



UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:)	
)	DOCKET NUMBER:
)	
Tony Quoc Bui, Vi Van Tran,)	SE 1603549
Timmy Van Le, and Dinh Van Ho)	
)	
Respondents.)	
)	

INITIAL DECISION AND ORDER

Date: March 25, 2019

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

Appearances: For the Agency:
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For Respondents:
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¹ 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 BACKGROUND

The National Oceanic and Atmospheric Administration (“NOAA” or “Agency”) initiated this proceeding when it issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”), dated March 23, 2017, which was later amended on December 12, 2017 (“Amended NOVA” or “Am. NOVA”), to remove an individual initially charged in the NOVA. The Amended NOVA charges Tony Ouoc Bui, Vi Van Tran, Timmy Van Le, and Dinh Van Ho (hereinafter referred to as Respondent Bui, Tran, Le, or Ho, respectively, or Respondents, collectively), jointly and severally, Am. NOVA at 3, with a single count of violation of the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”) and implementing regulations for “possessing red snapper taken during the seasonal closure of the recreational sector for red snapper . . . that were disposed overboard after approach by an enforcement vessel,” on or about April 4, 2016, Am. NOVA at 1-2 (citing 16 U.S.C. § 1857(1)(A); 50 C.F.R. § 600.725(e); 50 C.F.R. §§ 622.13(u), .34(b)). For this single-count alleged violation in the Amended NOVA, the Agency seeks a penalty of \$8,000. Am. NOVA at 2. Through counsel, Respondents timely requested a hearing, and the Agency subsequently forwarded the case to this Tribunal.

By order dated November 3, 2017, I was designated to preside over the litigation of this matter. On November 7, 2017, I issued an Order to Submit Preliminary Positions on Issues and Procedures (“PPIP Scheduling Order”) to the parties, setting forth various prehearing filing deadlines and procedures, including filing deadlines for each party to submit its Preliminary Position on Issues and Procedures (“PPIP”). In accordance with that order, the parties filed their respective PPIPs,² and I scheduled the evidentiary hearing in this matter by Notice of Hearing Order dated January 30, 2018, which established a hearing commencement date of May 30, 2018.³

Prior to the hearing, the Agency filed two motions in which it sought to exclude certain proposed evidence by Respondents. One of the motions, a Motion in Limine, sought to exclude any information introduced by Respondents as to their ability to pay an assessed penalty, arguing that Respondents failed to comply with applicable law on this issue in spite of attempts by the Agency, spanning several months, to obtain complete financial information to support such claims. The other motion by the Agency, a Motion to Disqualify, sought to disqualify Respondent Le as an expert regarding the behavior of red snapper. Although Respondents were provided with an opportunity to respond to these motions, they did not do so. On May 22, 2018, I issued an Order on Agency’s Motions in which I granted both motions.

² Both parties supplemented their PPIPs prior to hearing. By Order dated April 18, 2018, this Tribunal directed Respondents to supplement their joint PPIP due to deficiencies contained therein that failed to comply with the PPIP Scheduling Order requirements.

³ A Notice of Hearing Location was subsequently issued on March 14, 2018, setting forth details about the precise hearing location.

Thereafter, I conducted the evidentiary hearing in this matter as scheduled on May 30, 2018, in Lafayette, Louisiana.⁴ At the hearing, the Agency presented Agency's Exhibits ("AX") 1-15, which were admitted into evidence without objection. The Agency also presented the testimony of four witnesses: Derek Logan ("Officer Logan"), an officer with the Louisiana Department of Wildlife and Fisheries; Jason Stagg ("Officer Stagg"), an officer with the Louisiana Department of Wildlife and Fisheries; Justin Sonnier ("Officer Sonnier"), an officer with the Louisiana Department of Wildlife and Fisheries; and Ronald Messa ("Special Agent Messa"), a special agent within NOAA's Office of Law Enforcement. Respondents offered Respondents' Exhibits ("RX") 1-7 and RX 13-15, which were admitted into evidence without objection.⁵ Respondents also presented the testimony of each Respondent, namely Respondents Bui, Tran, Le, and Ho.

Following service of the certified transcript of the hearing to the parties on June 14, 2018, I issued an Order Scheduling Post-Hearing Submissions on the same date, establishing various post-hearing filing deadlines. Consistent with such deadlines, the Agency timely filed a motion to conform the transcript to the hearing testimony, which it later amended, and which was then granted by Order Granting Motions to Conform Hearing Transcript to Testimony, dated July 12, 2018. Thereafter, the Agency timely filed its Initial Post-Hearing Brief ("Ag. In. Br."), and Respondents filed their Initial Post-Hearing Brief ("Resps. In. Br."), in accordance with established post-hearing deadlines. Subsequently, the Agency timely filed its Reply Brief ("Ag. Rep. Br."). Respondents, though untimely by more than three weeks and without explanation, filed their Reply Brief ("Resps. Rep. Br."), on September 25, 2018. Nevertheless, in the absence of any prejudice from the delayed filing and to allow for a complete review of the arguments raised, I have accepted Respondents' untimely Reply Brief and considered it in my review and decision in this case.

II. STATEMENT OF THE ISSUES

a. Liability

In making a determination on liability, I must determine if Respondents, on or about April 4, 2016, violated the Magnuson-Stevens Act at 16 U.S.C. § 1857(1)(A), and regulations at 50 C.F.R. §§ 622.13(u), .34(b) and 50 C.F.R. § 600.725(e), by possessing red snapper taken during the seasonal closure of the recreational sector for red snapper and disposing of such snapper overboard after approach by an enforcement vessel.

⁴ Citations to the transcript of this evidentiary hearing are made in the following format: "Tr. [page]."

⁵ Respondents' proposed RX 8-12 are in support of an argument regarding an inability to pay a monetary penalty. These proposed exhibits were excluded from consideration consistent with the Order on Agency's Motions dated May 22, 2018.

b. Civil Penalty

If liability for a charged violation is established, then I must determine the amount of any appropriate 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; Respondents' degree of culpability; any history of prior violations; Respondents' 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 factors to be taken into account in assessing a penalty).

III. FACTUAL SUMMARY

At the outset, I note that material conflicts regarding the facts of this case were presented. The Agency's witnesses and Respondents had opposing accounts of the events that transpired and which gave rise to the charged violation in this matter. Below is a summary of the pertinent facts and an analysis of my resolution on factual conflicts in this matter.

A state-registered vessel, boat number LA-6146-GD ("Vessel"), owned by Johnny Ha (not a party to this case), was used recreationally by Respondents at the time of the alleged violation in this matter. *See* AX 2; AX 11; AX 13; Tr. 29-30. On April 4, 2016, uniformed Officers Logan and Stagg were on a routine federal fisheries patrol in the Exclusive Economic Zone ("EEZ") of the Gulf of Mexico in a "well-marked uniform patrol vessel." Tr. 32-33; *see also* Tr. 30, 92. This patrol vessel has distinguishing characteristics that include markings along the side of the vessel that read "State and Federal Law Enforcement" as well as the enforcement department's crest and large green stripes. Tr. 32-33. In addition, the patrol vessel has "a big blue light bar" on its top and large antennas that protrude in the air. Tr. 33. On this date, the recreational red snapper season was closed, which meant that it was illegal to possess red snapper during the seasonal closure. Tr. 33, 92; AX 1 at 5. Respondents were aware of these circumstances. *See* Tr. 185-86, 217, 233, 250, 261, 280.

