



UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:)
Richard Larocca,)
Respondent.)

Docket Number:
NE1002244, F/V Double Vision,
F/V Doubled Vision

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INITIAL DECISION AND ORDER

Date: June 17, 2014

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

Appearances: For the Agency:

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¹ The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011. 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 the “Agency”) issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”), dated February 19, 2013, to Richard Larocca (“Respondent”). In the NOVA, the Agency alleged four counts in which Respondent violated Section 307(1)(A) of the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson Act” or the “Act”), 16 U.S.C. § 1857(1)(A), and regulations promulgated under the Act at 50 C.F.R. § 600.725(s).² In each count Respondent is charged with violating the Act “by fishing without an observer when the vessel was required to take an observer in violation of 50 C.F.R. § 600.725(s).” NOVA at 1-2. Count I pertains to the F/V Double Vision “between on or about June 24, 2010 and on or about July 6, 2010.” *Id.* at 1. Count II pertains to the F/V Doubled Vision “between on or about June 24, 2010 and on or about July 6, 2010.” *Id.* Count III pertains to the F/V Double Vision “between on or about July 6, 2010 and on or about September 15, 2010.” *Id.* Count IV pertains to the F/V Doubled Vision “between on or about July 6, 2010 and on or about September 15, 2010.” *Id.* at 2. Each count carries a proposed penalty of \$17,500, for a total proposed penalty of \$70,000 against Respondent. *Id.*

By letter dated March 5, 2013, Respondent, through his attorney, requested a hearing before an Administrative Law Judge. On April 15, 2013, Chief Administrative Law Judge Susan L. Biro, issued a notice of Assignment of Administrative Law Judge, and Order Requiring 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, ordering the Agency to file its PPIP on or before May, 10, 2013, and Respondent to file his PPIP on or before May 24, 2013. On May 13, 2013, the Agency filed its PPIP. On May 24, 2013, Respondent filed his PPIP. On June 3, 2013, the Agency filed its response to Respondent’s PPIP.

On June 5, 2013, Chief Administrative Law Judge Susan L. Biro issued a Hearing Order setting filing deadlines and scheduling the hearing for November 13, 2013, in Islip, New York.³ On August 27, 2013, Chief Administrative Law Judge Susan L. Biro issued an Order of Redesignation, in which I was designated to preside over this matter.

On November 8, 2013, I issued an Order Staying Hearing with regard to the hearing that was scheduled to take place on November 13, 2013.⁴ By agreement of the parties, the hearing was rescheduled to take place the following week, on November 19, 2013, and an Order Rescheduling Hearing was issued on November 12, 2013, to this effect.

² Citations to 50 C.F.R. Parts 600 and 648 refer to the 2009 edition of the Code of Federal Regulations in effect at the time of the alleged violations.

³ A subsequent Notice of Hearing Location, issued on June 6, 2013, identified with specificity the time and location of the hearing. Although subsequently invited to participate in mediation for settlement of the case prior to commencement of litigation, both parties did not express a desire to pursue mediation.

⁴ Due to unforeseen impediments in this office’s authorization to travel, I was required to reschedule the hearing in this matter.

I conducted a hearing in this matter on Tuesday, November 19, 2013, in Central Islip, New York. The Agency presented Agency's Exhibits ("AX") 1 through 8, 9A, 9C, 9D, 10A, 10C, 10D, 11, 13, 18 through 20, and 23, which were admitted into evidence. The Agency also presented the testimony of three witnesses: Gunter L. Walker, Thomas S. Gaffney, and Amy S. Martins. Respondent presented Respondent's Exhibits ("RX") 4 through 8, 10A, and 12 through 17, which were admitted into evidence. Respondent also testified on his own behalf. The parties submitted Joint Exhibits ("JX") 1 and 2, which were admitted into evidence.

The docket clerk of this Tribunal received the certified transcript of the hearing on December 4, 2013, and an electronic copy of the transcript on December 9, 2013, and mailed a copy to both parties.⁵ I concurrently issued an Order Scheduling Post-Hearing Briefs, dated December 11, 2013, which set forth various filing deadlines for the Agency and Respondent.⁶ However, prior to its initial deadline, the Agency filed an unopposed motion, requesting an extension of time to file its Initial Post-Hearing Brief due to an emergency matter. On January 10, 2014, I granted the Agency's motion and issued an Order Amending the Schedules for Filing Post-Hearing Briefs, setting forth the following deadlines: January 17, 2014 as the deadline for the Agency's Initial Post-Hearing Brief; February 14, 2014 as the deadline for Respondent's Initial Post-Hearing Brief; February 28, 2014 as the deadline for the Agency's Reply Post-Hearing Brief; and March 14, 2014 as the deadline for Respondent's Reply Post-Hearing Brief.

On January 17, 2014, the Agency filed its Initial Post-Hearing Brief. On February 12, 2014, Respondent filed his Initial Post-Hearing Brief. On March 5, 2014, the Agency filed its Reply Post-Hearing Brief. On March 13, 2014, Respondent filed a motion requesting a brief extension of time, until March 19, 2014, to file his Reply Post-Hearing Brief, due to inadvertent delays in receipt of the Agency's Reply Post-Hearing Brief and other scheduling deadlines. On March 14, 2014, I granted Respondent's request and extended the deadline in which to file his Reply Post-Hearing Brief to March 19, 2014. On March 19, 2014, Respondent filed his Reply Post-Hearing Brief.

II. STATEMENT OF THE ISSUES

A. Liability

In dispute is whether Respondent, as owner and operator of the F/V Double Vision and F/V Doubled Vision, violated the Act and regulations promulgated under the Act by fishing without an observer when the vessels, F/V Double Vision and F/V Doubled Vision, were required to take an observer. At issue are two distinct periods of time: June 24, 2010 through July 6, 2010 (with regard to charged Counts I and II, relating to the F/V Double Vision and F/V Doubled Vision, respectively); and July 6, 2010 through September 15, 2010 (with regard to charged Counts III and IV, relating to the F/V Double Vision and F/V Doubled Vision,

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

⁶ Included in this Order was a deadline of December 27, 2013, to file any motion to conform the transcript to the actual testimony at hearing. Neither the Agency, nor Respondent, filed such motion.

respectively). Additionally, I had to determine whether the Agency waived the requirement to carry an observer aboard the F/V Double Vision and/or the F/V Doubled Vision.

B. Civil Penalty

If liability for the charged violations is established, then I must determine the appropriate amount, if any, to impose as a civil penalty for the violative behavior. To this end, I am to consider certain factors, including: 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.⁷

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 conflict(s) 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 is an individual owner and joint operator of gill net fishing vessels ("F/V") the Double Vision, the Doubled Vision, and the Gabriella Morgan. Tr. 153-157, 209-211, 220-221; AX 2; AX 3; AX 9A; RX 4; RX 5; RX 6. In 2010, Respondent utilized the services of other operators, or boat captains, to operate some or all of his fishing vessels because he endeavored to use each vessel for fishing on a daily basis and was not always personally available to conduct fishing trips due to other employment. Respondent compensated the operators he used to operate his vessels from the profits he received from the sale of fish caught on the conducted fishing trips. Tr. 209-212, 220-221; AX 10A.

For the 2010 fishing year, Respondent obtained fishing permits for the F/V Double Vision and F/V Doubled Vision for the following fisheries: Atlantic Mackerel, Bluefish, Herring, Monkfish,⁸ NE Multispecies, Skate, and Spiny Dogfish.⁹ See AX 2; AX 3. 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

⁷ While "ability to pay" is a factor that may be considered when determining penalty, Respondent did not raise such claims in this case. See 15 C.F.R. § 904.108.

⁸ For the Monkfish fishery, F/V Double Vision has a Category D permit while the F/V Doubled Vision has a Category C permit. See AX 2; AX 3.

⁹ For the 2010 fishing year, the F/V Double Vision also had a permit for the American Lobster and the F/V Doubled Vision also had a permit for the Black Sea Bass, Squid/Butterfish, and Summer Flounder fisheries. See AX 2; AX 3.

valid US Coast Guard Commercial Fishing Vessel Safety Examination decal is required to carry an observer.

AX 2 at 2; AX 3 at 2. Depending upon the time of year, Respondent has conducted fishing activities in two areas, “Moriches” and “Shinnecock.” Tr. 159-164. The Shinnecock area is approximately 14–15 miles east of the Moriches area. Tr. 160. In May, June, and early July 2010, Respondent generally conducted fishing activity with the F/V Double Vision and the F/V Doubled Vision out of the Moriches area, and during other time periods in the 2010 fishing year, he conducted such activity out of the Shinnecock area. Tr. 159-164, 166-169, 179-180, 200-201, 203-204, 208, 221; AX 9C; AX 10C; RX 10A; JX 1; JX 2. Respondent chose to fish out of Moriches to avoid conflicting with other fishermen and their gear, and to create space on the water between his own fishing activity and the activity of other fishermen. Tr. 160-161, 166, 181. From April 2010 until approximately July 9, 2010, while fishing out of Moriches, Respondent kept both the F/V Double Vision and F/V Doubled Vision docked at privately owned boat slips located behind a private residence. Tr. 166-167, 208, 217. Respondent leased these slips from the private property owner. Tr. 208, 217; JX 1; JX 2. While fishing out of Shinnecock, Respondent kept the F/V Double Vision and F/V Doubled Vision docked at a public and commercial fishing dock. Tr. 183.

By letters mailed to Respondent on June 22, 2010, and delivered on June 24, 2010, NMFS notified Respondent that the F/V Double Vision and F/V Doubled Vision had each been selected “to take a NMFS Certified Observer on [its] next fishing trip because” each vessel held “a permit in one of the covered fisheries.” Tr. 20-24; AX 4; AX 5. The letters advised: “Once selected to carry an observer it is unlawful to engage in fishing without an observer.” AX 4; AX 5. These letters further stated that Respondent “must make arrangements with the Observer Program in advance of [his] next trip,” provided contact names of “Gunter Walker/Rebecca Hailey” with a contact telephone number, and informed Respondent he would “either be assigned an observer, or observer requirements [would] be waived for that specific trip.” Tr. 20-24; AX 4; AX 5.

The use of such selection letters to arrange observer coverage is not frequently used. Tr. 30. In actuality, only three or four letters are sent out in a given month. Tr. 20-24, 30-31; AX 4; AX 5. Rather, observer coverage is more often arranged by less formal means, such as by the observer calling the vessel owner or operator beforehand to set up an observed trip, by the observer simply showing up at the dock and requesting to observe a fishing trip that is about to take place, or by the observer showing up at the dock and making arrangements with a vessel owner or operator to observe a trip at a later date. Tr. 30, 43-44, 46-48, 169-170, 179, 181-182. In this instance, selection letters to secure observer coverage were mailed to Respondent due to the limited amount of gill net fishing in Shinnecock, an area for which NMFS needed observer coverage in 2010 to meet fishery management objectives.¹⁰ Tr. 29-32, 46-48, 94, 96-107; AX 11; AX 23.

