



UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF: )  
 )  
 )  
**Keith O. Rodier,** )  
 )  
 Respondent. )  
 )

**Docket Number: NE1603827,  
F/V Santiago's Revenge**

**INITIAL DECISION AND ORDER**

**Date:** December 17, 2019

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

**Appearances:** For the Agency:  
Katherine L. Pohl, Esq.  
U.S. Department of Commerce  
National Oceanic and Atmospheric Administration  
Office of General Counsel, Enforcement Section  
Northeast Regional Office  
Gloucester, MA

For Respondents:  
Keith O. Rodier, *pro se*  
Norton, MA

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<sup>1</sup> The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011. *See* 5 U.S.C. § 3344; 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 April 12, 2018, to Keith O. Rodier (“Respondent”). The NOVA charges Respondent, as the owner and operator of F/V Santiago’s Revenge, with possessing two Atlantic striped bass in the Exclusive Economic Zone (“EEZ”) of the Atlantic ocean, southwest of Block Island, Rhode Island, on July 30, 2016, in violation of the Atlantic Striped Bass Conservation Act, 16 U.S.C. § 5158(c), and implementing regulation at 50 C.F.R. § 697.7(b)(3). For the single-count of violation alleged in the NOVA, the Agency seeks a penalty of \$2,000.

In response to the NOVA, Respondent requested a hearing on the alleged violation, and the matter was forwarded to this Tribunal. By order dated November 13, 2018, I was designated to preside over the litigation of this matter. On November 15, 2018, I issued an Order to Submit Preliminary Positions on Issues and Procedures 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”). Thereafter, the Agency timely filed its PPIP, which it later supplemented. Respondent did not file a PPIP. Consequently, the Agency filed a Motion in Limine in advance of the hearing, in which it sought to preclude Respondent from introducing the testimony of witnesses other than himself and other evidence at hearing due to his failure to submit a PPIP. By order dated July 17, 2019, I granted the Agency’s motion, thereby permitting Respondent to testify on his own behalf and to question Agency witnesses, but not otherwise introduce evidence that was not previously disclosed.<sup>2</sup>

On February 7, 2019, I issued a Notice of Hearing Order scheduling the hearing in this matter to commence on July 23, 2019 in the Boston, Massachusetts metropolitan area, with notice that specific location details would be provided once arrangements were completed. To that end, on May 31, 2019, I issued a Notice of Hearing Location that specified the venue and address for the scheduled hearing.

Thereafter, I conducted the evidentiary hearing in this matter as scheduled on July 23, 2019 in Boston, Massachusetts.<sup>3</sup> At the hearing, the Agency presented Agency’s Exhibits (“AX”) 1 through 4, AX 6, and AX 8, which were admitted into evidence. The Agency also presented the testimony of four witnesses: Jed Fiske (“Officer Fiske”), an Enforcement Officer with the National Marine Fisheries Services (“NMFS”) component of NOAA; Justin Hanacek (“Officer Hanacek”), also an Enforcement Officer with the NMFS component of NOAA; William Semrau (“Mr. Semrau”), an Investigative Support Program Manager at NOAA, who was qualified as an expert in maritime navigation; and Derek Orner (“Mr. Orner”), a Fishery Management Specialist with NOAA, who represents NOAA on the Striped Bass Management Board, and who was qualified as an

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<sup>2</sup> See Order on Agency’s Motion in Limine to Exclude Respondent’s Introduction of Testimony, Documents, or Other Evidence, dated July 17, 2019.

<sup>3</sup> Citations to the transcript of this evidentiary hearing are made in the following format: “Tr. [page].”

expert in Atlantic Striped Bass Management. Respondent presented his own testimony on his behalf.

On August 6, 2019, the parties were provided with a certified transcript of the hearing and on that same day I issued an Order Scheduling Post-Hearing Submissions, establishing various post-hearing filing deadlines. No motions to conform the transcript to the actual testimony were filed.<sup>4</sup> Consistent with the established filing deadlines, the Agency timely filed its Initial Post-Hearing Brief (“Ag. In. Br.”). Respondent did not file an Initial Post-Hearing Brief; consequently, no reply briefs were filed.