During their patrol, Officers Logan and Stagg observed and eventually approached the Vessel to conduct a routine boarding check. Tr. 30, 92. Initially, their view of the Vessel was unclear, but as they continued their approach, they navigated their patrol vessel around a platform rig and approached the Vessel from an angle, at which point they obtained a clearer view of it. Tr. 30, 66, 92-93. According to Officer Stagg, the presence of their patrol vessel appeared to surprise Respondents. Tr. 92. As the patrol vessel came into the view of Respondents, Officers Logan and Stagg observed two of the Respondents, later identified as Respondents Bui and Le, Tr. 36-37, 96-97, lift an ice chest and begin dumping its contents of red snapper into the water. Tr. 33-34, 93, 102, 116. At this point, the patrol vessel was no more than 100 feet away from Respondents' Vessel. Tr. 74-75, 113. In spite of the Officers' verbal warning to halt the discard of fish, Respondents Bui and Le continued to dump the fish from the ice chest into the water. *See* Tr. 34. According to Officer Logan, Respondents Bui and Le "just looked at us and kept on." *Id.* At the same time, the Officers were bringing the patrol

vessel to rest along the side of the Vessel, and the vessels were separated by approximately three to five feet throughout the encounter. Tr. 31, 34.

Officers Logan and Stagg were very surprised by the Respondents' actions and neither Officer had previously encountered a situation like this where fish were suddenly being discarded in their presence. Tr. 70, 124. Officer Stagg described the scene as "frantic" as the Officers tried to respond to the unusual situation and document their observations. Tr. 102-03. According to the Respondents, they first saw the approach of law enforcement from less than one mile away, did not dump any fish, and had immediately released any red snapper that they caught that day. Tr. 187, 194-95, 228, 231-32, 250-51, 279-80. While Respondent Tran maintained that Respondents did not dump fish on this occasion, he elaborated that "if we see they coming, we dump before they come so you don't see nothing around us. But we didn't dump any red snapper. We don't dump any red snapper." Tr. 251. He reiterated "[i]f we dump, we dump before they come. If they come, they don't see nothing on the boat and nothing on the water." Tr. 259. Later, Respondent Tran explained further that "what we are saying is that, you know, once they come and was not a fishing boat, it was a wildlife boat, I would have dumped it before they come." Tr. 268-71.

Officer Logan directed Officer Stagg to obtain a camera that was stowed on the patrol vessel while he rushed to the bow of the patrol vessel and began counting aloud the number of red snapper he saw in the water that Respondents had discarded. Tr. 34-35. While Officer Logan believed in excess of 20 fish were discarded, he was only able to count 20 fish before they sank into the water, and of those 20 fish, he and Officer Stagg were only able to retrieve one fish as evidence. Tr. 35-36, 94-96; AX 13 at 2. At some point during the chaotic scene, Officer Stagg was able to locate and power "on" a camera-device that had been stowed for security aboard the patrol vessel but by this time he was only able to photograph the single fish they recovered from the water, the length of which they also measured. Tr. 35-37, 95-96, 98; AX 2.

Soon thereafter, additional photographs were taken of the Vessel, Respondents, and the ice chests that were on board the Vessel, and the Respondents were questioned about the events that had just transpired. Tr. 38-42; AX 1 at 5; AX 8. One of the Respondents who had identified himself as the Captain of the Vessel (subsequently identified at hearing as Respondent Le),⁶ also permitted Officer Logan to inspect each of the ice chests and compartments aboard the Vessel, none of which revealed the presence of any fish. Tr. 38-39. During the questioning, it became apparent to Officer Logan that Respondents Bui and Le were fluent in English and could communicate in English without issue, however, it also appeared to him that a language barrier existed for Respondents Tran and Ho, who were "very reserved" and said little throughout the encounter. Tr. 42. Officer Logan inquired of Respondents why they dumped the fish overboard. *Id.* In response, Respondents Bui and Le stated they knew it was illegal to possess red snapper. *See* Tr. 41-42. Following some communication among Respondents in Vietnamese, one of the Respondents, either Respondent Bui or

⁶ Tr. 192.

Respondent Le,⁷ also informed Officer Logan that there were only 12 red snapper in the ice chest. Tr. 42-45, 85-86. According to Officer Logan, in making this statement either Respondent Bui or Respondent Le was “adamant,” and stated “multiple times” that there were “only 12 fish, 12 red snapper” in the ice chest. Tr. 44-45. Further, Respondents confirmed that the fish that were dumped overboard were red snapper, just like the single fish that was recovered and measured by the Officers. Tr. 45. However, according to the account by Respondents, they had immediately released any red snapper they caught that day and did not retain any red snapper. Tr. 187, 232, 250, 279-80. According to Respondent Tran, only 12 red snapper were in the water during the inspection. Tr. 249.

Officer Logan proceeded to complete the “Bag Limit/Prohibited Species/Undersize Catch Measurement Form” on which he identified the single red snapper retrieved from the water, measuring 19.5 inches in total length, and on a second line of the form, he identified 19 additional red snapper that he counted but could not retrieve and for which measurements could not be provided. Tr. 46-47; AX 2. He also identified the violation type as “P,” for “Prohibited Species,” since the red snapper were caught and retained during the seasonal closure for red snapper. *See* Tr. 46-47; AX 2. According to Officer Logan, Respondent Le disagreed with the number of red snapper identified on the form and insisted that only 12 red snapper were caught and retained before being dumped overboard. Tr. 47-48. In response, Officer Logan identified 12 red snapper on the third line of the form, for which no measurements could be provided and for which the violation type was again identified as “P.” Tr. 47-48; AX 2. Respondent Le initialed his agreement with the first and third lines on the form—the lines identifying the solely retained red snapper measuring 19.5 inches in total length, and the 12 red snapper Respondent Le insisted was the total number caught, retained, and then discarded overboard—but he initialed that he disagreed with the line identifying the 19 red snapper Officer Logan counted. Tr. 208-11; AX 2. Respondent Le also signed this form. Tr. 211; AX 2.

Respondents were initially issued state citations for their violative conduct, but following review of the case by Officers Logan and Stagg’s superior officers, it was determined that because the violative conduct included the disposal of red snapper in the EEZ—when Respondents dumped the ice chest of red snapper overboard from the Vessel—federal citations were required to be issued in place of state citations because this disposal activity in the EEZ invoked federal jurisdiction. Tr. 50-57, 107-08; AX 5, 6, 9, 10, and 15. Consequently, citations identifying violations of federal law, including the possession of red snapper during the seasonal closure and the disposal of such red snapper (characterized as “obstruction”) were issued to Respondents by certified mailing and received by Respondents. AX 6, 10.

Thereafter, the matter was referred to Special Agent Messa for review. Tr. 168. During his review, Special Agent Messa confirmed that the Vessel was in federal waters when the violation occurred. Tr. 169-70; AX 14. He subsequently referred the matter to

⁷ Officer Logan clarified during his sworn testimony that the Respondent who communicated this information to him was either Respondent Bui or Respondent Le (“Timmy” or “Tony”), not Respondent Tran as was mistakenly identified in his report. *See* Tr. 43-44; AX 1 at 5.