¹⁰ NMFS utilizes the Observer Program to deploy observers on board commercial fishing vessels to gather and record various information during a fishing event (for example, the type of gear used, catch composition, biological sampling). Tr. 94-95. The information collected is used for

Respondent opened the selection letter¹¹ on July 6, 2010, and placed a call to Gunter Walker “right away,” that is, on the same day, to arrange observed trips for both vessels. Tr. 24, 159, 168, 186-188, 212-213; AX 6. Respondent was familiar with the observer program and the requirement to take an observer aboard his vessel when requested to do so. Tr. 169-170, 177-178, 188-189; RX 12. By his own admission, he was well aware that he could not refuse to take an observer on a fishing trip. Tr. 188-189. The delay between the date the letters were delivered, on June 24, 2010, and the date on which Respondent opened the mail, on July 6, 2010, was attributable to the practice in Respondent’s home to place received mail into a bin, which Respondent then sorted through on a sporadic basis when he had time or needed to pay bills. Tr. 186-187, 219-220; AX 4; AX 5. Respondent explained: “It’s not a question of any set pattern. If the thing is overflowing, you know, I try to do it then. I do it when I can.” Tr. 220.

During this same time period, June 24, 2010 through July 6, 2010, Respondent engaged in fishing activities with the F/V Double Vision and F/V Doubled Vision out of Moriches without carrying an observer. Tr. 159-160, 162-164, 168, 178-179; 188-190; AX 6; AX 7. Specifically, based on “Fishing Vessel Trip Report[s]” that were completed by the vessel operator, fishing trips were conducted aboard the F/V Double Vision on June 25, June 26, June 29, July 1, July 2, July 3, and July 6, 2010, and fishing trips were conducted aboard the F/V Doubled Vision on June 25, June 26, June 28, June 29, June 30, July 1, July 2, July 5, and July 6, 2010.¹² AX 9C; AX 10C; JX 1; JX 2.

multiple purposes, such as conducting stock assessments for fish and other protected species, and monitoring compliance. Tr. 94. The need for observer coverage is determined by fishery management plans and authorizing law and regulations. Tr. 96-97. To achieve its objectives under the Observer Program, NMFS targets certain fisheries, based on federal funding, from which information is to be gathered by certified observers. Tr. 97-98. It reviews prior fishing efforts to determine what species are critically important in monitoring and then develops a schedule for a fishing year that identifies the type of coverage it seeks through the Observer Program. Tr. 99. This schedule, referred to as a “Sea Day Schedule,” identifies the fishery and gear type, and geographic area that is targeted, as well as the number of days tasked for observer coverage for certain months in the year. Tr. 19, 94-101; AX 11. The Sea Day Schedule is then sent to the observer service provider(s), an affiliate or contractor of the federal government for purposes of the observer program, to communicate the extent and level of observer coverage sought by NMFS. Tr. 19, 94-95, 99-100.

¹¹ Respondent did not specifically recall receiving two selection letters, but he understood he needed to secure observer coverage for both the F/V Double Vision and F/V Doubled Vision, and acknowledged that two letters had been delivered to his home. Tr. 187-189, 212-214.

¹² For purposes of ascertaining the days on which Respondent conducted fishing activities aboard the F/V Double Vision and/or F/V Doubled Vision, I have placed greater reliance on the Fishing Vessel Trip Report[s] received into evidence at AX 9C, AX 10C, JX 1, and JX 2 rather than the “Dealer Report[s]” received into evidence at AX 9D and AX 10D. It was undisputed at the hearing that the Fishing Vessel Trip Report[s], which are completed by the vessel operator, provide a more accurate account of the fishing vessels’ activities (such as dates and time) identified in the report, than do the “Dealer Report[s],” which are completed by federally

In the telephone conversation between Respondent and Gunter Walker (“Walker”) that took place on July 6, 2010, Respondent notified Walker that he was “fishing out of Moriches behind a private house” and could not authorize an observer to board the vessel(s) from someone else’s private property. Tr. 168. Nevertheless, Respondent explained that he would be moving his vessels from Moriches to Shinnecock by the approaching weekend, July 10-11, 2010, and could take observers from Shinnecock once the vessels were moved. Tr. 168, 178-181, 183, 188-189. According to Respondent, Walker agreed with this plan, and Respondent believed he had an agreement with Walker to take observers on the F/V Double Vision and the F/V Doubled Vision on Monday, July 12, 2010, once the vessels had been moved to Shinnecock. Tr. 178-179, 188-190, 200-201, 204-205, 212-214, 221-223. However, Walker left the conversation with an impression that Respondent would be contacting him again, on Monday, July 12, 2010, to make arrangements for observer coverage on his next fishing trip.¹³ Tr. 36. Although Respondent expected to see observers at the dock in Shinnecock to cover fishing trips on the F/V Double Vision and the F/V Doubled Vision on Monday, July 12, 2010,¹⁴ observers were not present to cover these trips. Tr. 188-190, 201, 204-205, 213-214, 221-223; AX 6; JX 1; JX 2.

Respondent continued to engage in fishing activities with the F/V Double Vision and F/V Doubled Vision, albeit without an observer on board either vessel. Tr. 222-223; RX 12. Based on Fishing Vessel Trip Reports that were completed by the vessel operator, from July 6, 2010 through September 15, 2010, the F/V Double Vision engaged in fishing activity on July 7, 8, 9, 10, 12, 16, 19, 20, and 23, August 2, 3, 4, 5, 6, 8, 9, 10, 12, 13, 15, 17, 18, 22, 25, 26, 27, 29, 30, and 31, and September 1, 6, 7, 9, and 14. JX 1. Based on Fishing Vessel Trip Reports that were completed by the vessel operator, from July 6, 2010 through September 15, 2010, the F/V Doubled Vision engaged in fishing activity on July 7, 8, 9, 12, 13, 16, 17, 19, 20, 22, 26, 27, and 28, August 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 15, 17, 18, 21, 25, 26, 27, 30, and 31, and September 1, 6, 7, 9, 10, 11, 12, 13, 14, and 15. JX 2.

Respondent had no further communication with Walker or anyone else following the July 6, 2010 conversation to make other arrangements for observer coverage on the F/V Double Vision or F/V Doubled Vision. Tr. 222-223; AX 6. Based on his experience with the observer program, Respondent presumed he would obtain observer coverage on his vessels by making arrangements with observers when they presented at the dock. Tr. 201-203, 222-223. It was by this means that Respondent had previously, and since this matter, carried observers aboard his

permitted dealers and identify dates of purchase for the catch (for example, fish) that may not necessarily be the actual date the catch was landed or caught. *See* Tr. 59-65, 238-246.

¹³ There were conflicts presented in the evidence as to the details of the July 6, 2010 conversation between Respondent and Walker. As mentioned, although Walker believed Respondent would contact him on Monday, July 12, 2010 to arrange observer coverage for a fishing trip, Respondent believed he already had an agreement with Walker to take observers aboard the F/V Double Vision and F/V Doubled Vision on July 12, 2010. Tr. 36, 178-179, 188-190, 200-201, 204-205, 212-214, 221-223

¹⁴ The F/V Double Vision also conducted a fishing trip out of Shinnecock on Saturday, July 10, 2010. *See* JX 1.

vessels. Tr. 169-170, 178-179, 181-182, 223-229; RX 12; RX 13. According to Agency records, Respondent carried observers aboard the F/V Double Vision and F/V Doubled Vision on many occasions from 2003 through 2013.¹⁵ RX 12; RX 13.

On July 15, 2010, Walker prepared a "NEFOP Observer Incident Report" for "Refusal" regarding the F/V Double Vision. Tr. 25-26; AX 6. This report was based on the June 22, 2010 selection letter of the F/V Double Vision to carry an observer for any subsequent fishing activity and Respondent's failure to do so by engaging in subsequent fishing activity without an observer aboard the vessel, which Walker characterized as "refusal" for the purposes of the report. Tr. 25-26; AX 1 at 9, AX 6; JX 1; RX 12. On July 16, 2010, Walker prepared a "NEFOP Observer Incident Report" for "Refusal" regarding the F/V Doubled Vision. Tr. 27-28; AX 7. This report was based on the June 22, 2010 selection letter of the F/V Doubled Vision to carry an observer for any subsequent fishing activity and Respondent's failure to do so by engaging in subsequent fishing activity without an observer aboard the vessel, again characterized as "refusal." Tr. 27-28; AX 1 at 9, AX 7; JX 2; RX 12. In the July 16, 2010 report, Walker noted that only the F/V Double Vision was discussed during his conversation with Respondent on July 6, 2010. AX 7.

A Special Agent with NMFS Law Enforcement, Thomas S. Gaffney ("Gaffney"), conducted an investigation and prepared a report regarding Respondent's alleged refusal to carry an observer on the F/V Double Vision and F/V Doubled Vision.¹⁶ Tr. 54-57, 85-86; AX 8. On July 15, 2010, Gaffney contacted an observer program manager to determine whether, by this time, Respondent had carried an observer on his vessels. Tr. 58. Gaffney learned that although a conversation had taken place between Respondent and Walker about the matter, no observers had yet been carried on either vessel. Tr. 57-58; AX 1; RX 12. In the course of his continued investigation, he reviewed the July 15 and 16, 2010 incident reports Walker had issued, as well as the vessel selection letters for observer coverage that had been issued and delivered to Respondent in June 2010. Tr. 58. In addition, Gaffney retrieved and reviewed information from an online database maintained by NMFS containing information reported by federally permitted dealers, referred to as a "Dealer Report." Tr. 59. Such Dealer Reports contain various information such as geographical information, species, grade, and pounds landed of the catch, the price paid, specific dealer information, the name and permit number of the vessel, and a cross reference to a Fishing Vessel Trip Report number (denoted as VTR) for the fishing trip. Tr. 59-64; AX 9D; AX 10D. These Dealer Reports revealed the fishing activity of the F/V Double Vision and F/V Doubled Vision, namely, in July, August, and September 2010. Tr. 65-66; AX 9D; AX 10D.

On August 18, 2010, Gaffney attempted to reach Respondent by telephone (calling Respondent's home telephone number, which had been listed as Respondent's contact number on his vessel applications), but was unsuccessful. Tr. 67. He did, however, leave a voicemail

¹⁵ The approximate number of occasions an observer was carried aboard the F/V Double Vision and/or F/V Doubled Vision from 2003 through 2013 is as follows: 2003 (1); 2004 (5); 2005(2); 2006 (5); 2007 (10); 2008 (1); 2009 (4); 2010 (1); 2011 (6); 2012 (3); 2013 (8). RX 12; RX 13.

¹⁶ Gaffney testified that he began his investigation as the result of an incident report submitted by Walker on July 2, 2010. Tr. 57. I note, however, that the record is devoid of a July 2, 2010 incident report.

message in which he identified his position with NMFS and stated the purpose of the call as relating to observer refusal complaints. *Id.* On September 15, 2010, Gaffney made a second unsuccessful attempt to reach Respondent at the same telephone number, and again left a similar voicemail message to the previous one. Tr. 67-68; AX 1 at 10. Although the telephone number used by Gaffney was Respondent's correct home telephone number, Respondent did not receive these messages. Tr. 192. Respondent's household consists of his wife and three children, ages 11, 10, and 7, and there are occasions when Respondent does not receive voice mail messages that are left for him. Tr. 191-193, 197. Also on September 15, 2010, Gaffney contacted Walker and learned that there had been no further contact between Respondent and Walker regarding observer coverage on Respondent's vessels since the July 6, 2010 conversation. Tr. 66-67; AX 1 at 10-11.

Concluding that Respondent was not complying with the requirement to take an observer aboard the F/V Double Vision or F/V Doubled Vision, on September 17, 2010, Gaffney issued an Enforcement Action Report ["EAR"], which was delivered to Respondent on September 20, 2010. Tr. 68-70; AX 1 at 11; AX 8. The EAR cited Respondent with two counts of violation characterized as "observer refusal," one count per vessel. AX 8. The cover letter accompanying the EAR notified Respondent that the information contained in the EAR was based on preliminary information and could be changed or corrected upon further investigation. *Id.* The letter also explained that in the event the claimed violations were substantiated by sufficient evidence, Respondent would receive a formal NOVA. *Id.*

Since the issuance of the June 2010 selection letters for observer coverage, the F/V Double Vision first carried an observer on December 5, 2010, and the F/V Doubled Vision first carried an observer on April 27, 2011. Tr. 226-228; RX 12.

