.2d 603, 604 (8th Cir. 1992)).

Applying this standard to the totality of the circumstances presented in this case, leads me to conclude that the Agency has shown by a preponderance of the evidence that Respondents violated the Act and implementing regulations by harassing and intimidating Craft while aboard the F/V Bailey Boy. Respondents subjected Craft to a general climate of hostility and vulgarity during the 6-day trip on which she served as a certified observer. It is undisputed that Respondents freely and frequently engaged in the use of profane language throughout the

journey. That profanity was often directed toward Craft. (“The engine was leaking oil. It was the f-ing observer’s fault.” AE 2 at 3. “He even called me a son of a bitch once. Maybe twice.” *Id.* “You’re f-ing pissing me off.” Tr. 65, AE 2 at 4. “I thought I f-ing told you to pick out the searobins [sic].” AE 2 at 5; *see* Tr. 63.)

Respondent Daniels acknowledged that he has a “bad habit” of cussing. Tr. 161, 163. Respondent Doak likewise conceded “I cuss. No doubt about it.” Tr. 138. It was also clear that Respondents did not welcome the legal obligation to carry an observer during a fishing trip, and in particular a female observer. Respondent Doak freely acknowledged at the hearing, “I never liked taking observers out. Like I’ve said before it’s not doing me any good and basically it’s putting me out of business, so . . . you’re not going to be overjoyed.” *Id.* Indeed, during his recorded interview, he characterized Craft as “the enemy” and expressed his belief that the purpose of an observer’s job is to save the planet and put him out of business. Tr. 115, AE 8 at 4, and 6; AE 16. Respondent Daniels related a theory, taught to him by his father, that women on boats are bad luck. He explained that women were not taken on boats when he was growing up, and lamented that “now you have to take them because the government makes you.” Tr. 173. He also candidly shared his personal belief “it’s no place on a boat for a woman.” *Id.*

The evidence reveals that Respondent Daniels’ behavior toward Craft during the fishing trip rose to the level of harassment and intimidation, in violation of 50 C.F.R. § 648.14(e)(1). Apart from the singular incident in which Respondent Daniels admitted to yelling (or “interfering” as recounted in his Initial Post-hearing Brief) at Craft over a safety-related issue,¹² the evidence is replete with other instances of improper conduct that do not relate to a legitimate purpose like safety. For example, Respondent Daniels blamed Craft for the difficulties encountered during the trip that, even he admits, were not her fault. According to Craft’s credible testimony, she was blamed for problems like the engine leaking oil, the vessel getting “hung up” and having to “haul back early,” an engine seal breaking, and the failure to catch lots of fluke or squid. *See* Tr. 59–61, 80, 84, 94, 172, AE 2 at 3–4. At the evidentiary hearing, Respondent Daniels conceded “Yeah. I blamed her” when things were going wrong on the trip. Tr. 172. He also used profane language toward Craft and made lewd remarks and inappropriate references about Craft and another crew member. (“[h]e even called me a son of a bitch once. Maybe twice.” AE 2 at 3; *see* Tr. 59–61, 80, 84, 94. In response to a crew member, Macon, assisting Craft with weighing catch, he remarked “y’all must be f-ing each other or something.” AE 2 at 5.)

Respondent Daniels acknowledged that he did not go out of his way to be nice to Craft. He also conceded that he “intimidates a lot of people.” *See* AE 2 at 2–3, AE 16. A fact confirmed by his crewmember, Respondent Doak, who described Respondent Daniels as “a big old burly boy who can intimidate people just with the sound of his voice.” AE 8 at 3, AE 16. Such a description of Respondent Daniels is particularly noteworthy in comparison to Respondent Doak’s description of Craft as a “frail woman.” Tr. 144. When Craft initially expressed her concerns to Respondent Daniels about the way he was speaking to her, he responded with increased anger. Not surprisingly, she did not raise any further concerns with him about her treatment while aboard the F/V Bailey Boy. *See* AE 9 at 2. Given Respondent

¹² *See also* Tr. 161.

