



**UNITED STATES DEPARTMENT OF COMMERCE**  
**NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

<b>In the Matter of:</b>	)	
<b>F/V Princess Elena, Inc., and</b>	)	<b>DOCKET NUMBER:</b>
<b>Pasquale DiMaio,</b>	)	<b>NE1305018, F/V Capt Joe</b>
<b>Respondents.</b>	)	
	)	

**INITIAL DECISION AND ORDER**

**Date:** May 24, 2017

**Before:** Christine Donelian Coughlin, Administrative Law Judge, U.S. EPA<sup>1</sup>

**Appearances:** For the Agency:

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

## I. PROCEDURAL HISTORY

On April 3, 2015, the National Oceanic and Atmospheric Administration (“NOAA” or “Agency”) initiated this proceeding by issuing a Notice of Violation and Assessment of Administrative Penalty (“NOVA I”) to F/V Princess Elena, Inc., and Pasquale DiMaio (collectively, “Respondents”) in regards to the Fishing Vessel (“F/V”) Capt Joe. The NOVA I alleges one violation of the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act” or “Act”), 16 U.S.C. § 1857(1)(A), and its implementing regulations, 50 C.F.R. § 648.14(k)(6)(i)(A), based on the allegation that on or about October 29, 2013, F/V Princess Elena, Inc. (“Respondent PEI”), and Pasquale DiMaio (“Respondent DiMaio”) as the owner and operator, respectively, of the F/V Capt Joe, fished using a trawl net configured with a separate mesh net on top of the main trawl net. The NOVA I proposed a penalty, to be jointly and severally assessed against Respondents, of \$62,200 for this violation.

The Agency sent the NOVA I to counsel for Respondent PEI, Paul T. Muniz, on behalf of Respondent PEI, and to Respondent DiMaio at his last known physical address, 6 Liberty Street, Gloucester, Massachusetts 01930 (“Massachusetts address”). On April 8, 2015, Mr. Muniz entered a Notice of Appearance on behalf of Respondent PEI and timely requested a hearing in this matter before an Administrative Law Judge.

On April 27, 2015, Chief Administrative Law Judge Susan L. Biro (“CALJ Biro”) was designated to preside over this matter. On June 5, 2015, CALJ Biro issued an Order to Submit Preliminary Positions on Issues and Procedures (PPIP) (“PPIP Order”). The PPIP Order set forth various prehearing filing deadlines and procedures for the parties, including deadlines by which to file their respective PPIPs. The PPIP Order also ordered the Agency to provide “documentation showing service of the NOVA was completed on each Respondent in accordance with 15 C.F.R. § 904.3.” PPIP Order at 2. A copy of the PPIP Order was sent by regular mail to Respondent DiMaio’s Massachusetts address, but it was later returned to this Tribunal marked “not deliverable as addressed.”

On June 26, 2015, the Agency timely filed its PPIP, wherein it stated that it had successfully served Respondent PEI with the NOVA I. Agency PPIP at 6. However, with respect to Respondent DiMaio, the Agency stated that it had yet to locate him and properly serve him with the NOVA I. Agency PPIP at 6. Respondent PEI timely filed its PPIP on July 10, 2015. Respondent DiMaio, on the other hand, did not file a PPIP. After affording the Agency an opportunity to produce proof of service of the NOVA I on Respondent DiMaio or, alternatively, show cause as to why the charges against him should not be dismissed for lack of jurisdiction, CALJ Biro dismissed Respondent DiMaio from the proceeding without prejudice on September 21, 2015. CALJ Biro also scheduled the hearing to commence on December 15, 2015.

Thereafter, on October 29, 2015, the Agency successfully served Respondent DiMaio with a second NOVA (“NOVA II”). The NOVA II, filed on November 24, 2015, proposed a \$59,700 penalty against Respondent DiMaio for violating the Magnuson-Stevens Act, 16 U.S.C.

§ 1857(1)(A), and its implementing regulations, 50 C.F.R. § 648.14(k)(6)(i)(A), by fishing on the F/V Capt Joe using a trawl net configured with a separate mesh on the top of the main trawl net on or about October 29, 2013. On November 23, 2015, Pamela F. Lafreniere entered a Notice of Appearance on behalf of Respondent DiMaio and requested a hearing in the proceeding.

At the request of the parties, CALJ Biro subsequently postponed the hearing scheduled to commence on December 15, 2015. She also advised the parties that the separate actions against Respondent PEI and Respondent DiMaio would thereafter be heard together. CALJ Biro then issued another Order to Submit Preliminary Positions on Issues and Procedures (PPIP), which set forth deadlines for the parties to submit their PPIPs once more. Subsequently, the Agency timely submitted its PPIP, and Respondents timely submitted separate PPIPs. Following these submissions, CALJ Biro scheduled the hearing for the two actions to be held beginning May 24, 2016.

On February 5, 2016, the Agency filed Agency Motion to Consolidate Cases and Amend NOVAs and a Notice of Amendments to NOVAs, seeking to have the two cases consolidated. The Agency also sought to amend the NOVA I and NOVA II such that 1) they contained identical language charging both Respondent PEI and Respondent DiMaio with the alleged violation; 2) they both proposed a penalty of \$62,200; and 3) they sought to assess that penalty against Respondents jointly and severally. Over the objections of Respondents, CALJ Biro granted the Agency's Motion to amend the NOVAs and consolidate the cases by Order dated February 25, 2016.

On February 23, 2016, Respondent DiMaio's counsel filed a Motion to Withdraw because Respondent DiMaio "is not participating in his own defense" and the

client/attorney relationship has deteriorated to the extent that the client has failed to return calls made each day for over three (3) weeks. Counsel does not have a current address for Respondent Dimaio [sic]. Without return phone calls and without an address, counsel is not able to communicate with Respondent Dimaio [sic] and is not able to defend Respondent in this action.

Mot. to Withdraw at 1. On March 15, 2016, CALJ Biro granted Respondent DiMaio's counsel's request to withdraw.

On April 26, 2016, an Order of Redesignation was issued, designating me to preside over this proceeding. This Order was sent by regular mail to Respondent DiMaio's Massachusetts address and to 2312 Palermo Drive, San Diego, California 92106 ("San Diego address"), another address on file for Respondent DiMaio.<sup>2</sup> The copy mailed to Respondent DiMaio's

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<sup>2</sup> Respondent DiMaio himself provided the San Diego address to the Agency's counsel on or about January 12, 2016. Tr. at 12–13. After Respondent DiMaio's counsel's request to

Massachusetts address was returned marked “refused[;] unable to forward.” The copy mailed to Respondent DiMaio’s San Diego address was not returned.

In preparation for the hearing scheduled to commence on May 24, 2016, a staff attorney from this Office sent Respondent DiMaio a letter dated May 4, 2016, inviting him to participate in a conference call. This letter was mailed by regular and certified mail to Respondent DiMaio’s Massachusetts and San Diego addresses. Both the regular and certified mail copies of this letter that were sent to Respondent DiMaio’s Massachusetts address were returned as “not deliverable as addressed[;] unable to forward.” The copy of the letter sent to Respondent DiMaio’s San Diego address by certified mail was delivered, and the certified mail green card, or Domestic Return Receipt, was returned to this Tribunal. However, the signature of the person who signed the green card and thus accepted the letter is illegible, and the signer did not print his or her name on the green card or mark the box indicating whether they were the agent or addressee. Therefore, it is unclear whether Respondent DiMaio did, in fact, receive the copy of this letter that was sent via certified mail to his San Diego address. The copy of the letter sent to Respondent DiMaio’s San Diego address by regular mail was not returned. Respondent DiMaio did not communicate with the staff attorney or this Tribunal in response to the letter.

After postponement of the hearing at the request of Respondent PEI, I issued a Notice of Hearing Order on May 31, 2016, setting the hearing for Tuesday, August 30, 2016. This Notice stated, “*RESPONDENTS ARE WARNED THAT FAILURE TO APPEAR AT THE HEARING, WITHOUT GOOD CAUSE BEING SHOWN, MAY RESULT IN DEFAULT JUDGMENT BEING ENTERED AGAINST THEM.*” Notice of Hr’g Order at 2. This Notice was sent by both regular and certified mail to Respondent DiMaio’s Massachusetts and San Diego addresses. Both copies of the Notice sent by regular mail were not returned. Both copies of the Notice sent by certified mail were returned as “not deliverable as addressed[;] unable to forward.” At the hearing, a copy of the Notice sent by certified mail to Respondent DiMaio’s Massachusetts and San Diego addresses, together with copies of the returned envelopes, the certified mail green cards, or Domestic Return Receipts, and printouts of the tracking information for both Notices from the United States Postal Service (“USPS”) website, were marked as Court’s Exhibit (“CX”) 1 and admitted into the record.<sup>3</sup> Tr. at 17–18, 34.

On June 13, 2016, a staff attorney for this Office called Respondent DiMaio using a telephone number given to her by the Agency’s counsel, who had obtained it from Respondent DiMaio’s former attorney. Tr. at 13. This call was unanswered, and therefore, the staff attorney left a voicemail requesting that Respondent DiMaio contact her. *Id.* To date, Respondent DiMaio has not returned the staff attorney’s call. *Id.*

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withdraw was granted, both the Agency and this Tribunal began sending filings to the San Diego address, as well as the Massachusetts address, in an attempt to contact Respondent DiMaio.

<sup>3</sup> Citations to the hearing transcript will be made in the following format: “Tr. at \_\_.”