IV. PRINCIPLES OF LAW

A. Liability

Congress enacted the Magnuson Act in 1976 "to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States." Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 401, 90 Stat. 331 (codified at 16 U.S.C. § 1801). The Act, as amended, aims to "promote domestic commercial and recreational fishing under sound conservation and management principles." *Id.* 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* Magnuson Act § 403, 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." Magnuson Act § 303(b)(8), 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.” Magnuson Act § 3(27), 16 U.S.C. § 1802(31).

Section 307(1)(A) of the Magnuson Act makes it unlawful “for any person—to violate any provision of this Act or any regulation or permit issued pursuant to this Act.”¹⁷ 16 U.S.C. § 1857(1)(A). Agency regulations provide that “the Regional Administrator may request any vessel holding a permit for . . . NE multispecies, monkfish, skates, Atlantic mackerel, squid, butterfish, scup, black sea bass, bluefish, spiny dogfish, [or] Atlantic herring . . . to carry a NMFS-certified fisheries observer.”¹⁸ 50 C.F.R. § 648.11(a). If so requested to carry an observer, it is the vessel owner’s responsibility to arrange for and facilitate observer placement. 50 C.F.R. § 648.11(b). Vessel owners who are selected for observer coverage “must notify the appropriate Regional or Science and Research Director, as specified by the Regional Administrator, before commencing any fishing trip that may result in the harvest of resources of the respective fishery.”¹⁹ *Id.* Further, it is unlawful to fish without an observer when the vessel is required to carry an observer. 50 C.F.R. § 600.725(s). The Regional Administrator may waive the requirement to carry an observer if the facilities on a vessel for housing the observer or for carrying out observer functions are so inadequate or unsafe that the health or safety of the observer, or the safe operation of the vessel, would be jeopardized. 50 C.F.R. § 648.11(c).

B. Standard of Proof

To prevail on its claims that Respondent violated the Act and the regulations, the Agency must prove facts constituting the violations by a preponderance of reliable, probative, substantial, and credible evidence. 5 U.S.C. § 556(d); *Cuong Vo*, 2001 NOAA LEXIS 11, at **16-17 (NOAA Aug. 17, 2001) (citing 5 U.S.C. § 556(d); *Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100-103 (1981)); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). This standard requires the Agency to demonstrate that the facts it seeks to establish are more likely than not to be true. *Fernandez*, 1999 NOAA LEXIS 9, at **8-9 (NOAA Aug. 23, 1999). To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence. *Cuong Vo*, 2001 NOAA LEXIS 11, at *17 (citing *Reuben Paris, Jr.*, 4 O.R.W. 1058, (NOAA 1987).

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.” *Tommy Nguyen*, 2012 NOAA LEXIS 2, at *21 (NOAA 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). The Administrative Law Judge must independently determine an appropriate penalty, “taking into

¹⁷ “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).

¹⁸ “Regional Administrator” means the Administrator, Northeast Region, NMFS, or a designee. 50 C.F.R. § 648.2.

¹⁹ Selection letters to vessel owners will specify notification procedures. 50 C.F.R. § 648.11(b).

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).

C. 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 (incorporating statutory civil and criminal penalty provisions, and civil forfeiture provisions). The amount of the civil penalty cannot exceed \$140,000. 16 U.S.C. § 1858(a); *see* Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, 104 Stat. 890, *amended by* Debt Collection and Improvement Act of 1996, Pub. L. 104-134, 110 Stat. 1321; 5 C.F.R. § 6.4(e)(14) (effective for violations that occurred between December 11, 2008, and December 6, 2012); 73 Fed. Reg. 75,321, 75,322 (Dec. 11, 2008); 77 Fed. Reg. 72,915, 72,917 (Dec. 7, 2012). 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 the civil penalty, the Act identifies certain factors to consider.

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

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

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

15 C.F.R. § 904.108(a).

For enforcement cases charged on or after March 16, 2011, the Agency utilizes the “Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions” (“Penalty Policy”) to calculate a civil penalty. 76 Fed. Reg. 20,959 (Apr. 14, 2011) (*available at* http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf.) Under this Penalty Policy, penalties are based on two criteria:

(1) A “base penalty” calculated by adding (a) an initial base penalty amount . . . reflective of the gravity of the violation and the culpability of the violator and (b) adjustments to the initial base penalty . . . upward or downward to reflect the particular circumstances of a specific violation; and (2) an additional amount added to the base penalty to recoup the proceeds of any unlawful activity and any additional economic benefit of noncompliance.

Penalty Policy at 4. The “initial base penalty” amount consists of two factors, collectively constituting the seriousness of the violation: (1) the gravity of the prohibited act that was committed; and (2) the alleged violator’s degree of culpability (assessing the mental culpability in committing the violation). *Id.* The “gravity” factor (also referred to as “gravity of the violation” or “gravity-of-offense level”) is comprised of four or six (depending upon the particular statute at issue) different offense levels, reflecting a continuum of increasing gravity, taking into consideration the nature, circumstances, and extent of a violation.²⁰ Thus, offense level I represents the least significant offense level, and offense level VI represents the most significant offense level. *Id.* at 6-8.

The “culpability” factor (also referred to as “degree of culpability”) is comprised of four levels of increasing mental culpability: unintentional activity (such as an unplanned act or one that results from accident or mistake); negligence (such as carelessness or a lack of diligence); recklessness (such as “a conscious disregard of substantial risk of violating conservation measures”); or an intentional act (such as “a violation that is committed deliberately, voluntarily, or willfully”). *Id.* at 6, 8-9.

These factors are depicted in a penalty matrix, with the “gravity” factor represented by the vertical axis of the matrix and the “culpability” factor represented by the horizontal axis of the matrix. *Id.* at 6. The intersection point from the levels used in each factor will identify a penalty range on the matrix. The midpoint of this penalty range determines the “initial base penalty” amount. *Id.* at 7. Once an “initial base penalty” amount is determined, “adjustment factors” will be considered to move up or down (or not at all) from the midpoint of the penalty range, or to move to an altogether different penalty range. *Id.* at 10. The “adjustment factors” are: an alleged violator’s history of non-compliance; whether the alleged violator’s conduct involves commercial or recreational activity; and the alleged violator’s conduct after the violation. *Id.* . Next, the proceeds gained from unlawful activity and any additional economic benefit of non-compliance to an alleged violator are considered and factored into the penalty calculation (such as: the gross value of fish, fish product, or other product illegally caught, or revenues received; delayed costs; and avoided costs). *Id.* at 12-13.

V. ANALYSIS

²⁰ Where a violation and corresponding offense level are not listed in the Penalty Policy, the offense level is determined by using the offense level of an analogous violation or by independently determining the offense level after consideration of the factors outlined in the Penalty Policy. Penalty Policy at 7-8.

A. Parties' Arguments

The Agency argues that it presented sufficient evidence to substantiate liability in this case. Specifically as to Counts I and II, the Agency contends that the undisputed evidence shows that Respondent's vessels, the F/V Double Vision and F/V Doubled Vision, fished on multiple occasions (six and eight, respectively) between June 25 and July 6, 2010, without carrying an observer. Agency's Post-Hr'g Initial Br. 4-5. The Agency notes that Respondent's primary challenge to Counts I and II deal with the timing of his receipt of the selection letters that were delivered on June 24, 2010, and argues that such claims are unpersuasive and not supported by documentary evidence, but based simply on Respondent's recollection of the events that transpired more than three years ago. *Id.*

As to Counts III and IV, the Agency contends that the undisputed evidence shows that Respondent's vessels, the F/V Double Vision and F/V Doubled Vision, fished on numerous occasions (34 and 42 times, respectively) between July 6 and September 15, 2010, without carrying an observer. *Id.* at 5-7. The Agency claims that, in a July 6, 2010 conversation with Walker, Respondent told Walker that he would contact him again on July 12, 2010, to arrange for observer coverage aboard his vessels, but failed to follow through on his commitment. *Id.* at 5-6. Further, the Agency asserts that Respondent failed to respond to subsequent attempts to reach him by Gaffney and Walker. *Id.* 5-6. The Agency argues that Respondent's claims—that he had been granted permission by Walker to fish without an observer between July 6 and July 12, and that Walker agreed to have observers available at the dock on July 12 to observe Respondent's fishing trips out of Shinnecock—are unpersuasive and not substantiated by any documentation or contemporaneous record. *Id.* at 6. Further, they are contradicted by Walker's report of what transpired during the July 6, 2010 conversation with Respondent. *Id.* The Agency also contends that Respondent's claim is inconsistent with the evidence presented by Walker and Amy Martins "that AIS had been tasked to place observers on extra-large gill net vessels during this time period and had been unable to do so." *Id.*

With regard to penalty, the Agency asserts it assessed a proposed penalty that is consistent with its Penalty Policy and that "[t]he Respondent's reckless disregard for the law highlights the need to assess a penalty that will encourage future compliance."²¹ *Id.* at 7. The Agency explains that the data collected by the Observer Program "is critical to making decisions regarding the management of federal fisheries and, specifically, bycatch monitoring in various fisheries." *Id.* Fisheries are classified by certain categories, including geographic area and gear type, and observer coverage "targets" are then established and communicated to the observer service provider. *Id.* at 7-8. The Agency states that "it is important to the integrity of the data that coverage is spread out across active fishery participants . . . [and] that observer coverage targets are met during the time period they are set as the data collection opportunity will be missed otherwise." *Id.* Further, when vessels do not timely comply with observer coverage requirements, the data the Agency seeks to collect is compromised, as was the case here because Respondent's actions "contributed to the lost opportunity for the Agency to collect any data from

²¹ While the Agency refers in its brief to its Penalty Policy, and provides a citation to locate a copy of the Penalty Policy on the Internet, the Agency did not introduce a copy of the Penalty Policy into evidence at the evidentiary hearing.

the extra-large mesh gillnet fishery in the Mid-Atlantic during the period of June through September 2010.” *Id.* at 8-9. The Agency contends the extent of the violation is significant because Respondent was directly notified of the need to carry an observer but failed to do so, and Respondent failed to respond to Agency attempts to reach him after his vessels were selected for observer coverage. *Id.* Lastly, the Agency argues against a reduction of the penalty, noting that Respondent made no effort to come into compliance despite the Agency’s attempts to reach him, and has not taken responsibility for the violations at issue. *Id.* at 10.

In his Post-Hearing Initial Brief, Respondent argues, as a threshold matter, that the Agency is barred from assessing any penalty in this case because it violated requirements of the Paperwork Reduction Act (“PRA”) by failing to include “a proper PRA warning” and Office of Management and Budget (“OMB”) Control Number on the observer program selection letters that were sent to Respondent regarding the F/V Double Vision and F/V Doubled Vision. Resp’t’s Post-Hr’g Br. 2-4. Specifically, Respondent argues that the Agency failed to comply with 44 U.S.C. § 3512, which provides as follows:

(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this subchapter if—

(1) the collection of information does not display a valid control number assigned by the Director in accordance with this subchapter; or

(2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

(b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.