Daniels' behavior, it was also not surprising that Craft grew fearful of him throughout the course of the observed trip. ("I was scared to ask him if he wanted a comment card or copy of the data." AE 2 at 4; *see* Tr. 94. "When it came to asking the gear questions and V&T questions and getting him to sign the reimbursement form, I was dreading it." AE 2 at 3.) Indeed, given the totality of the circumstances that Craft faced, including the described differences in body type (that is, big and burly as compared to frail), any reasonable person in her position would have likewise become fearful and intimidated by Respondent Daniels treatment and behavior.

In addition, evidence adduced at hearing revealed that Respondent Daniels interfered with Craft's observer duties when he did not permit Craft to measure the cod end of the fishing nets used during the trip. AE 3 at 2–3. According to Craft's credible testimony and supporting pre-hearing statements, Respondent Daniels told her in no uncertain terms "You ain't measuring no codends on this boat" and he pulled the net tightly on the reel leaving none of the cod end accessible for Craft to measure. Tr. 20–21, 62, 72, 101–102, AE 2 at 3. In order to measure the cod end, Craft would have required some assistance by a crew member, who would have needed to release "a lever and roll the net down." Tr. 171. During his recorded interview with Block, Respondent Daniels denied ever telling Craft she could not measure the cod end of the net. AE 16. However, during his sworn testimony at the evidentiary hearing, he acknowledged that he "probably . . . said no, you ain't going to measure it" because he was in a hurry over something else. Tr. 162. Even if true, he made no effort to communicate to Craft his preoccupation with another matter, or "hurry," and he did not afford her the opportunity to measure the cod end of his fishing nets at a later, more convenient, time. His failure to provide Craft access to measure the cod ends of his fishing nets, a measurement that was vital to the Agency's data collection efforts, interfered with Craft's observer duties and violated 50 C.F.R. § 648.14(e)(1). Further, the definitiveness of his statement ("You ain't measuring no codends on this boat") was effectively a "bar by command" that Craft would not be measuring any cod ends on his vessel and violated 50 C.F.R. § 648.14(e)(1).

As to Respondent Doak, the evidence established that his behavior toward Craft during the trip constituted harassment and intimidation, in violation of 50 C.F.R. § 648.14(e)(1). As has been discussed, Respondent Doak's use of profanity, often directed toward Craft, was relentless. On one occasion during the trip, Respondent Doak was alone with Craft on the vessel's deck, initially standing about ten feet away from her. For no apparent reason, he told Craft "You're f-ing pissing me off!" and moved toward her until he was about two feet away. AE 2 at 4. He proceeded to state that he had been watching her "do nothing but a bunch of nonsense for the past two days" and accused her of putting him (and, presumably, Respondent Daniels) "out of business by writing down all the by-catch." Tr. 65, 80–81, AE 2 at 4. Understandably, his behavior put Craft in fear. On another occasion, he repeatedly yelled at Craft to "pick out the f-ing searobins [sic]," referring to picking out the by catch, or discards, from the haul of catch, even though it was not her job to do so. Tr. 63, 83–84, 97, AE 2 at 5, AE 3. According to Craft, she would have "definitely sampled more baskets if [she] wasn't always feeling like [Respondent Doak] was going to say something or cuss at [her] or get in [her] face." AE 2 at 6.

Respondent Doak admitted to threatening to put eggs in Craft's boots and gloves in an effort to "pick on [her] a little bit" to determine how "tough" she was. Tr. 139. In response, Craft slept with her boots in her bunk for the entire trip. Tr. 64, AE 2 at 4. On other occasions,

he chose to undress in the galley area of the vessel in front of Craft to administer an insulin shot, even though he could have utilized other, more private, areas of the 64-foot vessel. Craft found this behavior inappropriate, but she did not voice her complaints. Tr. 146, AE 2 at 5, AE 4. Given the fact that the captain of the vessel, Respondent Daniels, had also engaged in his own pattern of abusive treatment toward Craft during this trip, Craft's decision to endure the conditions aboard this vessel rather than complain about Respondent Doak's behavior to Respondent Daniels was not unreasonable. See Tr. 75–77. In fact, it may have even been strategic, so as not to escalate the already hostile environment Respondents created aboard the vessel.