On July 20, 2016, I issued a Notice of Hearing Location, specifying that the hearing would take place at the John W. McCormack Post Office and Courthouse, Courtroom 5 (12th Floor), 5 Post Office Square, Boston, Massachusetts 02109. This Notice also reminded Respondents “*THAT FAILURE TO APPEAR AT THE HEARING, WITHOUT GOOD CAUSE BEING SHOWN, MAY RESULT IN DEFAULT JUDGMENT BEING ENTERED AGAINST THEM.*” Notice of Hr’g Location at 2. This Notice was sent by both regular and certified mail to Respondent DiMaio’s Massachusetts and San Diego addresses. The copy of the Notice sent to Respondent DiMaio’s Massachusetts address by certified mail was returned marked “unable to forward.” The copy of the Notice mailed to Respondent DiMaio’s Massachusetts address by regular mail was not returned. The copies of the Notice sent to Respondent DiMaio’s San Diego address by regular and certified mail were returned to this Tribunal marked “not deliverable as addressed[;] unable to forward.” At the hearing, the copy of this Notice sent by certified mail to Respondent DiMaio’s San Diego address, together with copies of the returned envelope, the certified mail green card, or Domestic Return Receipt, and a printout of the tracking information for the Notice from the USPS website, were marked as CX 2 and admitted into the record. Tr. at 34–35. The copy of this Notice sent by certified mail to Respondent DiMaio’s Massachusetts address, together with copies of the returned envelope, the certified mail green card, or Domestic Return Receipt, and a printout of the tracking information for the Notice from the USPS website, were marked as CX 3 and admitted into the record. Tr. at 35.

On July 26, 2016, a staff attorney for this Office sent a letter to Respondent DiMaio inviting him to participate in another conference call to prepare for the upcoming hearing. This letter was sent by regular and certified mail to Respondent DiMaio’s Massachusetts and San Diego addresses. The copies of this letter sent by certified mail to Respondent DiMaio’s Massachusetts and San Diego addresses were returned to this Tribunal marked “not deliverable as addressed[;] unable to forward.” The copies of this letter sent by regular mail were not returned. Respondent DiMaio did not respond to this letter in any manner.

On August 25, 2016, the Agency filed a Notice of Settlement, indicating that the Agency and Respondent PEI had reached a settlement in the matter, thus eliminating the need for a hearing with respect to Respondent PEI, but not with respect to Respondent DiMaio.<sup>4</sup> Accordingly, the case against Respondent DiMaio proceeded to hearing, and the hearing commenced on Tuesday, August 30, 2016, in Boston, Massachusetts, as scheduled by the Notice of Hearing Order dated May 31, 2016, and the Notice of Hearing Location dated July 20, 2016. The Agency participated in the hearing; however, Respondent DiMaio did not appear at the hearing, nor did anyone appear on Respondent DiMaio’s behalf. Tr. at 10. Mr. Muniz appeared at the hearing as an observer. Tr. at 9–10. At the hearing, the Agency moved for a default judgment against Respondent DiMaio for failing to appear, and this motion was granted. Tr. at 19, 33–34; *see* 15 C.F.R. § 904.211(a). The Agency presented Agency’s Exhibits (“AX”) 1–38,

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<sup>4</sup> Notwithstanding its settlement with Respondent PEI, the Agency did not formally request to remove Respondent PEI from the caption of future filings. For this reason and the sake of consistency, I maintained Respondent PEI in the caption of this Initial Decision.

which were all admitted into evidence. Tr. at 25, 33, 143.<sup>5</sup> The Agency also presented the testimony of seven witnesses: Sarah Heil, a Fishery Policy Analyst for NOAA's National Marine Fisheries Service; Jason Orifice, an at-sea monitor; Ross Lane, a Special Agent for NOAA's Office of Law Enforcement; William Semaru, the Northeast Vessel Monitoring Program Manager for NOAA's Office of Law Enforcement; Tom Gaffney, a Special Agent for NOAA's Office of Law Enforcement; Liam Kelly, a previous captain of the F/V Capt Joe; and Daniel D'Ambruoso, a Special Agent for NOAA's Office of Law Enforcement.

On September 6, 2016, the Hearing Clerk of this Tribunal received official copies of the hearing transcript. Electronic copies of the transcript were sent to the Agency and counsel for Respondent PEI on September 12, 2016. On September 14, 2016, I issued the Order Scheduling Post-Hearing Submissions, which set the following deadlines: September 30, 2016, as the deadline for the Agency to submit any motions to conform the transcript to the actual testimony; October 14, 2016, as the deadline for the Agency to file a post-hearing brief; October 28, 2016, as the deadline for Mr. Muniz to file a brief as an amicus curiae; and November 11, 2016, as the deadline for the Agency to file a reply brief.<sup>6</sup> This Order, along with copies of the hearing transcript, were sent to Respondent DiMaio's Massachusetts and San Diego addresses by certified mail. Both mailings were returned marked as "unclaimed."

On September 30, 2016, the Agency submitted Agency's Motion to Conform the Transcript to the Actual Testimony, requesting that numerous changes to the hearing transcript be made. No response to this Motion was filed. I granted this Motion, thereby amending the hearing transcript accordingly, by Order dated October 27, 2016. This Order was sent to Respondent DiMaio's Massachusetts and San Diego addresses by both regular and certified mail. The copy sent by certified mail to Respondent DiMaio's Massachusetts address was returned marked "unable to forward." The copy mailed to Respondent DiMaio's Massachusetts address by regular mail was returned marked "attempted – not known[;] unable to forward." The copies mailed to Respondent DiMaio's San Diego address were returned marked "not deliverable as addressed[;] unable to forward."

On October 14, 2016, the Agency timely submitted its Post-Hearing Brief. Mr. Muniz did not file a brief, and consequently, no reply brief by the Agency was received.

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<sup>5</sup> AX37 consists of NOAA's Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions ("Penalty Policy"). Counsel for the Agency did not have a copy of the Penalty Policy available at the hearing. Therefore, I marked the Penalty Policy as AX37 at the hearing with counsel's promise to provide a hard copy of it to this Tribunal post-hearing, which NOAA did. Tr. at 32–33. The Penalty Policy is also publicly available at [http://www.gc.noaa.gov/documents/Penalty%20Policy\\_FINAL\\_07012014\\_combo.pdf](http://www.gc.noaa.gov/documents/Penalty%20Policy_FINAL_07012014_combo.pdf).

<sup>6</sup> As discussed at the hearing, this Order afforded Mr. Muniz the opportunity to file a post-hearing brief as an amicus curiae, if desired. See Tr. at 140–41, 146–47; see also Agency's Mot. to Conform the Tr. to the Actual Test. at 4–5.



## II. STATEMENT OF THE ISSUES

### A. Liability

The issue presented is whether Respondent DiMaio violated the Magnuson-Stevens Act and its implementing regulations on or about October 29, 2013, by fishing with a trawl net unlawfully configured with a separate mesh net on top of the main trawl net, as alleged in the amended NOVAs.<sup>7</sup>

### B. Civil Penalty

If liability for the charged violation against Respondent DiMaio is established, then I must determine the appropriate amount of any civil penalty to be imposed for the violation. To this end, I must evaluate certain factors, including the nature, circumstances, extent, and gravity of the violation; Respondent DiMaio's degree of culpability, any history of prior violations, and ability to pay; and such other matters as justice may require. *See* 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(a) (enumerating the factors to be taken into account in assessing a penalty). Moreover, I may also consider the guidelines contained in the Agency's Penalty Policy when determining the appropriate penalty.

## 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.

Respondent PEI is the owner of the F/V Capt Joe, Coast Guard Documentation Number 582912, and Respondent DiMaio was the operator of the F/V Capt Joe during the fishing trip that occurred between October 24, 2013, and November 3, 2013. Tr. at 113, 124; AX1 at 007–08; AX9 at 047; AX19 at 223. At all relevant times, the F/V Capt Joe held a valid Northeast Multispecies Permit, number 410106, which was issued by NOAA. AX1 at 002–06; Tr. at 123–24.

The F/V Capt Joe departed port in Gloucester, Massachusetts, on October 24, 2013, to fish in the Northeast multispecies fishery,<sup>8</sup> also known as the groundfish fishery, and returned to port on November 3, 2013. Tr. at 43; AX2 at 010–11; AX9 at 047; AX19 at 209. During this trip, the F/V Capt Joe fished within the Gulf of Maine and the George's Bank Regulated Mesh Areas ("GOM Regulated Mesh Area" and "GB Regulated Mesh Area," respectively), and was always operating within one of these regulated mesh areas. AX3; AX25; Tr. at 103–08. The F/V Capt Joe exclusively used trawl gear to fish throughout the trip. AX2; Tr. at 125. In order to fish using trawl gear, a trawl net is

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<sup>7</sup> *See* 16 U.S.C. § 1857(1)(A); 50 C.F.R. § 648.14(k)(6)(i)(A).

<sup>8</sup> The term "Northeast (NE) multispecies" or "multispecies" is defined as including redfish and Atlantic cod, among other species. 50 C.F.R. § 648.2.

towed behind the vessel at a certain speed, and so, the fish go into the mouth of the net and are funneled back, and depending on the mesh size, there are some that escape then, some fish can actually swim out of the net, or some will go back into there, and the mesh – the sizes of the mesh – other fish can escape through the mesh.

Tr. at 47.

The mesh size of trawl gear is regulated based on the vessel’s targeted fish species and the location of fishing. *See* Tr. at 47–48. Sarah Heil, a Supervisory Fishery Policy Analyst for NOAA’s National Marine Fisheries Service (“NMFS”), testified credibly on this and related subjects at the hearing. As she explained, “[t]he ground fish fishery, as a whole . . . has been declining in recent years.” Tr. at 43. Therefore, restrictions on mesh size were put in place to protect the health of the groundfish fishery with the goal of reducing

overall mortality on a fish stock, and particularly on the smaller juvenile fish or bycatch of other species. So, in the context of ground fish, the minimum mesh size is set to try to get the fishery to target a larger size fish, to allow those smaller fish a chance to spawn and contribute to the population, before they’re caught in the fishery. . . . [T]he mesh size requirements are also set in conjunction with minimum fish sizes to achieve those objectives for the fishery.

Tr. at 48. Minimum fish sizes for all fish species and stocks in the groundfish fishery have been established. Therefore, if a groundfish vessel catches an undersized fish, the vessel is required to discard it. Tr. at 50, 51.

The redfish stock was at one time “overfished,”<sup>9</sup> and the slow growth rate of redfish inhibits the stock’s recovery from overfishing. Tr. at 49. However, the redfish stock is “one of the healthy ground fish stocks right now [because the] [b]io-mass[,] or the size of the fish stock[,] is really high.” Tr. at 49. The current minimum size for redfish “is seven inches, and that’s actually the smallest minimum size among all of the ground fish species.” Tr. at 50.