Implicit in Respondent’s argument is the premise that the observer program selection letters “constitute PRA requests for information” for which, as Respondent argues, the Agency failed to display the requisite OMB Control Number (a number that serves to “alert citizens to the validity of the request and the need to comply”). *Id.* As a result of the claimed failure, Respondent asserts the Agency should be precluded from imposing any fine or penalty in this case. *Id.* at 4. In support of this argument, Respondent refers to a document titled “Supporting Statement[,] NMFS Observer Programs’ Information That Can Be Gathered Only Through Questions[,] OMB Control No. 0648-xxxx,” to show that “direct inquiries to the captain and crew of the vessel, are, under the PRA, collections of information.” *Id.* at 3; RX 14; RX 15; RX 16.

Additionally, Respondent points to what appear to be sample observer coverage selection letters to permit holders from the Southeast Fisheries Science Center that contain an OMB Control Number and “Paperwork Reduction Act Statement,” to illustrate that the “[t]he Agency has actually acknowledged to OMB the requirements to place PRA warnings on observer

letters.” Resp’t’s Post-Hr’g Br. 3; AX 19 at 156-158; AX 20 at 159-164. These letters appear to relate to a November 13, 2012 request by the Agency to OMB for an “extension without change of a currently approved collection [of information, under PRA]” (hereinafter referred to as the “OMB Submission”) to include Observer Notification Forms from the Southeast Pelagic Observer Program, and are, presumably, examples of such observer notification forms from that southeast program. AX 18 at 1-4; AX 19 at 156-158; AX 20 at 159-164, 169-171. These letters include a reference to “Enclosures” and are followed by various forms either requiring or requesting completion by a member of the public, presumably the captain or operator of the vessel. AX 20 at 159-168. Notably, the “Paperwork Reduction Act Statement” that appears on these letters states, in pertinent part, that:

[U]nder the Paperwork Reduction Act (PRA) regulations at 5 C.F.R. 1320.3(h)(3), facts or opinions obtained through such observations and communications are not considered to be “information” subject to the PRA. The public reporting burden for responding to the questions that observers ask and that are subject to the PRA is estimated to average 65 minutes per trip, including the time for hearing and understanding the questions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

AX 19 at 156-158; AX 20 at 159-164, 169-171.

Turning to the merits of this case, Respondent argues that his vessels were not required to carry an observer until he “actually received the selection letter,” which occurred on July 6, 2010. Resp’t’s Post-Hr’g Br. 5. Thus, violations of 50 C.F.R. 600.725 that are alleged for “fish[ing] without an observer when the vessel is required to carry an observer” prior to July 6, 2010, are unfounded. *Id.* In support, he refers to the content of the selection letters in this case which state “[u]pon receiving this request . . . the owner or operator of the vessel must notify NOAA Fisheries or the appropriate NOAA Fisheries-authorized representative prior to commencing the next fishing trip.” *Id.* at 4-5; AX 4; AX 5. Moreover, Respondent argues that immediate compliance with such notification is not feasible, particularly for a smaller vessel operation, like Respondent’s, that lacks full-time staff to monitor mail, and he further notes that owners and captains of such operations “frequently have other jobs, creating a lapse between delivery at home and actual receipt by the intended recipient.” Resp’t’s Post-Hr’g Br. 5-6.

Respondent contends that after he opened the observer program selection letter on July 6, 2010, and in light of the fact that his vessels were being kept on private property and fishing out of Moriches at the time, he contacted Walker to request that “any observer obligation be deferred until the vessels returned to Shinnecock the following weekend.” *Id.* at 6-7. Respondent contends that he made arrangements with Walker “to defer observer coverage until July 12, when the vessel[s] would be fishing from Shinnecock,” and that Walker, in effect, granted him “the waiver provided for in the observer selection letters.” *Id.* at 9-10. Thus, Respondent argues that he did not violate the observer program regulations, alternately that any violation was unintentional. *Id.* at 9-10.

As to the penalty, Respondent argues that the Agency “does not explain how they arrived at their proposed penalty, other than by alluding to their penalty policy, which has not been introduced, and have thus not provided any argument in support of their proposed penalty.” Resp’t’s Post-Hr’g Br. 10. Nevertheless, Respondent makes several arguments concerning factors that, while not identified in the Act or Agency regulations, are explored in the Agency’s Penalty Policy that was provided to Respondent as part of the Agency’s PPIP. Specifically, Respondent generally argues: there was no harm to the resource at issue (“harm to the resource” is referenced in the Agency’s Penalty Policy at page 8); there was no seizure of fish as all fish were legally caught and landed (seizure of illegal catch or product is referenced in the Agency’s Penalty Policy at pages 12-13); there was no economic benefit derived from the violations (“economic benefit” is referenced in the Agency’s Penalty Policy at pages 12-13); and he suggests he did not fail to cooperate (cooperation/noncooperation is referenced in the Agency’s Penalty Policy at page 12). *Id.* at 12-14.

Further, Respondent argues that the proposed penalty of \$70,000 is excessive. Specifically, Respondent asserts that “given the unintentional nature of the violations alleged, lack of harm to the resource, acknowledgement of his responsibility to carry observers, as he has more than 45 times over the past ten years, and his compliance with all other regulatory requirements” the proposed penalty is “so grossly disproportionate to the violation alleged” so as to violate the Eighth Amendment to the United States Constitution prohibiting the imposition of excessive fines. *Id.* at 10-11. While Respondent agrees that “the collection of observer data is an important Agency function which benefits all fisherman and the resource,” he argues the alleged violations were of a technical nature for which there was no harm or damage. *Id.* at 12. He argues that “at worst the alleged violations resulted from a failure to communicate between [Respondent] and Mr. Walker.” *Id.* at 13. Further, he asserts that “[t]he violations are the same error repeated over a period of time,” resulting in “crippling fines that far exceed the harm alleged by the Agency.” *Id.* at 13. Respondent urges that “if the Court finds his conduct fell short of compliance, it assess fines in light of his long history of carrying observers, lack of prior violations, acknowledgment of importance of carrying observers and his obligations to do so, his longstanding involvement in the fishery management process and the limited income derived from commercial fishing,” which Respondent contends should be “significantly less than that proposed by the Agency.” *Id.* at 15, 21.

In reply, the Agency argues that the PRA does not apply to the violations charged or the penalty assessed. Agency’s Reply Br. 2-5. While the PRA provides public protection to preclude the imposition of a penalty for failing to comply with a collection of information subject to the PRA (when a valid control number is not displayed on the collection request or the agency has not informed the recipient of such a request that response is not required unless a valid control number is displayed), the Agency asserts, first, that the selection letters at issue in this case were not collections of information subject to the PRA, and second, that even if they were, the penalty assessed in this matter was not based on a failure to comply with a collection of information. *Id.* at 2.

The Agency contends that a collection of information “seeks answers to questions,” which the selection letters sent to Respondent did not do. *Id.* at 3. Rather, the selection letters “merely notified [Respondent] that his vessels had been selected for observer coverage and, in

that way, implemented a requirement that [Respondent] already had under the [Act], its implementing regulations, and the terms of his permit, to carry an observer if selected for observer coverage.” *Id.* With regard to Respondent’s reliance upon the OMB Submission to establish his claim that the selection letters are collections of information that are subject to the PRA, the Agency argues that the supporting statement it included with that OMB Submission, which was titled “Supporting Statement[,] NMFS Observer Program’s Information That Can Be Gathered Only Through Questions[,] OMB Control No. 0648-0593,” expresses that the clearance sought from OMB was for “information collected by the observer programs in the form of *questions, forms and questionnaires*, including questions asked by observers of the Captain or crew during their deployment aboard the fishing vessel.” *Id.* at 4; AX 18 at 8; RX 14 at 1. Furthermore, it asserts that while many forms used by the observer program were included in the OMB Submission, the observer selection letters sent to Respondent, as a participant in the Northeast Fisheries Observer Program, were not among the included forms. Agency’s Reply Br. 4. It also notes that the “the observer selection letters that were included in the 2012 submission to OMB had forms associated with them that recipients were required to complete.” *Id.* at 4; AX 18 at 1-4; AX 20 at 159-176 (see enclosed forms: Shrimp-Observer FAX Notification Form, Observer Evaluation, Safety Check Off Form, Safety Check Off Form Station Bill). Lastly, the Agency argues that the penalty it assessed was not based on a failure to comply with a collection of information subject to the PRA, that is, for failing to comply with the selection letters themselves, but rather for failing to comply with the Act, the Act’s implementing regulations, and Respondent’s permit conditions. Agency’s Reply Br. 5.

In reply to Respondent’s argument that he was not required to carry an observer prior to July 6, 2010 because he did not open the selection letter (and thereby receive notice of it) until that date, the Agency states it is an unreasonable interpretation of the notice requirement. *Id.* at 7. The Agency argues that such a position is “one that would, when taken to its logical conclusion, mean that a commercial fisherman could avoid the requirement that he contact the observer program to arrange for observer coverage and, by extension, the observer coverage requirement, forever by simply refusing to ever open his mail.” *Id.* Further, the Agency submits that the Respondent’s interpretation of effective notice is “inconsistent [with] other rules that equate delivery with service,” citing Federal Rule of Civil Procedure 5(b)(2) as an example. *Id.* (citing Fed. R. Civ. P. 5(b)(2)).

The Agency also challenges Respondent’s contention that, during the July 6, 2010 conversation with Walker, he was granted a waiver of the observer requirement until July 12, 2010, arguing that such a position is “completely inconsistent with the testimony and incident reports prepared by [Walker], the other party to the conversation.” *Id.* at 8. Apart from this inconsistency, the Agency contends it is unlikely a waiver would have been granted because of the “the practices and policies of the observer program and the number of seadays that had to be covered in the extra-large mesh gillnet fishery.” *Id.* at 9. Moreover, the Agency notes that Respondent’s testimony confirmed that Walker did not explicitly inform him of a waiver for future trips, but that Respondent assumed he had been granted a waiver. *Id.* at 9 n.6 (citing Tr. at 201).

With regard to Respondent’s contention that he had an agreement with Walker for both vessels to carry observers on July 12, 2010, the Agency argues that not only is this position in

conflict with the testimony and reports of Walker but “it also doesn’t make sense given the days that had been tasked to AIS and the uncertainty that would surround such a plan.” *Id.* at 9. Given the fact that Walker had been tasked with securing observer coverage for vessels fishing with extra-large mesh gillnet gear for a certain number of days, “it wouldn’t have made sense for Mr. Walker to agree to just send observers to the dock in the hopes that the vessels had not already left.” *Id.* at 10. Further, the Agency notes that the lack of predictability in the weather and the fact that Respondent’s vessels did not fish every day would make it “very difficult to be sure, six days in advance, that the vessel would fish on the [sic] July 12, 2010.” *Id.* at 9. The Agency also points out that despite Respondent’s assertion that his practice was to wait a few minutes for an observer to show up on the dock before leaving for the scheduled fishing trip, the record shows that, from June 14 to September 15, 2010, Respondent’s vessels departed for fishing activities at varied times which “would make it very difficult for an observer to catch one of these vessels prior to departure.” *Id.* at 10; AX 9C; AX 10C; JX 1; JX 2.