In recounting her experience she expressed her thoughts about quitting or withdrawing to her bunk for the remainder of the trip due to “all the cussing” from Respondents, but chose to persevere and finish the trip. AE 2 at 8. Nevertheless, she described how such conditions “wear[] on you” and that there was an occasion when she “started tearing up” because “[i]t just got really old – all the G D words & all the F words all the time.” *Id.* Apart from the emotional impact, the evidence shows Respondents' behavior impacted Craft's performance as an observer. As mentioned, Craft would have conducted more “sampling” had she not felt intimidated by the verbal abuse and threatening behavior of Respondent Doak. She also would have obtained the measurements of the cod end of the fishing nets used during the trip had she not been prevented from doing so by Respondent Daniels. In addition, Craft was unable to accurately record bycatch information from the fishing trip because Respondent Doak “kept throwing skates overboard” because he did not want Craft to record the bycatch. Tr. 64, 71, AE 2 at 7. In particular, on the “last haul” Respondent Doak “shoveled everything overboard” and Craft had to mark it as “unobserved.” Tr. 86, AE 2 at 7, AE 3 at 54.

In consideration of the foregoing discussion and applying the objective standard for determining whether Respondents created a hostile work environment, it is apparent that Respondents' actions and attitude towards Craft created an atmosphere so permeated with harassing and abusive behavior that it altered the conditions of Craft's working environment and unreasonably interfered with her work performance. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). Further, the evidence shows that Craft subjectively perceived that Respondents subjected her to an abusive environment. *Id.* at 21–23, AE 2 at 8, Tr. 81–88, 95.

Respondents have suggested in their respective post-hearing briefs that the trip was “difficult,” which increased tensions aboard the vessel during the multi-day trip. Nevertheless, encountering difficulties aboard a fishing vessel during a 6-day trip does not excuse the pattern of violative behavior exhibited by Respondents toward Craft. The weight of the evidence reveals not an isolated instance of improper conduct but a recurring theme of hostility toward Craft, presumably due to Respondents' displeasure with the requirement to carry a certified observer during this fishing trip, made worse by the observer being female. Consequently, I am not persuaded by Respondents' arguments.

To the extent there were material conflicts in the evidence in this case (between Craft and Respondents' respective accounts of Respondents' behavior and actions throughout the trip), I assessed the witnesses' credibility to determine what evidence I found more reliable upon which to base my written decision. Various factors are appropriate to consider when evaluating a

witness' credibility. Such factors may include the witness's opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; any internal inconsistency of the witness' statements; the witness' bias, or lack thereof; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent plausibility of the witness' version of events; any inaccuracies or falsehoods in the witness' statements; and the demeanor, candor, or responsiveness of the witness. *See Oshodi v. Holder*, 729 F.3d 883, 891 (9th Cir. 2013); *Phillip G. Hillen*, 35 M.S.P.R. 453, 458 (MSPB 1987). My analysis of the pertinent factors follows.

Craft's hearing testimony was consistent with her pre-hearing statements that were prepared within about two days of the conclusion of the fishing trip, which added to her credibility. Respondents, on the other hand, were less consistent, which detracted from their credibility. For example, with regard to telling Craft she could not measure the cod end of the fishing nets, Respondent Daniels denied saying so during his recorded interview with Block, but during his subsequent hearing testimony admitted to saying "that's probably when I said no, you ain't going to measure it [referring to the cod end]." Tr. 162, AE 7 at 5, AE 16. He stated during his recorded interview that the trip with Craft went fine with no problems, but later stated Craft was the worst observer he has ever had to try to get along with, and during his hearing testimony he accused Craft of having "a bad attitude." Tr. 158–159, AE 7 at 2, 5, AE 16. He generally denied using profanity toward Craft, but during his recorded interview admitted to telling Craft "to shove it up her ass, check and all" when Craft asked him if he wanted a comment card or copy of the data she collected, a statement he denied making during the hearing while also declining the opportunity to review his recorded interview during the hearing. Tr. 161, 176, 193–198, AE 7 at 5, AE 16. He stated during his recorded interview that he had been provided with instructions to give his crew about how to treat observers (presumably referring to Observer Duties) and that he gave these instructions to his crew members to read, yet his crewmember of multiple years, Respondent Doak, stated during his recorded interview that he had never seen or been provided such instructions from Respondent Daniels. Tr. 137–138, AE 7 at 3, AE 8 at 2, AE 11, AE 16. During his recorded interview, Respondent Doak expressed that he thought the trip with Craft went fine and that he and Respondent Daniels got along well with Craft. AE 8 at 2, AE 16. Initially during his hearing testimony, Respondent Doak described himself and Craft as "pretty good friends" and expressed surprise over Craft's complaints following the trip. At first he testified that did not even realize that Craft was offended, but later testified "You [could] tell [Craft] was offended by this, offended by that." Tr. 138, 144.