NOAA's Office of General Counsel for law enforcement since it involved "dumping or the destruction of evidence." Tr. 168-69.

IV. LIABILITY

a. Principles of Law Relevant to Liability

i. Standard of Proof

To prevail on its claim that Respondents violated the Magnuson-Stevens Act and its implementing regulations, the Agency must prove facts constituting the violation by a preponderance of reliable, probative, substantial, and credible evidence. 5 U.S.C. § 556(d); *Vo*, 2001 NOAA LEXIS 11, at *17 (NOAA Aug. 17, 2001) (citing 5 U.S.C. § 556(d); *Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100-03 (1981)); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). This standard requires the Agency to demonstrate that the facts it seeks to establish are more likely than not to be true. *Fernandez*, 1999 NOAA LEXIS 9, at *8-9 (NOAA Aug. 23, 1999) (citing *Herman & MacClean v. Huddleston*, 459 U.S. 375, 390 (1983)). To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence. *Vo*, 2001 NOAA LEXIS 11, at *17 (citing *Paris*, 4 O.R.W. 1058 (NOAA 1987)).

ii. Magnuson-Stevens Act and Implementing Regulations

In 1976, Congress enacted the Magnuson-Stevens Act, 16 U.S.C. §§ 1801-1883, "to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States." Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 401, 90 Stat. 331 (codified at 16 U.S.C. § 1801(b)(1)). The Magnuson-Stevens Act, as amended, aims to "promote domestic commercial and recreational fishing under sound conservation and management principles." 16 U.S.C. § 1801(b)(3).

Section 307(1)(A) of the Magnuson-Stevens Act makes it 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). "Person" is defined by the Magnuson-Stevens Act to include "any individual . . . , any corporation, partnership, association, or other entity . . . , and any Federal, State, local, or foreign government or any entity of any such government." 16 U.S.C. § 1802(36). Conservation-related violations of the Magnuson-Stevens Act are strict liability offenses, and, therefore, state of mind is irrelevant in determining whether a violation occurred. *Alba*, 1982 NOAA LEXIS 29, at *7 (NOAA App. 1982); *see also Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999) (holding that scienter is not required to impose civil penalties for violations of the Magnuson-Stevens Act and the implementing regulations); *Nguyen*, 2012 NOAA LEXIS 2, at *11 (NOAA Jan. 18, 2012) ("The Magnuson-Stevens Act, and the regulations promulgated thereunder, do not set forth a scienter requirement. Accordingly, any violations are strict liability offenses.") (internal citations omitted).

Regulations implemented pursuant to the Magnuson-Stevens Act provide protections to Gulf reef fish through seasonal and area closures. 50 C.F.R. § 622.34.⁸ Particular to the issues presented in this case, 50 C.F.R. § 622.34(b) provides that “the recreational sector for red snapper in or from the Gulf EEZ is closed from January 1 through May 31, each year. During the closure, the bag and possession limit for red snapper in or from the Gulf EEZ is zero.” The applicable regulations define the EEZ, to mean

the zone established by Presidential Proclamation 5030, 3 CFR part 22, dated March 10, 1983, and is that area adjacent to the United States which, except where modified to accommodate international boundaries, encompasses all waters from the seaward boundary of each of the coastal states to a line on which each point is 200 nautical miles (370.40 km) from the baseline from which the territorial sea of the United States is measured.

50 C.F.R. § 600.10. The general applicability provisions for bag and possession limits provide, in part, that such limits “apply for species/species groups in or from the EEZ.” 50 C.F.R. § 622.11(a)(1). The term “fishing” is defined, in part, as any activity that involves the actual or attempted “catching, taking, or harvesting of fish.” 50 C.F.R. § 600.10. Further, to “catch, take, or harvest includes, but is not limited to, any activity that results in killing any fish or bringing any live fish on board a vessel.” *Id.*

Further, applicable regulations set out certain prohibitions that make it unlawful for any person to “fail to comply with the restrictions that apply after closure of a fishery, sector, or component of a fishery, as specified in this part,” 50 C.F.R. § 622.13(u), or to “dispose of fish or parts thereof or other matter in any manner, after any communication or signal from an authorized officer, or after the approach by an authorized officer or an enforcement vessel or aircraft,” 50 C.F.R. § 600.725(e). An “authorized officer” is defined as:

- (1) Any commissioned, warrant, or petty officer of the USCG;
- (2) Any special agent or fishery enforcement officer of NMFS;
- (3) Any officer designated by the head of any Federal or state agency that has entered into an agreement with the Secretary and the Commandant of the USCG to enforce the provisions of the Magnuson-Stevens Act or any other statute administered by NOAA; or
- (4) Any USCG personnel accompanying and acting under the direction of any person described in paragraph (1) of this definition.

50 C.F.R. § 600.10.

⁸ Given the date of the alleged violation in this matter, the 2015 edition of the Code of Federal Regulations is the edition used in this decision, unless otherwise specified.

b. Parties' Arguments Regarding Liability

In its Initial Post-Hearing Brief, the Agency argues that it has met its burden and established liability for the charged violation by its presentation of the “detailed, credible testimony” of its witnesses, which is “corroborated by contemporaneously written records pertaining to their direct observations and investigations.” Ag. In. Br. at 5. It notes that this case turns on the issue of credibility, as Respondents disagree with the series of events related by the law enforcement officers and dispute the commission of any wrongdoing. *Id.* at 8.

On the issue of credibility, the Agency argues that it “provided contemporaneous reports, catch measurement forms, photographs, complaint/affidavits made at the time of the violations and credible testimony at the hearing documenting the disposal of red snapper possessed in the EEZ during the closure of the recreational fishery after the approach of law enforcement by [Respondents].” *Id.* at 7-8. It asserts that, unlike Respondents, “the Agency’s witnesses have no incentive to slant their contemporaneously written records or testimony, and possess no stake in the outcome of this case.” *Id.* at 8. Respondents offered less credible testimony, the Agency argues, about “events occurring more than two years ago,” which “was self-serving, inconsistent, improbable, and unpersuasive,” and the Agency notes that “each Respondent has an interest in the outcome of the case.” *Id.*

Specifically, the Agency highlights particular aspects of Respondents’ testimony to support its argument that Respondents are not credible. Regarding Respondent Tran, the Agency argues that his testimony suggests a pattern of dumping illegally possessed fish at the first sight of law enforcement so there is no evidence of wrongdoing. Ag. In. Br. at 9-10 (citing to Tr. 251, 258-59, 268-70). The Agency notes that, based on the testimony of Officers Logan and Stagg, Respondents appeared surprised by the approach of law enforcement and quickly discarded their illegal catch thereafter, which the Agency seems to imply is behavior consistent with Respondent Tran’s testimony. Ag. In. Br. at 10 (citing Tr. 30, 32, 74, 92-93, 113, 195, 228, 251). Further, the Agency asserts that Respondent Tran’s alternative explanation for what the officers observed—that Respondents “had just caught 12 red snapper on the 16 available hooks” which were released “all at once off the left side of the vessel right before the boarding officers arrived”—is improbable in that it is unlikely that “12 red snapper would be caught simultaneously using four rods . . . released on the left side, end up on the right side shortly thereafter, and simultaneously sink.” Ag. In. Br. at 10-11 (citing Tr. 265-68). Referencing the testimony of both Respondents Tran and Le, in which each recognized and confirmed the authority of Respondent Le as the captain over the vessel and crew, the Agency suggests that it is this very authority as vessel captain, which Respondent Le possessed at the time of the charged violation, that may have motivated “Respondent Tran’s change of story from what he told the officers on April 4, 2016 and his revised testimony about 12 red snapper simultaneously being caught and immediately released off the left side of the [Vessel].” Ag. In. Br. at 13 (citing Tr. 183, 250).