Lastly, the Agency reiterates that the regulatory responsibility for arranging and facilitating observer placement on a fishing vessel rests with Respondent, the permit holder. Agency’s Reply Br. 11. Respondent knew that it was illegal to fish without an observer once his vessels were selected for observer coverage. *Id.* Yet, when observers did not appear at the dock on July 12, 2010, Respondent failed to contact Walker to clarify the observer requirements and did not return any subsequent calls made to his home by Walker or Gaffney. *Id.*

As to the proposed penalty, the Agency asserts its assessment is reasonable and appropriate. *Id.* at 11-12. In support, the Agency notes that under the Act, “each trip taken by the FV Double Vision and FV Doubled Vision without an observer on board after the vessels had been selected for observer coverage could have been charged as separate violation[s].” *Id.* However, the Agency chose to consolidate a number of counts for each of the vessels. *Id.* The Agency also asserts that even if the Court were to conclude that Respondent’s delay in opening his mail was reasonable, imposition of the proposed penalty of \$35,000 for Counts I and II is sustainable provided that Respondent was determined to have violated the Act “on at least one occasion between June 24 and July 6, 2010” with the F/V Double Vision and F/V Doubled Vision. *Id.* at 12. Similarly, the Agency argues that even if the Court determines that Respondent’s account of his conversation with Walker and his assertion that a waiver was granted until and including July 12, 2010, were reasonable, imposition of the proposed penalty of \$35,000 for Counts III and IV is sustainable provided that Respondent was determined to have violated the Act “on at least one occasion between July 6 and September 15, 2010” with the F/V Double Vision and F/V Doubled Vision. *Id.*

In reply, Respondent reiterates his contention that the observer selection letters constitute collections of information subject to the PRA, that the Agency failed to adhere to PRA requirements, and that it is therefore barred from imposing fines in this case. Resp’t’s Reply Br. 2-5. He argues that as of 2012 the Agency acknowledged as much by submitting “additional ‘collection of information materials’ to OMB, including a number of observer requests which prominently display the OMB number and PRA warning.” *Id.* at 2. In support of this argument, Respondent again refers to sample letters from the Southeast Fisheries Science Center, previously cited in his Initial Post-Hearing Brief, as well as two other documents. *Id.* at 2; AX 18 at 1-4, 71, 72; AX 19 at 156-158; AX 20 at 159-164, 169-172. Specifically, he cites to a

portion of a document, presumably relating to either the Pelagic Observer Program or the Shark Observer Program (given the return mail instructions on the document) from the southeast fisheries region, containing a certification statement and a PRA statement that refers to an OMB Control Number. He also cites to a second document titled "Paperwork Reduction Act Statement for the At-Sea Hake Observer Program," from the northwest fisheries region that also bears an OMB Control Number. Resp't's Reply Br. 2; AX 18 at 71-72. Respondent notes (referring to PRA requirements) that although the Agency "started to bring itself into compliance in March 2012" with respect to the Southeast and Northwest regions, it failed to do so in the Northeast region where the instant violation occurred. Resp't's Reply Br. 4.

In reply to the Agency's argument that the observer selection letters included in the OMB Submission (seeking OMB clearance of an extension of an approved information collection request) had enclosed forms that recipients were required to complete, Respondent argues: "[S]uch is not the case. For example, the Southeast Region Letter, Agency Exhibit A19, Pages 156-157 sets out essentially the same information as the observer selection letter in this case, Agency Exhibits A4 & A5, but is more comprehensive and contains both the OMB number and the PRA warning." *Id.* at 4; AX 19 at 156-157. It is worth noting that the letter to which Respondent refers contains a reference to "Enclosures," and while specific forms are not attached to that sample letter, another similar letter included in the Agency's exhibits, and also from the Southeast Fisheries Science Center relating to the shrimp industry, not only contains the same reference to "Enclosures" but also contains attached forms for completion. Resp't's Reply Br. 4; AX 19 at 156-157; AX 20 at 159-176 (*See* Shrimp-Observer FAX Notification Form, Observer Evaluation, Safety Check Off Form, Safety Check Off Form Station Bill).

As to the merits of the case, Respondent reiterates his point that regardless of the fact that the U.S. Postal Service delivered the observer selection letters on June 24, 2010, he did not open the letter until July 6, 2010 and was, therefore, not made aware of the letter's content until that time. Resp't's Reply Br. 5. He also contends that while he was well aware of his obligation to carry observers, he was unfamiliar with written notice to do so in the form of selection letters. *Id.* He reiterates that once he opened the selection letter, he promptly contacted Walker to arrange observer coverage once he returned his vessels to the publicly accessible dock at Shinnecock to fish. *Id.* Respondent maintains he had a firm arrangement with Walker to have observers present on his vessels on July 12, 2010 once he had moved his vessels from Moriches to Shinnecock over the preceding weekend (July 10-11), and that it defies common sense to suggest he would have willingly risked losing a day or more of fishing by placing another call to Walker on July 12 to make plans for a future date on which to carry observers. *Id.* at 6. As to the Agency's argument that "the unpredictability of weather would preclude a discussion on July 6 for arranging an observer trip on July 12," Respondent suggests that such an argument is unpersuasive given the fact that a fisherman's schedule is inherently subject to change given the "vagaries of weather" and changing weather forecasts. *Id.* Respondent asserts "until [fishermen] clear port, it is always uncertain as to whether they may actually fish on any given day." *Id.*

Respondent contends it was not unreasonable that he proceeded with his fishing trip on July 12, 2010, when observers did not appear at the dock to observe the trip. *Id.* at 7. He reiterates that it was a routine practice for observers to arrange coverage of a trip the evening before a trip was to begin. *Id.* In the event an observer failed to show up for the trip, fishing

continued without consequence and arrangements were made by the observer for future coverage. *Id.*

Respondent challenges the Agency's allegation that he failed to return calls from Walker following July 12, 2010, and argues that the record does not support such an allegation. *Id.* As to telephone messages left by Special Agent Gaffney, Respondent contends he did not receive these messages. *Id.* He argues he did not intentionally avoid his obligation to carry observers nor refuse to do so. *Id.* Rather, he attributes the situation to a lack of communication between Walker and himself. *Id.* at 7-8.

As to penalty, Respondent states that the Agency has not sufficiently explained how it arrived at the penalty it proposes in this case. *Id.* at 8. Respondent points out that he has no history of prior violations and "does not require a \$70,000 fine to ensure future compliance." *Id.* Respondent argues that the "fines sought are patently unreasonable even if the apparent misunderstandings constitute a violation." *Id.* at 9. In support of his contention, Respondent points out that his "average day's catch is around \$2,000-\$2,200 per day before fuel, ice and other expenses, meaning the Agency is seeking 50-70% of the gross value of the vessels' catches for the period of time it claims they were in violation." *Id.* Respondent reiterates that the penalty proposed in this case is "so excessive as to be crippling, essentially depriving [Respondent] of a large percentage of [his] income for what, at most, was a miscommunication between [Respondent] and" Walker, and suggests that, at most, he should have been issued a warning rather than the imposition of a fine. *Id.* at 10.

B. Discussion of the Paperwork Reduction Act

As a preliminary matter, Respondent raises an argument that the Agency is barred from assessing a penalty in this case, alleging that it violated the PRA by failing to include a PRA statement (or warning) and OMB Control Number on the observer selection letters sent to him. In support of his argument, he relies upon exhibits relating to the Agency's OMB Submission which contain: sample observer coverage selection letters to permit holders from the Southeast Fisheries Science Center, bearing an OMB Control Number and PRA Statement; a certification statement on another document, presumably from the southeast fisheries region, containing a PRA statement but not an OMB Control Number; and a PRA statement for the At-Sea Hake Observer Program from the northwest fisheries region bearing an OMB Control Number. These documents were part of the Agency's OMB Submission, requesting an "[e]xtension without change of a currently approved collection." *See* Resp't's Post-Hr'g Br. 2-4, Resp't's Reply Br. 2-5; AX 18 at 1-4; AX 19 at 156-158; AX 20 at 159-172. Respondent contends that such inclusion of these documents in the OMB Submission illustrates that the observer selection letters were a "collection of information" and thus subject to the requirements of the PRA. Having carefully considered Respondent's arguments, I do not agree.

The purpose of the PRA is to, among other things, "minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government." *See* 44 U.S.C. § 3501(1). The term "collection of information" is defined in the PRA, in pertinent part, as:

[O]btaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either—

(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes

See 44 U.S.C. § 3502(3). OMB regulations implementing the PRA, found at 5 C.F.R. Part 1320, define “collection of information” as “any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information.” 5 C.F.R. § 1320.3(c). Such a collection of information refers to “the act of collecting or disclosing information, to the information to be collected or disclosed, to a plan and/or an instrument calling for the collection or disclosure of information, or any of these, as appropriate.” 5 C.F.R. § 1320.3(c). It includes “questions posed to agencies, instrumentalities, or employees of the United States, if the results are to be used for general statistical purposes . . . including compilations showing the status or implementation of Federal activities and programs.” 5 C.F.R. § 1320.3(c)(3). The term “information” means “any statement or estimate of fact or opinion, regardless of form or format, whether in numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic or other media,” but the term does not include “[f]acts or opinions obtained through direct observation by an employee or agent of the sponsoring agency or through nonstandardized oral communication in connection with such direct observations.” *See* 5 C.F.R. § 1320.3(h)(3).

In this case, the observer selection letters the Agency sent to Respondent did not seek to collect information from Respondent. The selection letters did not require Respondent to answer questions, provide facts or opinions, or disclose information. Rather, the selection letters served to notify Respondent that his obligation under the Act, its implementing regulations, and under the terms of his fishing permit—to carry an observer aboard his fishing vessels once requested to do so—had been triggered. To satisfy this obligation, Respondent was required to contact the Observer Program and make arrangements for observer coverage in advance of his next fishing trip. None of this activity imposed upon Respondent is the type of burden contemplated and described by the PRA or its implementing regulations.

Nevertheless, Respondent suggests that by including in the OMB Submission example notices sent to fishermen under the observer program which bear an OMB Control Number and PRA statement, the Agency has acknowledged that such notices are collections of information, and, by extension, that the notices sent to Respondent constituted collections of information under the PRA. The Agency, however, has convincingly refuted such claims. Notably, the Supporting Statement that the Agency included with its OMB Submission explains that although observer programs primarily collect data through direct observation or non-standardized oral communication not generally subject to the PRA, they also collect certain information that does require PRA clearance, namely in the form of:

(1) standardized questions of fishing vessels captains/crew . . . , which include gear and performance questions, safety questions, and trip costs, crew size and other economic questions; (2) questions asked by observer program staff/contractors to plan observer deployments; (3) forms that are completed by observers and that fishing vessel captains are asked to review and sign; (4) questionnaires to evaluate observer performance; (5) forms to certify that a fisherman is the permit holder when requesting observer data from the observer on the vessel; and (6) information on reimbursement forms.

AX 18 at 8. The notices Respondent cites for support, specifically the sample observer coverage selection letters to permit holders from the Southeast Fisheries Science Center that contain an OMB Control Number and PRA Statement found at AX 19, pages 156-158, and AX 20, pages 159-176, plainly make reference to “Enclosures.” Of the four sample letters cited, two of the sample letters actually contain the enclosed forms that are to be completed by the recipient. One such sample letter contains the following enclosed forms for completion: Shrimp-Observer FAX Notification Form, Observer Evaluation, Safety Check Off Form, and Safety Check Off Form Station Bill. *See* AX 20 at 165-168. Another sample letter contains the following forms for completion: Reef Fish-Observer FAX Notification Form, Observer Evaluation, Safety Check Off Form, Safety Check Off Form Station Bill, and Observer Performance Evaluation. *See* AX 20 at 172-176. Unlike the selection letters issued to Respondent in the instant case, the sample notices included in the OMB Submission contain forms or requests for information that the recipient is asked to complete, thereby imposing a public reporting burden under the PRA and, hence, the display of an OMB Control Number and PRA statement. *See* Agency’s Reply Br. 4.