## **II. STATEMENT OF THE ISSUES**

### **a. Liability**

In making a determination on liability, I must determine whether Respondent unlawfully possessed Atlantic striped bass in or from the EEZ on July 30, 2016, in violation of the Atlantic Striped Bass Conservation Act, 16 U.S.C. § 5158(c), and implementing regulation at 50 C.F.R. § 697.7(b)(3).

### **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; Respondent’s degree of culpability; any history of prior violations; Respondent’s 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**

Respondent is a resident of Massachusetts. Tr. 101. He is a recreational fisherman and holds both state and federal fishing permits for various species. Tr. 117. Respondent owns a fishing vessel named Santiago’s Revenge (“Vessel”), and on the day of the incident that is the subject of this matter, he was also the operator of that Vessel. Tr. 103, 117-18; AX 1 at 18. Respondent was accompanied by friends on this fishing trip on July 30, 2016. *See* Tr. 103.

Also on July 30, 2016, a scheduled joint patrol between the United States Coast Guard (“USCG”) and NOAA NMFS Office of Law Enforcement took place that focused on those fishing for Atlantic striped bass in federal waters, namely within the EEZ, which is a prohibited practice. *See* Tr. 21-22, 52-53; AX 1 at 4, 42. In particular, the unit conducting the joint patrol (“Joint Patrol Unit”), which included Officers Fiske and Hanacek, targeted an area off of Block Island, Rhode Island, known as the Southwest

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<sup>4</sup> Nevertheless, I note inadvertent and erroneous references in the transcript of proceedings to a corporate entity and named fishing vessel that are not relevant to this matter. *See* Tr. 6, 102. For clarity, this proceeding pertains only to Respondent Keith Rodier, individually, and F/V Santiago’s Revenge.

Ledge, that is located partly within the EEZ and is a popular spot among those fishing for Atlantic striped bass. *See* Tr. 22, 53.

As the Joint Patrol Unit approached this area, its presence clearly visible due to the bright orange USCG vessel used for the joint patrol, many fishing vessels in the vicinity began to scatter at the sight of law enforcement, with the exception of Respondent's Vessel, which remained in place. *See* Tr. 23, 115-16. According to Officers Fiske and Hanacek, Respondent's Vessel was actively fishing at the time, appeared to be in the EEZ, and was the easiest to reach to board and to conduct an inspection. Tr. 23-24, 53-54.

Consequently, Officer Fiske and two USCG employees boarded Respondent's Vessel and conducted an inspection, which lasted about twenty minutes. Tr. 24-25. During the inspection, Respondent cooperated with law enforcement and informed them that he was in possession of two Atlantic striped bass. *See* Tr. 25; AX 1 at 5. Photographs of these fish were taken. Tr. 25-26; AX 1 at 15. Additionally, photographs of the Vessel's GPS and chart plotter coordinates were taken to document the position of Respondent's Vessel. Tr. 27-33; AX 1 at 16-17, 39. The USCG patrol vessel remained within approximately 30 to 40 feet of Respondent's Vessel during the inspection process. Tr. 53-54. Photographs of the USCG patrol vessel's GPS and chart plotter coordinates were also taken to document its position throughout the inspection and its position relative to Respondent's Vessel. *See* Tr. 34-38, 54-62; AX 1 at 19, 42, 45; AX 6.

The GPS coordinates and chart plotter information taken from both Respondent's Vessel and the USCG patrol vessel, *see* AX 1 at 16-17, 19, 39, 42, 45; AX 6; Tr. 27-38, 54-62, were reviewed and analyzed, including by a NOAA expert in maritime navigation, Mr. Semrau, *see* Tr. 38, 60-64, 69-82; AX 1 at 43, 46-48; AX 3; AX 4. This review confirmed that Respondent's Vessel was approximately one-half nautical mile past the Three Nautical Mile Boundary Line, which separates state and federal waters, and was in the EEZ when it was boarded and inspected. *See* Tr. 38, 63-64, 71-82; AX 1 at 40-48; AX 3; AX 4. Respondent, while not disputing the evidence that established his Vessel was in the EEZ at the time of this incident, testified that his focus at the time was on the location of fish, as opposed to the position of his Vessel relative to the Three Nautical Mile Boundary Line, and that he had, accordingly, adjusted the view on his GPS unit such that this boundary line was not within immediate view. Tr. 108-10, 118.