The Agency notes that while testimony was offered concerning “whether red snapper will sink or float on the water” when immediately released, as opposed to being discarded after being held in an ice chest, it argues that this point is immaterial to this case and it relies on the testimony of the law enforcement officers it presented to support its position. Ag. In. Br. at 11. Nevertheless, the Agency argues that Respondent Bui testified inconsistently about this immaterial fact and identifies one point during his testimony when he states support for his position from his personal experience but at another point states that research, not personal experience, supports his position. Ag. In. Br. at 11-12 (citing Tr. 225-26, 238-40, 242).

The Agency also suggests that Respondent Le’s testimony was inconsistent when he first acknowledged a prior incident from 2014 of which he was a part—“involving 19 red snapper harvested during the recreational closure, five of which were thrown overboard after the approach of law enforcement”—and testified that he had learned a lesson from that previous incident, but later testified he did not recall a discussion with law enforcement about red snapper restrictions during a seasonal closure. Ag. In. Br. at 12-13 (citing Tr. 183, 206, 215, 250).

In their Initial Post-Hearing Brief, Respondents argue that this matter should be dismissed because the Agency has not established liability by a preponderance of the evidence. Resps. In. Br. at 12-14. In support of their position, they argue that the evidence relied upon by the Agency to establish the violation is the testimony of Officers Logan and Stagg, which they assert should be rejected as not credible. Resps. In. Br. at 3, 6. Respondents highlight the mistakes the Officers acknowledged making during the encounter on April 4, 2016, and in documentation related to the cited violations, and they urge that I discredit their testimony because of such mistakes. Specifically, they point out that the Officers failed to photograph Respondents dumping red snapper from the ice chest to prove this allegation. Resps. In. Br. at 2-3 (citing Tr. 118). They also point out that the Officers initially issued them state citations before correctly replacing them with federal charges. Resps. In. Br. at 3-4. Additionally, Respondents note an error made in Officer Logan’s written report, which Respondents mistakenly attribute to Officer Stagg,⁹ wherein Respondent Tran was erroneously identified as one of the individuals who dumped fish when, at hearing, the Officers identified Respondents Bui and Le as the actual individuals they witnessed dumping fish. Resps. In. Br. at 2; *see also* AX 1 at 5-6. In contrast to the Officers’ account of what transpired, Respondents, in their Initial Post-Hearing Brief, recite portions of their own testimony offered at hearing as to their version of the events that transpired, noting the significant conflicts that exist between the Agency’s account of events and that of Respondents. Resps. In. Br. at 6-11.

Respondents contend that the Agency failed to prove its case by a preponderance of the evidence because the “testimony of Officer Logan was unbelievable,” and Officer Stagg’s testimony revealed that he did not recollect certain points, like whether he boarded the Vessel or whether he looked at the ice chests on board the Vessel, and that generally Officer Stagg was “[unsure] of many things.” Resps. In. Br. at 12-13. Respondents argue that Officer Logan cannot prove the red snapper he may have seen

⁹ The erroneous reference to Respondent Tran appeared in a report authored by Officer Logan, not Officer Stagg. *See* AX 1 at 5-6.

in the water came from Respondents, and they note that neither Officer took pictures of the claimed dumping of fish in spite of having a camera on board the patrol vessel. *Id.* They argue that the sworn testimony of Respondents was unequivocal “that they never dumped any red snappers out of an ice chest into the gulf.” Resps. In. Br. at 13. Respondents contend that they caught and immediately released about 12 red snapper and knew, as experienced fishermen, that they were not allowed to keep red snapper during the seasonal closure. *Id.* In further support of their position that they never dumped red snapper from an ice chest, Respondents assert that red snapper that has been placed on ice for five to ten minutes will die, and if then are dumped into the water, will float, not sink into the depths of the water, as the Officers contend. Resps. In. Br. at 8-9 (citing Tr. 226). That “[t]he fish sank . . . proves that they didn’t come from the Respondents’ ice chest.” Resps. In. Br. at 9.

In its Reply Brief, the Agency argues that Respondents’ arguments have not effectively rebutted the evidence the Agency has presented to establish liability for the charged violation. Ag. Rep. Br. at 1. Contrary to Respondents’ assertion that the Agency failed to establish that Respondents actually dumped red snapper, the Agency reiterates the testimony presented by Officers Logan and Stagg, wherein each Officer related his individual observation that two of the Respondents “lift[ed] an ice chest from [the Vessel] and dump[ed] red snapper out of the ice chest and into the water.” *Id.* at 3 (citing Tr. 74-75; AX 1).

Regarding the issue of whether red snapper from an ice chest will float or sink in the water, the Agency maintains that this is an irrelevant point. Ag. Rep. Br. at 3. The Agency argues that fish flotation is not an element of the charged violation, moreover, it asserts, “[b]oth officers personally witnessed at close proximity two of the Respondents lifting an ice chest and dumping red snapper into the water.” *Id.*

The Agency also argues that Respondents’ version of the facts is “inconsistent with reasonable and expected human behavior, both in regard to the actions of the officers and of the Respondents themselves.” Ag. Rep. Br. at 4. The Agency questions why the Officers would have issued citations for illegal red snapper possession and disposal if that activity did not, in fact, occur, and it asserts that no evidence has been presented to establish a motive for misrepresentation by the Officers, noting that they have nothing to gain by committing perjury and jeopardizing their employment. Ag. Rep. Br. at 4-5. In contrast, the Agency notes, “Respondents have a strong motive to alter the facts, facts they agreed with on the day of the violation, in order to avoid a civil monetary penalty.” Ag. Rep. Br. at 5. Additionally, the Agency notes that while Respondents (more specifically, Respondent Le) noted their disagreement with regard to Officer Logan’s count of 19 red snapper that was identified on the prohibited species form, they indicated their agreement on this form with regard to the single red snapper of 19.5 inches that was retained and measured, as well as catching 12 red snapper, the latter being a correction by Respondents to Officer Logan’s claim of counting 19 red snapper in the water that were discarded by Respondents and sank into the water. *See* Ag. Rep. Br. at 5. The Agency questions such agreement, and correction to the number of red snapper, if, in fact, no illegal possession of a prohibited species, *i.e.*, red snapper, occurred. *Id.*

In their Reply, Respondents maintain that they did not keep any of the red snapper they caught; rather, they “threw every red snapper back in the water and they committed no violations.” Resps. Rep. Br. at 1. They contend the Agency has failed to meet its burden and establish liability for the charged violation by a preponderance of the evidence presented in this case. *Id.*

c. Analysis of Liability

It is undisputed that at the time of this incident the season for recreational red snapper was closed, making it illegal to possess red snapper in federal waters. It is also undisputed that at the time of this incident, Respondents were aboard the Vessel in federal waters, namely the EEZ. Whether Respondents possessed red snapper and discarded the red snapper overboard in the presence of law enforcement is disputed. As the parties have noted and as is evident from the evidence presented in this case, resolution of liability turns entirely on the issue of credibility. The parties have diametrically-opposed accounts of what transpired on April 4, 2016. According to the Agency, Respondents committed the charged violation by possessing red snapper during the seasonal closure and discarding the red snapper overboard at the sight of approaching law enforcement. According to Respondents, they were falsely accused and cited for the claimed violative conduct for no apparent reason since they engaged in no wrongdoing and immediately released any red snapper they happened to catch on April 4, 2016.