I also considered the plausibility of the witness' version of events and found Craft's version of the events more plausible than Respondents' general denial of wrongdoing. As discussed, Craft described with specificity a climate of hostility while aboard the F/V Bailey Boy, created by Respondents' behavior and actions. Respondents have candidly expressed their dislike of the Observer Program and observers in general, and appear to have a particular aversion to female observers aboard a vessel. Respondent Daniels stated he did not have to be nice to Craft. AE 7 at 3, AE 16. He admitted to stating "Fucking women on a boat! That should be against the fucking law" during his recorded interview, and reiterated his agreement with the statement. AE 7 at 4, AE 16. He also expressed his belief that observers were ruining fishermen. AE 7 at 5, AE 16. He also suggested, during his hearing testimony, that the fishing business is a "dying breed" in part because of the difficult nature of the work and in part from

regulatory requirements. Tr. 157–158. Respondent Doak candidly expressed his opinion that observers are the enemy and that their function is to save the planet and put fishermen out of business. AE 8 at 3–4, AE 16. Not unlike Respondent Daniels, Respondent Doak expressed his view that “a trawl boat . . . is not a place for women.” Tr. 144. Given Respondents’ views about the observer program in general and women in particular, Craft’s detailed description of the hostility she encountered aboard the vessel appears more likely to have occurred than Respondents’ general denial of improper conduct.

I also had the opportunity to observe the demeanor of the witnesses as each testified. Notably, Respondent Doak displayed some challenges with maintaining control over his emotions during the hearing. On one occasion, despite my admonition that he contain his emotions rather than interrupt direct examination of a witness simply because he disagreed with the answers of the witness, he proceeded to interrupt the examination and declined an opportunity to take a break to regain his composure. He then inquired about leaving the hearing altogether, which he decided not to do. Tr. 66–69. On another occasion during the hearing, he repeatedly interrupted and spoke over me, leading to another admonition to show courtesy toward an administrative tribunal and not speak over the statements of others.¹³ Tr. 191–192. Despite the formality of a hearing, it was clear that Respondent Doak lacked requisite control over his emotions and demonstrated behavior that lent support to Craft’s claims of improper conduct while aboard the F/V Bailey Boy.

I also considered Respondent Doak’s credibility challenges to Craft with regard to alcohol use while aboard the F/V Bailey Boy. Specifically, Respondent Doak questioned the veracity of Craft’s allegations against Respondents because, according to Respondent Doak, Craft had consumed beer during the outbound journey to the fishing grounds when the 6-day trip began. Tr. 74–75, 140–142, 150. Respondent Doak did not know what amount of beer Craft consumed, but alleged he had observed her drinking in the wheelhouse while he was watching television in the galley. Tr. 140–142. Respondent Daniels, who was also in the wheelhouse with Craft, confirmed that he witnessed Craft drinking beer “on the way out” but he did not know how much she consumed. In any event, Respondent Daniels testified that there was not much beer present on the vessel and, whatever amount, there “wasn’t enough to get [anyone] drunk.” Further, others on board, in addition to Craft, consumed the available beer, with the exception of Respondent Doak, who does not drink alcohol. Tr. 75, 166–168. In contrast to Respondents’ claims, Craft did not recall consuming alcohol during the fishing trip. Tr. 73. Respondent Doak did not previously raise this issue, for example during his recorded interview, because he did not think it was a relevant factor and it did not occur to him to do so. Tr. 152–153. Even if Craft consumed some amount of beer “on the way out” at the start of the fishing trip, no evidence was offered to suggest Craft was intoxicated or that her judgment or perception was impaired. Moreover, Craft’s reports of harassment and intimidation by Respondents occurred over a span of roughly six days, long after the consumption of any alcohol at the very start of the trip.

¹³ I note an error in the transcript identifying that this exchange pertained to Respondent Daniels. Based on my recollection of the hearing and the stage of the proceedings, namely cross examination by Respondent Doak, the exchange actually pertained to Respondent Doak. Also based on my recollection, Respondent Daniels did not display difficulty maintaining control of his emotions during the evidentiary hearing.