According to Respondent, he and his friends that were aboard the Vessel had caught and released around 15 striped bass that day, but kept two of the fish they caught to eat later. Tr. 103, 108. These were the same two fish on board the Vessel and photographed during the inspection. Tr. 112. These fish were not seized by law enforcement; rather, they were left on the Vessel and later consumed by Respondent and his friends. Tr. 116. Respondent testified that, contrary to statements in an investigative report authored by Officer Fiske, *see* AX 1 at 5; Tr. 35, he was aware of the applicable federal law that prohibits possession of Atlantic striped bass in or from the

EEZ,<sup>5</sup> see Tr. 113-14, but he explained that on this occasion he was not paying attention to the boundary line separating state waters from the EEZ and had accidentally crossed into the EEZ while possessing Atlantic striped bass, see Tr. 106, 110, 114, 116-17.

Immediately following the inspection, Respondent was issued a proposed summary settlement in the amount of \$1000 for possessing two Atlantic striped bass in the EEZ (\$500 per striped bass), in violation of 50 C.F.R. § 697.7(b)(3). AX 1 at 4, 7, 11, 20. Respondent did not accept this proposed summary settlement, and, as a result, this the matter was forwarded to NOAA's Office of General Counsel, Enforcement Section for prosecution. See AX 1 at 7, 25. This enforcement action ensued.

#### **IV. LIABILITY**

##### **a. Principles of Law Regarding Liability**

###### *i. Standard of Proof*

To prevail on its claim that Respondent violated the Atlantic Striped Bass Conservation Act and implementing regulation at 50 C.F.R. § 697.7(b)(3), 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 WL 1085351, at \*6 (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)). This standard requires the Agency to demonstrate that the facts it seeks to establish are more likely than not to be true. *Fernandez*, 1999 WL 1417462, at \*3 (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 WL 1085351, at \*6 (citing *Paris*, 4 O.R.W. 1058 (NOAA 1987)).

###### *ii. Atlantic Striped Bass Conservation Act, Magnuson-Stevens Act, and Implementing Regulations*

Congress enacted the Atlantic Striped Bass Conservation Act, 16 U.S.C. §§ 5151-5158, "to support and encourage the development, implementation, and enforcement of effective interstate action regarding the conservation and management of the Atlantic striped bass." 16 U.S.C. § 5151(b). To that end, Congress directed the Secretary of Commerce to promulgate regulations that govern "fishing for Atlantic striped bass in the [EEZ]." 16 U.S.C. § 5158(a). Further, the Atlantic Striped Bass Conservation Act made applicable to the regulation of such fishing, the provisions of certain sections of the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), 16 U.S.C. §§ 1801-1883, which delineate prohibited acts, civil penalties, criminal offenses, civil forfeitures, and enforcement. See 16 U.S.C. § 5158(c) (setting forth the applicability of 16 U.S.C. §§ 1857, 1858, 1859, 1860, and 1861 to regulations promulgated under the Atlantic Striped Bass Conservation Act); see also 50 C.F.R.

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<sup>5</sup> While inapplicable here, an exception to this prohibition exists for a specifically designated "continuous transit" area whereby possession is permitted provided the "vessel is in continuous transit" through this area. See 50 C.F.R. §§ 697.2, 697.7 (b)(1), (3).



§ 697.3 (regulation identifying the relationship between such acts). Specifically, the Atlantic Striped Bass Conservation Act directed that such provisions be applied to regulations promulgated under its authority, as if such regulations were promulgated under the Magnuson-Stevens Act. 16 U.S.C. § 5158(c).

Turning to the relevant prohibitions applied by the Atlantic Striped Bass Conservation Act, 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, inter alia, “any individual, . . . any corporation, partnership, association, or other entity . . .” 16 U.S.C. § 1802(36).