In resolving the material conflicts presented, I evaluated the credibility of the witnesses and evidence presented as to the events that transpired on April 4, 2016, including the testimony of Officers Logan and Stagg and Respondents. Various factors are appropriate to consider when evaluating a witness’s credibility. Such factors may include the witness’s opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; any internal inconsistency of the witness’s statements; the witness’s bias, or lack thereof; the contradiction of the witness’s version of events by other evidence or its consistency with other evidence; the inherent plausibility of the witness’s version of events; any inaccuracies or falsehoods in the witness’s statements; and the demeanor, candor, or responsiveness of the witness. *See Oshodi v. Holder*, 729 F.3d 883, 891 (9th Cir. 2013); *Hillen*, 35 M.S.P.B. 453, 458 (MSPB 1987).

After a thoughtful and thorough review of the evidence presented in this case, I have determined that the testimony provided by Officers Logan and Stagg and their supporting documentation is more credible and reliable than the testimony provided by Respondents. Consequently, I have resolved the material conflicts presented in favor of the Agency and I have concluded that liability for the charged violation has been established by a preponderance of the reliable and credible evidence. My analysis follows.

Considering the aforementioned credibility factors, the evidence reveals that Officers Logan and Stagg had both the opportunity and capacity to observe the events

that transpired throughout the encounter with Respondents. It is undisputed that during a routine patrol of the EEZ, Officers Logan and Stagg approached Respondents in the Vessel, navigating their patrol vessel around a rig and at an angle such that their presence appeared to surprise Respondents. It also appears undisputed that the patrol vessel was no more than 100 feet away from the Vessel when the Officers first began to observe the violative conduct, and that they drew much closer, within several feet of Respondents and the Vessel, as the encounter ensued. While Respondents maintain they engaged in no wrongdoing, were simply fishing and eating lunch at the time of law enforcement's approach, and immediately released any red snapper they happened to catch that day, the Officers' credible, detailed, and consistent testimony about their observations reveal that two of the Respondents, later identified as Respondents Bui and Le, dumped red snapper from an ice chest overboard and into the water. In fact, according to the Officers, they were close enough, *i.e.*, within several feet, to be able to communicate with Respondents and direct them to stop discarding the fish, to no avail. According to Officer Logan, the Respondents responded to the Officers' directive by looking at them and then continuing to discard the red snapper from the ice chest, behavior that came as a surprise to the Officers and behavior they had not previously encountered. In spite of the "frantic" and surprising scene, Officer Logan managed to count aloud the number of fish he observed that had been discarded by Respondents, and which remained at the surface long enough before sinking to be observed by him, and the Officers were able to retrieve one fish as a means of proof of what had transpired.

Respondents collectively dispute they ever dumped fish. Nevertheless, Respondent Le contends that one of the Officers jokingly asked them why they threw the fish away and alleges he was told that they could have kept the fish. Tr. 195-96, 217-18. He had no explanation for why one of the Officers would have posed this question if Respondents had, in fact, not disposed of any fish. Tr. 196.

Respondent Tran asserts that the Officers were mistaken and mistook their actions as discarding fish into the water when, according to Respondent Tran, what transpired was that Respondents had caught 12 red snapper on the four fishing rods they were collectively using, each of which contained four hooks, and he immediately, and simultaneously, released all 12 red snapper back into the water. Tr. 264-65. Respondent Tran argues that after he simultaneously released the 12 red snapper back into the water from the left side of the Vessel, the fish collectively floated and drifted to the right side of the Vessel and remained there to be later observed by the Officers at the surface before eventually sinking, and he contends that these were the fish the Officers counted. Tr. 249, 265-68.

While Respondent Tran claims that each of Respondents' fishing rods contains four hooks, Respondent Le testified that the rod he used had at least four to five hooks, Tr. 187, and Respondent Bui testified that his rod contained two to three hooks, Tr. 230. According to Respondent Bui, he was cooking, and relaxing at the time law enforcement approached, and Respondents were collectively preparing to eat, and he contends that any red snapper they caught were immediately released, not retained and dumped from an ice chest. Tr. 229, 231-32. He, too, believes the Officers were mistaken about their

belief that he and Respondent Le dumped fish from the ice chest into the water. Tr. 235. Respondent Ho agrees with the other Respondents that any red snapper Respondents caught were released. Tr. 279-80.

Unlike the testimony of the Officers, the testimony presented by Respondents is not consistent, aside from their collective dispute of any wrongdoing, and is simply not plausible or believable. In spite of fishing together for many hours and using only four rods with which to collectively fish, Respondents' testimony as to the number of hooks per rod is inconsistent, as discussed above. Respondent Tran claims that during the encounter one of the Officers jokingly asked him why they dumped fish, yet he maintains they never dumped fish and has no explanation for why such a question—a question that would be consistent with the account by the Officers—would even be posed. While maintaining that Respondents did not dump red snapper on this occasion, Respondent Tran elaborated during his testimony that “if we see they coming, we dump before they come so you don't see nothing around us.” Tr. 251. This very admission as to their typical behavior, presumably on other occasions, would lend credence to the Officers' account of what transpired on April 4, 2016, namely that the Officers' arrival appeared to surprise Respondents and they then quickly began to dump overboard the red snapper from their ice chest.

Respondent Tran further testified that he was the one tasked with unhooking the red snapper Respondents caught. *See* Tr. 249 (“I'm the one to, like, unhook the red snap and clean up the boat.”). He suggests that the 12 red snapper Respondents agree were caught (contrary to the 19 red snapper the Officers counted) were the ones he simultaneously unhooked and released into the water from one side of the Vessel that had collectively drifted to the other side of the Vessel and remained afloat there for some time before sinking so as to be observed by the Officers when they later arrived. Apart from the implausibility of such a theory, it also appears inconsistent with the testimony of Respondent Bui, who testified that at the time Respondents observed law enforcement, Respondents were collectively preparing to eat and that he, Respondent Bui, was relaxing and helping Respondent Le cook. *See* Tr. 229. It is also inconsistent with the testimony of Respondents Bui and Le, both of whom testified that they individually unhooked and released into the water the red snapper they caught. *See* Tr. 186, 250.