Aside from the sample letters discussed above, Respondent relies upon two additional documents: a certification statement, presumably relating to either the Pelagic Observer Program or the Shark Observer Program from the southeast fisheries region, containing a PRA statement that refers to an OMB Control Number, and a second document titled “Paperwork Reduction Act Statement for the At-Sea Hake Observer Program,” from the northwest fisheries region that bears an OMB Control Number. Resp’t’s Post-Hr’g Br. 2; AX 18 at 1-4, 71, 72. The extent to which these unrelated documents support Respondent’s argument is unclear. Both contain a PRA statement and alert the recipient to the estimated reporting burden. For example, the PRA statement on the certification document states “[p]ublic reporting burden for completing the vessel information form above is estimated at 2 minutes per response.” AX 18 at 71. The PRA statement on the second document states—

[t]he public reporting burden for responding to the questions that observers ask and that are subject to the PRA is estimated to average 20 minutes per trip, including time for hearing and understanding the questions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Id. at 72. The plain language of these statements serves to reinforce that the PRA addresses collection of information activities, such as responding to questions or completing forms, neither of which Respondent was asked to do upon receipt of the selection letters sent to him. Accordingly, I am not persuaded by Respondent's argument that the Agency violated the PRA and is therefore barred from assessing a penalty in this case.²²

C. Liability

Several elements of liability are undisputed in this case. Specifically, it is undisputed that Respondent is a "person" with the meaning of the Act, that Respondent owns the vessels involved in this matter, the F/V Double Vision and the F/V Doubled Vision, and that Respondent obtained 2010 fishing permits for these vessels for fisheries that require the permit holder to carry an observer when requested to do so. At issue is whether Respondent, as owner and operator of the F/V Double Vision and F/V Doubled Vision, violated the Act and its implementing regulations, by fishing without an observer after he had been selected to take observers aboard these vessels.²³

The violations alleged encompass two distinct periods of time: June 24, 2010 through July 6, 2010 (with regard to charged counts I and II, relating to the F/V Double Vision and F/V Doubled Vision, respectively) and July 6, 2010 through September 15, 2010 (with regard to charged counts III and IV, relating to the F/V Double Vision and F/V Doubled Vision, respectively). While Respondent does not dispute that he engaged in fishing activities with one or both vessels from June 24, 2010 through September 15, 2010 without carrying an observer, he presents other arguments as challenges to liability that I discuss below. One argument concerns whether, in the conversation between Respondent and Walker on July 6, 2010, the Agency waived the requirement to carry an observer aboard the F/V Double Vision and/or the F/V

²² As an aside, I also note that the penalty proposed by the Agency does not arise from a failure to comply with a collection of information subject to the PRA; rather, it arises from alleged violations of the Act.

²³ Though not specifically addressed by the parties, it is a well-established principle "that an employer may be vicariously liable for its employee's acts committed in the scope of employment while furthering the employer's business." *Tommy Nguyen*, 2012 NOAA LEXIS 2, at *13 (NOAA Jan. 18, 2012); see *United States v. Kaiyo Maru Number 53*, 503 F. Supp. 1075 (D. Alaska 1980), *aff'd*, 699 F.2d 989 (9th Cir. 1983) (owner vicariously liable for violations of captain and crew); *Joseph F. Raposa*, 1995 NOAA LEXIS 43 (NOAA App. 1995) (upholding determination that operator was the owner's agent and owner could be held liable under respondeat superior); *Charles P. Peterson*, 6 O.R.W. 486, 1991 NOAA LEXIS 34 (NOAA 1991) (finding owner and operator of vessel were engaged in a joint venture and therefore each was vicariously liable for the violations of the other); Restatement (Third) of Agency § 7.03(2) (2006). Consequently, Respondent, as the employer of other operators or boat captains used to operate one or more of his fishing vessels, including the F/V Doubled Vision, is subject to liability for the actions of his employees.

Doubled Vision until July 12, 2010. For clarity, I discuss liability as it relates to each distinct period of time at issue in this case.

i. June 24, 2010 through July 6, 2010

On June 22, 2010, the Agency mailed to Respondent observer selection letters (one letter for each vessel) that notified Respondent his vessels, F/V Double Vision and F/V Doubled Vision, had been selected to carry an observer on the next fishing trip. It is undisputed that these letters were delivered to Respondent on June 24, 2010. As a consequence, Respondent's obligation under the Act and its implementing regulations—to carry an observer once requested to do so by NMFS—was triggered. *See* 16 U.S.C. §§ 1881b(a), 1857(1)(A), 1853(b)(8); 50 C.F.R. § 648.11(a). Further, NOAA's regulations state that it is unlawful to fish without an observer when the vessel is required to carry an observer. 50 C.F.R. § 600.725(s).

Respondent contends, however, that he did not become aware that his vessels had been selected for observer coverage until July 6, 2010, when he physically opened the mail containing the letter(s).²⁴ Respondent asserts he was not required to carry an observer until he received actual notice of the content of the mailings, which he states happened only after he opened the mail on July 6, and that the violative behavior alleged prior to July 6 is, thus, unfounded. Further, he argues that requiring immediate compliance as of the delivery date of June 24, 2010, is not feasible for a small business operation like his since he does not employ staff to monitor his mail. Respondent also points out that while he knew he was obligated to carry observers when requested, he was unfamiliar with written requests to do so since arrangements for observer coverage in the past had been made through informal verbal conversations with the observer.²⁵ These claims do not defeat the establishment of liability.

Contrary to Respondent's assertion, effective notice is not contingent upon a recipient's willingness to open his mail and read its contents. To impose such a requirement would enable an individual to indefinitely avoid their responsibilities. *See Ho v. Donovan*, 569 F.3d 677, 680 (7th Cir. 2009) (citing *Dusenbery v. United States*, 534 U.S. 161 (2002)) (“The Constitution does not require that an effort to give notice succeed. If it did, then people could evade knowledge, and avoid responsibility for their conduct, by burning notices on receipt—or just leaving them unopened, as Ho did.”). The Seventh Circuit Court of Appeals recently dealt with a similar argument as presented here—“that a document is not ‘received’ until the envelope is opened and the contents read”—in a case addressing a plaintiff who had received notice under the Federal Rules of Civil and Appellate Procedure of an entry of judgment or order. *Khor Chin-Lim v. Courtcall, Inc.*, 683 F.3d 378, 380-381 (7th Cir. 2012). In that case, the court reasoned:

²⁴ Respondent recollected opening only one of the letters, but acknowledges there could have been two letters and does not contest that proof of mailing evidence establishes that two letters were delivered to his home. Tr. 187-88; AX 4 at 3-4; AX 5 at 3-4. Nevertheless, he understood both vessels had been selected to carry an observer and that he needed to arrange observer coverage for both vessels. Tr. 187-189, 212-214.

²⁵ The Agency acknowledged that the use of selection letters to arrange observer coverage is infrequent, in that only three or four letters may be issued in a given month. Tr. 30, 46-48, 108-109

“Delivery to the address on file . . . is the normal meaning of receipt in law. No authority which we are aware holds that a litigant may defer ‘receipt’ of a document by failing to open the envelope containing it.” *Id.* at 381. The court also noted it had recently rejected such a contention in *Ho v. Donovan*, 569 F.3d 677 (7th Cir. 2009). *Id.* Consequently, I am not persuaded by Respondent’s argument.

The fact that Respondent was unfamiliar with receiving notice of observer coverage selection via mail delivery and that he lacked administrative staff to assist him with timely reviewing his mail is equally unpersuasive. As the Agency noted, Respondent, as a commercial fisherman holding a NMFS fishing permit, participates in a highly regulated industry. It has been established that “commercial fishing is regulated and those engaged in it for profit activities are required to keep abreast of and abide by the laws and regulations that affect them.” *See Dennis D. O’Neil*, 1995 NOAA LEXIS 20, at **7-8 (NOAA June 14, 1995). As such, it is reasonable to expect Respondent to remain alert to mailings from the very agency that regulates his fishing activities. Furthermore, Respondent’s testimony at the hearing concerning the delay in opening his mail was attributed to a practice followed in his home to place received mail into a bin that Respondent would sporadically sort through when he had spare time, had to pay bills, or when the bin was overflowing. Given this irregular process for handling incoming mail, I considered and recognize that in 2010 Respondent maintained his commercial fishing operation (consisting of three vessels, two of which relate to this case) concurrently with employment as a firefighter. Nevertheless, Respondent’s presumably busy schedule did not obviate the need to exercise due diligence in the management of his fishing operation, which would include the timely review of mail. Here, Respondent did not physically open and review the observer selection letters until 12 days after delivery. During that 12-day delay, Respondent continued to engage in fishing activities with both vessels and without carrying an observer on either vessel, contrary to his legal obligations as reiterated in the letter(s). Specifically, from June 24, 2010 through July 6, 2010, Respondent fished with the F/V Doubled Vision seven times and fished with the F/V Doubled Vision nine times.

Respondent’s argument that “strict compliance” with the observer selection letters is impossible, because “a letter could be delivered minutes after a captain left for his boat, making him non-compliant with no opportunity to have complied,” is also not persuasive. Resp’t’s Post-Hr’g Br. 6. Leaving hypotheticals aside, the evidence in this case does not show that it would have been impossible for Respondent to comply with the law. The selection letters were delivered to Respondent, and were therefore legally received, on June 24, 2010. AX 4 at 4; AX 6 at 4; *see Khor Chin-Lim*, 683 F.3d at 381 (concluding a document is “received” under the Federal Rules of Appellate Procedure upon delivery). The F/V Double Vision and F/V Doubled Vision both sailed the morning of June 25, 2010. AX 9C at 1; AX 10C at 1. Though perhaps inconvenient, it would not have been *impossible* for Respondent to have delayed the June 25th fishing trips in order to obtain observer coverage for his vessels.

Moreover, it is worth noting, as the Agency has argued, that under the Act, “each trip taken by the F/V Double Vision and F/V Doubled Vision without an observer on board after the vessels had been selected for observer coverage could have been charged as a separate violation.” Agency’s Reply Br. 11; *see* 16 U.S.C. § 1858(a) (“Each day of a continuing violation shall constitute a separate offense.”). Instead, the Agency consolidated the alleged multi-day

violations into a single count for each vessel and for each time period.²⁶ Thus, to support the charged violations, the preponderance of the evidence must establish a single violation for each vessel for each time period. The undisputed facts of this case reveal that Respondent engaged in fishing activity without an observer aboard both vessels over multiple days from delivery of the observer selection letters *through* July 6, 2010. Specifically, such fishing activity took place aboard the F/V Double Vision on June 25, June 26, June 29, July 1, July 2, July 3, and July 6, 2010, and aboard the F/V Doubled Vision on June 25, June 26, June 28, June 29, June 30, July 1, July 2, July 5, and July 6, 2010.²⁷ Given the extent of fishing activity that transpired during the 12-day period in which Respondent left his mail unopened, Respondent's impossibility argument becomes even less convincing. In fact, the evidence shows Respondent continued to fish with both vessels through the morning of July 6, 2010, after which he opened the observer selection letter(s) and then contacted Walker to arrange observer coverage. *See* Tr. 186-187; AX 6; JX 1; JX 2 (Fishing Vessel Trip Reports). Therefore, the undisputed evidence shows that ample time for compliance existed in this case, and that Respondent could have complied with the observer selection notification had he acted reasonably and with due diligence by timely reviewing his mail.