Regulations implementing the Atlantic Striped Bass Conservation Act provide that it is unlawful for any person to, inter alia, “fish for Atlantic striped bass in the EEZ,” or to “possess any Atlantic striped bass in or from the EEZ” except in a specifically designated “continuous transit” area whereby possession is permitted, provided the “vessel is in continuous transit.” 50 C.F.R. § 697.7 (b)(1), (3). The term “continuous transit” means that “a vessel does not have fishing gear in the water and remains continuously underway.” 50 C.F.R. § 697.2. Atlantic striped bass are defined in the regulations as “members of stocks or populations of the species *Morone saxatilis* found in the waters of the Atlantic Ocean north of Key West, FL.” *Id.* Additionally, the EEZ is defined to include the “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.

As noted, the Atlantic Striped Bass Conservation Act applies the prohibitions of the Magnuson-Stevens Act to regulations promulgated under its authority, as if such regulations were issued pursuant to the Magnuson-Stevens Act. 16 U.S.C. § 5158(c). Accordingly, it is notable that 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 WL 42985, at \*4 (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 WL 1497024, at \*5 (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).

## **b. Arguments Regarding Liability and Analysis**

In its Initial Post-Hearing Brief, the Agency argues that it has established that Respondent violated the Atlantic Striped Bass Conservation Act by possessing two Atlantic striped bass in or from the EEZ. Ag. In. Br. at 6. The Agency notes that Respondent did not contest the evidence establishing his liability and, in fact, admitted that he had retained two Atlantic striped bass in the EEZ while fishing on July 30, 2016.

*Id.* at 7. The Agency cites to portions of the hearing transcript in which Respondent acknowledges that he was in federal waters, namely just past the Three Nautical Mile Boundary Line, and in possession of Atlantic striped bass, but states his actions were accidental. *Id.* (citing Tr. 106, 118).

Apart from this admission, the Agency recounts the evidence it presented, including witness testimony and documentary evidence of Respondent's location in the EEZ, and it asserts that it has met its burden of proof and established Respondent's liability for the charged violation. *Id.* at 6-9. The Agency notes that the chart plotter information from Respondent's Vessel reflects that the Vessel was within federal waters, namely the EEZ, by at least .47 nautical miles when he was in possession of the two Atlantic striped bass. *Id.* at 7-8. Further, the Agency asserts that this information regarding the Vessel location is also consistent with the information from the chart plotter on the USCG patrol vessel, which indicated that the Vessel was approximately .52 nautical miles into federal waters, within the EEZ. *Id.* The Agency also notes that although Respondent did not challenge or dispute the evidence presented, he did argue that he had "enlarged his GPS display settings to better see the contours of the ocean floor, such that the Three Nautical Mile Boundary Line was not displayed on his plotter." *Id.* at 9. In response, the Agency argues that by adjusting his GPS settings in that way, Respondent "failed to heed any caution when fishing near the federal-state boundary" and his actions do not undermine liability. *Id.* Thus, the Agency urges, I should find liability for the charged violation. *Id.* at 6, 9.

### **c. Analysis of Liability**

The evidence presented in this matter is uncontroverted and establishes clearly that Respondent violated 50 C.F.R. § 697.7(b)(3) by possessing two Atlantic striped bass while in the EEZ on July 30, 2016. Documentary evidence and witness testimony, both from the Agency and Respondent, confirm that the position of Respondent's Vessel at the time of boarding was within federal waters, namely the EEZ, and that evidence also confirms that Respondent was unlawfully in possession of two Atlantic striped bass. At the hearing, Respondent candidly acknowledged that he knew of the federal prohibition against possession of Atlantic striped bass in the EEZ, *see* Tr. 113-14, but, nevertheless, allowed his Vessel to cross into the EEZ while in possession of Atlantic striped bass, due to his inattention to its location, *see* Tr. 106, 110, 116-17. As noted above, however, the state of mind or intention of Respondent is not relevant to the determination of liability in this matter. Consequently, I must conclude that Respondent violated 50 C.F.R. § 697.7(b)(3), and thereby violated the Atlantic Striped Bass Conservation Act, under the provision in 16 U.S.C. § 5158(c), on July 30, 2016.