Furthermore, the Respondents' position, that they did not dump red snapper overboard and had immediately released any red snapper they caught, is not consistent with the documentary evidence that Respondent Le, as captain of the Vessel, initialed and signed on the day of the violation. Specifically, Respondent Le initialed his agreement on the “Bag Limit/Prohibited Species/Undersize Catch Measurement Form,” agreeing with having caught 13 prohibited red snapper, 12 red snapper of unknown length, because the Officers were unable to retrieve them from the water, and one red snapper that was retrieved from the water and which measured 19.5 inches in length. Tr. 46-48, 208-11; AX 2. Officer Logan explained that this form does not contemplate a scenario in which evidence of a violation is dumped overboard, so in an effort to document the violation he and Officer Stagg observed, Officer Logan completed the form to identify the number of prohibited species, *i.e.*, 20 red snapper, they observed

Respondents dump overboard and to provide the measurement of the single red snapper they were able to retrieve from the water. Tr. 46-47. According to Officer Logan, Respondent Le disagreed with his count of 20 red snapper and insisted that only 12 red snapper were caught before being dumped overboard. Tr. 47-48. However, Respondent Le maintains that his initials and signature on the form were simply an agreement to having caught 12 red snapper that Respondents immediately released but did not retain and did not dump overboard. Tr. 208-11. If Respondents had immediately released any red snapper they caught, presumably there would be no need to even complete a form that by its very title addresses, *inter alia*, the catch and measurement of a prohibited species. Moreover, in spite of recording his disagreement on this form with the Officers' count of red snapper, Respondent Le did not record this other significant point of disagreement or otherwise articulate his claim of no wrongdoing and that any red snapper caught were immediately released. Further, by signing this form, Respondent Le agreed to abandon and relinquish title to the single red snapper that was retrieved and measured to be 19.5 inches, which is inconsistent with his claim. It is inconceivable to relinquish title to a fish that was never retained because it was immediately released. Consequently, I find Respondents' claims to be inconsistent, implausible, and, simply put, not credible.

As I evaluated witness credibility, I also considered the factor of bias, or a lack thereof. Here, it is uncontroverted that Officers Logan and Stagg had no familiarity with Respondents prior to the day of violation on April 4, 2016. Tr. 58-59, 123. The evidence reveals that the Officers were on a routine patrol when they encountered Respondents and the Vessel. Further, there is no indication from this record that either Officer had an incentive to issue citations to Respondents or would have otherwise reaped a reward for doing so. Thus, I see no evidence in this record to suggest that the Officers in this case would have had a basis to fabricate the encounter that occurred on April 4, 2016, and issue citations for conduct that never took place. The same cannot be said for Respondents. Respondents' denial of any wrongdoing and assertion that any red snapper they had caught was immediately and simultaneously released, so as to collectively drift afloat from one side of the Vessel to the other side to be later observed by the Officers, is dubious, at best. It is also patently self-serving, not to mention inconsistent with other credible evidence in this record. Unlike Officers Logan and Stagg, Respondents have an incentive to craft a story of denial, albeit an unconvincing one, in an attempt to avoid a monetary penalty for their violative conduct.

I also considered Respondents' arguments that I should reject the testimony of Officers Logan and Stagg as not credible because of mistakes that they made that, according to Respondents, discredit the value of their testimony. In particular, Respondents highlight the fact that the Officers failed to take photographs of Respondents dumping red snapper from the ice chest into the water. While it is true that photographs, even video, of the violative conduct as it was occurring would have been beneficial to the Agency's case, I do not find the absence of such evidence a detriment. Indeed, the lack of photographic or video evidence leaves room for the implausible arguments Respondents have made that would otherwise have been demonstrably dispelled by such evidence. Nevertheless, Officers Logan and Stagg credibly testified as to the circumstances that prevented them from being able to take

photographs of Respondents' actions. Officer Logan explained that their routine patrols can extend 60 to 100 miles or more, and that all equipment must be secured and stowed to prevent damage, from for example rough water. Tr. 34-35. For this reason, a camera was not readily available. Once the Officers observed Respondents dump the red snapper from their ice chest, Officer Logan directed Officer Stagg to get a camera while he brought the patrol vessel to rest next to Respondents' Vessel, and then he approached the bow of the patrol vessel to count aloud the fish that were discarded overboard and still visible in the water. Tr. 34-35, 93-95. According to Officer Stagg, the circumstances were chaotic,

You were trying to, you know, react on certain things. I did not have my eye on them. We were trying to get pictures, go after the fish. And, I mean, you can, I mean, imagine yourself there and still trying to drive the boat, all of this going on, and not damage any equipment, you know, their boat or ours while you're trying to do all of this. It was just frantic.

Tr. 103. Moreover, neither Officer had previously encountered a situation like this one, where prohibited catch was dumped overboard at the sight of law enforcement. Tr. 70, 124. Officer Stagg was ultimately able to retrieve his camera phone and power it on, but by that time, the dumping activity had concluded, so his photographic evidence was limited to the subsequent boarding activities. *See* Tr. 94-95, 98-99; AX 8. While Officer Stagg candidly acknowledged that one could construe as a mistake the lack of immediate availability of a camera with which to photograph the dumping activities as they were occurring, Tr. 118, this lack of preparedness is understandable, given the need to securely stow equipment while patrolling, and given the unusual and frantic scene that confronted the Officers, all with little time to react. Thus, I find no merit in Respondents' argument.

Respondents also challenge reliance placed on the Officers' testimony because they initially issued Respondents' state citations, as opposed to charging them with a violation of federal law. The explanation was reasonable and relates to a matter of law, rather than the credibility of the Officers. Under the Cooperative Agreement that exists between NOAA and the Louisiana Department of Wildlife and Fisheries ("LDWF") Enforcement Division, *see* AX 15, LDWF enforcement officers "who are designated by the State as marine conservation law enforcement officers" are authorized by NOAA to carry out law enforcement responsibilities mandated by the Magnuson-Stevens Act. AX 15 at 2. As Special Agent Messa testified, the Cooperative Agreement "basically gives the State of Louisiana the authority to enforce federal fisheries laws." Tr. 167. Given that the language of state law versus federal law did not mirror one another as it related to the dumping activities by Respondents, and that Respondents were in federal waters, and that the disposal of the red snapper after approach by law enforcement is considered a serious offense, the initial state citations were replaced with federal citations once the matter was reviewed by the Officers' superiors. *See* Tr. 53-54, 107-08, 168-69; AX 5; AX 6; AX 9; AX 10. The fact that the Officers were not immediately aware of the language differences between state and federal law as it related to the

Respondents' disposal of red snapper at the sight of law enforcement, does not cast doubt upon the veracity of the Officers' testimony and their credibility as witnesses.

Respondents also argue that Officer Logan made an error in his report, specifically under the section addressing "Supplemental Details of Investigation," by identifying Respondent Tran as the individual who expressed that Respondents "had only caught and kept 12 red snapper that day," AX 1 at 5, when later, at the hearing, he corrected that statement and identified either Respondent Le or Respondent Bui as the individual making the statement at issue, *see* Tr. 42-44. At the outset I note that Respondents mistakenly attribute the error in the report to Officer Stagg, yet it is Officer Logan's report and his related testimony about which they take issue. Nevertheless, I do not find this error to be so destructive as to discredit the testimony of Officer Logan, specifically, or both Officers, generally, as Respondents urge. Indeed, it was a mistaken reference, as Respondents too have made in their post-hearing briefs¹⁰, but that alone does not lead me to reject the sworn testimony of the Officers, in which honest and forthright corrections were made. Based on my review of the evidence, the error appears to be isolated, and I do not find reason to discredit the otherwise credible, consistent, and plausible testimony of the Officers.