Consequently, I do not find that Craft's consumption of alcohol, assuming that she actually consumed alcohol, detracted from her credibility in this case.

While no one factor dominated the credibility determination in this case, a thoughtful and careful review of the totality of the evidence presented led to my determination that the testimony offered by Craft was more credible and reliable than the testimony offered by Respondents. Consequently, I resolved any such conflicts in the evidence in favor of the Agency.

In sum, upon consideration of all the evidence adduced at hearing, I conclude that the Agency has shown by a preponderance of the evidence that Respondents jointly and severally violated the Act and its implementing regulations by intimidating and harassing a NMFS-approved observer while conducting her duties aboard the F/V Bailey Boy from October 20, 2009 through October 26, 2009.

C. Civil Penalty Assessment

Having determined that Respondents are liable for the charged violation, I must next determine the appropriate amount, if any, to impose as a civil penalty for their violative behavior. As previously stated, there is no presumption in favor of the penalty proposed by the Agency, and as the Administrative Law Judge presiding in this matter, I am not "required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document." *In re Nguyen*, 2012 NOAA LEXIS 2, at *21 (ALJ, Jan. 18, 2012); see 15 C.F.R. § 904.204(m), Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631 (June 23, 2010). Rather, I must independently determine an appropriate penalty "taking into account all of the factors required by applicable law." 15 C.F.R. § 904.205(m); see 15 C.F.R. § 904.108 (enumerating factors that may be considered in assessing penalty). Thus, in assessing a penalty, I have considered the factors set forth in the Act and in Agency regulations at 15 C.F.R. § 904.108(a). These factors include: the nature, circumstances, extent, and gravity of the violation(s); Respondent's degree of culpability; any history of prior violations; ability to pay; and such other matters as justice may require.¹⁴

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

The Agency has demonstrated the important role the Observer Program plays in the management of federal fisheries. The information obtained through the program is vital for NMFS' evaluation of fish stock assessments and the population of other marine resources that it oversees. As the Agency argued in its post-hearing brief, "[t]he Agency relies on stock assessments to ensure the catch limits are set at a level that ensures sustainable fisheries." See Agency's Initial Post-Hearing Brief at 9, 16 U.S.C. § 1851(a)(1). The data observers collect is necessary for bycatch analyses NMFS conducts as well as for examining trends in the type of fishing gear being utilized and the effectiveness of that gear in catching targeted species. Tr. 18. To that end, specific gear characteristics, such as the cod end or mesh size of a net, is critical

¹⁴ While "ability to pay" is a factor that may be considered when determining penalty, Respondents did not raise such a claim in this case. See 15 C.F.R. § 904.108.

information to be collected by an observer while deployed on a fishing trip. It is this type of information that NMFS uses “to characterize the fleet because it has a direct effect on the kind of bycatch that might be expected in that fleet strata.” Tr. 20–22. Thus, Respondent Daniels’ failure to permit Craft to measure the cod end or mesh of the fishing nets he used during the 6-day fishing trip directly and negatively impacted the Agency’s ability to collect critical gear characteristic information that it relies upon to characterize a fleet, assess bycatch within that fleet, and effectively manage federal fisheries. Given Craft’s inability to measure the mesh size of Respondent Daniels’ nets, the data she collected during the trip “could not be applied to any of the fleet strata and so could not be used in the Agency’s stock assessments.” Agency’s Initial Post-Hearing Brief at 9, Tr. 17–22, 40, 42.

Additionally, Respondent Doak’s harassment and intimidation of Craft throughout the fishing trip impacted the extent to which she conducted sampling while aboard the vessel. Craft testified she would have “sampled more baskets if [she] wasn’t always feeling like [Respondent Doak] was going to say something or cuss at [her] or get in [her] face.” AE 2 at 6. Further, Craft was unable to accurately record bycatch information from the fishing trip because of Respondent Doak’s direct interference. Craft recounted that he “kept throwing skates overboard” because he did not want her to record any bycatch. Tr. 64, 71, AE 2 at 7. As a result, Craft had to mark the last haul as “unobserved” when Respondent Doak “shoveled everything overboard.” Tr. 86, AE 2 at 7, AE 3 at 54. This, too, curtailed the Agency’s ability to gather critical bycatch information through the Observer Program, thereby negatively impacting its ability to effectively monitor fisheries.