Accordingly, after a careful and thorough review of the evidence in this matter, I conclude that the Agency has established by a preponderance of the evidence that Respondent violated the Act and its implementing regulations by engaging in fishing activities aboard his vessels, the F/V Double Vision and F/V Doubled Vision, without carrying an observer during the period of June 24, 2010 through July 6, 2010.

ii. July 6, 2010 through September 15, 2010

The undisputed facts of this case show that from July 6, 2010 through September 15, 2010, Respondent engaged in fishing activities with the F/V Double Vision and F/V Doubled Vision without an observer on board either vessel. Specifically, the F/V Double Vision engaged in fishing activity without an observer on July 7, 8, 9, 10, 12, 16, 19, 20, and 23, August 2, 3, 4, 5, 6, 8, 9, 10, 12, 13, 15, 17, 18, 22, 25, 26, 27, 29, 30, and 31, and September 1, 6, 7, 9, and 14. JX 1. The F/V Doubled Vision engaged in fishing activity on July 7, 8, 9, 12, 13, 16, 17, 19, 20,

²⁶ As previously mentioned, the NOVA in this matter contains 4 counts, each alleging violations of "fishing without an observer when the vessel was required to take an observer in violation of 50 C.F.R. § 600.725(s)." NOVA at 1-2. Count I pertains to the F/V Double Vision "between on or about June 24, 2010 and on or about July 6, 2010." *Id.* at 1. Count II pertains to the F/V Doubled Vision "between on or about June 24, 2010 and on or about July 6, 2010." *Id.* Count III pertains to the F/V Double Vision "between on or about July 6, 2010 and on or about September 15, 2010." *Id.* at 2. Count IV pertains to the F/V Doubled Vision "between on or about July 6, 2010 and on or about September 15, 2010." *Id.*

²⁷ As previously stated in note 12, for purposes of ascertaining the days on which Respondent conducted fishing activities aboard the F/V Double Vision and/or F/V Doubled Vision, I have placed greater reliance on the Fishing Vessel Trip Report[s] received into evidence at AX 9C, AX 10C, JX 1, and JX 2 rather than the "Dealer Report[s]" received into evidence at AX 9D and AX 10D.

22, 26, 27, and 28, August 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 15, 17, 18, 21, 25, 26, 27, 30, and 31, and September 1, 6, 7, 9, 10, 11, 12, 13, 14, and 15. JX 2.

In defense to liability, Respondent argues that during his telephone conversation with Walker on July 6, 2010, Walker granted him a waiver from his obligation to carry an observer from July 6, 2010 to July 12, 2010, at which time he had planned to carry observers aboard the F/V Double Vision and F/V Doubled Vision. When observers did not appear on July 12, 2010, Respondent argues it was reasonable for him to continue fishing without an observer because the process for arranging coverage had typically been an informal one and because, in the past, when an observer did not show up the observer would simply arrange another trip.

The evidence presented reveals some conflict as to the details of the telephone conversation between Respondent and Walker on July 6, 2010. According to Respondent, once he opened the observer selection letter(s) on July 6, 2010, he promptly contacted Walker by telephone to arrange observer coverage for his vessels. He asserts that since his vessels were on private property (thereby inaccessible for observer boarding) and fishing out of Moriches at that time, his desire was to arrange for observer coverage once his vessels were moved to a public dock in Shinnecock²⁸ (about 14-15 miles from Moriches) the following weekend, that is July 10-11, 2010. Tr. 168, 178-179. He asserts that he informed Walker of his situation and suggested that he carry observers once his vessels were moved to Shinnecock, which, to Respondent, meant Monday, July 12, 2010. *Id.* Respondent contends Walker expressed agreement with this plan of action and, as such, Respondent fully expected to carry observers on the F/V Double Vision and F/V Doubled Vision on July 12, 2010. *Id.* Consequently, Respondent believed he had been excused from his obligation to carry an observer aboard his vessels until July 12, 2010, hence his current argument that the Agency waived the requirement until that time.

Walker, on the other hand, had a different account of the July 6 telephone conversation. According to a report Walker completed nine days later, on July 15, 2010, that addressed the F/V Double Vision, Walker recollected that Respondent had contacted him in the afternoon of July 6, 2010 to explain that his vessel was not in Shinnecock at that time but that he was moving the vessel to Shinnecock the weekend of July 10-11 and would contact Walker on Monday to arrange observer coverage. AX 6. In that report, Walker stated that he did not inquire of Respondent whether he would be fishing before he moved the vessel “because it was [Walker’s] understanding that [Respondent] was taking the boat to Shinnecock to fish there.” *Id.* Aside from the July 15, 2010 report Walker completed, he had no independent recollection of the conversation at the evidentiary hearing in this matter, other than the fact that the conversation took place. Tr. 45–46. In a subsequent report, dated July 16, 2010, that addressed the F/V Doubled Vision, Walker stated that in the conversation he had with Respondent on July 6, 2010, only the F/V Double Vision was discussed. AX 7. However, Walker was “sure he got the selection letter on the Doubled Vision since he did receive the letter on the Double Vision.” *Id.* Following the July 6, 2010 conversation, Walker expected to receive a phone call from Respondent on July 12, 2010, to arrange future observer coverage.

²⁸ Shinnecock was the area for which NMFS needed observer coverage in 2010, due to the limited amount of gill net fishing there.

While I am tasked with resolving material conflicts presented in the evidence, I need not resolve conflicts that are not material to the outcome, as is the situation here. The Agency consolidated the alleged multi-day violations of this case into a single count for each vessel and for each time period. To establish liability for the relevant time period, the preponderance of the evidence must show that on at least one occasion, with each vessel, Respondent violated the Act and its regulations by fishing without an observer between July 6, 2010 and September 15, 2010. As such, whether or not Respondent was granted a waiver to defer observer coverage from July 6 to July 12 is not dispositive as to his liability for the period from July 6 through September 15.

Nevertheless, in response to Respondent's argument concerning waiver, the regulations identify specific circumstances that justify the grant of a waiver, namely, when the vessel's facilities for the observer's housing or for carrying out observer functions "are so inadequate or unsafe that the health or safety of the observer, or the safe operation of the vessel, would be jeopardized." 50 C.F.R. § 648.11(c). The undisputed facts of this case show that the regulatory requirements for granting a waiver were not met. Instead, the underlying basis for the alleged waiver related to the location of Respondent's vessels and his representation that he would be moving his vessels to a publicly accessible dock in Shinnecock where observers could more easily be deployed. Agency regulations would not have authorized a waiver of the observer requirements under such circumstances. Further, assuming, for the sake of argument, that Walker had granted Respondent a waiver to defer observer coverage from July 6 until July 12, in spite of the lack of clear authority to do so under Agency regulations, the granting of such a waiver would not defeat the entire period of liability I must consider. Thus, I do not find Respondent's argument of waiver as a defense to liability persuasive in this matter.

Irrespective of whether Respondent was granted a waiver by the Agency, meaning an agreement to defer observer coverage from July 6, 2010 until July 12, 2010, the evidence establishes that Respondent continued to engage in fishing activities over a two-month period with both vessels, and without an observer, contrary to his obligations under the Act, its implementing regulations, and his permit requirements. Respondent argues it was reasonable to continue fishing without an observer beyond July 12, 2010, given the informal process utilized to arrange observer coverage. The preponderance of the evidence presented in this case supports Respondent's contention that the Agency typically relied upon an informal process to arrange observer coverage by having the observer call the vessel owner directly to set up a trip, or by the observer presenting at the dock to request to observe a trip that is about to take place or make arrangements to observe a future trip. Tr. 30, 43-44, 46-48, 169-170, 179, 181-182. However, the evidence does not support Respondent's claim that it was reasonable to continue fishing over the course of two months without securing observer coverage for his vessels in violation of the law to which he was bound.

Regardless of the lack of formality by which observer coverage was arranged, the obligation to effectuate such coverage rested entirely with Respondent. 50 C.F.R. § 648.11(b) provides: "If so requested to carry an observer, it is the vessel owner's responsibility to arrange for and facilitate observer placement." Yet, beyond his July 6, 2010 conversation with Walker, Respondent failed to make any further effort to ensure observer placement on his vessels. Arguably, the informal process to which Respondent refers should have simplified efforts to arrange observer coverage. But, as the facts of this case show, when observers did not appear on

July 12, 2010, to observe Respondent's fishing trips, his reaction was simply to continue fishing with both vessels without taking further action to arrange for observer coverage. Of particular significance is that from July 12, 2010 through September 15, 2010, Respondent continued to fish on 29 occasions with the F/V Double Vision and on 38 occasions with the F/V Doubled Vision, all without carrying an observer. During this time, Respondent did not attempt to reach Walker, nor did he attempt to arrange coverage directly with an observer. When asked at the evidentiary hearing whether Respondent ever tried to reach Walker or anyone else in the observer program to find out why no observers appeared at the dock on July 12, 2010, or to take steps to arrange coverage on a future trip, Respondent testified: "No, I never did, and I never did in the past with any of the other cancellations or whatever you want to call them. Just when they want to go, they come." Tr. 223. Respondent's explanation, however, attempts to deflect to the Agency the responsibility expressly assigned to him under the law. The burden to effectuate observer coverage rested with Respondent as the vessel owner, not the Agency. Further, the mere lack of formality in the process by which observers were placed on vessels did not diminish Respondent's legal responsibility to ensure that such coverage was arranged on his vessels. Of note, it was not until December 5, 2010, that the F/V Double Vision carried an observer, and it was not until April 27, 2011, that the F/V Doubled Vision carried an observer.

Consequently, after having carefully considered all the evidence adduced at hearing, I have concluded that the Agency has established by a preponderance of the evidence that Respondent violated the Act and its implementing regulations, by engaging in fishing activities aboard his vessels, the F/V Double Vision and F/V Doubled Vision without carrying an observer during the period of July 6, 2010 through September 15, 2010.

D. Civil Penalty Assessment

Having determined that Respondent is liable for the charged violations, I must next determine the appropriate amount, if any, to impose as a civil penalty for the 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." *Tommy Nguyen*, 2012 NOAA LEXIS 2, at *21 (NOAA 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.²⁹

As noted previously, the Agency referred to and included a copy of its Penalty Policy in its PPIP, which was provided to Respondent as part of the pre-hearing exchange of information.

²⁹ While "ability to pay" is a factor that may be considered when determining penalty, Respondent did not raise such claim in this case. See 15 C.F.R. § 904.108.

In its Post-Hearing Initial Brief, the Agency made reference to its Penalty Policy, including a citation for its location on the Internet. Agency's Post-Hr'g Br. 7 n.2. In his Post-Hearing Initial Brief, while questioning how the Agency calculated the penalty it proposed, Respondent correctly noted that the Agency did not introduce into evidence a copy of its Penalty Policy during the evidentiary hearing in this matter. Resp't's Post-Hr'd Br. 10. Nevertheless, Respondent's arguments as to penalty address various considerations that, while not contained in the Act or Agency regulations, are explored in the Agency's Penalty Policy. Thus, it would appear that Respondent was not only aware of the Agency's Penalty Policy but also relied on aspects of it in formulating some of his arguments concerning what penalty amount, if any, to assess in this case. *See id.* at 12-15. Given these particular circumstances, it is appropriate that I not exclude the Penalty Policy entirely from my consideration even though it was not introduced into the evidentiary record. Accordingly, I have given some consideration to the Agency's Penalty Policy, but I have placed greater reliance on the factors set forth in the Act and Agency regulations in assessing a penalty in this case.