For the entire duration of its October 24 to November 3, 2013 trip, the F/V Capt Joe maintained an at-sea monitor (“ASM”) by the name of Jason Orifice onboard the vessel to

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<sup>9</sup> The term “overfishing” is defined by the Act as “a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis.” 16 U.S.C. § 1802(34). Ms. Heil similarly explained at the hearing that overfishing occurs “when the level of fish mortality or the amount of fish that are being taken exceeds a threshold, at which it jeopardizes the long term sustainability of the stock.” Tr. at 40.



observe the fishing trip.<sup>10</sup> Tr. at 53, 57; AX5; AX18. Mr. Orifice has been an ASM for approximately 13 years, and for “[m]ost of the 13 years, [Mr. Orifice has] worked on ground fish boats.” Tr. at 54.

In his capacity as an ASM, Mr. Orifice’s responsibilities include “go[ing] out on commercial fishing vessels and collect[ing] data on the fish that they are catching, specifically both to be kept and the discards.” Tr. at 54. Mr. Orifice is also tasked with documenting any “derelict fishing gear” that a vessel may catch.<sup>11</sup> Tr. at 73. He testified that he did not believe he recorded the F/V Capt Joe catching any derelict fishing gear on this trip. Tr. at 73. Additionally, he documents the fishing gear onboard and any damage sustained during a trip. Tr. at 69, 72–73. Mr. Orifice documented two trawl nets onboard the F/V Capt Joe, both of which were used during the October 24 to November 3, 2013 trip. AX18 at 103; Tr. at 70. The first trawl net, which Mr. Orifice labeled “Gear 1,” had square-shaped mesh openings, while the second trawl net, which Mr. Orifice labeled “Gear 2,” had diamond-shaped mesh openings. AX18 at 103; Tr. at 70. The mesh openings of both nets were roughly 6–6.5 inches in their codends.<sup>12</sup> See AX9 at 047; AX18 at 103. The F/V Capt Joe was able to use both nets until October 27, 2013, when Gear 2 was lost during the sixth haul.<sup>13</sup> AX18 at 101, 123; Tr. at 67, 69–70.

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<sup>10</sup> Throughout the record of this proceeding, the terms “at-sea monitor” and “observer” appear to have been used interchangeably to describe Mr. Orifice’s position. With respect to the Northeast multispecies fishery, the term “at-sea monitor” is defined as “any person responsible for observing, verifying, and reporting area fished, catch, and discards of all species by gear type for sector trips as part of an approved sector at-sea monitoring program.” 50 C.F.R. § 648.2. The term “observer/sea sampler,” in turn, is defined as “any person certified/approved by NMFS to collect operational fishing data, biological data, or economic data through direct observation and interaction with operators of commercial fishing vessels as part of NMFS Northeast Fisheries Observer Program and Northeast At-sea Monitoring Program.” *Id.* For the sake of simplicity, this Initial Decision refers to Mr. Orifice as an at-sea monitor only.

<sup>11</sup> Mr. Orifice testified that, based on his experience, the term “derelict fishing gear” means, “[i]f they got any lobster pots, hag fish barrels, large pieces of old netting, that sort of thing. Anything that was used to catch fish from any other commercial fishing vessel, that has managed to make its way into their net.” Tr. at 73.

<sup>12</sup> The codend is the “very end of the net . . . that holds all of the fish” caught during a haul. Tr. at 58.

<sup>13</sup> For that particular haul, the F/V Capt Joe trawled for approximately 23 hours, purportedly to avoid bad weather and because Respondent DiMaio would not wake up. Tr. at 67; AX18 at 123. Mr. Orifice noted that “[t]his is apparently something that happens on occasion on this boat, according to other crewmen.” AX5 at 037. Because the crew “did not know at what point that they lost [Gear 2], no effort was made to retrieve it.” AX5 at 037.

For each of the 30 hauls that the F/V Capt Joe completed during the trip in question, Mr. Orifice completed a trawl haul log, which “details everything that happens over the course of any given haul.”<sup>14</sup> Tr. at 68; AX 18. Notably, on October 28, 2013, after the eighth haul of the trip, the F/V Capt Joe moved to “a redfish fishing ground” to target redfish, and the amount of fish caught significantly increased. See AX18 at 129; AX5 at 037; compare AX18 at 105–32, with AX18 at 133–203.

On October 29, 2013, while onboard the F/V Capt Joe, Mr. Orifice took two pictures of the vessel’s catch and trawl gear with a digital camera. AX4; AX20; Tr. at 55–63. Mr. Orifice took these pictures at the request of the crew because the crew wanted a picture of themselves posing with a large catch. Tr. at 63; AX5 at 037 (Mr. Orifice noted that the crew was posing with a “large bag.”); AX6 at 039; AX19 at 213. The first photograph is time stamped at 11:22 a.m. AX20 (the digital file is named 04\_2013\_D30022\_050\_1); see Tr. at 55–57. The second photograph is time stamped at 11:23 a.m. AX20 (the digital file is named 04\_2013\_D30022\_050\_2); see Tr. at 55–57, 62–63. The haul depicted in both photographs occurred after the F/V Capt Joe had moved to the redfish fishing ground, and based on the time stamps of the pictures, they likely depict a time between hauls 10 and 11. AX4; AX18 at 135 (haul 10 concluded at 11:09 a.m.), 139 (haul 11 began at 11:27 a.m.). Furthermore, “[b]oth photographs appear to be from the same haul, as noted by the identical orientation of two individual pollock caught in the mesh of the upper reaches of the codend.” AX13 at 079. Thus, the photographs in all likelihood depict the vessel’s catch from haul 10.

Because the photographs were taken after Gear 2 was lost, the net depicted is Gear 1, which Mr. Orifice had identified in his records of the gear onboard as having square-shaped mesh openings. AX18 at 103; see AX5 at 037; see also AX13 at 079–80. Both photographs show the “top of the net . . . facing the top of both photographs, with the bottom of the net oriented toward the deck of the boat.” AX13 at 079. At the hearing, Mr. Orifice credibly described the codend of the net and the associated gear as depicted in the photographs, first explaining that the codend consisted of the black mesh with square-shaped openings seen in the photographs. Tr. at 59–60. Mr. Orifice then described the “piece of green mesh with lots of yellow rope hanging off the bottom [of the codend]” as the chafing gear, the purpose of which is “to prevent damage to the cod end, as it’s being dragged along the bottom.” Tr. at 59. Moreover, Mr. Orifice testified that the thick brown rope running diagonally along the codend in the bottom of the first photograph “is a bull rope [which is] basically used to keep the cod-end in shape and from being torn apart by the stress of flipping it on and off the boat.” Tr. at 61. Additionally, Mr. Orifice identified the thinner brown rope hanging vertically off of the net as “a splitting or lifting strap.” Tr. at 61.

Significantly, the photographs also show green mesh with diamond-shaped openings underlying portions of the codend, most notably those portions not draped with the yellow

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<sup>14</sup> A haul begins “from the moment . . . the first piece of fishing gear hits the water” and continues “until they engage the first piece of haul back equipment.” Tr. at 68.

chafing gear. AX20; Tr. at 59–60. With regard to this green diamond-shaped mesh visible inside the codend, Mr. Orifice rejected the notion that it consisted of chafing gear, a bull rope, or a splitting strap. Tr. at 60–62. According to Mr. Orifice, the internal material also did not appear to be derelict fishing gear, which would “tend to be more bunched up” and not as “evenly spaced” and “very well stretched out” as the internal mesh appeared to be in the photographs. Tr. at 60. Rather, Mr. Orifice suspected that the internal material consisted of a net liner, although he could not be certain because of his inability to see the material clearly without the aid of the photographs and his lack of experience or training in identifying a net liner. AX6 at 039; AX5 at 037; AX19 at 212, 216–18; Tr. at 82. At the hearing, a net liner was described by Ms. Heil as

anything that is used within the net, that constricts . . . the meshes of the net that’s being fished. . . . [B]ecause [a net liner] constricts the meshes or blocks the meshes, it essentially reduces the mesh size that’s being fished, and in doing that, there is a potential to reduce juvenile escapement. It potentially increases the catch of sub-legal sized ground fish, potentially increase[s] bi-catch of other species, as well, and those management measures that are designed to help allow those smaller fish to survive and not be caught in the fishery until they have an opportunity to spawn, a net liner jeopardizes those objectives for the management program.

Tr. at 51–52.

At the conclusion of the fishing trip, the F/V Capt Joe sold its catch, AX21, and Respondent DiMaio earned \$3,202.54 for his share, although \$605 was deducted from his earnings for unknown reasons according to a settlement sheet for the trip, AX38. Also at the end of the fishing trip, Mr. Orifice conducted routine questioning of Respondent DiMaio, and as part of this questioning, Mr. Orifice asked Respondent DiMaio if he had used a net liner on the trip, which he denied. Tr. at 80–81; AX18 at 103; AX19 at 218–21. According to Mr. Orifice, Respondent DiMaio claimed that any irregularities seen by Mr. Orifice were “just the chafing gear, it’s a little screwed up, it just creates the illusion of looking like there is something else in there.” AX19 at 212–13.

Nevertheless, Mr. Orifice documented his suspicions that the F/V Capt Joe had fished using a net liner in an incident report that he prepared on November 4, 2013. AX5 at 037. This report prompted an investigation by NOAA’s Office of Law Enforcement. Accordingly, Mr. Orifice was interviewed by Special Agent (“SA”) Thomas S. Gaffney on November 4, 2013. Tr. at 111; AX6. During this interview, Mr. Orifice stated that “based on his experience as an observer with almost 10 years of trips on commercial fishing vessels . . . he did not believe [that the second net] was chafing gear,” as Respondent DiMaio had claimed. AX6 at 039. On November 5, 2013, Mr. Orifice was interviewed again by SA Gaffney and SA Daniel D’Ambruso. Tr. at 127; AX7; AX19 at 210. During this interview, Mr. Orifice stated that

for safety reasons he was asked to remain off the deck during the time the [trawl gear was] hauled in and until the [trawl gear was] set back out. . . . [S]uch a request is a common occurrence, but it also prevented him from getting close to the net while it was fishing.