Of equal if not greater significance is the effect Respondents’ harassment and intimidation had on Craft, as an individual observer, and the potential effect their actions have on the Observer Program as a whole. It is clear from the evidence presented in this hearing, the details of which need not be repeated here, that Respondents had little regard for the Observer Program and a particular disdain for the presence of a woman on a fishing vessel. Respondents freely unleashed their hostilities in the form of harassing and intimidating behavior toward Craft throughout the 6-day fishing trip, which led Craft to feel threatened and afraid. The fact that one of the two offenders was the captain of the vessel only added to the gravity of the situation. Also noteworthy is the amount of risk, in general, that observers undertake by traveling out to sea with fisherman, at times for multiple days as was the case here. Consequently, I have considered the harm to the Observer Program and the Agency’s objectives by Respondents’ actions in my assessment of a monetary penalty.

ii. *Respondent’s Degree of Culpability, Any History of Violations, Ability to Pay*

The duty to know and follow the law is squarely on Respondents. *In re O’Neil*, 1995 NOAA LEXIS 20, at **7–8 (ALJ, June 14, 1995) (“[C]ommercial fishing is regulated and those engaged in it for profit activities are required to keep abreast of and abide by the laws and regulations that affect them.”); *In re Peterson*, 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.”).

Respondents have not claimed any lack of familiarity with the observer program. On the contrary, they have made their views about their experience with the Observer Program very clear. Respondent Doak pointed out that he does not like to carry observers during a fishing trip and believes their mission is to put him out of business. (“I ran boats for a long time and I just don’t like it [referring to carrying observers].”) Tr. 115, 138, AE 8 at 3, 4, and 6, AE 16. He testified that “[t]he best observers are the ones that don’t do anything. They don’t talk to you.” Tr. 142. He candidly admitted to picking on Craft during the trip to determine how tough she was and in his post-hearing submission conceded that he may have been too tough on Craft. Tr. 139, Respondent Doak’s Post-Hearing Brief. Given this context, it is difficult to believe that Respondent Doak’s harassment and intimidation of Craft was anything but conscious. His actions reflect deliberate attempts to make Craft feel uncomfortable throughout the multi-day journey because he disagreed with the need to carry an observer aboard the vessel.

Respondent Daniels, similarly, expressed his belief that women have no place on a boat and stated, with regard to carrying female observers, “now you have to take them because the government makes you.” Tr. 172–173. He conceded to blaming Craft for the difficulties encountered during the trip even though he knew Craft was not at fault for the various problems. Tr. 172. He also acknowledged not being nice to Craft, at one point telling Craft to “shove it [referring to a comment card or copy of the data collected] up her ass, check and all.” AE 7 at 3, 5, AE 16. And in response to one of his crewmembers extending courtesy toward Craft during the trip, he remarked “y’all must be f-ing each other or something.” AE 2 at 5. With regard to a vital piece of gear information, he unequivocally told Craft she would not be measuring any of the cod ends of nets on his vessel, rendering the rest of Craft’s collection of information during the trip useless to the Agency. Tr. 20–21, 40, 42, 62, 72, 101–102, AE 2 at 3, Agency’s Initial Post-Hearing Brief at 9. Like Respondent Doak, Respondent Daniels’ actions reflect deliberate conduct toward Craft that succeeded in making her feel intimidated and harassed throughout the trip she was assigned to observe. Accordingly, I have considered the deliberateness of Respondents’ behavior in my assessment of the monetary penalty in this case.