Lastly, I considered Respondents' arguments relating to whether red snapper that has been placed on ice, in an ice chest for example, will sink or float when discarded into the water. To challenge the Officers' testimony that they observed Respondents dump red snapper from an ice chest into the water as they approached the Vessel, Respondents contend that red snapper that has been stored on ice will float, not sink as the Officers contend. Thus, Respondents' argue, the Officers' observation of sinking red snapper proves that the fish did not come from Respondents' ice chest. In response, the Agency has argued that the point is irrelevant given the direct observations by the Officers of Respondents dumping red snapper overboard. Since I have found the testimony of the Officers credible, consistent, and reliable, I agree. Moreover, testimony offered at hearing regarding the tendency of red snapper that has been on ice to float or sink once discarded into the water was varied with no universal conclusion. Respondent Bui testified that even though he has never personally dumped red snapper from an ice chest into the water, research he has read leads to the "obvious" conclusion that dead fish will float. Tr. 238-242. Respondent Le agreed that discarded red snapper that were previously on ice, will float, in part because of the condition of the stomach of the fish in this state. Tr. 203-05. Office Sonnier, whose testimony Respondents urge me to strongly consider for fish valuation purposes, also testified as to his lay opinion on this issue. Office Sonnier, who has an undergraduate degree in biology with an emphasis in wildlife and fisheries biology, *see* Tr. 126-27, and has been a recreational fisherman for about 25 years, *see* Tr. 127-28, testified that "depending on the conditions and the way the fish are caught and the way they preserve could indicate whether a fish would float or not float." Tr. 147. In essence, whether a fish would sink or float would depend on a variety of factors, including the particular circumstances in which the fish was caught and retained. *See* Tr. 145-49, 156-57. Thus, apart from my determination that the

¹⁰ For example, the erroneous reference to Respondent Tran that appeared in a report authored by Officer Logan, not Officer Stagg. *See* AX 1 at 5-6.

Officers testified credibly, resolution as to the flotation tendencies of dead red snapper is not informative for purposes of resolving the credibility issues presented in this case.

Based on the foregoing, I have concluded that the Agency has established by a preponderance of the evidence I have found credible that Respondents violated the Magnuson-Stevens Act and relevant implementing regulations, as identified in the Amended NOVA and above in this decision, by possessing red snapper taken during the seasonal closure of the recreational sector for red snapper and by disposing of that red snapper overboard the Vessel after approach by law enforcement.

V. CIVIL PENALTY

a. Principles of Law Relevant to Civil Penalty

The Magnuson-Stevens Act provides that “[a]ny person who is found by the Secretary, after notice and an opportunity for a hearing in accordance with section 554 of title 5 [of the United States Code], to have committed an act prohibited by [16 U.S.C. § 1857] shall be liable to the United States for a civil penalty.” 16 U.S.C. § 1858(a). The Magnuson-Stevens Act further provides that the amount of the civil penalty shall not exceed \$100,000 for each violation. *See id.* Notably, the maximum statutory penalty amount in 16 U.S.C. § 1858(a) was increased to \$184,767, for inflation, during the period relevant to this proceeding. *See* 15 C.F.R. § 6.3(f)(15) (2018) (adjusting the maximum penalty amount in 16 U.S.C. § 1858(a) for inflation effective January 15, 2018).

The factors to be considered in assessing a civil monetary penalty are set out in both the statutory and regulatory provisions that apply in this case. The Magnuson-Stevens Act states that,

In determining the amount of [a] 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) (emphasis omitted).

Similarly, the applicable procedural regulations governing this proceeding provide that

Factors to be taken into account in assessing a civil penalty, depending upon the statute in question, may include the

nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior violations, and ability to pay; and such other matters as justice may require.

15 C.F.R. § 904.108(a). With regard to considering a respondent's ability to pay, the procedural regulations provide that "if a respondent asserts that a civil penalty should be reduced because of an inability to pay, the respondent has the burden of proving such inability by providing verifiable, complete, and accurate financial information to NOAA." 15 C.F.R. § 904.108(c). If such a claim is made after a request for hearing, the procedural regulations require that such "verifiable, complete, and accurate financial information must be submitted to Agency counsel at least 30 days in advance of the hearing." 15 C.F.R. § 904.108(e).

b. Parties' Arguments Regarding Penalty

In its Initial Post-Hearing Brief, the Agency argues that the penalty factors to be considered support the proposed penalty of \$8,000. *See* Ag. In. Br. at 13-15. It acknowledges that while "the health of the red snapper fishery has improved, it is still a fishery that has had increasingly shorter seasons for the private angling/recreational sector component." Ag. In. Br. at 13. The Agency asserts that the fact that two of Respondents "intentionally discarded at least 20 red snapper possessed during the recreational red snapper sector closure" represents a "serious offense" due to the "precarious status of the red snapper stock," and due to the hindrance to the Agency's ability to "carry out its responsibilities under the Magnuson-Stevens Act." Ag. In. Br. at 14. The Agency contends Respondents admitted to their violative behavior on April 4, 2016, and that Respondent Le had prior notice of the red snapper seasonal closure from his previous incident in 2014. Lastly, in support of its arguments concerning the seriousness of this offense, the Agency cites to a prior decision, *Stiller*, 1998 WL 1277931 (NOAA Aug. 10, 1998), wherein the presiding administrative law judge determined that the inferred dumping of shark fins warranted a \$50,000 penalty, and concluded that the interference with a lawful investigation by dumping that which was illegally possessed was a direct attack on NOAA's enforcement program and must not be tolerated. *Id.* (citing *Stiller*, 1998 WL 1277931, at *5).

Respondents argue in their Initial Post-Hearing Brief that as an alternative to dismissal of the case, they should not be assessed a penalty greater than \$500. Resps. In. Br. at 14. In support, they refer to the prior incident in 2014 involving Respondent Le and about which Special Agent Messa and Officer Sonnier offered testimony, the latter of whose testimony they urge I should "strongly consider" for the valuation of fish. Resps. In. Br. at 5-6. Specifically, Respondents argue that 19 red snapper were at issue in the incident in 2014, and the fine imposed for the value of those fish was \$545 and paid by the vessel's captain. Resps. In. Br. at 6, 14. Respondents suggest that, contrary to the Agency's arguments regarding the red snapper fishery, "the discovery of one red snapper floating in the gulf is not worth \$8,000." Resps. In. Br. at 14.

In its Reply Brief, the Agency argues that Respondents' proposed penalty of \$500 would be inadequate and that Respondents are unpersuasive in their arguments to support a penalty lower than that proposed by the Agency. Ag. Rep. Br. at 5. The Agency contends that Respondents' actions, both in possessing at least 20 red snapper during the known seasonal closure and then deliberately discarding the fish overboard at the sight of law enforcement, "show nothing less than an intentional disregard of the law." Ag. Rep. Br. at 6. Further, the Agency argues, Respondent Tran's testimony suggests a pattern and practice of dumping illegal catch once the presence of law enforcement is detected. *Id.* The Agency asserts that the gravity of Respondents' behavior in this regard is serious given the "precarious status of the red snapper stock" and given the impacts such behavior has on the Agency's ability to enforce the law, all of which supports the proposed penalty of \$8,000. *Id.*

Respondents reply by reasserting their belief that a penalty of \$8,000 is "totally out of line," and contend that "[t]he Agency's own witnesses testified that [the penalty] should be no more than around \$500." Resps. Rep. Br. at 1. They further contend that they owe no penalty, but that any penalty I may assess should be no more than \$500. *Id.*

c. Analysis and Discussion of Civil Penalty and Assessment

Having determined that Respondents are liable for the charged violation in this matter, I now turn to my assessment of the amount of a civil monetary penalty, if any, that is appropriate under the circumstances of this case and in consideration of the statutory and regulatory factors I must consider.¹¹

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

The Agency has argued that while the health of the red snapper fishery has improved, it remains a fishery with increasingly shorter seasons for the recreational component "to help achieve optimum yield for the Gulf red snapper resource without increasing the risk of red snapper experiencing overfishing." Ag. In. Br. at 13 (citing 80 Fed. Reg. 24,832 (May 1, 2015)). At the time of this violation, Respondents were not permitted to possess a single red snapper, yet they discarded 20 red snapper, which the Agency argues, is not only a serious offense but also an impediment to the Agency's ability to fulfill its responsibilities under the Magnuson-Stevens Act. Ag. In. Br. at 14.