## **V. PENALTY**

### **a. Principles of Law Regarding Civil Penalty**

Having determined that Respondent is liable for the charged violation, I must next determine the appropriate civil monetary penalty to impose, if any, for the violation. I note that the Agency's penalty policy was neither introduced as an exhibit

during the evidentiary hearing nor the subject of a motion requesting that I take official notice of it. As such, I have not considered the Agency's penalty policy in my evaluation. Rather, in assessing the penalty, I have considered only the factors set forth in the applicable statutory and regulatory provisions, as discussed below. *See* 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(a).

As previously noted, the Atlantic Striped Bass Conservation Act applies civil penalty provisions of the Magnuson-Stevens Act to regulations promulgated under its authority, as if such regulations were issued pursuant to the Magnuson-Stevens Act. 16 U.S.C. § 5158(c). In turn, the Magnuson-Stevens Act provides that any person who violates any provision of the Act or implementing regulation may be assessed a civil penalty. 16 U.S.C. § 1858(a). The amount of the civil penalty cannot exceed \$189,427 for each violation. *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 March 1, 2019); *see also* 15 C.F.R. § 6.4 (providing the effective date for inflation adjustments). No penalty assessment may be made unless the alleged violator is given notice and opportunity for a hearing conducted in accordance with Section 5 of the Administrative Procedure Act, 5 U.S.C. § 54. 16 U.S.C. § 1858(a).

To determine the appropriate amount of the civil penalty, the Magnuson-Stevens Act identifies certain factors to consider.

[T]he Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require. In assessing such penalty the Secretary may also consider any information provided by the violator relating to the ability of the violator to pay, [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 procedural rules governing this proceeding, set forth at 15 C.F.R. part 904, provide, in pertinent part:

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

15 C.F.R. § 904.108(a).

There is no presumption in favor of the penalty proposed by the Agency, and an Administrative Law Judge ("ALJ") is not "required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging



document.” *Nguyen*, 2012 WL 1497024, at \*8; *see also* 15 C.F.R. § 904.204(m). The ALJ must independently determine an appropriate penalty “taking into account all of the factors required by applicable law.” 15 C.F.R. § 904.204(m); *see also* 15 C.F.R. § 904.108 (enumerating factors to be taken into account in assessing a penalty).

## **b. Arguments Regarding Civil Penalty**

In its Initial Post-Hearing Brief, the Agency notes that the prohibitions and civil penalty sanctions within the Magnuson-Stevens Act apply to violations of the Atlantic Striped Bass Conservation Act, and to that end, urges that I impose the proposed penalty of \$2,000 for Respondent’s possession of two Atlantic striped bass while in the EEZ. Ag. In. Br. at 9. In support of this proposed penalty, the Agency explains that “since 1990, the Secretary of Commerce has imposed a moratorium on fishing for striped bass within the EEZ . . . in an effort to conserve and manage the species.” *Id.* at 10. The Agency recounts portions of testimony by its expert in striped bass management, Mr. Orner, to emphasize that the significance of management tools, like a moratorium, is to “conserve and sustain the stock.” *Id.* at 10. Further, the Agency cites to Mr. Orner’s testimony discussing how violation of the moratorium against fishing for striped bass in the EEZ increases mortality in this stock, by reducing the number of available reproductive females within the stock and causing injury to fish in the species that are caught, even when they are subsequently released. *Id.* (citing Tr. 97-99). The Agency argues that Respondent’s “conduct is precisely what the federal moratorium seeks to prevent” and, thus, any assessed civil penalty should be “adequate to deter Respondent, specifically, and other recreational striped bass fishers from not adhering to the regulations.” *Id.*