AX19 at 211–12. Mr. Orifice reported to SA Gaffney and SA D’Ambruoso that he was able to measure the codend approximately two hours after the last haul of the trip was completed, and that the green diamond-shaped mesh visible inside the codend in the photographs was not present at that time. AX19 at 215. Mr. Orifice indicated that he never saw the inside mesh removed, unloaded with the catch, or on the deck, and that he never clearly saw it inside the codend without the aid of the photographs he had taken on October 29th. *See* AX19 at 215–17.

SA D’Ambruoso and SA Ross Lane subsequently interviewed Respondent DiMaio on November 25, 2013. Tr. at 84; AX9. During this interview, Respondent DiMaio denied the use of a net liner and claimed rather that the vessel “had picked up a trash net, a derelict net during the trawl . . . and they subsequently took that net to an old ship wreck and dumped it.” Tr. at 86. Respondent DiMaio informed the SAs that Mr. Orifice had observed the derelict net fall from the codend onto the deck, but that he may not have seen it thrown overboard. AX9 at 049–50; AX19 at 225–26. Respondent DiMaio then obtained from his chart plotter the coordinates of the location where he claimed to have discarded the derelict net, and provided these coordinates to the SAs. AX9 at 050; AX19 at 226; Tr. at 87. SA D’Ambruoso and SA Lane proceeded to interview Mr. Orifice with regard to Respondent DiMaio’s claims. Tr. at 128; AX10; AX19 at 227. Mr. Orifice indicated that he could not recall seeing any large pieces of netting fall out of the codend or discarded overboard as Respondent DiMaio had described to the SAs. AX19 at 227–28.

NOAA then sought the opinion of others on Mr. Orifice’s photographs, who concurred that the green diamond-shaped mesh visible inside the codend was indeed a net liner. In particular, upon viewing Mr. Orifice’s photographs, Liam Kelly, a commercial fisherman of 27 years who had served as an operator of the F/V Capt Joe before the events in question, testified that he believed that the pictures depicted a net liner. Tr. at 112–13, 115–16. Mr. Kelly elaborated:

[I]f you look at the picture, you can see – I believe you can see the black mesh, which was the cod-end. . . . So, you use the square mesh and inside the square mesh would have what’s known as a diamond mesh and what it does, it chokes up the cod-end and the small fish can’t get out. So, that’s clearly a net liner.

Tr. at 116.

Douglas Christel, a fishery policy analyst for NMFS whose duties include developing regulations that describe the gear used in the Northeast multispecies fishery, also examined the photographs taken by Mr. Orifice, and agreed: “[I]t is clearly evident that the gear depicted in these photographs includes a mesh liner that would obstruct the codend mesh of the net while fishing for groundfish species, particularly redbfish.” AX13 at 079. In reaching this conclusion, Mr. Christel reasoned:

If you zoom in on each photograph, thinner green diamond mesh is visible inside the thicker, darker square-oriented mesh of the codend. This thinner green diamond mesh is a net liner, as it resides inside and overlaps with the outer mesh of the net. Because this thinner green mesh is of a different orientation (diamond) than the thicker outer dark mesh (square), close examination of these photographs reveal how the different configuration of the thinner green mesh liner essentially bisects the darker square mesh openings, thereby obstructing the codend mesh openings, and reducing the open area by approximately half. This net liner is clearly visible extending throughout the darker codend . . . .

AX13 at 079. Mr. Christel explained that the green diamond-shaped mesh in the photograph could not be a bull rope or splitting strap because “other ropes are used for that purpose (see the approximately 2” diameter green rope in a vertical orientation around the entire codend that is being hauled vertically in each picture).” AX13 at 080. Furthermore, Mr. Christel ruled out the green diamond-shaped mesh as chafing gear because “that can only be oriented on the bottom of the net and is often frayed due to contact with the bottom. . . . [The] chafing gear is the yellow strands hanging from the bottom of the net in each photograph.” AX13 at 080. Conversely, Mr. Christel noted, the green diamond-shaped mesh “can be seen throughout the entire codend.” AX13 at 080.

NOAA also investigated Respondent DiMaio’s claim that the material visible inside the codend was derelict fishing gear. Specifically, Linda Galvan, a former Vessel Monitoring System (“VMS”) specialist with NMFS, composed a report depicting the F/V Capt Joe’s movements during the fishing trip relative to the location where Respondent DiMaio claimed to have discarded the derelict net. *See* AX3. At the hearing, William Semaru, the Northeast VMS Program Manager and Ms. Galvan’s former supervisor, explained how VMS works:

[T]he VMS system is comprised essentially of three components. We have . . . NOAA approved hardware and reporting software that is installed on the commercial fishing vessel, and that reporting software transmits automatically generated position reports. These are GPS reports with an accuracy of 100 meters or better, via a satellite communications network to a ground station. . . . [T]hat data is then picked up by our data center, and stored, processed, and

it displays on an application called V Track, which we use nationwide within [the Office of Law Enforcement] to monitor commercial fishing vessels at sea.

Tr. at 90. The F/V Capt Joe was required to report its position via the VMS every 30 minutes for the entire duration of its trip. Tr. at 99. This reporting would happen automatically, and therefore, the “[c]aptain has no control over changing the reporting rate of the positions or manipulating the positions in any way.” Tr. at 99. Ms. Galvan named one of the points she plotted in the report “Faria 2,”<sup>15</sup> which “represents the location of the net gear that was dumped as reported by the captain.” Tr. at 95; AX3 at 014.

After reviewing Ms. Galvan’s report, Mr. Semaru credibly testified that the location of Faria 2, as depicted in the report, was “very close” to the coordinates that Respondent DiMaio had given to SAs Lane and D’Ambruoso on November 25, 2013, as the two points “were within about 35 yards” of each other. Tr. at 103. However, the “nearest VMS position [of the F/V Capt Joe] to the [Faria 2] position was about 17 miles to the north/northwest.” Tr. at 97. Ms. Galvan’s report also concluded that “[d]uring the subject trip, the track line of the **F/V CAPT JOE** indicates that the **F/V CAPT JOE** was not in the vicinity of the Faria 2 position.” AX3 at 014; *see* Tr. at 96–97.

#### IV. LIABILITY

##### A. Principles of Law

###### i. *Magnuson-Stevens Act and Implementing Regulations*

In 1976 Congress enacted the Magnuson-Stevens Act “to take immediate action to conserve and manage the fishery resources off the coasts of the United States.” Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 2(b)(1), 90 Stat. 331 (1976), (codified as amended at 16 U.S.C. §§ 1801–91 (2007)). The goal of the Magnuson-Stevens Act is to “promote domestic commercial and recreational fishing under sound conservation and management principles.” 16 U.S.C. § 1801(b)(3). The Magnuson-Stevens Act authorizes the Secretary of Commerce “to station observers aboard commercial fishing vessels to collect scientific data required for fishery and protected species conservation and management . . . and to monitor compliance with existing Federal regulations.” Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Observer Health and Safety, 72 Fed. Reg. 61,815, 61,815 (Nov. 1, 2007); *see* 16 U.S.C. § 1881b(a). An observer is defined by the Act as “any person required or authorized to be carried on a vessel for conservation and management purposes by regulations or permits under this Act.” 16 U.S.C. § 1802(31).

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<sup>15</sup> Faria 2 was transcribed as “FARIA II” in the hearing transcript. Because Ms. Galvan’s report labels the position as “Faria 2,” I will use that spelling and capitalization throughout this decision.



Under Section 307(1)(A) of the Magnuson-Stevens Act, it is unlawful “for any person . . . to violate any provision of this Act or any regulation or permit issued pursuant to this Act.” 16 U.S.C. § 1857(1)(A). The Act defines a person as “any individual . . . any corporation, partnership, association, or other entity.” 16 U.S.C. § 1802(36).

The Agency’s regulations make it “unlawful for any person, including any owner or operator of a vessel issued a valid NE multispecies permit . . . to . . . [o]bstruct or constrict a net as described in § 648.80(g)(1) or (2).” 50 C.F.R. § 648.14(k)(6)(i)(A). Section 648.80 subjects vessels operating in the Northeast multispecies fishery to requirements governing minimum mesh size, gear, and methods of fishing, unless otherwise exempted.<sup>16</sup> In particular, Section 648.80(a) requires the mesh openings of trawl nets used by vessels in the GOM and GB Regulated Mesh Areas to be at least a certain minimum size. 50 C.F.R. § 648.80(a)(3)(i), (4)(i). Section 648.80(g)(1) – (2) then prohibits vessels subject to such minimum mesh size requirements from obstructing or constricting their trawl nets as follows:

(1) Net obstruction or constriction. . . . [A] fishing vessel subject to minimum mesh size restrictions shall not use any device or material, including, but not limited to, nets, net strengtheners, ropes, lines, or chafing gear, on the top of a trawl net, except that one splitting strap and one bull rope (if present), consisting of line and rope no more than 3 in (7.6 cm) in diameter, may be used if such splitting strap and/or bull rope does not constrict, in any manner, the top of the trawl net. . . .

(2) Net obstruction or constriction. (i) . . . [A] fishing vessel may not use any mesh configuration, mesh construction, or other means on or in the top of the net subject to minimum mesh size restrictions . . . if it obstructs the meshes of the net in any manner.

50 C.F.R. § 648.80(g)(1)–(2). For purposes of these provisions, “the top of the trawl net” is “the 50 percent of the net that (in a hypothetical situation) would not be in contact with the ocean bottom during a tow if the net were laid flat on the ocean floor.” 50 C.F.R. § 648.80(g)(1).

In order to conserve and manage the Northeast groundfish fishery, the Agency’s regulations also set minimum fish sizes for vessels fishing with a Northeast multispecies permit. At the time of the alleged violation, the minimum length for cod was 19 inches, or 48.3 centimeters, and the minimum length for redfish was 7 inches, or 17.8 centimeters. 50 C.F.R. § 648.83(a)(1). Redfish has the smallest minimum size for all fish in the Northeast groundfish fishery. *See id.*

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<sup>16</sup> The record does not contain any evidence suggesting that any exemption to the relevant regulations applies in this matter.

ii. *Default Judgment*

The procedural rules governing this proceeding, set forth at 15 C.F.R. Part 904 (the “Rules of Practice”), place the responsibility of scheduling the hearing on the Judge. 15 C.F.R. § 904.250(a). Specifically, the Rules of Practice state:

With due regard for the convenience of the parties, their representatives, or witnesses, the Judge shall fix the time, place and date for the hearing and shall notify all parties of the same. The Judge will promptly serve on the parties notice of the time and place of hearing. The hearing will not be held less than 20 days after service of the notice of hearing . . . .