Respondents maintain their denial that they discarded 20 red snapper, and they argue that the single red snapper that the Officers retained does not warrant a penalty of \$8,000. *See* Resps. In. Br. at 14; Resps. Rep. Br. at 1. Rather, Respondents urge that I assess a penalty no greater than \$500, because in an earlier incident from 2014, also involving Respondent Le, the retention of 19 red snapper during the seasonal closure, and the discard of red snapper overboard as law enforcement approached, led to the

¹¹ As reflected in the case record and the transcript of the evidentiary hearing, neither party sought my consideration of the Agency's penalty policy (prior to hearing, the Agency withdrew its request that I take official notice of the Agency's penalty policy). Tr. 133-34. Consequently, I have limited my assessment of any penalty to consideration of only the applicable statutory and regulatory factors.

payment of state civil restitution in the amount of \$545, based on the replacement value of the fish. *See* Resps. In. Br. at 14; Resps. Rep. Br. at 1; *see also* Tr. 136-41, 154-55, 163-64; AX 7 at 16-17.

I do not find Respondents' arguments convincing. Apart from their renewed arguments concerning liability that I need not address further, their argument that my assessment of a civil monetary penalty for a violation of federal law should be guided by an earlier valuation of fish by the state is misguided. My assessment of the amount of a penalty to be imposed stems from an established violation of federal law and considers the statutory and regulatory factors outlined above, and is not influenced by a predetermined replacement value for fish, *see* Tr. 163-64, that was presumably utilized by a state court in 2014. Further, while Respondents focus on the single fish retained by the Officers, arguing that that single fish is not worth an \$8,000 penalty, the evidence I have found credible reveals more than a single fish was involved in Respondents' violative conduct.

I do, however, find merit in the Agency's arguments with regard to the impact Respondents' illegal fishing activity had on the red snapper fishery and associated risks of overfishing. In addition, and of particular concern, is the impact of Respondents' behavior, namely the discard of their illegal catch of red snapper overboard upon approach of law enforcement, on the Agency's ability to enforce the law. Such deliberate conduct by Respondents in an attempt to conceal their wrongdoing and evade accountability is grave. Their actions demonstrate an intention to frustrate the very intent of the Magnuson-Stevens Act, Agency regulations, and enforcement efforts, and must not be minimized. Consequently, I gave great consideration to these circumstances in my assessment of a penalty in this case.

ii. Respondents' culpability and history of violations

The Agency argues that Respondents were well aware of the seasonal closure for red snapper and that they knew it was illegal to possess red snapper at the time of this violation. Ag. In. Br. at 14. These are points that do not appear to be in dispute. The Agency further argues that Respondents intentionally dumped red snapper overboard as law enforcement approached because they knew it was illegal to possess red snapper, and it contends that this demonstrates an intentional disregard of the law. Ag. In. Br. at 14; Ag. Rep. Br. at 6. As previously discussed, Respondents deny dumping the fish overboard. *See* Resps. In. Br. at 13; Resps. Rep. Br. at 1. That factual determination has been made, and I have concluded that liability has been established by a preponderance of the credible evidence presented.

With regard to Respondents' culpability, the credible evidence presented makes it clear that Respondents' actions were intentional. Indeed, Officer Logan credibly testified that when he and Officer Stagg first observed Respondents Bui and Le start to dump red snapper overboard from an ice chest on the Vessel, the Officers directed them to stop, but Respondents Bui and Le just looked at the Officers and continued to dump the red snapper. Tr. 34. Also telling was Respondent Tran's testimony that revealed he has fished with the other Respondents many times in the past, *see* Tr. 248-49, and that

when they see law enforcement coming, they dump fish so that law enforcement will not see the fish on their boat or around them, Tr. 251, 259, 268-71. Collectively, this evidence reveals not only the intentionality of Respondents' conduct on this occasion, but also, from Respondent Tran's testimony, a pattern and practice of dumping illegally possessed fish on other occasions once law enforcement is observed, so as to evade prosecution. Further support for this pattern of behavior is the evidence relating to a prior incident from 2014. That prior incident involved Respondent Le, but none of the other Respondents in this case, and like the case at hand involved the illegal possession of red snapper during the closed season that was dumped overboard by the fishermen as law enforcement approached. Also similar to the instant case, was the utter disregard for law enforcement's directive to stop the discard of fish overboard in the prior incident. Tr. 136-37. The deliberateness of Respondents' behavior in the case at hand was given great consideration in my assessment of a penalty.

iii. Other matters as justice may require

As to the issue of the inability to pay a civil penalty, the procedural regulations governing this proceeding are clear in providing that "if a respondent asserts that a civil penalty should be reduced because of an inability to pay, the respondent has the burden of proving such inability by providing verifiable, complete, and accurate financial information to NOAA." 15 C.F.R. § 904.108(c). Further, as previously discussed, the applicable procedural rules provide that if an inability to pay claim is made after a request for a hearing, such "verifiable, complete, and accurate financial information must be submitted to Agency counsel at least 30 days in advance of the hearing." See 15 C.F.R. § 904.108(e). Here, Respondents failed to comply with the requirements regarding a claim of an inability to pay a civil penalty set forth in these regulations. As previously discussed in this decision, and more fully examined in my Order on Agency's Motions dated May 22, 2018, Respondents failed to comply with these procedural regulations, in spite of attempts by the Agency to obtain the requisite complete financial information to support such a claim, and Respondents further failed to respond to the Agency's Motion in Limine on this issue, leading to the exclusion of such evidence at hearing with proffer. See Tr. 22-25, 211-12, 283-94. Accordingly, Respondents are presumed to have the ability to pay an assessed penalty.

Regarding cooperation, both parties agree that Respondents were cooperative by allowing law enforcement to board the Vessel and investigate. See Ag. In. Br. at 14; Resps. In. Br. at 6. Nevertheless, I do not find that such limited action warrants a reduction in the proposed penalty in this case given the gravity of Respondents' otherwise deliberate conduct to thwart law enforcement's efforts and conceal their wrongdoing. Accordingly, I gave little to no consideration of the minimal cooperation Respondents provided after trying to conceal their violative conduct.

VI. DECISION AND ORDER

Respondents are liable, jointly and severally, for the charged violation in this case. A civil monetary penalty of \$8,000 is imposed for the charged violation. Once this Initial Decision becomes final under the provisions of 15 CFR § 904.271(d), Respondents will

be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein.

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

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

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

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

SO ORDERED.



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

Dated: March 25, 2019
Washington, D.C.