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. Indeed, Respondent has acknowledged as much and offered that, as a member of the Monkfish Advisory Panel, a joint panel for both the New England Fishery Management Council and the Mid Atlantic Fishery Management Council, he utilizes the data collected by the program in his advisory duties. Tr. 176-178. The Agency relies on the information collected through the Observer Program for multiple reasons, including stock assessments for protected species and fish stock as well as for purposes of monitoring compliance. It reviews prior fishing efforts to determine what species are critically important in monitoring, and then develops a schedule for a fishing year that identifies the type of coverage it seeks through the Observer Program.

In this case, the Agency needed data to be collected in the 2010 fishing year for extra-large mesh gill net fishing in order to meet its fishery management objectives. Given the limited amount of gill net fishing in the general area, the Agency chose to send Respondent observer selection letters in an effort to secure the necessary coverage for the targeted fishery. Tr. 30, 47-48, 100-101; AX 23. When Respondent failed to timely effectuate observer coverage for his vessels, the negative impact his actions had on the Agency were significant, especially since the Agency could not make up the deficiency by increasing the amount of coverage at a later time or by repeatedly relying on other vessels to carry observers. Tr. 101-104. As a result, in June and July 2010, although the observer service provider was tasked to complete 10 days of observed trips in the mid-Atlantic region (which included Respondent's fishing area) for extra-large mesh gill net fishing, zero days were completed. Tr. 101, 105-108, 147-149; AX 23 at 1. Similarly, in August and September 2010, the observer service provider was tasked to complete 1 day each month for the same region and type of gill net, but zero days were completed. Tr. 101, 105-108, 123-124, 147-149; AX 11 at 1; AX 23 at 1, 3. Contrary to Respondent's assertion that there was no harm or damage from the violative conduct, the evidence shows that there was, in fact, harm caused by Respondent's failure to carry an observer aboard his vessels in June, July, August, and September 2010. *See* Resp't's Post-Hr'g Br. 12. While I recognize that Respondent was not solely responsible for the Agency's lack of success in reaching its objectives, his actions

contributed to its failure, especially in light of the limited amount of gill net fishing available from which to gather data through the Observer Program. *See* Tr. 48, 50-52 (limited large-mesh gill net fishing). Further, the extent of the violative behavior of fishing without an observer—spanning over the course of multiple months and involving two vessels—was significant and has been considered in my penalty assessment.

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

The duty to know and follow the law is squarely on Respondent. *O'Neil*, 1995 NOAA LEXIS 20, at **7-8 (NOAA June 14, 1995) (“[C]ommercial fishing is regulated and those engaged in it for profit activities are required to keep abreast of and abide by the laws and regulations that affect them.”); *Charles P. Peterson*, 6 O.R.W. 486, 1991 NOAA LEXIS 34, at *9 (NOAA July 19, 1991) (“When one engages in a highly regulated industry, that person bears the responsibility of knowing and interpreting the regulations governing that industry.”). Respondent has candidly acknowledged his familiarity with the Observer Program and its benefits, expressed his awareness that refusing to carry an observer is prohibited, and demonstrated that he has carried observers in the past. Tr. 169, 178, 188-189, 206-207; RX 12; RX 13. It is clear from the evidence, therefore, that Respondent was aware of his duties and obligations under the law as it relates to the Observer Program.

The Agency has argued that the evidence supports a determination that Respondent acted with reckless disregard for the law and that any penalty assessment should be sufficient to encourage future compliance. In contrast, Respondent argues that, at worst, the circumstances that gave rise to this action stemmed from miscommunication, and that the \$70,000 fine suggested by the Agency is excessive for such indeliberate conduct. In support, Respondent highlights his long history of carrying observers, his history of involvement in the fishery management process, and his lack of prior violations. I find Respondent's arguments compelling and supported by the totality of the evidence presented, including Respondent's credible testimony.

I agree with Respondent that the evidence establishes his conduct was not reckless or in conscious disregard of his legal duties and obligations. The uncontroverted evidence adduced at hearing by both Respondent and the Agency's witness, Walker, established that observer coverage was typically arranged through an informal process whereby the observer would call the vessel owner or operator beforehand to set up an observed trip, or would simply show up at the dock and request to observe a fishing trip that is about to take place or make arrangements with a vessel owner or operator to observe a trip at a later date. Tr. 30, 43-44, 46-48, 169-170, 179, 181-182. It was this process that Respondent had successfully utilized in the past to carry observers and since the violations in this case. Walker confirmed that the use of written selection letters to arrange observer coverage, such as those presented in this case, is infrequent in that only three or four letters are sent out in a given month. Tr. 20-24, 30-31; AX 4; AX 5. Once he opened the selection letter, Respondent promptly telephoned Walker (the observer service provider contact on the letter) to arrange observer coverage aboard his vessels. During the evidentiary hearing, Respondent consistently and credibly testified that, upon concluding his conversation with Walker, he genuinely believed he had an arrangement to carry observers aboard his vessels on Monday, July 12, 2010. Tr. 168, 178-181, 188-190, 201-205, 213-214.

Contrary to Walker's limited recollection of the conversation he shared with Respondent,³⁰ Respondent convincingly expressed he sincerely believed he had a clear and firm arrangement to carry observers in fulfillment of his duties. Tr. 179 (“[A]nd I expected them to be there, to have their observer coverage there, to take them. That was the understanding I had, and it was no doubt in my head that that was the way the conversation went.”); Tr. 189 (“I’m 100 percent sure the trip was set up at Shinnecock for that weekend because he said it was okay.”).

Once observers failed to present at the dock on July 12, 2010, Respondent made no further attempts to secure coverage, presuming that he would carry an observer once he was approached to do so. When specifically questioned as to whether Respondent was concerned about future consequence when observers did not present at the dock on July 12, he forthrightly stated: “To be honest with you, I was not concerned until I got the letter of noncompliance. I was totally caught off guard and surprised. . . . I’ve always taken observers. I never refused. I had the thing set up. They didn’t show up.” Tr. 223-224. When questioned as to whether he made attempts to determine why observers did not show up on July 12 or determine next steps to arrange coverage on a future trip, he replied, “No, I never did, and I never did in the past with any of the other cancellations or whatever you want to call them. Just when they want to go, they come.” Tr. 223. It was not until December 2010 that Respondent carried an observer aboard the F/V Double Vision, and still later, in April 2011, that Respondent carried an observer aboard the F/V Doubled Vision. While Respondent’s actions in allowing so much time to pass before finally carrying an observer lacked diligence and may very well have been careless, the evidence does not support that he deliberately tried to avoid his responsibilities or that he behaved in conscious disregard of the Observer Program. Rather, the preponderance of the evidence shows that he held a sincere belief, based on past practice, that eventually he would carry an observer aboard his vessels as he had been selected to do once observers asked to observe a fishing trip. And, in actuality, he did eventually carry an observer aboard each vessel. Consequently, such circumstances warrant assessment of a penalty lower than that proposed by the Agency.

An additional consideration in my assessment of penalty is, as Respondent has argued, the fact that he had no history of prior violations, a point that is not contested but rather confirmed by the Agency’s Penalty Assessment Worksheet, in which no relevant prior violations was noted. While the Penalty Policy the Agency utilizes advises that a history of non-compliance may serve as a basis to increase a penalty, a number of administrative tribunals have found, conversely, that the absence of prior offenses may support the assessment of a lower penalty. *See, e.g., Pauline Marie Frenier*, 2012 NOAA LEXIS 11, at **39-40 (NOAA 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.”); *Michael Straub*, 2012 NOAA LEXIS 1, at *24 (NOAA Feb. 1, 2012) (“The absence of prior offenses . . . tends to favor a low civil monetary penalty.”); *The Fishing Co. of Alaska*, 1996 NOAA LEXIS 11, at **43-44 (NOAA Apr. 17, 1996) (“In an industry that is so heavily regulated, this absence of prior violations by any of the Respondents has been taken into consideration as a mitigating

³⁰ Aside from a report Walker completed nine days after the conversation, he had no independent recollection of the conversation at the evidentiary hearing in this matter, other than the fact that the conversation took place. Tr. 45-46

factor in the penalty assessment.”). In this case, Respondent testified that he began fishing with his father when he was 10 years old, and obtained his “first ocean-going boat when [he] was 18.” Tr. 153. The fact that Respondent has no history of prior violations amidst a lengthy career in the industry weighs in his favor with regard to assessing a penalty lower than that proposed by the Agency.

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

iii. Such Other Matters as Justice May Require

The evidence supports that Respondent recognizes and values the benefits derived from the Observer Program. Tr. 205-207. As has been stated, Respondent serves on the Monkfish Advisory Panel, a joint panel for both the New England Fishery Management Council and the Mid Atlantic Fishery Management Council. In connection with his panel member duties, he utilizes the data the Agency collects through the Observer Program, in part, to support the existence of a “clean fishery.” Tr. 205-206. Respondent testified “It works in our favor to take them [referring to observers] because we can demonstrate that we have a clean fishery. . . . All that documentation that they have helps us. . . . The information that they’ve gathered on all of my vessels every trip has only benefitted us.” Tr. 206-207. Respondent’s participation in the fishery management councils is voluntary and he has not sought compensation for expenses incurred from his participation, further demonstrating his genuine concern for and commitment to the industry. Also worth noting is the fact that Respondent has participated in the fishing industry concurrently with over 18 years of dedicated service as a New York City fireman, an inherently dangerous occupation for which Respondent received four awards of bravery. Tr. 157-158.

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 Respondent is \$35,000 (\$8,750 for each count charged in this case for which Respondent has been found liable).

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. Respondent is a “person” as defined by the Magnuson-Stevens Fishery Conservation and Management Act (“Act”), 16 U.S.C. § 1802(36), and is subject to the jurisdiction of the United States.
2. Respondent owns and is an operator of the F/V Double Vision and F/V Doubled Vision.

3. For the 2010 fishing year, Respondent obtained fishing permits for the F/V Double Vision and F/V Doubled Vision for the following fisheries: Atlantic Mackerel, Bluefish, Herring, Monkfish, NE Multispecies, Skate, and Spiny Dogfish.
4. By letters mailed on June 22, 2010, and delivered to Respondent on June 24, 2010, the Regional Administrator notified Respondent that his vessels, the F/V Double Vision and the F/V Doubled Vision, were required to carry a National Marine Fisheries Service ("NMFS") certified observers on the vessels' next fishing trips. This requirement was not waived.
5. After being selected to carry a NMFS certified observer, Respondent's vessels, the F/V Double Vision and the F/V Doubled Vision, were used to conduct fishing activities without carrying an observer in violation of the Act and in violation of regulations issued pursuant to the Act, as alleged in the Notice of Violation and Assessment of Administrative Penalty dated February 19, 2013. 16 U.S.C. §§ 1853 (b)(8), 1857(1)(A), 1881b(a); 50 C.F.R. §§ 648.11(a), (b), and (c), 600.725(s).
6. Having violated a regulation issued pursuant to the Act, 16 U.S.C. § 1857(1)(A), Respondent is liable to the United States for a civil penalty, 16 U.S.C. §§ 1857(1)(A), 1858(a); 50 C.F.R. § 600.735.
7. In consideration of the penalty provisions of the Act and applicable regulations, a civil penalty in the amount of \$35,000 (\$8,750 for each count charged in this case for which Respondent has been found liable) 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 \$35,000 is hereby IMPOSED on Respondent Richard Larocca for the violations upon which he was 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.

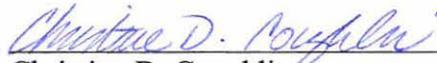
PLEASE TAKE NOTICE, that any petition for reconsideration of this Initial Decision must be filed with the undersigned within 20 days after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and relief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



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

Dated: June 17, 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.