15 C.F.R. § 904.250(a). The Rules of Practice further provide:

If, after proper service of notice, any party appears at the hearing and an opposing party fails to appear, the Judge is authorized to . . . [w]here the respondents have failed to appear, find the facts as alleged in the NOVA . . . and enter a default judgment against the respondents.

15 C.F.R. § 904.211(a). Moreover, the Rules of Practice allow the Judge to “deem a failure of a party to appear after proper notice a waiver of any right to a hearing and consent to the making of a decision on the record.” 15 C.F.R. § 904.211(d).

Service of a NOVA “may be made 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. Service of a notice under this subpart will be considered effective upon receipt.” 15 C.F.R. § 904.3(a). Service of all other documents “may be made by first class mail (postage prepaid), facsimile, electronic transmission, or third party commercial carrier, to an addressee’s last known address or by personal delivery.” 15 C.F.R. § 904.3(b). Service of these documents “will be considered effective upon the date of postmark (or as otherwise shown for government-franked mail), facsimile transmission, delivery to third party commercial carrier, electronic transmission or upon personal delivery.” *Id.*

iii. *Standard of Proof*

To prevail on its claim that Respondent DiMaio violated the Magnuson-Stevens Act and its implementing regulations, the Agency must prove the facts constituting the violation by a preponderance of reliable, probative, credible, and substantial evidence. 5 U.S.C. § 556(d); *Vo*, 2001 NOAA LEXIS 11, at \*16–17 (NOAA Aug. 17, 2001) (citing *Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100–03 (1981)); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). To meet the preponderance of the evidence standard, the Agency must 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) (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983)). To satisfy this standard of proof, the Agency may rely on direct and circumstantial evidence. 2001 NOAA LEXIS 11, at \*17 (citing *Paris*, 4 O.R.W. 1058 (NOAA 1987)).

## **B. The Agency’s Arguments**

The Agency argues in its Post-Hearing Brief that Mr. Orifice’s photographs clearly prove that on October 29, 2013, Respondent DiMaio violated the regulation prohibiting the obstruction or constriction of trawl nets subject to minimum mesh size restrictions, as the pictures show a “greenish net inside the codend . . . [which] is an illegal net liner and is obviously obstructing the meshes in the codend.” Agency’s Post-Hearing Brief (“Agency’s Br.”) at 12–13.

## **C. Analysis**

### *i. Entry of Default Judgment Against Respondent DiMaio*

As evidenced by a Service of Legal Process Form admitted into the record, NOAA personally served Respondent DiMaio with the NOVA II on October 29, 2015, in Monterey, California. AX28. Upon serving the NOVA II on Respondent DiMaio, SA Don Tanner interviewed Respondent DiMaio about the allegations against him. AX29. Moreover, on November 23, 2015, Respondent DiMaio, through counsel, requested a hearing before an Administrative Law Judge on the matter. Finally, nothing in the record suggests that Respondent DiMaio ever raised any challenge to the service of process of the NOVA II. Accordingly, I find that the Agency properly served Respondent DiMaio with the NOVA II pursuant to 15 C.F.R. § 904.3(a), and that Respondent DiMaio had notice of the charges against him.

As for Respondent DiMaio’s notice of the date, time, and place of the hearing, on May 31, 2016, I issued a Notice of Hearing Order, scheduling the hearing to begin at 9 a.m. on August 30, 2016, in Boston, Massachusetts. CX 1. This Notice was sent by both regular and certified mail with return receipt requested to Respondent DiMaio’s Massachusetts and San Diego addresses. Although both copies of the Notice sent by certified mail were returned as “not deliverable as addressed[;] unable to forward,” both copies sent via regular mail were not returned. CX 1. On July 20, 2016, I issued a Notice of Hearing Location, specifying that the hearing would take place at the John W. McCormack Post Office and Courthouse, Courtroom 5 (12th Floor), 5 Post Office Square, Boston, Massachusetts 02109. CX 2; CX 3. This Notice was sent by both regular and certified mail with return receipt requested to Respondent DiMaio’s Massachusetts and San Diego addresses. The copy of the Notice sent to Respondent DiMaio’s Massachusetts address by certified mail was returned marked “unable to forward.” CX 3. The copy of the Notice that was mailed to Respondent DiMaio’s Massachusetts address by regular mail was not returned. The copies of the Notice that were sent to Respondent DiMaio’s San Diego address by regular and certified mail were returned to this Tribunal marked “not deliverable as addressed[;] unable to forward.” CX 2. The mailing addresses used for these

Notices, and for other documents mailed to Respondent DiMaio throughout this proceeding, consisted of Respondent DiMaio's last known address prior to issuance of the NOVA I (Massachusetts address) and an address provided by Respondent DiMaio himself during the prehearing stage of the proceeding (San Diego address). At no time did Respondent DiMaio supply any other address.

When mail is properly addressed and proper postage has been affixed, there is a strong presumption that it was delivered in the ordinary course of mail and was received by the addressee, and this presumption can be rebutted only "by specific facts and not by invoking another presumption." *Ark. Motor Coaches, Ltd. v. Comm'r*, 198 F.2d 189, 191 (8th Cir. 1952). Utilizing both addresses of record for Respondent DiMaio, this Tribunal provided reasonable notice to Respondent DiMaio of the time, place, and date of the hearing in this proceeding more than 20 days before the hearing occurred. Consequently, I find that Respondent DiMaio was properly notified of the time and place of the hearing in accordance with 15 C.F.R. § 904.250(a). By failing to appear at the hearing, Respondent DiMaio effectively waived his right to a hearing and consented to the making of a decision on the record pursuant to 15 C.F.R. § 904.211(d). Pursuant to 15 C.F.R. § 904.211(a), a default judgment was, therefore, properly entered against Respondent DiMaio at the hearing on August 30, 2016.

*ii. Discussion of Liability Against Respondent DiMaio*

The NOVAs, as amended, charge Respondent DiMaio with one count of violating 16 U.S.C. § 1857(1)(A) and 50 C.F.R. § 648.14(k)(6)(i)(A) on or about October 29, 2013. In order to prove this violation, the Agency needs to demonstrate by a preponderance of the evidence that on or about October 29, 2013: 1) Respondent DiMaio was a person; 2) the F/V Capt Joe was subject to minimum mesh restrictions; and 3) Respondent DiMaio obstructed or constricted a net on the F/V Capt Joe either by using "any device or material, including, but not limited to, nets, net strengtheners, ropes, lines, or chafing gear, on the top of a trawl net" or by using "any mesh configuration, mesh construction, or other means on or in the top of the net . . . if it obstructs the meshes of the net in any manner." 50 C.F.R. § 648.80(g)(1)–(2).

By virtue of the default judgment entered against Respondent DiMaio, the facts as alleged in the amended NOVAs are deemed to be true. *See* 15 C.F.R. § 904.211(a)(2). In particular, the amended NOVAs allege as part of the "Facts Constituting Violation" section that "on or about October 29, 2013, Respondent [DiMaio] fished on the F/V Capt Joe using a trawl net configured with a separate mesh net on the top of the main trawl net."<sup>17</sup> These facts, coupled with the findings of fact that I made in the Factual Background section of this decision, amply support the elements of the charged violation against Respondent DiMaio, and thus, a finding of liability against him. Of particular significance, the photographs taken by Mr. Orifice on October 29th show that the green diamond-shaped mesh extended through portions of the codend that were not draped with yellow chafing gear. AX20; Tr. at 59–60. As the chafing gear hangs

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<sup>17</sup> The remainder of the "Facts Constituting Violation" section consists of conclusions of law, not allegations of fact.

from the bottom of the trawl net, and thus, serves to protect the bottom of the trawl net as it is being dragged along the ocean floor, Tr. 59; AX13 at 079; AX19 at 214, the green diamond-shaped mesh clearly was positioned “on the top of the trawl net,” as that term is defined by the applicable regulations. Further, as can be seen in the photographs, the different configurations of the black codend and the underlying green mesh result in the green mesh bisecting the mesh openings of the codend, effectively reducing their size and obstructing them. AX20; AX13 at 079–080.

Consistent with the foregoing discussion, I find that the Agency has established each element of the alleged violation by a preponderance of the evidence. Therefore, I conclude that on or about October 29, 2013, Respondent DiMaio violated 16 U.S.C. § 1857(1)(A) and 50 C.F.R. § 648.14(k)(6)(i)(A) by unlawfully fishing on the F/V Capt Joe in a regulated mesh area with a trawl net configured with a separate mesh net on top of the main trawl net that effectively obstructed the mesh openings of the trawl net.

## V. CIVIL PENALTY

Having determined that Respondent DiMaio is liable for violating the Magnuson-Stevens Act and its implementing regulations as charged in the amended NOVAs, I must next determine the appropriate amount, if any, of a monetary penalty to impose for this violation.

### A. Principles of Law

The Magnuson-Stevens Act provides, “[a]ny person who is found by the Secretary, after notice and opportunity for a hearing . . . to have committed an act prohibited by section 307 [of this Act] shall be liable to the United States for a civil penalty.” 16 U.S.C. § 1858(a). The amount of the civil penalty cannot exceed \$181,071 for each violation of the Act. *See* 16 U.S.C. § 1858(a) (establishing the maximum statutory penalty amount); 15 C.F.R. § 6.3(f)(15) (adjusting the penalty amount in 16 U.S.C. § 1858(a) for inflation, effective January 15, 2017); *see also* 15 C.F.R. § 6.4 (providing January 15, 2017, as the effective date for inflation adjustments).