The Agency argues that Respondent “was reckless when he fished for and possessed Atlantic striped bass with no regard to the federal boundary line.” *Id.* at 11. It points out that Respondent conceded he was not paying attention to the federal-state boundary, and suggests that Respondent’s actions were not mere inadvertence, since the “track lines on his chart plotter show he spent considerable time and effort fishing in federal waters, circling all around.” *Id.* Moreover, the Agency contends, information from Respondent’s GPS unit suggests that coordinates were manually entered for a destination point in federal waters and that his “track lines indicate that he traveled to the destination point.” *Id.* Lastly, the Agency argues that even if Respondent “did not intend to enter federal waters, [he] knowingly ran the risk that he would cross the Three Nautical Mile Boundary Line and enter the EEZ” while fishing for Atlantic striped bass, and “his conduct establishes, at a minimum, a conscious disregard of that risk.” *Id.* at 11-12.

## **c. Analysis of Civil Penalty and Assessment**

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

Here, the Agency highlights the purpose behind the moratorium imposed on fishing for, and possessing, Atlantic striped bass in the EEZ, namely, an effort to “conserve and manage the species.” Ag. In. Br. at 9-10. The Agency further notes that

this particular species has been determined to be of “historic commercial and recreational importance and economic benefit.” Ag. In. Br. at 9 (quoting 16 U.S.C. § 5151). According to Mr. Orner, a NOAA expert in Atlantic striped bass management, the current status of the Atlantic striped bass stock is “considered overfished and . . . overfishing is occurring.” Tr. 92; *see also* Tr. 94; AX 8 at 4. Mr. Orner elaborated, specifically with regard to the EEZ, that any additional fishing in that area increases mortality based on the way the striped bass stock tends to distribute. Tr. 98. He explained that some of the larger female striped bass, in particular, tend to linger further off shore and are the fish typically caught in the EEZ, so decreasing the number of mortality events of those reproductive females “allows for higher reproductive rates coming back into the bays.” *Id.*; *see also* Ag. In. Br. at 10 (discussing this testimony). As to catch-and-release activity, Mr. Orner further opined that “there is roughly a 15 percent post-release mortality estimate” used in NOAA’s models. Tr. 99; *see also* Ag. In. Br. at 10 (citing such testimony). To this end, the Agency submits that “fishing for striped bass in the EEZ has considerable impact on the resource and its sustainability,” and although measures have been taken to combat this threat, the Agency argues that Respondent has disregarded them. Ag. In. Br. at 10.

Thus, the Agency urges that I assess a penalty significant enough to deter Respondent from engaging in further violative activity and to deter other fishermen, generally, from engaging in such conduct. Respondent has not submitted a response to the Agency’s position or advanced arguments to the contrary. In my review, I find the Agency’s arguments supported by the credible evidence presented and persuasive. Accordingly, I have considered the elements of this factor and the gravity of Respondent’s actions in assessing a penalty in this case.

*ii. Respondent’s Culpability, History of Violations, and Other Matters as Justice May Require*

As to the level of Respondent’s culpability, the Agency contends Respondent acted recklessly when he fished for and possessed Atlantic striped bass in federal waters, without regard to the Three Nautical Mile Boundary Line. At the hearing, Respondent urged that his actions were accidental, but the Agency suggests otherwise. In its Initial Post-Hearing Brief, the Agency argues that “Respondent did not just inadvertently veer into federal waters,” as demonstrated by the track lines on his chart plotter, which reveal that “he spent considerable time and effort fishing in federal waters, circling all around.” Ag. In. Br. at 11 (citing AX 1 at 17; Tr. 31). Further, according to the Agency, either Respondent, or one of his friends on board the Vessel, must have “manually input coordinates’ within federal waters as a destination point,” and based on the Vessel’s track lines, the Vessel reached this destination point. *Id.* Thus, the Agency urges, “Respondent’s conduct evinced a conscious disregard of the risk that he would enter federal waters while fishing for and possessing [Atlantic] striped bass in contravention of the law,” consistent with recklessness. *Id.* The Agency submits that, even if Respondent did not intend to enter federal waters, “he knowingly ran the risk that he would cross the Three Nautical Mile Boundary Line and enter the EEZ while fishing for and possessing [Atlantic] striped bass onboard his vessel and his conduct establishes, at a minimum, a conscious disregard of that risk.” Ag. In. Br. at 11-12.