Respondent Daniels has argued that the penalty proposed by the Agency is excessive, noting that this is the first complaint made against him and his crew. Respondent Daniels’ argument—that he has no history of prior violations—is supported by the Agency’s Penalty Assessment Worksheet, in which no relevant prior violations was noted. *See* Penalty Assessment Worksheet attached to NOVA. A number of administrative tribunals have found that the absence of prior offenses may support the assessment of a lower penalty. *See, e.g., In re Frenier*, 2012 NOAA LEXIS 11, at *39 (ALJ, Sept. 27, 2012) (“[T]he absence of any prior or subsequent offenses can serve as a mitigating factor and support the assessment of a lower civil penalty under certain circumstances.”); *In re Straub*, 2012 NOAA LEXIS 1, at *24 (ALJ, Feb. 1, 2012) (“The absence of prior offenses . . . tends to favor a low civil monetary penalty.”); *In re The Fishing Co. of Alaska*, 1996 NOAA LEXIS 11, at **43–44 (ALJ, Apr. 17, 1996) (“In an industry that is so heavily regulated, this absence of prior violations by any of the Respondents has been taken into consideration as a mitigating factor in the penalty assessment.”). In this case, Respondent Daniels testified that has been in the fishing business all his life and that he got his vessel when he was 25 years old. Tr. 157–158, AE 5. At the time of the hearing, Respondent Daniels was 60 years old. AE 5. The fact that Respondent Daniels has no history of prior

violations amidst a lengthy career in the industry weighs in his favor and was considered in my assessment of a monetary penalty.

As to the factor of “ability to pay,” NOAA’s Civil Procedures state that if a 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 Respondents’ inability or ability to pay was submitted at any time in this proceeding. As such, this factor shall not be considered.

Having carefully considered the evidence presented in this case and the factors set forth in the Act and Agency regulations, I have concluded that an appropriate total civil penalty to impose upon Respondents is \$16,625.

VI. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon thorough and careful review of the evidence presented in this proceeding, I make the following ultimate findings of fact and draw the following conclusions of law:

1. Respondents are each a “person” as defined by the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1802(36), and are subject to the jurisdiction of the United States.
2. Denise Craft is an “observer” as defined by the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1802(31).
3. Respondent Daniels is a principal officer and President of Bailey Boy, Inc., which owns the F/V Bailey Boy and Respondent Daniels is an operator of the F/V Bailey Boy.
4. For the 2009 fishing year, Respondent Daniels, through Bailey Boy, Inc., obtained a fishing permit for the F/V Bailey Boy for the following fisheries: Atlantic Mackerel, Monkfish, NE Multispecies, Skate, Spiny Dogfish, Illex Squid, and Summer Flounder.
5. Respondent Daniels was notified of his obligation to carry a NMFS certified observer on the F/V Bailey Boy and carried a NMFS certified observer named Denise Craft for a fishing trip that commenced on October 20, 2009 and ended on October 26, 2009.
6. Respondent Doak has worked for Respondent Daniels as a crew member for several years, including in 2009, and was a crew member aboard the F/V Bailey Boy for the fishing trip Denise Craft observed that commenced on October 20, 2009 and ended on October 26, 2009.
7. During the fishing trip that began on October 20, 2009 and ended on October 26, 2009, Respondents harassed, intimidated, and interfered with NMFS certified observer, Denise Craft, in violation of the Magnuson-Stevens Fishery Conservation and Management Act and regulations promulgated under that Act. 16 U.S.C. §§ 1857(1)(A) and (L), 50 C.F.R. §§ 648.14(e)(1) (2009).

8. Having violated a regulation issued pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A), Respondents are jointly and severally liable to the United States for a civil penalty, 16 U.S.C. §§ 1857(1)(A), 1858(a). *See also* 50 C.F.R. § 600.735.

9. In consideration of the penalty provisions of the Magnuson-Stevens Fishery Conservation and Management Act and applicable regulations, a civil penalty in the amount of \$16,625 is deemed appropriate. 16 U.S.C. § 1858(a) and 15 C.F.R. § 904.108(a).

VII. DECISION AND ORDER

A total penalty of \$16,625 is hereby IMPOSED on Respondents Stephen C. Daniels and Joseph J. Doak, III, jointly and severally, for the violation upon which they were found liable herein. Once this Initial Decision becomes final under the provisions of 15 CFR § 904.271(d), you will be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein.

PLEASE TAKE NOTICE, that any petition for reconsideration of this Initial Decision must be filed with the undersigned within **20 days** after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. *Id.* Within **15 days** after a petition for reconsideration is filed, any other party to this proceeding may file an answer in support or in opposition. The undersigned will rule on any petition for reconsideration.

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

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

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

SO ORDERED.

A handwritten signature in cursive script, reading "Christine D. Coughlin", is written over a horizontal line.

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

Dated: October 24, 2014
Washington, DC

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.