The Magnuson-Stevens Act identifies factors to consider when determining the appropriate penalty to impose on a violator of the Act. The Act states:

In determining the amount of such penalty, the 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, *[p]rovided, [t]hat the information is served on the Secretary at least 30 days prior to an administrative hearing.*

16 U.S.C. § 1858(a). The Rules of Practice similarly state that “[f]actors to be taken into account in assessing a civil penalty . . . 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). Moreover, the Rules of Practice empower Administrative Law Judges to determine an appropriate penalty independently, “taking into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m).

## **B. Agency’s Penalty Policy**

When determining an appropriate proposed civil penalty, the Agency frequently refers to its Penalty Policy. Under the 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” 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.” *Id.* Under the Magnuson-Stevens Act, the “gravity” factor is composed of six different offense levels, which “reflect a continuum of increasing gravity, taking into consideration the nature, circumstances, and extent of a violation, with offense level I representing the least significant charged offenses, and offense level VI the most significant.” Penalty Policy at 6–8. The “culpability” factor is comprised of four levels of increasing mental culpability: unintentional activity (a violation that is inadvertent, unplanned, and the result of accident or mistake); negligence (the failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances); recklessness (a conscious disregard of a substantial risk of violating conservation measures that involves a gross deviation from the standard of conduct that a law-abiding person would observe in like circumstances); and intentional activity (a violation that is committed deliberately, voluntarily, or willfully). Penalty Policy at 6, 8–9.

The foregoing factors are depicted in a penalty matrix, with the “gravity” factor depicted on the vertical axis, and the “culpability” factor depicted on the horizontal axis of the matrix. Penalty Policy at 6. The intersection point from the levels used in each factor then identifies a penalty range on the matrix, and the midpoint of this penalty range determines the “initial base penalty” amount. Penalty Policy at 7. Once an “initial base penalty” amount is determined, “adjustment factors” are considered “to reflect legitimate differences among similar violations,” with the effect being that the initial base penalty may be adjusted up or down (or not at all) from



the midpoint of the penalty range, or to an altogether different penalty range. Penalty Policy at 9–10. The “adjustment factors” are as follows: an alleged violator’s history of non-compliance and “other matters as justice may require,” including the alleged violator’s conduct after the violation. Penalty Policy at 9–12. After the application of any “adjustment factors,” the resulting figure constitutes the “base penalty.” Penalty Policy at 5. Next, the value of proceeds gained from the unlawful activity and any additional economic benefit of non-compliance to the alleged violator are factored into the penalty calculation. Penalty Policy at 13–14. Such considerations include the gross ex-vessel value of fish illegally caught. Penalty Policy at 13.

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 environment.” *Nguyen*, 2012 NOAA LEXIS 2, at \*21 (NOAA Jan. 18, 2012); *see* 15 C.F.R. § 904.204(m). Rather, as noted above, Administrative Law Judges determine an appropriate penalty independently, “taking into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m).

### C. The Agency’s Arguments

The Agency argues that although Respondent DiMaio has not had any prior violations, “the other required considerations counsel in favor of a significant penalty.” Agency’s Br. at 13. First, the Agency argues for a significant penalty on account of Respondent DiMaio’s degree of culpability. *Id.* at 14–16. In particular, the Agency contends that Respondent DiMaio “had a strong motive to use illegal fishing gear, because the illegal gear configuration he employed made it easier for the F/V Capt Joe to catch the species he was targeting,” namely, “redfish, which has the smallest minimum size limit in the groundfish fishery.” *Id.* at 14 (citing various portions of the transcript). By increasing the F/V Capt Joe’s catches, the Agency argues, Respondent DiMaio then increased his earnings given the compensation structure in place. *Id.* at 15 (citing AX37). The Agency further argues that Respondent DiMaio’s claims about the net liner being misaligned chafing gear or derelict fishing gear were “implausible, deceptive, and inconsistent with other evidence in the case.” *Id.* at 14. According to the Agency, these considerations demonstrate that Respondent DiMaio intentionally fished for redfish using an illegal gear configuration, thus warranting a significant penalty. *Id.*

Turning to the nature, circumstances, extent, and gravity of the unlawful activity at issue, the Agency acknowledges that a program in effect at the time of the violation allowed fishermen to target redfish with trawl nets having 4.5 inch mesh openings. Agency’s Br. at 16 (citing Northeast Multispecies 2015 and 2016 Sector Operations Plans and 2015 Contracts and Allocation of Northeast Multispecies Annual Catch Entitlements, 80 Fed. Reg. 25,143, 25,152 (May 1, 2015)). Nevertheless, the Agency argues, the use of a net liner is a “clear violation, which counsels in favor of a higher penalty.” Agency’s Br. at 16. The Agency additionally argues that although the redfish population is currently healthy, it has historically been overfished, and the recovery of the stock from overfishing is inhibited by the slow growth of redfish. *Id.* at 16–17. Therefore, the Agency urges, this “Tribunal should impose a penalty that

deters illegal gear use and which will hopefully prevents [sic] redfish from becoming overfished again.” Agency’s Br. at 17. The Agency also argues in favor of a significant penalty because, while fishing with the illegal net liner, the F/V Capt Joe caught undersized cod, which are currently, and at the time they were caught, overfished. *Id.* at 17–18 (citing various sources). The Agency also claims that the use of a net liner likely continued from October 29 through October 30, as evidenced by the F/V Capt Joe’s large hauls of redfish during that period and Respondent DiMaio’s incentive to use a net liner, which further warrants a significant penalty. Agency’s Br. at 18 (citing 18 U.S.C. § 1858(a)).

Finally, the Agency argues that “[j]ustice requires the Tribunal to consider several other important principles in this case,” such as the economic benefit of the violation, a need to achieve deterrence, and the difficulty of detecting the violation at hand. Agency’s Br. at 18. In particular, the Agency contends that the entire amount earned by the F/V Capt Joe from the fishing trip in question, which the Agency contends added up to \$42,200, was “tainted” by Respondent DiMaio’s unlawful use of a net liner. *Id.* The Agency further argues that “[t]his amount represents the proceeds of his illegal activity and is subject to civil forfeiture under the Magnuson-Stevens Act.” *Id.* (citing 16 U.S.C. § 1858(a)). While recognizing that Respondent DiMaio earned only \$2,577.54 according to a settlement sheet for the trip, the Agency maintains that “[m]erely adding \$2,577.54 to the civil penalty in this case is unlikely to effectuate deterrence.” Agency’s Br. at 18–19 (citing AX38). Rather, the Agency argues, “a significant penalty is warranted, because violations [such as the one at issue] appear common and the culture of compliance is weak,” and “[i]f the fishing business a violator is operating in is not promoting compliance, then this Tribunal needs to impose greater penalties to deter violations.” Agency’s Br. at 19 (citing Tr. at 118; AX30–33). The Agency then argues that as “illegal fishing gear violations are difficult to detect . . . , the incentive to commit violations gets higher. If the incentive to commit violations is high, a significant penalty is necessary to deter violations.” *Id.* Finally, the Agency argues that “this Tribunal should impose a penalty that demonstrates to law-abiding fishermen that they will not be disadvantaged by complying with the law.” *Id.* at 20.

For the foregoing reasons, the Agency urges that I assess a significant penalty against Respondent DiMaio and, in particular, one that is higher than the civil penalties assessed in such similar cases as *Roberge*, NE1300388, F/V Princess Laura (EPA ALJ July 14, 2015), [http://www.gc.noaa.gov/documents/2015/2015\\_ALJ\\_Roberge\\_ocr.pdf](http://www.gc.noaa.gov/documents/2015/2015_ALJ_Roberge_ocr.pdf)<sup>18</sup> (civil penalty in the amount of \$20,000 assessed jointly and severally against the owner and operator of the F/V Princess Laura for one count of fishing with trawl gear containing a net liner), and *Drinkwater*, 2015 NOAA LEXIS 23 (NOAA July 14, 2015) (civil penalty in the amount of \$40,000 assessed jointly and severally against the owner and operator of the F/V Capt Joe for two counts of fishing with an obstructed or constricted trawl net). Agency’s Br. at 20–21.

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<sup>18</sup> Citation to Lexis is not yet available for this case. Consequently, an alternate citation for the case from NOAA’s website is provided herein.

#### D. Analysis

As previously discussed, I am tasked with independently determining the appropriate penalty to assess, if any, for the charged violation, “taking into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m). Thus, in calculating the penalty assessed below, I considered the following factors set forth in the Act and in the regulations at 15 C.F.R. § 904.108(a): the nature, circumstances, extent, and gravity of Respondent DiMaio’s violative conduct; Respondent DiMaio’s degree of culpability and history of prior offenses; and other matters required by justice.<sup>19</sup>

While focusing on those factors, I also gave some consideration to the Agency’s Penalty Policy. As previously noted, the Agency’s Penalty Policy was admitted into the evidentiary record at the hearing. *See* Tr. at 32–33; AX37. In addition, the Agency included with the NOVA I and NOVA II copies of the Agency’s Penalty Assessment Worksheets, which describe how the Agency calculated its proposed penalty based on the methodology set forth in the Penalty Policy. These documents were also admitted into the evidentiary record. *See* Tr. at 25; AX22; AX27. While the Agency noted at the hearing that it was “going to argue the statutory factors under the Magnuson-Stevens Act, as opposed to pointing to the penalty policy, to determine what the appropriate penalty should be,” the Agency’s arguments regarding the penalty address various considerations that are more thoroughly explored in the Penalty Policy, and it thus adds context to those arguments. Tr. at 28. Accordingly, I found the guidelines in the Penalty Policy to be informative.