I find the Agency's arguments persuasive. Although Respondent maintained in his testimony that his actions were accidental, *see* Tr. 106, 117, the Agency points to evidence of a destination point entry in the Vessel's chart plotter that suggests an objective to enter prohibited federal waters to fish for Atlantic striped bass. Respondent did not respond to this argument. Aside from the suggested deliberateness of Respondent's actions, the fact remains that he did possess Atlantic striped bass in a prohibited area due to his own carelessness. Respondent admits that at the time of the incident he was fishing "close to the line," Tr. 114; *see also* Tr. 105-06, and he expressed at the hearing that law enforcement "caught us when we went over [the line]," Tr. 116. As a vessel operator, it is within Respondent's discretion to choose to operate so closely to the boundary between state and federal waters. However, doing so without adequate vigilance regarding vessel position invites the peril of crossing into federal waters, and the resulting accountability for violations of applicable requirements. At hearing, Respondent acknowledged that a vessel operator "should know the coordinates" in which he is operating. Tr. 105. Further, Respondent acknowledged that at the time of the violation he was aware of the prohibition against possession of Atlantic striped bass in the EEZ, Tr. 113-14, and therefore he was aware of the specific consequence of crossing into federal waters with Atlantic striped bass. *See* Tr. 113-14. Nevertheless, despite being aware of the duties of a vessel operator, and more specifically, the consequence of crossing into federal waters with Atlantic striped bass, Respondent conceded that he was not paying close attention to the Vessel's position at the time of the violation. *See* Tr. 106, 110, 114, 116-17. Thus, at a minimum, the evidence reveals Respondent acted negligently, but given the totality of the evidence presented, the arguments advanced based on that evidence, and Respondent's silence in response to those arguments, a reckless level of culpability is supportable. Accordingly, I have considered the extent of Respondent's actions and his level of culpability in assessing a penalty in this matter.

The Agency notes that an inability to pay the proposed penalty has not been asserted by Respondent and, as such, is not a factor to be considered in assessing a monetary penalty. The record is consistent with that position. Accordingly, I have not considered this factor.

With regard to Respondent's history of prior violations, the record does not reflect Respondent has any history of prior violations. In NOAA civil enforcement proceedings, the absence of prior violations has been found to be an appropriate mitigating factor in penalty calculations. *See Straub*, 2012 WL 1497025, at \*9 (NOAA Feb. 1, 2012) ("The absence of prior offenses . . . tends to favor a low civil monetary penalty."). In the present case, the absence of any history of prior violations is notable given Respondent's engagement in the fishing community, as a holder of multiple state and federal fishing permits, *see* Tr. 117, and his reported history of prior enforcement boardings without incident, *see* Tr. 114. As a result, I considered Respondent's absence of violations as a mitigating factor in calculating the penalty.

In consideration of other matters as justice may require, I find Respondent's cooperation throughout the enforcement action underlying this proceeding warrants

reduction of the penalty. Though not identified by the parties as a factor to be considered in the penalty assessment, the evidence presented reveals that Respondent was cooperative with law enforcement prior to, and during, the enforcement boarding. While there was testimony that fishing vessels often scatter in various directions at the sight of law enforcement, presumably to evade boarding and inspection, *see* Tr. 23, 43, Respondent did not. He remained in a fixed position, thereby making it relatively easy and simple for law enforcement to board and inspect his Vessel. *See* Tr. 23, 42-43, 103. Respondent also testified that he cooperated with law enforcement during the inspection. *See* Tr. 110, 112-13. Accordingly, I have considered Respondent's level of cooperation as a mitigating factor in my penalty assessment.

Based on the foregoing, it my assessment that a civil monetary penalty in the amount of \$1,500 is appropriate.

## **VI. DECISION AND ORDER**

Respondent is liable for the charged violation in this case. A civil monetary penalty of \$1,500 is imposed for the charged violation. Once this Initial Decision becomes final under the provisions of 15 CFR § 904.271(d), Respondent 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

Dated: December 17, 2019  
Washington, D.C.