As a final preliminary matter, I also note that the Agency did not put forth, either at the hearing or in its Post-Hearing Brief, a specific proposed penalty for me to consider as I weighed the appropriate amount of civil penalty to assess against Respondent DiMaio. In the NOVAs, as amended, the Agency had proposed a penalty of \$62,200 to be assessed jointly and severally against the Respondents, \$42,200 of which was characterized as the proceeds of their unlawful activity. After settling with Respondent PEI, the Agency did not further amend its NOVAs to present an updated proposed penalty reflecting the settlement, provide a copy of the settlement agreement between the Agency and Respondent PEI to this Tribunal, or otherwise inform this Tribunal of the amount for which Respondent PEI and the Agency had settled. *See generally Smith*, 2013 NOAA LEXIS 3, at \*7 (NOAA Feb. 4, 2013) (After NOAA settled with one respondent, it “advised the Tribunal that it was now seeking a reduced penalty of \$10,750 against [the remaining respondent], representing the balance of the proposed penalty after it settled with [the other respondent].”); *Hawthorne*, 2013 NOAA LEXIS 2, at \*3–4 (NOAA Feb. 27, 2013) (After settling with one respondent, NOAA reduced its proposed penalty against the remaining respondent and amended its NOVA to reflect that change.). Consequently, it is unclear how much, if anything, Respondent PEI agreed to pay NOAA for the violation in this proceeding, and

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<sup>19</sup> While the Act and Rules of Practice also identify a respondent’s ability to pay as a factor that may be considered in determining a penalty, the respondent bears the burden of proof on that issue. *See* 15 C.F.R. § 904.108. Because no evidence with respect to Respondent DiMaio’s ability to pay was submitted at any time in this proceeding, he is presumed to be able to pay a penalty, and therefore, this factor did not impact my assessment of any penalty.

how much of the proposed penalty of \$62,200 that NOAA considered to be attributable to Respondent DiMaio.

i. *Nature, Circumstances, Extent, and Gravity of the Violation*

As discussed above, the Agency argues that a number of considerations pertaining to the nature, circumstances, extent, and gravity of the violation support a significant penalty in this case. *See* Agency’s Br. at 16–18. In weighing the Agency’s arguments, I note that the Penalty Policy describes several factors generally considered by the Agency to be relevant to this inquiry, such as the nature and status of the resource at issue in the violation (e.g., whether the fishery is currently overfished, overfishing is continuing, or the stock is particularly vulnerable because of its slow reproduction rate); the potential or actual harm to the resource or regulatory scheme; and whether the violation involves fishing with unauthorized gear. Penalty Policy at 8.

Upon consideration of the entire evidentiary record, I find the nature, circumstances, extent, and gravity of Respondent DiMaio’s offense to be more modest than argued by the Agency. First, the stock targeted by the F/V Capt Joe at the time of the violation was redfish, and as the Agency established through the credible testimony of Sarah Heil at the hearing, the redfish stock in the Northeast multispecies fishery was healthy and not overfished at that time. The Agency also did not offer any evidence of actual harm to the redfish stock resulting from Respondent DiMaio’s unlawful activity. *See* 50 C.F.R. § 648.83(a)(1); Tr. at 74–75; AX18 at 137 (reflecting that the sample of 50 redfish from the tenth haul that Mr. Orifice measured were all of legal size).

Certainly, I recognize the evidence in the record demonstrating that the redfish stock has historically been overfished, that redfish may be more vulnerable than other species because its slow growth rate inhibits the stock’s recovery from overfishing, and that the use of a net liner reduces the size of the mesh openings in a trawl net, thereby enabling vessels to increase the numbers of redfish caught and, in turn, increasing the potential for overfishing of redfish. However, the Agency’s arguments on this point appear to be undermined, at least to some extent, by the fact that a program existed at the time of the violation that allowed vessels to target redfish with trawl nets having smaller mesh openings than the minimum size required by the regulations. Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; 2013 Sector Operations Plans and Contracts and Allocation of Northeast Multispecies Annual Catch Entitlements, 78 Fed. Reg. 25,591, 25,598 (May 2, 2013).<sup>20</sup> This program is seemingly incongruous with the objectives behind the prohibition on

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<sup>20</sup> This program, which has been in existence since 2012, grants an exemption to the minimum mesh size requirements as it allows for “sectors to use a codend with mesh as small as 4.5 inches (11.4 cm) when an observer or at-sea monitor is onboard.” Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; 2013 Sector Operations Plans and Contracts and Allocation of Northeast Multispecies Annual Catch Entitlements, 78 Fed. Reg. at 25,598. In order “to ensure that fishing under this exemption will not adversely affect other NE multispecies stocks,” NOAA imposed several requirements,

the use of net liners for purposes of reducing the size of a trawl net's mesh openings, at least with respect to redfish. Thus, the gravity of Respondent DiMaio's violation of that prohibition is questionable.

Moreover, as explained above, the two photographs that Mr. Orifice took depict a net liner being used only during the tenth haul of the trip. The record does contain some evidence suggesting that the F/V Capt Joe continued to use a net liner after that haul. For example, Mr. Orifice informed the SAs investigating this matter that he did not see the green diamond-shaped mesh material unloaded with the fish from the tenth haul or otherwise removed from the trawl net before the trawl net was returned to the water to begin the next haul. AX19 at 216. The Agency also points to Respondent DiMaio's incentive to use a net liner and the large hauls of redfish caught by the F/V Capt Joe on October 29th and October 30th as demonstrating that a net liner was used on other hauls. However, I am not persuaded that that evidence is sufficient, especially given Mr. Orifice's assertions that he never saw the green mesh at any time, in the trawl net or otherwise, except with the aid of the photographs he had taken of the catch from the tenth haul. See AX19 at 215-17; Tr. 81-82. Accordingly, I find that the record lacks sufficient evidence to establish that Respondent DiMaio used a net liner at any time other than the tenth haul, which counsels in favor of a modest penalty.

Finally, I found the Agency's argument that Respondent DiMaio's catch of undersized cod on this fishing trip should serve to increase the penalty in this proceeding to be unpersuasive. In two recent cases adjudicating violations of the regulations at issue here, the administrative tribunal found that the nature, circumstances, extent, and gravity of the violations were merely modest because the respondents in those cases targeted healthy stocks of fish when using illegal gear, and the number of undersized fish caught was limited. See *Roberge*, NE1300388, F/V Princess Laura (EPA ALJ July 14, 2015), [http://www.gc.noaa.gov/documents/2015/2015\\_ALJ\\_Roberge\\_ocr.pdf](http://www.gc.noaa.gov/documents/2015/2015_ALJ_Roberge_ocr.pdf); *Drinkwater*, 2015 NOAA LEXIS 23 (NOAA July 14, 2015). In the first case, *Roberge*, "the record evidence[d] that only .8%, or approximately 200 pounds out of the total of almost 25,000 pounds of fish caught, were undersized or short," and the undersized fish caught were redfish. See *Roberge*, NE1300388, F/V Princess Laura, at \*20-21 (EPA ALJ July 14, 2015), [http://www.gc.noaa.gov/documents/2015/2015\\_ALJ\\_Roberge\\_ocr.pdf](http://www.gc.noaa.gov/documents/2015/2015_ALJ_Roberge_ocr.pdf). In the second case, *Drinkwater*, "the number of juvenile fish the vessel caught as a result of the violations, 330 pounds, represents a tiny percentage (1.5%) of the total fish caught. Moreover, the evidence suggests the juvenile fish that were caught were not endangered." *Drinkwater*, 2015 NOAA LEXIS 23, at \*72-73 (NOAA July 14, 2015).

In the present case, Mr. Orifice measured only one undersized Atlantic cod that was caught during the tenth haul when the F/V Capt Joe was found to have fished with unlawful gear. See 50 C.F.R. § 648.83(a)(1); Tr. at 74-75; AX18 at 137. This undersized cod was documented as weighing two pounds. AX18 at 137. The total weight of fish caught during haul 10 was

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including "[m]onthly catch thresholds (80-percent redfish requirement and no more than 5 percent NE multispecies discard requirement)." *Id.*



documented as weighing a total of 14,170 pounds. AX18 at 135. Therefore, only 0.014% of the total of 14,170 pounds of fish caught during haul 10 were undersized cod. While I recognize that the circumstances here are not identical to those in the cases cited above given the unhealthy status of the Atlantic cod stock at the time of Respondent DiMaio's violation, *see* Notification of a Determination of Overfishing or an Overfished Condition, 78 Fed. Reg. 64,480 (Oct. 29, 2013), the percentage of undersized cod that the F/V Capt Joe caught when fishing with unlawful gear during haul 10 represents a miniscule proportion of the overall fish that it caught during this haul. As such, Respondent DiMaio's catch of undersized cod was not a factor that I used to increase the penalty.

ii. *Respondent DiMaio's Degree of Culpability*

As previously discussed, the Agency's Penalty Policy discusses four levels of increasing mental culpability – unintentional, negligence, recklessness, and intentional – and the Agency argues that Respondent DiMaio's conduct in this proceeding should be characterized as “intentional,” the highest degree of culpability set forth in the Penalty Policy. Agency's Br. at 14–16. The Penalty Policy defines an “intentional” violation as one that is “committed deliberately, voluntarily or willfully, i.e., the alleged violator intends to commit the act that constitutes the violation.” Penalty Policy at 8.

The evidence presented in this proceeding reveals conduct on the part of Respondent DiMaio that is consistent with a high degree of culpability, or an “intentional” violation. As an actor in a highly regulated industry, Respondent DiMaio had a duty to know and abide by the law. *See Peterson*, 6 O.R.W. 486, at \*9 (NOAA 1991) (“When one engages in a highly regulated industry, that person bears the responsibility of knowing and interpreting the regulations governing that industry.”). Respondent DiMaio demonstrated his understanding of the regulations governing the industry when Mr. Orifice asked him at the conclusion of the trip if he was using a net liner, and he replied, “[N]o, you have to belong to a program and pay \$500 a day to use the 4 inch liner, and he wasn't part of it.” AX19 at 218. Therefore, it is clear that Respondent DiMaio was aware of the restrictions governing the use of net liners; nevertheless, when questioned by Mr. Orifice at the conclusion of the trip and by the SAs during NOAA's investigation of the matter, Respondent DiMaio consistently denied having used one. Given Respondent DiMaio's role as the captain of the F/V Capt Joe, it seems unlikely that a net liner could have been used onboard without his knowledge. *See* AX19 at 221–22. Thus, he appears to have been deliberately trying to deceive those who were questioning him with his denials.

Casting further doubt on Respondent DiMaio's truthfulness as to the use of a net liner is the fact that he altered his explanation of the alleged offense as NOAA's investigation progressed, and that both of his explanations were inconsistent with other available evidence. In particular, when Mr. Orifice questioned Respondent DiMaio about the use of a net liner, Respondent DiMaio claimed that any irregularities seen by Mr. Orifice were simply the result of misaligned chafing gear. AX5 at 037; AX19 at 213. However, when he was subsequently interviewed by the SAs, Respondent DiMaio claimed instead that the green diamond-shaped



mesh material visible in the photographs taken by Mr. Orifice was debris that had been caught during a haul. The fact that Respondent DiMaio changed his account of the violation is suspect.

Further, both of Respondent DiMaio's claims are at odds with the ample evidence in the record supporting the conclusion that the material was not chafing gear or debris, but a net liner, such as Douglas Christel's determinations based on the photographs taken by Mr. Orifice and Mr. Orifice's credible testimony on the subject at the hearing. Especially notable is that Respondent DiMaio claimed to have thrown the purported debris overboard at a location that was later conclusively established by Ms. Galvan's report and Mr. Semaru's testimony as being well outside the route traveled by the F/V Capt Joe on the trip. Respondent DiMaio thus appears to have blatantly falsified information on this matter. Accordingly, I am compelled to find that Respondent DiMaio was aware of the net liner's presence in the trawl net and, knowing that it was unlawful, attempted to avoid detection by misleading Mr. Orifice and the SAs as to the true nature of the material. Such conduct undoubtedly reflects a high level of culpability and weighs in favor of a commensurately high penalty.

### iii. *Respondent DiMaio's History of Prior Violations*

The Agency does not allege any history of prior violations in this proceeding by Respondent DiMaio. *See* Agency's Br. at 13. While a history of prior violations may serve as a basis to increase a penalty, a number of administrative tribunals have conversely determined that the absence of prior violations may support the assessment of a lower penalty. *See, e.g., Frenier*, 2012 NOAA LEXIS 11, at \*39 (NOAA Sept. 27, 2012) ("The 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."); *Straub*, 2012 NOAA LEXIS 1, at \*24 (NOAA Feb. 1, 2012) ("The absence of prior offenses . . . tends to favor a low civil monetary penalty."); *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 factor in the penalty assessment."). The Agency's Penalty Policy also appears to recognize a respondent's long history of compliance as a mitigating factor (albeit in the context of "other matters as justice may require"). *See* Penalty Policy at 5, 12. In the present case, Respondent DiMaio asserted during NOAA's investigation of the charged violation that he had not been cited for any similar infractions despite his vessels having been inspected on multiple occasions before and after the trip in question, and the record does not contain any evidence suggesting otherwise. AX9 at 49; AX29 at 274. However, the evidence presented also does not establish the length of time in which Respondent DiMaio has participated in the fishing industry so as to provide context for the lack of prior and subsequent violations. Therefore, this factor was given very limited consideration in my assessment of the penalty.

### iv. *Other Matters as Justice May Require*

As noted above, the Agency argues that a number of other matters merit a significant penalty, including the economic benefit of the violation, a need to achieve deterrence, and the difficulty of detecting the violation at hand. Agency's Br. at 18-20. Additionally, the Penalty Policy identifies several considerations constituting "other matters as justice may require" that may warrant an upward or downward adjustment of the penalty, including the good or bad faith

activities of the violator after the violation occurs. Penalty Policy at 12. Examples of good faith factors that may mitigate the penalty include “self-reporting, providing helpful information to investigators, and cooperating with investigators in any on-going investigation.” *Id.* In turn, examples of bad faith factors that may result in an increased penalty include “any attempt on the part of the alleged violator to avoid detection . . . or any evidence that the alleged violator interfered with the investigation by destroying evidence, intimidating or threatening agents or witnesses, lying, or similar activity.” *Id.*

With respect to Respondent DiMaio’s conduct after the violation occurred, the record reflects that Respondent DiMaio was “very cooperative” in inviting the SAs onboard the F/V Capt Joe and responding to their questions. Tr. at 87–88. Moreover, Mr. Orifice stated that Respondent DiMaio “was one of the best captain’s he’s worked with.” AX19 at 218. However, in responding to the questions of Mr. Orifice and the SAs, Respondent DiMaio plainly lied about using a net liner and about disposing of the derelict fishing gear that he claimed the F/V Capt Joe picked up. Accordingly, any cooperation that could be attributed to Respondent DiMaio was negated by his dishonesty, and therefore, I did not mitigate the penalty based on Respondent DiMaio’s cooperation with Mr. Orifice and with the SAs when they were conducting their investigation.

As for the economic benefit of the violation and need to achieve deterrence, the Agency presented documentation related to the sale of the fish caught on the fishing trip, which was admitted into evidence as AX21, and was described at the hearing as reflecting the gross proceeds of the trip. *See* Tr. at 133–36. Counsel for the Agency explained at the hearing that this figure – which, as shown in AX21, appears to exceed \$40,000 – is “how much we believe the fishing business, the entire business, the owner, the operator was paid for the fishing trip in question.” Tr. at 135–36. Counsel further acknowledged that he had “no reason to believe [that Respondent DiMaio had] received the gross proceeds of this fishing trip.” Tr. at 135. The Agency reiterated this position in its Post-Hearing Brief. Referring to a “settlement sheet” offered by Mr. Muniz at the hearing and entered into evidence as AX38,<sup>21</sup> the Agency asserted that “it seems that the Respondent Pasquale DiMaio only kept a small fraction of these illegal proceeds for himself,” namely \$2,577.54 as documented on the settlement sheet. Agency’s Br. at 18 (citing AX38). Nevertheless, the Agency appears to argue in its Post-Hearing Brief that the value of the fish as shown in AX21 represents the proceeds of Respondent DiMaio’s unlawful activity, and should be added to any penalty assessed against him for purposes of deterrence. At the very least, the Agency argues, “[m]erely adding [Respondent DiMaio’s proceeds of] \$2,577.54 to the civil penalty in this case is unlikely to effectuate deterrence.” Agency’s Br. at 19.

I disagree with the Agency’s reasoning. First, I recognize the importance of recapturing the value of proceeds gained from unlawful activity in this type of proceeding. As has been explained:

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<sup>21</sup> The Agency presented no evidence of its own concerning the amount that Respondent DiMaio earned for his work on the fishing trip. As counsel for the Agency explained at the hearing, “[W]e don’t have any specific evidence to put on regarding what it is that Mr. Pasquale DiMaio was paid for this particular trip, and we were not planning on doing so today.” Tr. at 136.

Justice . . . requires that the assessed penalty recapture the full economic benefit which accrued to Respondents as a result of the violations. Recapturing the economic benefit serves two purposes important as a matter of justice, both unrelated to “punishing” the violator: First, it discourages violations by dispelling the notion that penalties are merely a “cost of doing business.” Second, it demonstrates to judicious, law-abiding fishermen that complying with the law will not put them at a competitive disadvantage.

*Bolton*, 2015 NOAA LEXIS 2, at \*124 (NOAA Feb. 9, 2015). That being said, penalties are not imposed to punish the violator; rather, they are assessed with the goal of achieving deterrence. Depending on the circumstances of a case, deterrence can be accomplished by imposing a penalty that recoups the value of an unlawful catch and assesses an additional amount that is significant enough “to alter the economic calculus that might lead [the violator] and other participants in the fishery to simply account for any possible sanction as the cost of doing business.” *Churchman*, 2011 NOAA LEXIS 2, at \*60–61 (NOAA Feb. 18, 2011). “This amount should not, however, be so large that it renders the deterrent punitive.” *Id.*

In the present case, imposing a penalty against Respondent DiMaio that is so large that it encompasses the entire gross value of the fish that the F/V Capt Joe caught for the trip would undoubtedly be punitive. First, it is undisputed that he received only a small fraction of those proceeds. While the Agency may consider the gross proceeds from the fishing trip as the amount earned by the entire business, the entire business is not a party to this proceeding at this point, only Respondent DiMaio is. Moreover, the gross value represents the proceeds from the entire multiday trip, which occurred from October 24, 2013, to November 3, 2013. However, as discussed above, the Agency proved that Respondent DiMaio was fishing with a net liner only during one haul out of the 30 conducted over the course of the trip. Therefore, imposing a penalty that accounts for proceeds from fish caught during hauls where a net liner was not used, and for proceeds that Respondent DiMaio never received, would far surpass the goal of deterrence and serve to unjustly punish Respondent DiMaio for his violation. Instead, I find that a penalty encompassing both the economic benefit accrued just to Respondent DiMaio from his unlawful use of a net liner on the tenth haul of the fishing trip,<sup>22</sup> and an additional amount that is much less severe than that suggested by the Agency, will strike a better balance between a penalty that is punitive in nature and one that is sufficient for purposes of deterrence.

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<sup>22</sup> The precise economic benefit accrued to Respondent DiMaio from his unlawful use of a net liner on the tenth haul is not evident from the record, and the Agency did not offer any proposed methodology for calculating how much of Respondent DiMaio’s earnings can be attributed to the tenth haul alone. However, the amount clearly is a modest percentage of Respondent DiMaio’s total earnings from the trip, and I do not find the uncertainty about the precise figure to be an impediment in determining the appropriate penalty.

#### **D. Conclusion**

Upon consideration of the evidence in the record and the penalty factors listed at 16 U.S.C. § 1858(a) and 15 C.F.R. § 904.108(a), I hereby determine that a civil penalty in the amount of \$15,000 is appropriate for Respondent DiMaio's violation. This figure encompasses the economic benefit accrued to Respondent DiMaio as a result of his unlawful conduct. It also represents a balance of the factors weighing in favor of a substantial penalty, namely, Respondent DiMaio's culpability in this proceeding, and those weighing in favor of a more modest penalty, such as the moderate gravity of the violation. Given the relatively small economic benefit that accrued to Respondent DiMaio as a result of his unlawful use of a net liner on the tenth haul, this penalty is also deemed to be sufficient to serve as a deterrent to him and others operating in the Northeast multispecies fishery from committing such infractions.

#### **V. DECISION AND ORDER**

A total penalty of **\$15,000** is hereby **IMPOSED** on Respondent Pasquale DiMaio for the violation upon which he was found liable herein.

*Once this Initial Decision becomes final under the provisions of 15 C.F.R. § 904.271(d), Respondent Pasquale DiMaio 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.**



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

Date: May 24, 2017  
Washington, D.C.

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.